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23-458-cv
Kamdem-Ouaffo v. Balchem Corp.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of March, two thousand twenty-four.

PRESENT:

BARRINGTON D. PARKER,
DENNY CHIN,
JOSEPH F. BIANCO,
Circuit Judges.

RICKY KAMDEM-OUAFFO,

Plaintiff-Appellant,

v. 23-458-cv

BALCHEM CORPORATION, GIDEON OENGA, BOB MINIGER, RENEE McCOMB, THEODORE HARRIS, JOHN KUEHNER, TRAVIS LARSEN, MICHAEL SESTRICK, JOHN/JANE DOES,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT: Ricky Kamdem-Ouaffo, *pro se*, New Brunswick, New Jersey.

FOR DEFENDANTS-APPELLEES: Mary A. Smith, Jackson Lewis P.C., New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Philip M. Halpern, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, entered on February 28, 2023, is **AFFIRMED**.

This is the second of two appeals arising out of a dispute between Plaintiff-Appellant Ricky Kamdem-Ouaffo and Defendants-Appellees the Balchem Corporation and affiliated individuals (collectively, "Balchem").[1] This appeal arises out of a case filed in 2019 while Kamdem-Ouaffo's first lawsuit, filed in 2017, was still pending. After the first lawsuit had been resolved on the merits—and we dismissed Kamdem-Ouaffo's appeal as frivolous, *see* 2d Cir. 21-653, doc. 157—the district court dismissed the instant case as either duplicative of the first or barred by claim preclusion and denied Kamdem-Ouaffo's post-judgment motions for recusal and reconsideration under Rule 59(e) as without merit. This appeal followed. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

"We review the dismissal of a complaint and the application of claim preclusion *de novo*," *Simmons v. Trans Express, Inc.*, 16 F.4th 357, 360 (2d Cir. 2021), and in doing so we may affirm on any ground supported by the record, *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987). The doctrine of claim preclusion, or *res judicata*, bars a later lawsuit "if an earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *Hecht v.*

[1] The other appeal is *Kamdem-Ouaffo v. Balchem Corp.*, No. 23-455 (2d Cir.).

United Collection Bureau, Inc., 691 F.3d 218, 221–22 (2d Cir. 2012). It applies to claims that either were or could have been raised in the prior action. *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 918 (2d Cir. 2010).

This lawsuit was properly dismissed as precluded by the first. The 2017 action ended in a final judgment on the merits, the same parties were involved, the claims raised in this action were or could have been raised in that lawsuit, and the district court had jurisdiction over both this and the prior suit. *See Milltex Indus. Corp. v. Jacquard Lace Co.*, 922 F.2d 164, 166–68 (2d Cir. 1991) (observing that *res judicata* operates even if two lawsuits are initially pending at the same time). The entry of judgment in the first action therefore had preclusive effect on this one.

Kamdem-Ouaffo argues that claim preclusion does not apply because the judgment in the 2017 action is void. However, he provides no basis for that assertion; to the contrary, we dismissed his appeal from that judgment as frivolous. *See* 2d Cir. 21-653, doc. 157. Kamdem-Ouaffo has abandoned any other challenge to the order—including his argument below that his failure-to-rehire claim could not have been raised in the 2017 action because it was unexhausted at the time—by not raising it in his opening brief on appeal. *Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (finding that a *pro se* litigant "waived any challenge" to the district court's adverse ruling mentioned only "obliquely and in passing" in his opening brief).

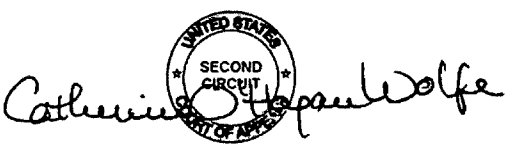
Finally, the district court did not abuse its discretion by denying Kamdem-Ouaffo's post-judgment motions for reconsideration and recusal. *See Empresa Cubana del Tabaco v. Culbro Corp.*, 541 F.3d 476, 478 (2d Cir. 2008) (per curiam) (review of denial of reconsideration under Rule 59(e) governed by abuse-of-discretion standard); *LoCascio v. United States*, 473 F.3d 493,

495 (2d Cir. 2007) (per curiam) (review of denial of recusal governed by abuse-of-discretion standard). "A court may grant a Rule 59(e) motion only when the movant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Metzler Inv. GmbH v. Chipotle Mex. Grill, Inc.*, 970 F.3d 133, 142 (2d Cir. 2020) (alteration adopted) (internal quotation marks and citations omitted). Kamdem-Ouaffo's motions did not identify any intervening change of controlling law, new evidence, need to correct clear error or prevent manifest injustice, or any factual or legal basis for recusal of the magistrate judge or district court judge. Therefore, the district court acted well within its discretion in denying these motions.

* * *

We have considered Kamdem-Ouaffo's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of May, two thousand twenty-four.

Ricky Kamdem-Ouaffo,

Plaintiff - Appellant,

v.

Balchem Corporation, Gideon Oenga, In personal capacity and in capacity with Balchem Corporation, Bob Miniger, In personal capacity and in capacity with Balchem Corporation, Renee McComb, In personal capacity and in capacity with Balchem Corporation, Theodore Harris, CEO, in personal capacity and in capacity with Balchem Corporation, John Kuehner, In personal capacity and in capacity with Balchem Corporation, Travis Larsen, In personal capacity and in capacity with Balchem Corporation, Michael Seastrick, In personal capacity and in capacity with Balchem Corporation,

Defendants - Appellees.

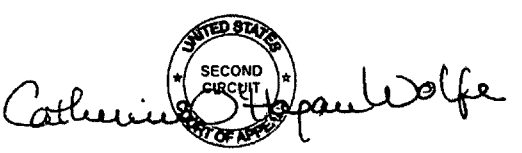
ORDER

Docket No: 23-455

Appellant, Ricky Kamdem-Ouaffo, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



23-455-cv
Kamdem-Ouaffo v. Balchem Corp.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of March, two thousand twenty-four.

PRESENT:

BARRINGTON D. PARKER,
DENNY CHIN,
JOSEPH F. BIANCO,
Circuit Judges.

RICKY KAMDEM-OUAFFO,

Plaintiff-Appellant,

v. 23-455-cv

BALCHEM CORPORATION, GIDEON OENGA, IN PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION, BOB MINIGER, IN PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION, RENEE McCOMB, IN PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION, THEODORE HARRIS, CEO, IN PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION, JOHN KUEHNER, IN PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION, TRAVIS LARSEN, IN PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION, MICHAEL SEASTRICK, IN

PERSONAL CAPACITY AND IN CAPACITY WITH BALCHEM CORPORATION,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:	Ricky Kamdem-Ouaffo, *pro se*, New Brunswick, New Jersey.
FOR DEFENDANTS-APPELLEES:	Mary A. Smith, Jackson Lewis P.C., New York, New York.

Appeal from post-judgment orders of the United States District Court for the Southern District of New York (Philip M. Halpern, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the orders of the district court are **AFFIRMED**.

This is the first of two appeals arising out of a dispute between Plaintiff-Appellant Ricky Kamdem-Ouaffo and Defendants-Appellees the Balchem Corporation and affiliated individuals (collectively, "Balchem").[1] In this appeal, Kamdem-Ouaffo, proceeding *pro se*, appeals orders denying several of his post-judgment motions. He also challenges the original March 2021 dismissal of his complaint as a sanction—the appeal from which we earlier dismissed as frivolous, *see* 2d Cir. 21-653, doc. 157—as well as other pre-judgment orders. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

[1] The other appeal is *Kamdem-Ouaffo v. Balchem Corp.*, No. 23-458 (2d Cir.).

I. Scope of the Appeal

As an initial matter, this appeal is only timely as to certain of Kamdem-Ouaffo's post-judgment motions. A notice of appeal "must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). The Court lacks jurisdiction over untimely appeals. *See* 28 U.S.C. § 2107; *In re Am. Safety Indem. Co.*, 502 F.3d 70, 72 (2d Cir. 2007) (per curiam).

The only order of the district court that falls within thirty days of Kamdem-Ouaffo's notice of appeal, dated March 29, 2023, is the February 28, 2023 order denying his post-judgment motions under Rule 59(a)(2) (which the district court treated as filed under Rule 59(e)) and Rule 60(b)(4) (the "February 2023 Order"). Additionally, the subsequent orders of the district court, dated April 5, 2023 and April 13, 2023, denying his motion for recusal and motion for reconsideration of that denial, are subject to our review because Kamdem-Ouaffo timely amended his notice of appeal on April 28, 2023 to include them. Our jurisdiction also extends to the order denying Kamdem-Ouaffo's earlier Rule 60 motion and awarding attorneys' fees to Balchem (the "April 2022 Order") because his Rule 59 motion was timely filed within twenty-eight days of the April 2022 Order. *See* Fed. R. App. P. 4(a)(4)(A)(vi); *Weitzner v. Cynosure, Inc.*, 802 F.3d 307, 309 (2d Cir. 2015) (stating that Rule 4(a)(4)(A)(vi) allows "an appellant to toll th[e] 30-day time limit by filing a [timely] motion for reconsideration").

II. April 2022 Order

In its April 2022 Order, the district court denied Kamdem-Ouaffo's motion under Rule 60(a) and (b), which sought reconsideration of its judgment and certain pre-judgment orders, and calculated the total amount of attorneys' fees owed to the defendants.

a. Attorneys' Fees Calculation

Kamdem-Ouaffo has abandoned any argument challenging the portion of the district court's order calculating the award of attorneys' fees by failing to raise any argument as to it in his opening brief before this court. *See Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (concluding that a *pro se* litigant forfeited a challenge to the district court's adverse ruling mentioned only "obliquely and in passing" in his opening brief).

b. Rule 60

We review an order denying Rule 60 relief generally for abuse of discretion. *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009). We find no abuse of discretion in the district court's April 2022 Order. Assuming *arguendo* that Kamdem-Ouaffo's January 2022 Rule 60 motion for reconsideration of the district court's March 2021 dismissal of his second amended complaint was timely filed, it fails on the merits because Kamdem-Ouaffo has not identified any new evidence or exceptional circumstances warranting relief. *See United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391–92 (2d Cir. 2001). To the extent that he challenges the dismissal of the case as a sanction, he was afforded sufficient process before the issuance of the order. To the extent that he challenges the April 2022 Order under Rule 60(a) instead of Rule 60(b), he has failed to identify any clerical errors, oversights, or omissions in the district court's prior orders that would provide a basis for Rule 60(a) relief. Fed. R. Civ. P. 60(a); *see also Hodge ex rel. Skiff v. Hodge*, 269 F.3d 155, 158 (2d Cir. 2001) (per curiam).

III. February 2023 Order

The February 2023 Order denied Kamdem-Ouaffo's motion pursuant to Rule 59(a)(2) and Rule 60(b)(4), which the district court construed as pursuant to Rule 59(e), seeking reconsideration

of the April 2022 Order. The denial of a "motion to alter or amend judgment under Rule 59(e) is reviewed for an abuse of discretion." *See Empresa Cubana del Tabaco v. Culbro Corp.*, 541 F.3d 476, 478 (2d Cir. 2008) (per curiam) (alteration adopted) (internal quotation marks and citation omitted). For substantially the same reasons set forth above with respect to the April 2022 Order, we likewise discern no abuse of discretion in the February 2023 Order. In particular, Kamdem-Ouaffo did not identify any intervening change in law or a clear error warranting correction. *See Metzler Inv. GmbH v. Chipotle Mex. Grill, Inc.*, 970 F.3d 133, 142 (2d Cir. 2020). Instead, he merely reiterated arguments that the district court had previously rejected and made unsupported allegations of fraud against the district court and the defendants.

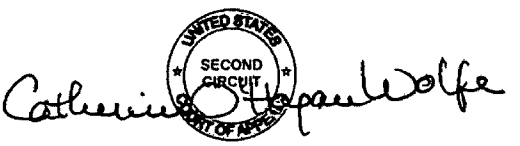
IV. Motion to Disqualify

"Recusal motions are committed to the sound discretion of the district court, and this Court will reverse a decision denying such a motion only for abuse of discretion." *LoCascio v. United States*, 473 F.3d 493, 495 (2d Cir. 2007). We again find no abuse of discretion in the district court's denial of Kamdem-Ouaffo's recusal motion and its subsequent denial of his motion to reconsider that denial. The grounds that Kamdem-Ouaffo cited in support of his recusal motion were that the magistrate judge and the district judge were biased against him and that they were involved in a conspiracy against him, involving persons posing as attorneys from the United States Department of Justice and officers of the U.S. Marshals Service "plotting [his] kidnapping and murder, and/or [his] ambush and assassination." 7:17-cv-02810-PMH-PED, doc. 313 at 2. The Supreme Court has held that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," *Liteky v. United States*, 510 U.S. 540, 555 (1994), and Kamdem-Ouaffo's motion has provided no basis in law or fact to support his fanciful allegations of bias.

* * *

We have considered Kamdem-Ouaffo's remaining arguments and find them to be without merit.[2] Accordingly, we **AFFIRM** the orders of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



[2] Kamdem-Ouaffo has filed motions to submit various supplemental materials. Because those materials do not affect our grounds for affirmance, the motions are denied as moot. However, his motion to seal Exhibits A–E attached to his March 12, 2024 motion is granted. Any other requests for relief in his pending motions are denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICKY KAMDEM-OUAFFO,

Plaintiff,

-against-

BALCHEM CORPORATION, et al.,

Defendants.

OPINION & ORDER

19-CV-09943 (PMH)

PHILIP M. HALPERN, United States District Judge:

Ricky Kamdem-Ouaffo ("Plaintiff") brought this action against Balchem Corporation, Gideon Oenga, Bob Miniger, Renee McComb, Theodore Harris, John Kuehner, Travis Larsen, Michael Sestrick, and John/Jane Does (collectively, "Defendants"), asserting claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and New York State Human Rights Law ("NYSHRL"), as well as a claim for "tortious interferences." (Doc. 2, "Compl."). The Court, on Defendants' motion, dismissed Plaintiff's Complaint with prejudice on April 8, 2022, because "Plaintiff's claims are duplicative of those already dismissed in a previous action [*Kamdem-Ouaffo v. Balchem Corp., et al.*, 17-CV-02810, "Original Action"], and this new action is clearly an attempt to circumvent a court order prohibiting him from re-pleading those dismissed claims." (Doc. 70, "Prior Order").[1]

On April 8, 2022, the same day the Prior Order was entered, Plaintiff moved under Federal Rule of Civil Procedure 59(a)(2) and Local Civil Rule 6.3 for "clarification, re-argument, or reconsideration" of the Court's decision dismissing his case. (Doc. 72; Doc. 73, "Pl. Br."). Plaintiff filed a reply memorandum of law in further support of his motion on April 20, 2022, before

[1] The Prior Order is also available on commercial databases. *See Kamdem-Ouaffo v. Balchem Corp.*, No. 19-CV-09943, 2022 WL 1081994 (S.D.N.Y. Apr. 8, 2022).

Defendants had filed any opposition. (Doc. 75, "Reply"). Defendants, on direction from the Court, opposed Plaintiff's motion on April 28, 2022. (Doc. 79, "Opp. Br.").

Rule 59(a)(2) allows a party to move for a new trial "[a]fter a nonjury trial" has concluded and is plainly inapplicable to this case which, *inter alia*, never went to trial. Moreover, although Plaintiff describes his motion as also seeking "clarification and/or re-argument," (Pl. Br. at 11), "a motion for clarification is not intended to alter or change a court's order, but merely to resolve alleged ambiguities in that order." *Bank of N.Y. Mellon, London Branch v. Cart 1, Ltd.,* No. 18-CV-06093, 2021 WL 2358695, at *1 (S.D.N.Y. June 9, 2021) (internal citation omitted). Plaintiff's motion seeks instead to reinstate his case and is, accordingly, properly construed only as a motion for reconsideration.[2]

Given the extensive litigation history in this matter, the Court assumes the parties' familiarity with the factual background and procedural history of the case and recites only that which is germane to Plaintiff's instant motions. For the reasons stated herein, Plaintiff's motion is DENIED.

STANDARD OF REVIEW

"A motion for reconsideration is governed by Local Civil Rule 6.3." *Senisi v. John Wiley & Sons, Inc.*, No. 13-CV-03314, 2016 WL 1045560, at *1 (S.D.N.Y. Mar. 15, 2016). Such a motion under Local Civil Rule 6.3 or Fed. R. Civ. P. 59(e) "is appropriate where 'the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that

[2] Defendants read Plaintiff's motions as seeking reconsideration, albeit under Federal Rule of Civil Procedure 59(e), which provides for "motion[s] to alter or amend a judgment." As Defendants point out, "[t]he standard for a motion to alter or amend a judgment under Rule 59(e) . . . is the same as the standard for a motion for reconsideration under Local Civil Rule 6.3." *Worldcom, Inc. v. Voice Plus Int'l, Inc.*, No. 97-CV-08265, 2000 WL 274182, at *1 (S.D.N.Y. Mar. 13, 2000). Thus, the Court's analysis under Rule 6.3, which Plaintiff references explicitly in each notice of motion, applies equally to the extent Plaintiff's motion could have been brought under Rule 59(e). In any event, the Court will consider Plaintiff's motions under Fed. R. Civ. P. 59(e) as well.

might reasonably be expected to alter the conclusion reached by the court.'" *Henderson v. Metro. Bank & Tr. Co.*, 502 F. Supp. 2d 372, 375-76 (S.D.N.Y. 2007) (quoting *In re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003)); *see also Analytical Surys., Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("the standard for granting a Rule 59 motion for reconsideration is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked.") (quotation removed). It is appropriate to grant a motion for reconsideration only if the movant points to "an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Id.* at 376 (quoting *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)). "Reconsideration . . . is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.'" *RST (2005) Inc. v. Research in Motion Ltd.*, 597 F. Supp. 2d 362, 365 (S.D.N.Y. 2009) (quoting *In re Health Mgmt. Sys. Inc. Secs. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (noting that the "[t]he standard for granting [a reconsideration] motion is strict . . . ."). Moreover, a motion for reconsideration "may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court." *RST (2005) Inc. v. Research in Motion Ltd.*, 597 F. Supp. 2d 362, 365 (S.D.N.Y. 2009). "Ultimately, the decision as to whether or not to grant a motion for reconsideration is entrusted to the district court's sound discretion." *Senisi*, 2016 WL 1045560, at *1.

ANALYSIS

The Prior Order: (i) dismissed Plaintiff's Complaint as a duplicative lawsuit; (ii) dismissed Plaintiff's Complaint on *res judicata* grounds; and (iii) warned Plaintiff he could be enjoined from

filing future frivolous lawsuits. Plaintiff seeks reconsideration of each branch of the Prior Order and the Court will address them separately.

I. First Branch: Plaintiff's Complaint is Duplicative

The Court found in the Prior Order that "[b]ecause this action 'involves essentially the same factual background and legal questions as those presented in' the Original Action, it is duplicative and cannot proceed further." (Prior Order at 6 (quoting *Grimes-Jenkins v. Consolidated Edison Company of New York, Inc.*, No. 18-CV-01545, 2019 WL 1507938, at *4 (S.D.N.Y. Apr. 5, 2019)); *see also Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit."). Specifically, the Prior Order considered that, on September 10, 2019, Judge Karas denied Plaintiff leave to file a third amended complaint in the Original Action and Plaintiff—a little over a month later—filed the instant action with "essentially identical" factual allegations and claims asserted. (Prior Order at 2). At the time of filing, the Complaint in this action was duplicative and thus improper.

Plaintiff argues with respect to the duplicative nature of this Action that the claims in this action do not mirror the claims in the Original Action because his "failure to rehire" claim arose later and that his receipt of an Equal Employment Opportunity Commission ("EEOC") right to sue letter on July 26, 2019 entitled him to file a new action.

Plaintiff, subsequent to the filing of the Original Action, filed a complaint with the EEOC under federal charge number 16GB801267. (Doc. 2 at 21). That complaint alleged, *inter alia*, that Defendants refused to rehire Plaintiff for job openings that he applied for after being terminated. (*Id.* at 22-24). The EEOC notified Plaintiff on July 23, 2019 that his charge was dismissed and issued him a right to sue letter. (*Id.* at 10). Plaintiff argues that because his failure to rehire claim

was based on a right to sue letter that he did not receive until after the second amended complaint in the Original Action was filed on October 12, 2018, the instant action is not duplicative.

Plaintiff, however, *did* raise "failure to rehire" claims in the Original Action. (*See, e.g.* Original Action Doc. 37 at 14 ("Plaintiff has also applied for other science jobs that Balchem Corporation posted on public website for expertise that Plaintiff has, but Balchem Corporation has opposed calling Plaintiff for interview and Plaintiff was not even called for interview."). Indeed, the Court explicitly considered in the Prior Order that "both pleadings allege that Plaintiff suffered harassment during his period of employment from April 2015 to August 2016, that he was wrongfully terminated, *and that he was not re-hired.*" (Prior Order at 7 (emphasis added)). The alleged failure to rehire in this case constitutes the same failure to rehire claim considered in the Original Action because the circumstances of Plaintiff's dismissal and Defendants' decision not to rehire arose from the same set of facts and circumstances. Defendants made the decision not to rehire Plaintiff once. That Plaintiff repeatedly attempted to gain employment thereafter does not generate new failure to rehire claims each and every time he sought reinstatement. *See Robinson v. Purcell Const. Corp.*, 647 F. App'x 29, 30 (2d Cir. 2016) ("Regardless of whether [Plaintiff's] discharge is called a layoff, termination, firing, or failure to rehire, the fact remains that the circumstances surrounding Plaintiff's termination . . . were fully adjudicated.").

Nor does Plaintiff's receipt of an EEOC right to sue letter on July 23, 2019 relating to his failure to rehire claim render this claim non-duplicative. Receipt of an EEOC right to sue letter is a prerequisite to filing suit in federal court designed to ensure the exhaustion of administrative remedies, not a representation as to the validity of the contemplated claims. Indeed, the EEOC letter is entirely irrelevant to whether Plaintiff's claims are duplicative. *See, e.g. Jemmott v. Metro.*

Transit Auth., No. 13-CV-02665, 2014 WL 2120357 (E.D.N.Y. May 21, 2014) (dismissing employment discrimination claims as duplicative despite Plaintiff's EEOC right to sue).

Plaintiff's claims in this action are duplicative of those in the Original Action and his argument with respect to the EEOC right to sue letter lacks merit. Plaintiff's motion to reconsider the first branch of the Prior Order is, accordingly, denied.

II. Second Branch: *Res Judicata*

The Prior Order next held that "in addition to being duplicative, Plaintiff's claims in this action are barred by the doctrine of *res judicata*." (Prior Order at 6). Specifically, the Court held that: (i) the dismissal of the Original Action was an adjudication on the merits; (ii) the instant action and the Original Action involved identical parties; and (iii) the claims and facts in the instant action largely mirrored those of the Original Action. (*Id.* at 7). Once Plaintiff's claims were dismissed with prejudice in the Original Action, the identical claims asserted in this action were barred by *res judicata*.

Plaintiff raises two arguments relevant to the application of *res judicata*: (i) his receipt of the July 23, 2019 EEOC right to sue letter prevents its application; and (ii) the Order dismissing the Original Action is void. Neither argument warrants reconsideration of the Prior Order.

a. The EEOC Right to Sue

Plaintiff's receipt of an EEOC right to sue letter, just as it does not render his claims non-duplicative, does not bestow upon him the right to avoid application of *res judicata*. *See Mulero v. Hartford Bd. of Educ.*, No. 05-CV-00630, 2006 WL 752852, at *2 (D. Conn. Mar. 20, 2006) ("Plaintiff's receipt of a [right to sue] letter from the Justice Department subsequent to an action in which final judgment on the merits has been rendered does not mean that Plaintiff is now given the right to re-file that action; the doctrine of *res judicata* is not so easily avoided.").

Plaintiff attempted to replead *duplicative* claims in the Original Action after multiple rounds of dispositive motion practice. Judge Karas, recognizing this strategy, denied Plaintiff leave to file a third amended complaint in the Original Action because "Plaintiff ha[d] already taken multiple bites at the apple." (Original Action, Doc. 66 at 2). That Judge Karas denied leave to amend did not open the door to a new suit on those duplicative claims. *Robinson*, 647 F. App'x at 30 ("Regardless of whether a plaintiff attempts to bring the additional claims in an initial suit, and regardless of whether plaintiff meets with success in that attempt, the *res judicata* bar is based on the requirement that the plaintiff must bring all claims at once against the same defendant relating to the same transaction or event.") (internal quotation omitted). Receipt of the July 23, 2019 EEOC right to sue letter does not change this result.

b. Dismissal of the Original Action

Plaintiff's second argument is that the dismissal of the Original Action was invalid because it somehow prejudiced his due process rights in that case. A voided dismissal of the Original Action, according to Plaintiff, would presumably invalidate the Prior Order's finding with respect to the first element of *res judicata*, previous adjudication on the merits.

Plaintiff's incongruous theories of "fraud on the court" and "the doctrine of the ends justify the means" have been the subject of considerable letter-writing in the Original Action. (*See, e.g.* Original Action Docs. 279-285; Docs. 293-306). Those theories are, however, simply without merit. Plaintiff failed to establish a fraud on the court in either the Original Action or this one; his argument that he did not receive notice that he would be sanctioned for skipping a court-ordered deposition is contradicted by Magistrate Judge Davison's repeated warnings to that effect. (*See, e.g.* Original Action Doc. 173; Doc. 194). The "doctrine" of the ends justify the means is not a legal theory known to this Court and, in any event, has no applicability to this case or to the

Original Action. The dismissal of the Original Action was entirely valid, was a previous adjudication on the merits, and supports the application of *res judicata* here.

Plaintiff again fails to meet the strict burden required of him on a motion of this type and, therefore, his argument does not warrant reconsideration.

III. Third Branch: Reconsideration of the Injunction Warning

The Court, in the Prior Order, warned Plaintiff that "[a]n injunction against future lawsuits is an available remedy in appropriate circumstances and has been applied where litigants file repeated lawsuit relating to the same case." (*Id.* (quoting *Edwards v. Barclays Servs. Corp.*, No. 19-CV-09326, 2020 WL 2087749, at *7 (S.D.N.Y. May 1, 2020) (collecting cases), *adopted by* 2020 WL 3446870 (S.D.N.Y. June 24, 2020))). Plaintiff points to no intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. Plaintiff's displeasure with the Court's ruling does not suffice to warrant reconsideration and therefore, this branch of his motion is denied.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for reconsideration is DENIED. The Clerk of Court is respectfully directed to terminate the motion sequence pending at Doc. 72.

SO ORDERED:

Dated: White Plains, New York
February 28, 2023

Philip M. Halpern
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICKY KAMDEM-OUAFFO,

Plaintiff,

-against-

BALCHEM CORPORATION, et al.,

Defendant.

MEMORANDUM OPINION AND ORDER

19-CV-09943 (PMH)

PHILIP M. HALPERN, United States District Judge:

Ricky Kamdem-Ouaffo ("Plaintiff") brings this action against Balchem Corporation, Gideon Oenga, Bob Miniger, Renee McComb, Theodore Harris, John Kuehner, Travis Larsen, Michael Sestrick, and John/Jane Does (collectively, "Defendants"). Plaintiff asserts claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and New York State Human Rights Law ("NYSHRL"), as well as a claim for "tortious interferences." Because Plaintiff's claims are duplicative of those already dismissed in a previous action, and this new action is clearly an attempt to circumvent a court order prohibiting him from re-pleading those dismissed claims, this action is dismissed with prejudice.

BACKGROUND

The Court assumes the parties' familiarity with the facts alleged in this case, as they are essentially identical to the facts already alleged and described in detail in Judge Karas's prior decisions. (Original Action, Docs. 36, 48). Accordingly, the Court will only wade into the facts and procedural history as necessary to resolve this motion.

On April 14, 2017, Plaintiff commenced an action against Defendants[1] captioned *Kamdem-Ouaffo v. Balchem Corporation, et al.*, No. 17-CV-02810 (S.D.N.Y. 2017) ("Original Action").[2] Plaintiff's second amended complaint[3] in the Original Action asserted eighteen claims for relief, including claims under Title VII, NYSHRL, and a claim for tortious interference. (Original Action, Doc. 37). On June 27, 2019, Judge Karas[4] granted in part and denied in part Defendants' motion to dismiss the second amended complaint. (Original Action, Doc. 48). The claims that Judge Karas dismissed were dismissed with prejudice, as he determined that any "further amendment" of those claims "would be futile." (*Id.* at 22). Following a request by Plaintiff to amend his complaint for a third time to add new claims, on September 10, 2019, Judge Karas denied Plaintiff's request, reasoning that:

> Plaintiff has already taken multiple bites at the apple, and the Court has already written two opinions addressing motions to dismiss. Plaintiff has offered no persuasive reason he did not bring these putative claims sooner. Further, Plaintiff is not otherwise amending; the claims previously dismissed were dismissed with prejudice, and the parties are now moving on to mediation and a possible motion for summary judgment.

(Original Action, Doc. 66). A little over a month later, on October 25, 2019, Plaintiff commenced this action by filing a complaint that is essentially identical (in terms of the factual allegations and claims asserted) to the second amended complaint filed in the Original Action. (*Compare* Doc. 2, *with* Original Action, Doc. 37).

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[1] The Defendants named in this action—except for the John/Jane Does—are the same as those named in the Original Action.

[2] References to the Original Action docket are cited as "Original Action, Doc. __."

[3] Plaintiff filed his original complaint on April 14, 2017, his first amended complaint on September 19, 2017, and his second amended complaint—the operative pleading in the Original Action—on October 12, 2018. (Original Action, Docs. 1, 24, 37).

[4] The Original Action was reassigned to this Court on April 16, 2020. (Min. Entry Apr. 16, 2020).

On December 23, 2020, Magistrate Judge Davison issued a Report and Recommendation in the Original Action, in which he recommended to this Court that the Original Action be dismissed with prejudice due to Plaintiff's discovery misconduct, including his failure to appear for his court-ordered October 13, 2020 video deposition. (Original Action, Doc. 225). On March 23, 2021, this Court issued an order adopting Magistrate Judge Davison's Report and Recommendation in its entirety, thereby dismissing the Original Action with prejudice. (Original Action, Doc. 244). That same day, Plaintiff filed a notice of appeal from the dismissal order. (Doc. 245). The Second Circuit dismissed his appeal on December 16, 2021, "because it 'present[ed] no arguably meritorious issue for [their] consideration.'" (Doc. 65-6 (quoting *Pillay v. INS*, 45 F.3d 14, 17 (2d Cir. 1995) (per curiam)). On January 18 and 19, 2022, Plaintiff filed motions under Rules 60(a) and (b), again seeking to overturn the dismissal order. (Docs. 256-59). The Court denied those motions on April 4, 2022. (Doc. 274).

On February 24, 2022, Defendants moved to dismiss Plaintiff's complaint in this action. (Doc. 63; Doc. 64; Doc. 65). On March 10, 2022, Plaintiff filed a letter that the Court construes as his opposition. (Doc. 66).[5]

STANDARD OF REVIEW

A Rule 12(b)(6) motion enables a court to consider dismissing a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the

[5] As of the date of this Memorandum Opinion and Order, Defendants' reply—which is due April 11, 2022—has not yet been filed. The Court, however, deems Defendants' reply unnecessary to resolve this motion and, therefore, deems the motion fully submitted.

ple[d] factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly,* 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant acted unlawfully." *Id.* The factual allegations pled "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"When there are well-ple[d] factual allegations [in the complaint], a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. Thus, a court must "take all well-ple[d] factual allegations as true, and all reasonable inferences are drawn and viewed in a light most favorable to the plaintiff." *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996). However, the presumption of truth does not extend to "legal conclusions, and threadbare recitals of the elements of the cause of actions." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. 662). Therefore, a plaintiff must provide "more than labels and conclusions" to show entitlement to relief. *Twombly*, 550 U.S. at 555.

A complaint submitted by a *pro se* plaintiff, "however inartfully ple[d], must be held to less stringent standards than formal pleadings drafted by lawyers." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (internal quotation marks omitted)). Because *pro se* plaintiffs "'are often unfamiliar with the formalities of pleading requirements,' courts must apply a more flexible standard in determining the sufficiency of a *pro se* [complaint] than they would in reviewing a pleading submitted by counsel.'" *Smith v. U.S. Dep't of Just.*, 218 F. Supp. 2d 357 (W.D.N.Y. 2002) (quoting *Platsky v. Cent. Intelligence Agency*, 953 F.2d 26, 28 (2d Cir. 1991)). While "[*p*]*ro se* complaints are held to less stringent standards than those drafted by lawyers, even following *Twombly* and *Iqbal* . . . dismissal of a *pro se* complaint is nevertheless appropriate where a plaintiff has clearly failed to meet minimum pleading

requirements." *Thomas v. Westchester Cty.*, No. 12-CV-06718, 2013 WL 3357171, at *2 (S.D.N.Y. July 3, 2013) (internal citations omitted); *see also Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) ("Even in a *pro se* case . . . although a court must accept as true all of the allegations . . . in a complaint, that tenet is inapplicable to legal conclusions, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (internal quotation marks omitted)).

Therefore, while the Court must "draw the most favorable inferences that [a plaintiff's] complaint supports, [it] cannot invent factual allegations that [a plaintiff] has not pled." *Chappius*, 618 F.3d at 170. The Court also has a duty to interpret "the pleadings of a *pro se* plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest.'" *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)).

ANALYSIS

I. Plaintiff's Claims are Duplicative and Barred by Res Judicata

Plaintiff's complaint in this action, which is duplicative of his second amended complaint in the Original Action, is dismissed on two independent grounds.

First, it is axiomatic that "[a]s part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). Here, the facts alleged in Plaintiff's complaint are essentially identical to those pled in the second amended complaint in the Original Action. For instance, the second amended complaint in the Original Action alleges that:

> Although the project that Plaintiff developed at Balchem Corporation remains 'Active' as recently testified under oath by the CTO of Balchem Corporation, namely Mr. Michael Sestrick in and [sic] Affidavit before this Court, Plaintiff has re-applied for work at Balchem Corporation and Balchem has not even called Plaintiff for interview and has opposed the rehiring of Plaintiff.

(Original Action, Doc. 37 ¶¶ 77, 160, 221, 257, 292, 327). Nearly the same exact allegation appears in Plaintiff's complaint in this action. (Doc. 2 ¶¶ 82, 146, 177, 208, 250, 292, 333, 374). When faced with this type of copy/paste litigation, courts in this district have routinely dismissed the later-filed action asserting duplicative claims.

For instance, in *Grimes-Jenkins v. Consolidated Edison Company of New York, Inc.*, the plaintiff's complaint "largely mirror[ed]" his second amended complaint in his first-filed action. No. 18-CV-01545, 2019 WL 1507938, at *4 (S.D.N.Y. Apr. 5, 2019). Although the plaintiff asserted "a handful of new allegations, most of them [were] premised on conduct occurring before [his first action] was filed, and which, therefore, should have been asserted then." *Id.* Therefore, the court dismissed the second case as duplicative, reasoning that the plaintiff was "not entitled to another bite at the apple simply because [she] ha[d] repackaged various claims . . . ." *Id.* (citation omitted, second alteration added).

Here, as in *Grimes-Jenkins*, Plaintiff's complaint is a "blatant attempt to replead" his claims that were dismissed with prejudice in the Original Action. *Id.* at *4 (citation omitted). Because this action "involves essentially the same factual background and legal questions as those presented in" the Original Action, it is duplicative and cannot proceed further. *Id.* (citation omitted).

Second, in addition to being duplicative, Plaintiff's claims in this action are barred by the doctrine of res judicata. Res judicata "bars the subsequent litigation of any claims that were or could have been raised in a prior action." *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 128 n.1 (2d Cir. 2015). "The doctrine applies only if (1) there is a previous adjudication on the merits; (2) the previous action involved the party against whom *res judicata* is invoked or its privy; and (3) the claims involved were or could have been raised in the previous action." *Swiatkowski v.*

Citibank, 745 F. Supp. 2d 150, 171 (E.D.N.Y. 2010) (cleaned up), *aff'd*, 446 F. App'x 360 (2d Cir. 2011). All three elements are satisfied here.

First, the dismissal of Plaintiff's second amended complaint in the Original Action under Federal Rule of Civil Procedure 37 was an adjudication on the merits. *See Nasser v. Isthmian Lines*, 331 F.2d 124, 128 (2d Cir. 1964); *Shukla v. Deloitte Consulting LLP*, No. 19-CV-10578, 2021 WL 3721349, at *4 (S.D.N.Y. Aug. 20, 2021) ("[D]ismissal pursuant to . . . [Rule] 37 is an adjudication on the merits."); *Snyder v. Yonkers Pub. Sch. Dist.*, 315 F. Supp. 2d 499, 502 (S.D.N.Y. 2004) ("The dismissal of an action, with prejudice, for failure to comply with discovery orders is a judgment on the merits.").

Second, the second amended complaint in the Original Action and the complaint in this action involve identical parties, and therefore, res judicata applies. *See Sinicropi v. Nassau Cty.*, 601 F.2d 60, 62 (2d Cir. 1979) ("Since the parties are identical, appellant's suit is barred by res judicata."); *see also Denny v. Ford Motor Co.*, 959 F. Supp. 2d 262, 269 (N.D.N.Y. 2013) (dismissing fraud claims on res judicata grounds where "the parties are identical"). Plaintiff's addition of John/Jane Does as defendants in this action does not alter this conclusion. *See Winnie v. Durant*, No. 20-CV-00502, 2021 WL 1999782, at *4 (N.D.N.Y. May 19, 2021) ("[A] party's Jane or John Doe status does not prevent them from establishing privity for the purposes of *res judicata*.").

Third, the claims and facts alleged in this action largely mirror those in Plaintiff's second amended complaint in the Original Action. Indeed, both pleadings allege that Plaintiff suffered harassment during his period of employment from April 2015 to August 2016, that he was wrongfully terminated, and that he was not re-hired. (*Compare* Doc. 2, *with* Original Action, Doc.

37). The complaint in this action does not contain any claims or factual allegations that were not, or could not have been, included in the second amended complaint in the Original Action.

Accordingly, Plaintiff's claims in this action are dismissed as duplicative and barred by res judicata.

II. Warning of Injunction Against New Actions Filed by Plaintiff

Between Plaintiff's multiple amendments to his complaint in the Original Action, his subsequent Second Circuit appeal, and his motions for reconsideration in the Original Action, he has now had enough bites at the apple to have chewed through the core.

Plaintiff is cautioned, in light of his repeated filings involving the same claims and facts, that "[a]n injunction against future lawsuits is an available remedy in appropriate circumstances and has been applied where litigants file repeated lawsuit relating to the same case." *Edwards v. Barclays Servs. Corp.*, No. 19-CV-09326, 2020 WL 2087749, at *7 (S.D.N.Y. May 1, 2020) (collecting cases), *adopted by* 2020 WL 3446870 (S.D.N.Y. June 24, 2020). The authority to enjoin litigants arises from the All Writs Act, 28 U.S.C. § 1651(a), *see Safir v. U.S. Lines, Inc.*, 792 F.2d 19, 23-24 (2d Cir. 1986) (collecting cases), as well as the inherent authority of the court, *see Lacy v. Principi*, 317 F. Supp. 2d 444, 449 (S.D.N.Y. 2004) ("When a plaintiff files repeated lawsuits involving the same nucleus of operative facts, a district court has the inherent power to enjoin him from filing vexatious lawsuits in the future.") (collecting cases). Not only does the court have the right to enjoin a vexatious litigant, but the Second Circuit has found that "[f]ederal courts have . . . the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984); *see also Lacy*, 317 F. Supp. 2d at 449 ("[T]he Court has a constitutional duty to enjoin the filing of frivolous lawsuits in order to preserve judicial resources when the plaintiff

is likely to file more suits in the future and non-injunctive relief would be ineffective.") (citation omitted).

The Court is cognizant of Plaintiff's *pro se* status, and it has construed all of his filings liberally. Nevertheless, the Court warns Plaintiff that future filings involving similar claims, facts, issues, and parties, will not be tolerated. Should Plaintiff persist in his course of conduct, "the Court will require that Plaintiff first seek leave of Court before submitting such filings. In addition, the Court may direct the Clerk of Court to return to Plaintiff, without filing, any such action that is received without a clear application seeking leave to file, and the Court may invite an application to dismiss the case with prejudice." *Kapsis v. Brandveen*, No. 09-CV-01352, 2009 WL 2182609, at *3 (E.D.N.Y. July 20, 2009).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED. Plaintiff's complaint is dismissed with prejudice.[6]

The Clerk of the Court is respectfully directed to terminate the motion sequences pending at Doc. 51 and Doc. 63 and close this case.

SO ORDERED:

Dated: White Plains, New York
April 8, 2022

Philip M. Halpern
United States District Judge

[6] *See, e.g.*, *Snyder*, 315 F. Supp. 2d 499, 503 (dismissing *pro se* plaintiff's complaint with prejudice on res judicata grounds); *Rene v. Jablonski*, No. 08-CV-03968, 2009 WL 2524865, at *8-10 (E.D.N.Y. Aug. 17, 2009) (Bianco, J.) (same).

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of May, two thousand twenty-four.

Ricky Kamdem-Ouaffo,

Plaintiff - Appellant,

v.

Balchem Corporation, Gideon Oenga, Bob Miniger, Renee McComb, Theodore Harris, John Kuehner, Travis Larsen, Michael Sestrick, John/Jane Does,

Defendants - Appellees.

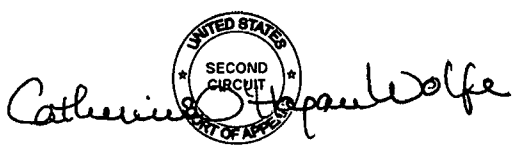
ORDER

Docket No: 23-458

Appellant, Ricky Kamdem-Ouaffo, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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