Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1880

WILLIAM F. KAETZ,
Appellant

v.

UNITED STATES OF AMERICA, et al

(D.C. Civil No. 2-22-cv-03469)

SUR PETITION FOR REHEARING

Present: JORDEN, RESTREPO, BIBAS, PORTER, MATEY an d FREEMAN, 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 Court en banc, is denied.

BY THE COURT,

s/ David J. Porter
Circuit Judge

Date: August 27, 2024
Amr/cc: All counsel of record

ELD-004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 23-1880

WILLIAM F. KAETZ,
Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; EDUCATIONAL CREDIT MANAGEMENT CORP.; LAW OFFICES OF KENNETH L. BAUM; *EXPERIAN INFORMATION SOLUTIONS, INC.; PRICE MEESE SHULMAN & D'ARMINIO; TRANSUNION; SCHUCKIT & ASSOCIATES; *EQUIFAX INFORMATION SERVICES LLC; *CLARK HILL PLC; SEYFARTH SHAW, LLP; KENNETH L. BAUM; CAMILLE R. NICODEMUS; WILLIAM R. BROWN, ESQ.; DOROTHY A. KOWAL; ROBERT T. SZYBA; BORIS BROWNSTEIN, ESQ.

*(Amended pursuant to Clerk Order of 6/22/23)

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil Action No. 2:22-cv-03469) District Judge: Honorable Kevin McNulty

Submitted on Appellees' Motion for Summary Action

Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 May 23, 2024

Before: JORDAN, BIBAS, and PORTER, 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 on Appellees' motion for summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on May 23, 2024. On consideration whereof,

it is now hereby **ORDERED** and **ADJUDGED** by this Court that the judgment of the District Court entered March 30, 2023, be and the same is hereby **AFFIRMED**. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: June 11, 2024

ELD-004 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 23-1880

WILLIAM F. KAETZ,
Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; EDUCATIONAL CREDIT MANAGEMENT CORP.; LAW OFFICES OF KENNETH L. BAUM; *EXPERIAN INFORMATION SOLUTIONS, INC.; PRICE MEESE SHULMAN & D'ARMINIO; TRANSUNION; SCHUCKIT & ASSOCIATES; *EQUIFAX INFORMATION SERVICES LLC; *CLARK HILL PLC; SEYFARTH SHAW, LLP; KENNETH L. BAUM; CAMILLE R. NICODEMUS; WILLIAM R. BROWN, ESQ.; DOROTHY A. KOWAL; ROBERT T. SZYBA; BORIS BROWNSTEIN, ESQ.

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Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 May 23, 2024

Before: JORDAN, BIBAS, and PORTER, Circuit Judges

(Opinion filed: June 11, 2024)

OPINION*[1]

PER CURIAM

I.

William F. Kaetz, proceeding pro se, appeals from an order of the United States District Court for the District of New Jersey dismissing his complaint. For the following reasons, we grant the Appellees' motion and will summarily affirm the District Court's judgment.

II.

In June 2022, Kaetz initiated a civil rights complaint in the District of New Jersey against the United States of America and the United States Department of Justice, the Educational Credit Management Corp., three credit reporting agencies, several law firms, and various lawyers, based upon their involvement in a 2016 action brought by Kaetz in the District of New Jersey, see Kaetz

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

v. Educ. Credit Mgmt. Corp., D.N.J. Civ. No. 2:16-cv-09225, affirmed Kaetz v. Educ. Credit Mgmt. Corp., No. 20-2592, 2022 WL 996422 (3d Cir. Apr. 4, 2022) ("2016 Action"). The 2022 Complaint challenges (1) the constitutionality of 11 U.S.C. § 523(a)(8), the Bankruptcy Code provision excepting student loan debt from discharge; and (2) the Defendants' conduct in the 2016 Action, including claims of fraud, fraud on the court, and other violations and requests for injunctive relief.

All Defendants filed motions to dismiss and Kaetz responded by filing cross motions to strike as well as oppositions to the motions. On March 30, 2023, the District Court entered an order denying Kaetz's motions to strike and granting the Defendants' motions to dismiss. Specifically, the Court granted the Defendants' motions to dismiss on collateral estoppel grounds as to his constitutional challenge to the Bankruptcy Code and for failure to state a claim as to his remaining claims. The District Court's order dismissed Kaetz's claims barred by collateral estoppel with prejudice and dismissed the remaining claims without prejudice. The day after the Court entered its order, Kaetz filed a timely motion to set aside the judgment under Fed. R. Civ. P. 60, and subsequently filed a timely notice of appeal. On January 4, 2024, the Court denied Kaetz's post-judgment motion. He thereafter filed a motion for reconsideration of the Court's denial, which was also denied.[2]

Appellees United States of America and United States Department of Justice ("Federal Appellees") moved

[2]Pursuant to Federal Rule of Appellate Procedure 4(a)(4)(B)(ii), the scope of this appeal does not encompass the District Court's January 4, 2024 order denying Kaetz's motion to set aside the judgment or its April 10, 2024 order denying reconsideration of the prior denial. Kaetz did not file a notice of appeal, or amended notice of appeal, after the Court entered those orders.

for summary affirmance in this Court and Appellees Experian Information Solutions, Inc., Equifax Information Services, LLC, and Tran Union, LLC ("CRA Appellees") later joined the motion. Appellant subsequently filed several motions in this Court, including requests for an injunction, to strike the motion for summary affirmance, and for judicial notice.

III.

We have jurisdiction pursuant to 28 U.S.C. § 1291. "Application of collateral estoppel is a question of law," over which we exercise plenary review, Szehinskyj v. Att'y Gen., 432 F.3d 253, 255 (3d Cir. 2005), as we do over an order of dismissal for failure to state a claim, see Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008). We may summarily affirm a District Court's decision if the appeal fails to present a substantial question. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam); 3d Cir.L.A.R. 27.4; I.O.P. 10.6.

IV.

We agree with the District Court that Kaetz's constitutional challenge to 11 U.S.C. § 523(a)(8) is barred by collateral estoppel. Collateral estoppel, also known as issue preclusion, "prevents the re-litigation of a factual or legal issue that was litigated in an earlier proceeding." Doe v. Hesketh, 828 F.3d 159, 171 (3d Cir. 2016). Collateral estoppel is appropriate where: "(1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question." In re Bestwall LLC, 47 F.4th 233, 243 (3d Cir. 2022) (quoting Hesketh, 828 F.3d at 171).

This test is easily satisfied with respect to Kaetz's challenge to the constitutionality of § 523(a)(8). First, as the District Court correctly noted, the identical issue was decided in the prior adjudication, as the District Court in the 2016 Action specifically addressed and rejected Kaetz's argument that § 523(a)(8) was unconstitutionally vague. Kaetz v. Educ. Credit Mgmt. Corp., No. 2:16-cv-09225, 2019 WL 4745289, at *3–4 (D.N.J. Sept. 30, 2019) (dismissing complaint); Kaetz v. Educ. Credit Mgmt. Corp., No. 2:16-cv-09225, 2020 WL 3542382, at *3 (D.N.J. June 30, 2020) (denying reconsideration); Kaetz v. Educ. Credit Mgmt. Corp., No. 20-2592, 2022 WL 996422, at *3 (3d Cir. Apr. 4, 2022) (affirming judgment). Second, there was a final judgment on the merits since the District Court dismissed the claim with prejudice and the dismissal was affirmed on appeal. Third, Kaetz was clearly a party to the 2016 Action as he was the claimant. Fourth, Kaetz had a full and fair opportunity to litigate the issue in question, both in the District Court and on appeal.

V.

We further agree with the District Court's dismissal of Kaetz's remaining claims for failure to state a claim upon which relief may be granted. These claims include: (1) Bivens claims for constitutional violations under the First, Fifth, Eighth, and Fourteenth Amendments; (2) fraud; (3) fraud on the court; (4) intentional infliction of emotional distress; (5) "misconduct," for which Kaetz contends the Court should issue sanctions pursuant to Fed. R. Civ. P. 11; and (6) injunctive relief.

As the District Court noted, Kaetz brought his complaint against three groups of defendants; (1) the United States, (2) federal agencies, and (3) private parties. Bivens actions, however, only authorize suits against federal officials in their individual capacities. FDIC v. Meyer, 510 U.S. 471, 473 (1994). Accordingly, Kaetz's failure to name specific federal officials as defendants and to allege their personal involvement constituted a fatal defect to his Bivens claim. Because the defendants are not proper defendants under Bivens, the District Court properly dismissed this claim.

Regarding Kaetz's fraud claim, we agree with the District Court's interpretation of Kaetz's allegations in support of this claim, explaining that the allegations "consist[] of nothing beyond a disagreement with the prior court's legal interpretation" and are based on an argument that "all Defendants, by virtue of their involvement in the 2016 Action, must have committed fraud merely because the Court did not rule in his favor." Compl., Dkt No. 122, at 18. These allegations fall far short of stating a claim for fraud. See Gennari v. Weichert Co. Realtors, 691 A.2d 350, 367 (N.J. 1997) (describing the elements for a fraud claim); see also Fed. R. Civ. P. 9(b) (requiring that fraud be pleaded with particularity).

Kaetz's complaint includes the same, deficient, allegations for his fraud on the court claim. In order to state a claim for fraud on the court, a plaintiff must allege, "(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. U.S., 424 F.3d 384, 390 (3d Cir. 2005). We have previously made clear that such allegations must constitute "egregious misconduct ... such as bribery of a judge or jury or fabrication of evidence by counsel." Id. (quoting In re Coordinated Petrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir. 1976)). We agree with the District Court that Kaetz failed to meet this demanding standard. The purportedly fraudulent acts that Kaetz identified in his complaint are merely legal disagreements with the proceedings in the 2016 Action and do not constitute egregious misconduct.

Kaetz additionally asserts a claim for the intentional infliction of emotional distress ("IIED"). Such a claim requires allegations demonstrating that, *inter alia*, the defendant's conduct was so "extreme and outrageous . . . as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Juzwiak v. Doe, 2 A.3d 428, 451 (N.J. Super. Ct. App. Div. 2010) (quoting Buckley v. Trenton Saving Fund Soc'y, 544 A.2d 857, 863 (N.J. 1988)). Here, as the District Court concluded, Kaetz failed to allege facts sufficient to plausibly demonstrate that Defendants engaged in extreme and outrageous conduct. Rather, the conduct described in the complaint concerns ordinary litigation-related conduct, which does not by itself rise to the level of outrageous conduct.

Finally, to the extent Kaetz intended to assert a claim for "misconduct" under Federal Rule of Civil Procedure 11, the District Court correctly dismissed such claim as a private right of action under Rule 11 does not exist.

VI.

For these reasons, we grant the Appellees' motion and will summarily affirm the District Court's judgment.[3]

[3] Kaetz's motion to withdraw his motions for judicial notice is granted. His remaining motions are denied.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

WILLIAM F. KAETZ, Plaintiff, v. UNITED STATES OF AMERICA; US DEPARTMENT OF JUSTICE; EDUCATIONAL CREDIT MANAGEMENT CORP.; EXPERIAN; TRANSUNION; EQUIFAX INC; LAW OFFICES OF KENNETH L. BAUM; KENNETH L. BAUM; SCHUCKIT & ASSOCIATES; CAMILLE R. NICODEMUS; WILLIAM R. BROWN; PRICE MEESE SHULMAN & D'ARMINIO; DOROTHY A. KOWAL; SEYFARTH SHAW LLP; ROBERT T. SZYBA; CLARK HILL INTERNATIONAL LAW FIRM; and BORIS BROWNSTEIN, ESQ.,	Defendants. Civ. No. 22-03469 (KM) (JRA) ORDER

THIS MATTER having come before the Court on 1) Defendants' motions to dismiss the complaint (DE 39, 42, 56, 58, 59, 62, 90), 2) Plaintiff William F. Kaetz's motions to strike each of Defendants' motions to dismiss (DE 41, 66, 67, 68, 69, 91), and 3) Kaetz's motion for reconsideration (DE 114) of this Court's administrative termination of his January 9, 2023 summary judgment motion; and the Court having considered the submissions of the parties (DE 1, 39, 41, 42, 56, 58, 59, 62, 65, 66, 67, 68, 69, 70, 73, 80, 82, 83, 90, 91, 94, 114, 115, 116, 117, 119) without oral argument pursuant to Fed. R. Civ. P. 78(b); for the reasons stated in the accompanying Opinion, and for good cause shown;

IT IS, this 30th day of March, 2023,

ORDERED that Plaintiff's motions to strike (DE 41, 66, 67, 68, 69, 91) are **DENIED** (*see* accompanying Opinion Part II); and it is further

ORDERED that Defendants' motions to dismiss the complaint (DE 39, 42, 56, 58, 59, 62, 90) are **GRANTED** and the complaint is **DISMISSED** (*see* accompanying Opinion Part III.A & B); and it is further

ORDERED that Plaintiff's motion for reconsideration (DE 114) is **DENIED** (*see* accompanying Opinion Part IV).

The collateral estoppel dismissal (Part III.A, *supra*) and denial of reconsideration (Part IV, *supra*) are entered **with prejudice**; the remaining rulings are entered without prejudice to the submission, within 30 days, of a proposed amended complaint.

The Clerk shall close the file.

/s/ Kevin McNulty
Hon. Kevin McNulty
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

WILLIAM F. KAETZ, **Plaintiff,** **v.** **UNITED STATES OF AMERICA; US DEPARTMENT OF JUSTICE; EDUCATIONAL CREDIT MANAGEMENT CORP.; EXPERIAN; TRANSUNION; EQUIFAX INC; LAW OFFICES OF KENNETH L. BAUM; KENNETH L. BAUM; SCHUCKIT & ASSOCIATES; CAMILLE R. NICODEMUS; WILLIAM R. BROWN; PRICE MEESE SHULMAN & D'ARMINIO; DOROTHY A. KOWAL; SEYFARTH SHAW LLP; ROBERT T. SZYBA; CLARK HILL INTERNATIONAL LAW FIRM; and BORIS BROWNSTEIN, ESQ.,** **Defendants.**	Civ. No. 22-03469 (KM) (JRA) **OPINION**

KEVIN MCNULTY, U.S.D.J.:

Pro se plaintiff William F. Kaetz filed this civil action against the United States of America and the United States Department of Justice ("DOJ" and together, the "Federal Defendants"), along with Educational Credit

Management Corp. ("ECMC"); Experian Information Solutions, Inc. ("Experian"); Equifax Inc. ("Equifax"); the Law Office of Kenneth L. Baum LLC; Kenneth L. Baum; Schuckit & Associates, P.C. ("Schuckit"); Camille R. Nicodemus; Trans Union, LLC; William R. Brown; Price Meese Shulman & D'Arminio ("Price Meese"); Dorothy A. Kowal; Seyfarth Shaw LLP; Robert T. Szyba; Clark Hill, PLC; and Boris Brownstein, Esq. (collectively, the "Defendants"). Kaetz asserts that 1) 11 U.S.C. § 523(a)(8) is unconstitutional, and 2) Defendants committed fraud, fraud on the court, and various civil rights violations based on their involvement in a prior action he brought in this Court: *Kaetz v. Educ. Credit Mgmt. Corp. et al.*, Case No. 2:16-CV-09225 (the "2016 Action").[1]

Now before the Court are three sets of motions: 1) Defendants' motions to dismiss Kaetz's complaint (DE 39, 42, 56, 58, 59, 62, 90), primarily on preclusion grounds and for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6);[2] 2) Kaetz's cross motions to strike (DE 41, 66, 67, 68, 69, 91) each of Defendants' motions to dismiss; and 3) Kaetz's motion for reconsideration (DE 114) of this Court's administrative termination of his January 9, 2023 motion for summary judgment. For the reasons set forth below,

[1] The Third Circuit, in reviewing an appeal of one of this Court's orders in the 2016 Action, assigned Kaetz's case a separate case number on the appellate docket: App. No. 20-2592. In his complaint, Kaetz purports to "incorporate" the 2016 Action in bringing the present action. (Compl. at 6.)

[2] To be clear, one of these motions is not a standalone motion to dismiss, but rather a joint motion (DE 58) by Clark Hill, PLC and Boris Brownstein, Esq. to join in Equifax Information Services LLC, Seyfarth Shaw LLP, and Robert T. Szyba's motion (DE 56) to dismiss Kaetz's complaint. Similarly, Defendant William R. Brown filed a Notice of Joinder (DE 104) in Schuckit & Associates, P.C., Camille R. Nicodemus, and Trans Union, LLC's Joint 12(b)(6) Motion to Dismiss Plaintiff's Complaint (DE 39).

Kaetz's motions to strike Defendants' motions to dismiss are **DENIED**, Defendants' motions to dismiss the complaint are **GRANTED**, and Kaetz's motion for reconsideration of this Court's administrative termination of his summary judgment motion is **DENIED**.

I. BACKGROUND[3]

The allegations in Kaetz's complaint all arise out of events that occurred during and leading up to the 2016 Action. I begin with pertinent background regarding Kaetz's claims in the 2016 Action and the outcome of that case. The following is a brief history of the 2016 Action, courtesy of the Third Circuit:

> Kaetz filed a complaint against Educational Credit Management Corporation ("ECMC"), and three credit reporting agencies, Experian, Equifax, and TransUnion (together, the

[3] Certain citations to record are abbreviated as follows: "DE" = Docket entry number in this case "Compl." = Kaetz's complaint (DE 1) "Schuckit MTD" = Schuckit & Associates, P.C., Camille R. Nicodemus, and Trans Union, LLC's Joint 12(b)(6) Motion to Dismiss Plaintiff's Complaint (DE 39)
"Price Meese MTD" = Defendants Price, Meese, Shulman & D'Arminio P.C. and Dorothy A. Kowal's Memorandum of Law in Support of Motion to Dismiss Complaint (DE 42-1)
"Equifax MTD" = Memorandum of Law in Support of Defendants Equifax Information Services LLC, Seyfarth Shaw LLP, and Robert T. Szyba Motion to Dismiss Plaintiff's Complaint (DE 56-2)
"Experian MTD" = Defendant Experian Information Solutions, Inc.'s Memorandum in Support of its Motion to Dismiss Plaintiff's Complaint (DE 59-1)
"ECMC MTD" = Memorandum of Law in Support of Joint Motion of Defendants Educational Credit Management Corporation, Law Offices of Kenneth L. Baum LLC, and Kenneth L. Baum, to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) (DE 62-1)
"Govt. MTD" = Federal Defendants' Memorandum of Law in Support of their Motion to Dismiss the Complaint Under Rules 12(b)(1) and (6) (DE 90-1)

"CRAs"), arising from actions taken to collect and report his student loan debt. Kaetz alleged that in 2012, he filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of New Jersey. He listed ECMC in his petition as a creditor with claims totaling $15,835, which represented his student loans. The Bankruptcy Court granted Kaetz a discharge in 2013. Kaetz alleged that, after the discharge and completion of his bankruptcy case, ECMC used harassing telephone calls and letters to collect the debt. ECMC also informed the CRAs about his debt and the CRAs published the information on his credit report. Kaetz averred that the debt was discharged and that he disputed the debt without success.

Kaetz claimed that the defendants violated the Fair Debt Collection Practices Act, that the CRAs violated the Fair Credit Reporting Act, and that the defendants were in civil contempt of the Bankruptcy Court's discharge order. He also raised constitutional claims challenging, among other things, the constitutionality of the Bankruptcy Code provision excepting student loan debt from discharge, 11 U.S.C. § 523(a)(8).

ECMC moved to dismiss Kaetz's second amended complaint for failure to state a claim upon which relief could be granted. Experian and Equifax filed a joint motion to dismiss, which TransUnion joined. The District Court granted the motions and dismissed Kaetz's complaint. It ruled that many of Kaetz's claims failed because their prem-

> ise—that his student loan debt was discharged in his bankruptcy case—was incorrect. The District Court explained that student loan debt is presumptively nondischargeable under § 523(a)(8) and that Kaetz had not filed an adversary proceeding to determine whether his debt could be discharged.
>
> Kaetz filed a motion for reconsideration. . . [H]e disputed the District Court's conclusion that his student loan debts were not discharged in his bankruptcy case. He argued that he was not required to file an adversary proceeding and that he rebutted the presumption that his debt was nondischargeable by satisfying the exception in § 523(a)(8) for undue hardship. The District Court ruled that Kaetz had provided no reason justifying reconsideration of its prior decision and denied relief. It stated that Kaetz did not point to a change in law, new evidence, a clear error of law or fact, or manifest injustice, but had restated arguments he had made in opposition to the defendants' motion to dismiss. The District Court reiterated that his student loan debt was not discharged in his bankruptcy case.

Kaetz v. Educ. Credit Mgmt. Corp., No. 20-2592, 2022 WL 996422, at *1 (3d Cir. Apr. 4, 2022), *cert. denied*, 143 S. Ct. 277 (2022), *reh'g denied*, 143 S. Ct. 416 (2022) (affirming this Court's decision denying Kaetz's motion to reconsider its prior dismissal of his Second Amended Complaint in the 2016 Action).

Kaetz initiated the current action on June 6, 2022, approximately two months after the Third Circuit upheld this Court's dismissal of his Second Amended Complaint in the 2016 Action. In his current complaint, Kaetz articulates two primary contentions:

First, Kaetz asserts—once again—that the Bankruptcy Code provision excepting student loan debt from discharge, 11 U.S.C. § 523(a)(8), is unconstitutional. (Compl. at 10.) He argues that the statute is vague insofar as it "fails to provide adequate notice of its scope and sufficient guidelines for its application." As a result, says Kaetz, the statute is being "arbitrarily [and] discriminatorily enforced against debtors" like him. (*Id.* at 15.)[4]

Second, Kaetz claims that during the 2016 Action, Defendants "manipulat[ed] court processes" and impermissibly "read language into the [challenged] statute," thereby committing fraud against him, fraud on the court, and various violations of his civil rights. Kaetz alleges that Defendants' actions inflicted various "tort and economic injuries that resulted in cruel and unusual punishment and intentional infliction of emotional distress." (*Id.* at 10, 13, 26.)

Kaetz seeks monetary relief in the amount of $100,009,999.99, as well as injunctive relief prohibiting "the reading of court dicta and [other] language into statutes and rules." (*Id.* at 26.)

[4] Kaetz's constitutional attack on 11 U.S.C. § 523(a)(8) reasserts his previous challenge in the 2016 Action. *See Kaetz v. Educ. Credit Mgmt. Corp.*, No. 2:16-CV- 09225, 2019 WL 4745289, at *3 (D.N.J. Sept. 30, 2019) ("Plaintiff argues that [§ 523(a)(8)] is unconstitutional both on its face and as applied because it is vague and therefore violates Plaintiff's due process rights.")

All Defendants have filed motions to dismiss Kaetz's complaint. (DE 39, 42, 56, 58, 59, 62, 90.) In response, Kaetz filed cross motions to strike each of the Defendants' motions to dismiss, simultaneously filing opposition briefs in the alternative. (DE 41, 66, 67, 68, 69, 91.) Defendants then filed reply briefs in further support of their motions to dismiss and in opposition to Kaetz's cross motions to strike. (DE 70, 73, 80, 82, 83, 94.) Defendants' motions to dismiss and Kaetz's cross motions to strike are fully briefed and ripe for decision.[5]

II. MOTIONS TO STRIKE

Before addressing the pending motions to dismiss, I consider Kaetz's six motions to strike them. "As a general matter, motions to strike under Rule 12(f) are highly disfavored." *F.T.C v. Hope Now Modifications, LLC*, No. CIV. 09-1204 JBS/JS, 2011 WL 883202, at *1 (D.N.J. Mar. 10, 2011) (citations omitted). Viewed through the lens of the Civil Rule explicitly authorizing a motion to strike, Fed. R. Civ. P. 12(f), each of Kaetz's motions is invalid.

Rule 12(f) authorizes a court "to strike from a pleading an insufficient defendant or any redundant, immaterial, impertinent, or scandalous matter." The "pleadings" in a federal action consist of a complaint, an answer to a

[5] On January 9, 2023, Kaetz filed a motion for summary judgment. (DE 102.) On January 25, 2023, this Court administratively terminated Kaetz's summary judgment motion "in light of the pending motions to dismiss" and ordered that "[n]o motions for summary judgment shall be filed before the resolution of the pending motions to dismiss." (DE 113.) On January 30, 2023, Kaetz filed a motion for reconsideration of this Court's administrative termination of his summary judgment motion. (DE 114.) Certain Defendants filed briefs in opposition. (DE 115, 116, 117.) On February 23, 2023, Kaetz filed a reply brief in further support of his motion for reconsideration. (DE 119.) Kaetz's motion for reconsideration is also ripe for decision and will be addressed in the final section this Opinion.

complaint, an answer to a counterclaim, an answer to a crossclaim, a third- party complaint, an answer to a third-party complaint, and, if the court so orders, a reply to an answer. Fed. R. Civ. P. 7(a). A motion to dismiss, however, is not a "pleading," and for that matter, neither is a response to a motion to strike. *See Thompson v. Real Estate Mortg. Network, Inc.*, Civ. No. 11-1494, 2018 WL 4604310, at *2 (D.N.J. Sept. 24, 2018) (holding that a motion to strike is the improper response to a motion for summary judgment). And even if the Rule applied here, the motion would not be granted; the motions to dismiss contain no impertinent, scandalous, or otherwise improper matter that should not appear in the record.

Kaetz's motions to strike are therefore denied. His contentions are more properly considered as his opposition to Defendants' motions to dismiss, and I will so consider them in the following section.

III. MOTIONS TO DISMISS[6]

III.

Defendants all move to dismiss Kaetz's complaint on the following grounds: 1) Defendants argue that Kaetz's claims are barred by the preclusion doctrines of res judicata and/or collateral estoppel (Schuckit MTD at 6-11, Price

[6] Kaetz asserts that this Court has subject matter jurisdiction over his claims, invoking both federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C. § 1332. While it is evident that this Court has subject matter jurisdiction over the claims Kaetz brings under federal law (*e.g.* his several constitutional claims), it is less than clear whether there is complete diversity of citizenship, permitting this Court to exercise original jurisdiction over Kaetz's state law claims (*e.g.*, fraud, intentional infliction of emotional distress). Nevertheless, the presence of federal question jurisdiction would allow me to exercise supplemental jurisdiction over the remaining state claims under § 1367. In sum, I find that the Court has subject matter jurisdiction to decide the pending motions, subject to the caveat in n.7, *infra*.

Meese MTD at 6, Equifax MTD at 8-11, Experian MTD at 6-11, ECMC MTD at 6-9, Govt. MTD at 9-11.), and 2) Defendants argue that Kaetz's complaint fails to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. 12(b)(6). (Schuckit MTD at 11-14, Price Meese MTD at 7, Equifax MTD at 12-14, Experian MTD at 11-21, ECMC MTD at 9-10, Govt. MTD at 11-18). In the following discussion, I first consider Defendants' preclusion arguments, and then address their arguments regarding the sufficiency of Kaetz's pleading[7].

[7] Certain Defendants assert additional arguments as to why Kaetz's claims against them must be dismissed.

The Federal Defendants argue that this Court lacks subject matter jurisdiction over Counts II, III, IV, and V of the complaint to the extent the claims therein are brought against them pursuant to the Federal Tort Claims Act ("FTCA"). (Govt. MTD 14-16.) The FTCA, which provides the exclusive remedy for tort claims against the United States, is a limited waiver of sovereign immunity. See *Santos v. United States*, 559 F.3d 189, 193 (3d Cir. 2009). Pursuant to the FTCA, the United States shall be liable, to the same extent as a private party, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. §§ 1346(b), 2679(b)(1). "Intentional conduct," like fraud or deceit, "is explicitly exempted from the FTCA's waiver of sovereign immunity." *In re Ortho. Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 363 (3d Cir. 2001) (dismissing FTCA claim based on agency's allegedly dishonest and fraudulent behavior); see also 28 U.S.C. § 2680(a). Here, the United States has not waived sovereign immunity for the tort claims Kaetz appears to include in his complaint. This Court therefore lacks subject matter jurisdiction over all tort claims Kaetz asserts against the Federal Defendants. Accordingly, I only exercise subject matter jurisdiction over Kaetz's tort claims that are asserted against the remaining Defendants.

The attorney and law firm Defendants who represented certain other Defendants in the 2016 Action argue that the litigation privilege immunizes them from Kaetz's claims to the extent they pertain to that prior lawsuit. (Price Meese MTD 8-9; Equifax MTD 11-12.) I need not consider this argument, given the result of my preclusion and 12(b)(6) analyses.

A. Preclusion

Defendants assert that Kaetz's complaint must be dismissed on grounds of res judicata (claim preclusion) and/or collateral estoppel (issue preclusion).[8] It is true, of course, that claim and issue preclusion are affirmative defenses, but they may be raised on a motion to dismiss in an appropriate case:

> The defense of claim preclusion, however, may be raised and adjudicated on a motion to dismiss and the court can take notice of all facts necessary for the decision. *Cf. Connelly Found. v. Sch. Dist. of Haverford Twp.*, 461 F.2d 495, 496 (3d Cir.1972) (res judicata may be raised in motion to dismiss prior to answer).
>
> Specifically, a court may take judicial notice of the record from a previous court proceeding between the parties. *See Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 n. 3 (3d Cir.1988).

Toscano v. Conn. Gen. Life Ins. Co., 288 F. App'x. 36, 38 (3d Cir. 2008).

"The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision

[8] I note that the term "res judicata" is sometimes used to refer to the preclusion doctrines collectively. I here use it in its narrower sense as a synonym for claim preclusion.

may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry,* 449 U.S. 90, 94, (1980) (internal citation omitted).

I find that Kaetz's constitutional challenge to 11 U.S.C. § 523(a)(8) is barred by collateral estoppel. Collateral estoppel, or issue preclusion, "prevents relitigation of a particular fact or legal issue that was litigated in an earlier action." *Seborowski v. Pittsburgh Press Co.,* 188 F.3d 163, 169 (3d Cir.1999) (citing *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 326 (1979)). Issue preclusion has five essential prerequisites:

> (1) the identical issue was decided in a prior adjudication;
>
> (2) the issue was actually litigated;
>
> (3) there was a final judgment on the merits;
>
> (4) the determination was essential to the earlier judgment; and
>
> (5) the party against whom the doctrine is asserted was a party or in privity with a party to the earlier proceeding.

Fitzgerald v. Shore Mem'l Hosp., 92 F. Supp. 3d 214, 225–26 (D.N.J. 2015) (line breaks added) (citing *Seborowski,* 188 F.3d at 169). I discuss those five requirements, somewhat out of order.

1. *Identical Issue Decided*

Following a thorough analysis of Kaetz's arguments in the 2016 Action, this Court expressly found that 11 U.S.C. § 523(a)(8) was not unconstitutional as applied to Kaetz's bankruptcy case:

[Kaetz] challenges the constitutionality of 11 U.S.C. 523 §(a)(8), which provides exceptions to bankruptcy discharge. In the relevant bankruptcy proceedings, Plaintiff was granted a discharge under section 727 of title 11, United States Code. A discharge of debt under section 727 does not discharge any debt "for an obligation to repay funds received as an education benefit" unless "excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor." 11 U.S.C. 523 § (a)(8). The debts at issue here are educational loans. Under section 523(a)(8), student loan debt is "presumptively nondischargable 'unless' a determination of undue hardship is made." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *see also In re Sperazza*, 366 B.R. 397, 407 (Bankr. E.D. Pa. 2007) (noting that neither party suggested plaintiff's debts to Education Credit Management Corporation, the same defendant here, were anything other than educational loans and therefore "the obligations [were] presumptively nondischargeable"); *In re Jones*, 392 B.R. 116, 124- 25 (Bankr. E.D. Pa. 2008) (same). The Bankruptcy Rules "require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors." *Espinosa*, 559 U.S. 260; *see also In re Miller*, No. 06-1082, 2006 WL 2361819, at *3 (Bankr. W.D. Pa. Aug. 14, 2006); *In re Kahl*, 240 B.R. 524, 530 (Bankr. E.D. Pa. 1999).

Plaintiff argues that the statute is unconstitutional both on its face and as applied because it is vague and therefore violates

Plaintiff's due process rights. However, Plaintiff also writes in his Second Amended Complaint that "[t]he Statute is fine" and that "[t]he law is not that ambiguous and it does not need interpretation." Plaintiff seemingly contends that the statute itself is not unconstitutional but rather that "the vagueness doctrine...also should apply to the techniques courts use to decide on legal definitions and requirements." From these statements in the Second Amended Complaint and Plaintiff's brief in opposition, the Court discerns that Plaintiff is challenging how this section of the Bankruptcy Code, 11 U.S.C. § 523 (a)(8), was implemented in his case. The Court finds that, based on Plaintiff's allegations and a review of the underlying bankruptcy order, the statute was properly applied in Plaintiff's proceedings.

Plaintiff contends that his student loan debts were automatically discharged under the undue hardship exception because "11 U.S.C. 523 (a)(8) is neutral and self-executing to creditors and debtors meaning immediately effective without further action, legislation or legal steps, no other process required." As stated above, however, an individual seeking discharge under the undue hardship exception must commence an adversary proceeding in Bankruptcy Court to determine whether his student loan debts were eligible to be discharged. Here, because Plaintiff does not allege that he commenced an adversary proceeding to determine whether his student loans were dischargeable, Plaintiff's debts were not discharged through the bankruptcy proceedings. Accordingly, Plaintiff's claims fail.

Kaetz v. Educ. Credit Mgmt. Corp., No. 2:16-CV-09225, 2019 WL 4745289, at *3–4 (D.N.J. Sept. 30, 2019) (record citations omitted).

On Kaetz's subsequent motion for reconsideration, this Court once again considered Kaetz's "conten[tion] that 11 U.S.C. § 523 is unconstitutional" and denied it:

> To the extent Plaintiff is challenging how this section of the Bankruptcy Code, 11 U.S.C. § 523 was applied in his case, his contentions are without merit. As discussed above, 11 U.S.C. § 523 provides, that a discharge under section 727 does not discharge an educational loan. 11 U.S.C. § 523 (a); 11 U.S.C. § 523 (8)(A)–(B). The Court finds that, based on Plaintiff's allegations and a review of the underlying bankruptcy order, the statute was properly applied in Plaintiff's proceedings.

Kaetz v. Educ. Credit Mgmt. Corp., No. 16-CV-09225, 2020 WL 3542382, at *3 (D.N.J. June 30, 2020), *aff'd*, No. 20-2592, 2022 WL 996422 (3d Cir. Apr. 4, 2022) (record citations omitted).

On appeal, the Third Circuit affirmed this Court's dismissal of Kaetz's constitutional challenge to 11 U.S.C. § 523(a)(8). In particular, the Third Circuit considered and rejected Kaetz's argument that the statute is unconstitutionally vague as well as his related contention that "the statute does not direct the filing of an adversary proceeding." *Kaetz v. Educ. Credit Mgmt. Corp.*, No. 20-2592, 2022 WL 996422, at *3 (3d Cir. Apr. 4, 2022), *cert. denied*, 143 S. Ct. 277 (2022), *reh'g denied*, 143 S. Ct. 416 (2022). The

Third Circuit noted that "the Bankruptcy Rules address the applicable procedure" and held that Kaetz did not "establish[] that the statute is constitutionally infirm." *Id.*

Clearly, then, both this Court and the U.S. Court of Appeals for the Third Circuit have found that 11 U.S.C. § 523(a)(8) is constitutional, the issue as to which estoppel is sought here.[9]

2. *Actually Litigated and Essential to Judgment*

Requirements 2 and 4 are that the issue have been actually litigated and essential to the prior judgment. It is evident from this Court's thorough analysis of Kaetz's arguments regarding the constitutionality of 11 U.S.C. § 523(a)(8), as well as the Third Circuit's review of the matter on appeal (*see* Section III.A.1., *supra*) that the issue was actually litigated. This issue was at the heart of one or more of Kaetz's claims in the 2016 Action and therefore was essential to judgment in that case. Requirements 2 and 4 are satisfied.

3. *Final Judgment on the Merits*

Requirement 3 is that the prior judgment have been

[9] To the extent Kaetz attempts to fashion his constitutional challenge in the present action as a facial attack on the statute in order to distinguish it from his claims in the 2016 Action—which this Court and the Third Circuit analyzed primarily as an as-applied challenge—his present challenge does not circumvent preclusion. The Supreme Court has directed that there is a higher burden on facial challenges than on as-applied challenges, holding that in a facial attack, a "challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It therefore follows that if this Court and the Third Circuit upheld 11 U.S.C. § 523(a)(8) as constitutional as applied to Kaetz, it also upheld the statute as constitutional on its face. In short this action presents not a distinguishable but an *a fortiori* case.

final. That requirement is clearly satisfied here. On September 30, 2019, this Court dismissed Kaetz's claims pertaining to the constitutionality of 11 U.S.C. § 523(a)(8) with prejudice,[10] and a dismissal with prejudice constitutes an adjudication on the merits "as fully and completely as if the order had been entered after trial." *Petrossian v. Cole*, 613 F. App'x 109, 111–12 (3d Cir. 2015) (quoting *Gambocz v. Yelencsics*, 468 F.2d 837, 840 (3d Cir. 1972)). And that dismissal was of course upheld on appeal.

4. *Identical Party*

Requirement 5 is that the party against whom the doctrine is asserted was a party or in privity with a party to the earlier proceeding. That requirement is satisfied as well. It is undisputed that Kaetz was a party to the 2016 Action. Indeed, he purports to "incorporate" the 2016 Action in his current complaint.

5. *Miscellaneous Fairness Factors*

Preclusion doctrines are equitable, and a court must consider the fairness of applying them. Courts—albeit most commonly in more exotic applications, such as offensive collateral estoppel—have considered equitable factors such as the following:

> (a) the party to be estopped had little incentive to vigorously litigate the first action; (b) the first judgment is inconsistent with other judgments on the issue to be estopped; (c) the second action affords procedural opportunities unavailable in the first action (or, more generally speaking that the party to be estopped had a full and fair opportunity to litigate its claims in the first action); or (d) ap-

[10] *Kaetz v. Educ. Credit Mgmt. Corp.*, No. 2:16-CV-09225, 2019 WL 4745289, at *6 (D.N.J. Sept. 30, 2019).

> plication of collateral estopped would not otherwise be unfair to the defendant.

E.g., Glictronix Corp. v. Am. Tel. & Tel. Co., 603 F. Supp. 552, 563–64 (D.N.J. 1984); *see also Mann v. Estate of Meyers*, 61 F. Supp. 3d 508, 518 (D.N.J. 2014) (McNulty, J.) (applying New Jersey law).

Those factors do not militate against the application of collateral estoppel: Kaetz has "vigorously litigate[d]," to say the least, the constitutionality of 11 U.S.C. § 523(a)(8), and its application to his bankruptcy proceedings; there are no inconsistent judgments on the issue; the present action affords Kaetz no opportunities, procedural or otherwise, for full and fair litigation of his claims that were unavailable to him during the 2016 Action; and the application of collateral estoppel in this case results in no unfairness to any party.

All five prerequisites of collateral estoppel, then, are met with respect to Kaetz's challenge to 11 U.S.C. § 523(a)(8), and the fairness factors do not point the other way.

Those estoppel prerequisites are *not* met, however, with respect to Kaetz's remaining claims. The rest of Kaetz's claims pertain to injuries he allegedly sustained during and as a result of the 2016 Action, *e.g.*, violations of his civil rights and injuries stemming from Defendants' alleged tortious conduct. It cannot be the case that these issues, which Kaetz alleges—however frivolously—*arose from* the 2016 Action were identical to issues litigated and decided *during* the 2016 Action, as is required to invoke the doctrine of collateral estoppel. *Fitzgerald*, 92 F. Supp. 3d, at 225–26.

Therefore, at this stage, I will grant Defendants' motions to dismiss on collateral estoppel grounds only in part. I rule that Kaetz's constitutional challenge to 11 U.S.C. § 523(a)(8) is barred by collateral estoppel and must be dismissed.[11]

I therefore proceed to consider, as to Kaetz's remaining claims, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

B. Failure to State a Claim

Setting aside the now-precluded constitutional challenge to 11 U.S.C. § 523(a)(8), I construe Kaetz's complaint to be asserting the following claims: 1) *Bivens*[12] claims for constitutional violations under the First, Fifth, Eighth, and Fourteenth Amendments; 2) fraud; 3) fraud on the court; 4) intentional infliction of emotional distress; and 5) "misconduct" for which Kaetz contends the Court should issue sanctions pursuant to Fed. R. Civ. P. 11. (Compl. at 23- 26.) In addition, Kaetz invokes the Administrative Procedure

[11] I acknowledge that in my analysis of Defendants' preclusion arguments, I took up their collateral estoppel argument but declined to address further the related argument that Kaetz's claims are barred by the doctrine of res judicata, or claim preclusion. This is because unlike collateral estoppel, the doctrine of res judicata may only be invoked by the parties, or those in privity with the parties, that appeared in the prior action. In re Mullarkey, 536 F.3d 215, 225 (3d Cir. 2008). Because this doctrine may only be invoked by a subset of the Defendants—as not all Defendants were party or privy to the 2016 Action—I began my analysis with issue preclusion, which may more straightforwardly be invoked by all Defendants. Having found that Kaetz's constitutional challenge was barred by collateral estoppel, there was no need to analyze the matter from a claim preclusion perspective. I note, however, that had I performed a claim preclusion analysis, it would have led to the same finding I make here that Kaetz's remaining claims are not precluded given that they arose from the litigation of the 2016 Action, as opposed to being litigated during that case.

[12] The reference is to Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Act and the All Writs Act in his request for injunctive relief in the forms of "administrative action" and a "writ . . . to stop the reading of court dicta and language into statutes and rules that do not exist in the statutes and rules." (*Id.* at 26.)

Kaetz has failed to state a viable claim upon which relief can be granted with respect to these alleged causes of action. I will therefore grant Defendants' motions and dismiss the remainder of Kaetz's complaint.

1. Legal Standard

Federal Rule of Civil Procedure 8(a) does not require that a pleading contain detailed factual allegations but "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations must raise a claimant's right to relief above a speculative level, so that a claim is "plausible on its face." *Id.* at 570. That standard is met when "factual content [] 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). Rule 12(b)(6) provides for the dismissal of a complaint if it fails to state a claim. The defendant bears the burden to show that no claim has been stated. *Davis v. Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016). I accept facts in the complaint as true and draw reasonable inferences in the plaintiff's favor. *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (en banc).

Where the plaintiff is proceeding *pro se*, the complaint is "to be liberally construed," and, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). Nevertheless, "pro se litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013). "While a litigant's *pro se* status requires a court to construe the allegations in the complaint liberally, a litigant is not absolved from complying with *Twombly* and the federal pleading requirements merely because s/he proceeds *pro se*." *Thakar v. Tan*, 372 F. App'x 325, 328 (3d Cir. 2010) (citation omitted).

2. *Bivens* Claims

Kaetz asserts *Bivens* claims against unnamed government employees, alleging that they are "liable to [him]" for damages he sustained in connection with their violation of his constitutional rights under the First, Fifth, Eighth, and Fourteenth Amendments. (Compl. at 23.) Under *Bivens*, a plaintiff must allege 1) a deprivation of a right secured by the Constitution or laws of the United States; and 2) that the deprivation of the right was caused by a person acting under color of federal law. *Hastings v. Hickson*, No. CV158119KMJBC, 2015 WL 7432354, at *2 (D.N.J. Nov. 23, 2015). A *Bivens* claim therefore can be brought only against a federal official, and Kaetz has named no federal official as a defendant.

Because *Bivens* claims cannot be brought against the United States, federal agencies, or private parties—the three types of Defendants that have been sued in the present action—Kaetz's *Bivens* claims must be dismissed. *See, e.g., Mierzwa v. United States*, 282 F. App'x 973, 976 (3d Cir. 2008) ("a plaintiff may not use *Bivens* to pursue constitutional claims against the United States or its agencies"); *see also Robertson v. Exec. Dir. Brain Inst. Geisinger Med Ctr.*, 578 F. App'x 76, 77 (3d Cir. 2014) ("It is well-settled that a *Bivens* action can only be brought against federal officials, not private entities.") (citations omitted). It is therefore not necessary to analyze them further. The *Bivens* claims are dismissed.

3. Fraud

Kaetz alleges that Defendants committed fraud against him. (Compl. at 26.) However, Kaetz does not plead facts sufficient to support such a claim.

Under New Jersey law, the five elements of common law fraud are: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Gennari v. Weichert Co. Realtors*, 148 N.J. 582 (1997); *see Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007); *Stockroom, Inc. v. Dydacomp Dev. Corp.*, 941 F.Supp.2d 537, 546 (D.N.J. 2013).

Procedurally, Kaetz's fraud claim is subject to a heightened pleading standard under Fed. R. Civ. P. 9(b). Under Rule 9(b), "[i]n alleging fraud or mistake, a party must state with *particularity* the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b) (emphasis added). As the Third Circuit has explained, "[a] Plaintiff alleging fraud must therefore support its allegations with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue." *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 307 (3d Cir. 2016) (citing *In re Rockefeller Ctr. Props., Inc. Securities Litig.*, 311 F.3d 198, 217 (3d Cir. 2002)) (citation and quotation marks omitted). In other words, Kaetz may satisfy this requirement by pleading "the date, time and place" of the alleged fraud or deception, or by "otherwise inject[ing] precision or some measure of substantiation" into the allegation. *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (citing *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir. 2004)). Additionally, to survive a motion to dismiss, Plaintiffs must also allege "who made a misrepresentation to whom and the general content of the misrepresentation." *Gray v. Bayer Corp.*, No.Civ.A.08–4716, 2010 WL 1375329, at *3 (D.N.J.

Mar. 31, 2010) (citing *Lum*, 361 F.3d at 224).

Kaetz pleads no facts to support his common law fraud claim, which consists of nothing beyond a disagreement with the prior court's legal interpretation. He states that Defendants committed "fraud" against him by "adding and reading language from non-binding obiter dicta into statutes and rules." (Compl. at 26.) He does not allege that he relied to his detriment on any factual misrepresentation made by any of the Defendants. Instead, he appears to claim that all Defendants, by virtue of their involvement in the 2016 Action, must have committed fraud merely because the Court did not rule in his favor.

Kaetz's fraud claim must be dismissed.

4. Fraud on the Court

Kaetz alleges that Defendants "deliberately planned a carefully executed [a] scheme to defraud debtors of student loans and to perpetrate a fraud on the court" by "[r]eading language into the Bankruptcy Statutes and Rules." (Compl. at 22.) He further alleges that Defendants "manipulat[ed] court processes" and "controlled the court[']s action with the fraud." (*Id.* at 22, 26.) Once again, Kaetz dresses up a legal disagreement as a claim of "fraud." Kaetz offers no factual basis whatsoever to support these allegations, and his fraud on the court claim will therefore be dismissed.

To prevail on a claim of fraud on the court, the movant must demonstrate by clear and convincing evidence the following four elements:

> (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court.'" *Herring v. United States*, 424 F.3d 384, 390

> (3d Cir. 2005); *Thompson v. Eva's Vill. and Sheltering Program*, 2009 WL 3486050, at *10 (D.N.J. Oct. 28, 2009).

Estate of Sinclair v. Cty. of Union, No. CIV.A. 05-55 KSH, 2011 WL 3417115, at *2 (D.N.J. Aug. 3, 2011). Such a fraud consists of some "unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Hatchigan v. Int'l Bhd. Of Elec. Workers Local 98 Health & Welfare Fund*, 610 F. App'x 142 (3d Cir. 2015) (quoting *Booker v. Dugger*, 825 F.2d 281, 283 (11th Cir. 1987) and *Pizzuto v. Ramirez*, 783 F.3d 1171, 1180 (9th Cir. 2015)).

There has been no miscarriage of justice or egregious conduct in connection with this Court's dismissal of the 2016 Action. The record discloses that Kaetz has been provided every opportunity to fairly present his case in the 2016 Action at the district court level and the appellate level. That he dislikes the outcome and believes both courts misinterpreted the law are not grounds for a finding of "fraud on the court," whether by the court itself or by any of the Defendants. Moreover, Kaetz had a full and fair opportunity to present his arguments in his appeal to the Third Circuit, which affirmed judgment against Kaetz, and this Court obviously lacks the power to sit in review of the Third Circuit's judgment. *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337, n.1 (3d Cir. 1982) ("The district court is without jurisdiction to alter the mandate of this court on the basis of matters included or includable in defendants' prior appeal.") (citations omitted).

Neither this Court nor the Third Circuit was deceived or defrauded into holding as it did in the 2016 Action. Kaetz's fraud on the court claim will be dismissed.

5. Intentional Infliction of Emotional Distress

Kaetz alleges that Defendants "caused [him] . . . intentional infliction of emotional distress." (Compl. at 26.) Though Kaetz fashions this allegation as a statement describing an injury he sustained as a result of Defendants' purportedly tortious conduct, intentional infliction of emotional distress is itself a cognizable cause of action, and I will analyze it as such.

To state a prima facie case for intentional infliction of emotional distress, a plaintiff must plausibly assert that 1) the defendant acted either intentionally to do the act and to produce emotional distress or acted "recklessly in deliberate disregard of a high degree of probability that emotional distress will follow"; 2) the defendant's conduct is so "extreme and outrageous ... as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"; 3) the defendant's intentional or reckless conduct proximately caused the plaintiff's emotional distress; and 4) the plaintiff suffered emotional distress that is "so severe that no reasonable [person] could be expected to endure it." *Juzwiak v. Doe*, 415 N.J. Super. 442, 451 (App. Div. 2010) (citing and quoting *Buckley v. Trenton Saving Fund Socy.*, 111 N.J. 355 (1988)).

Kaetz has not pleaded facts sufficient to support any of the elements of an intentional infliction of emotional distress claim. His allegations do not include any elaboration as to any Defendant's 1) purported intent to cause him emotional distress, 2) how Defendants' conduct was "extreme and outrageous,"3) how this conduct caused Kaetz emotional distress, or 4) the severity of the harm. Kaetz therefore fails to state a claim for intentional infliction of emotional distress. The taking of a legal position in court—even one with which the plaintiff vehemently disagrees—is not extreme and outrageous conduct.

Kaetz's claim of intentional infliction of emotional distress will be dismissed.

6. "Misconduct"

Kaetz alleges that Defendants committed "misconduct" by defrauding him. (Compl. at 26.) While "misconduct" does not refer to any specific cause of action, I note that in asserting this claim, Kaetz appears to refer to Fed. R. Civ. P. 11 by suggesting that Defendants' alleged fraud on the court involved "frivolous court filings in violation of court rule 11." (Compl. at 26.) I therefore construe Kaetz's complaint as asserting a claim under Fed. R. Civ. P. 11.[13] However, such a claim must fail. The Rules Enabling Act, 28 U.S.C. § 2072, which authorized the Supreme Court to promulgate the Federal Rules of Civil Procedure, explicitly states that these procedural rules do not create any private right of action. 28 U.S.C. § 2072(b) (providing that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right").[14]

Kaetz's "misconduct" claim does not set forth a cognizable cause of action and will be dismissed.

[13] Even if Kaetz intended for his "misconduct" count to constitute a motion for sanctions under Fed. R. Civ. P. 11, his motion would be denied as procedurally improper. The rule specifically provides that "[a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." Fed. R. Civ. P. 11(c). Kaetz has made no such separate motion, and in any event, does not describe any "specific conduct" by any Defendant that warrants sanctions.

[14] To the extent Kaetz's "misconduct" claim refers to "official misconduct" under New Jersey statute, N.J. Stat. Ann. § 2C:30-2, this common law statutory scheme does not provide a private right of action either. See McBride v. Township of Washington, C.A. No. 19-17196, 2020 WL 3396802, at *10 (D.N.J. 2020) (dismissing claim with prejudice because "[t]he statute [criminalizing official misconduct] does not contem-plate a private or civil right of action," and thus "any amendment ... would be legal-ly futile").

7. Injunctive Relief Pursuant to APA and All Writs Act

Finally, Kaetz seeks injunctive relief, presumably under the Administrative Procedure Act ("APA") and the All Writs Act, requesting both "administrative action" and a "writ . . . to stop the reading of court dicta and language into statutes and rules that do not exist in the statutes and rules." (*Id.* at 1, 26.)

Kaetz's APA claim must fail because under the APA, only "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. "For an agency action to be final under the APA, the action must mark the consummation of the agency's decision-making process, and the action must determine a right or obligation." *Jie Fang v. Dir. U.S. Immigr. & Customs Enforcement*, 935 F.3d 172, 180 (3d Cir. 2019) (citations omitted). Kaetz does not allege any facts regarding a "final agency action" of which he seeks judicial review. Notably, if Kaetz means to challenge actions taken by the DOJ—the only federal agency defendant in this case— during the 2016 Action, his APA claim still fails, as an agency's litigation decisions do not constitute a final agency action. *See, e.g., Tucker v. United States*, No. 2:12CV409DAK, 2013 WL 4498897, at *5 (D. Utah Aug. 19, 2013) (citing *Watts v. SEC*, 482 F.3d 501, 507 (D.C. Cir. 2007)) ("[l]itigation decisions are not agency decisions that can be reviewed under the APA"). Moreover, the APA expressly precludes judicial review of "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) Here, the DOJ had absolute discretion over its litigation decisions in the 2016 Action. *See* 28 U.S.C. § 516.[15] Accordingly, the DOJ's actions in litigating the 2016

[15] See also Morrison v. U.S. Dep't of Labor, 713 F. Supp. 664, 669 (S.D.N.Y. May 10, 1989) ("Because this discretionary authority of the Justice Department is absolute, the Court agrees with the federal defendants that the decision not to defend an administrative determination, and the DOL's concomitant withdrawal of that de-

Action are not subject to review under the APA. The only relevant decision is the prior decision of this Court, which is reviewable and was reviewed by the Court of Appeals, not by a separate action under the APA.

Kaetz's request for injunctive relief under the All Writs Act fares no better. The All Writs Act, 28 U.S.C. § 1651, grants courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." A writ of mandamus is "an extreme remedy that is invoked only in extraordinary situations." *In re Anderson,* No. 21-2507, 2021 WL 5505405, at *1 (3d Cir. Nov. 23, 2021) (citing *Kerr v. United States Dist. Court,* 426 U.S. 394, 402 (1976)). Writs of mandamus are traditionally used "'only to confine an inferior court to a lawful exercise of its prescribed jurisdiction.'" *Id.* (quoting *Kerr,* 426 U.S. at 402). A district court only has jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C.A. § 1361; *see also In re Wolenski,* 324 F.2d 309, 309 (3d Cir. 1963). Kaetz alleges no such duty owed to him, and the Court is aware of none, that would warrant this Court issuing a "writ . . . to stop the reading of court dicta and language into statutes and rules that do not exist in the statutes and rules." (Compl. at 26.) Here, Kaetz asserts no recognized cause of action, but only a generalized grievance about the manner in which courts interpret laws.

Kaetz's claims for injunctive relief under the APA and the All Writs Act will be dismissed.

* * *

Kaetz's constitutional challenge of 11 U.S.C. § 523(a)(8) is precluded by the doctrine of collateral es-

termination, are litigation decisions which are not reviewable under the Administrative Procedure Act.")

toppel and must be dismissed. As for his remaining claims, Kaetz does not plead facts sufficient to state a claim under any of the counts his complaint may reasonably allege. The remainder of Kaetz's complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).[16]

IV. MOTION FOR RECONSIDERATION

Kaetz moves for reconsideration of this Court's administrative termination of his January 9, 2023 motion for summary judgment. Given that I have now dismissed Kaetz's complaint in its entirety, his motion for reconsideration will be denied as moot.[17]

[16] In conjunction with their motions to dismiss, certain Defendants request that this Court take steps to bar Kaetz from filing additional complaints against them. (Schuckit MTD at 14-15; Equifax MTD at 3-4.) In Matter of Packer Ave. Assoc., 884 F.2d 745 (3d Cir. 1989) the Third Circuit recognized that the All Writs Act, 28 U.S.C. § 1651, gives this District Court the power to issue an injunction to restrict the filing of meritless pleadings. However, the Third Circuit cautioned that it is an extreme remedy which must "be narrowly tailored and sparingly used." 884 F.2d at 747.

I am sympathetic to Defendants' frustrations in that they are being called up-on to litigate frivolous claims that were conclusively resolved in prior proceedings. Kaetz's contentions are frivolous in the extreme, and any further attempt to assert them may expose him to more drastic consequences than mere dismissal. I will not, however, issue an order barring Kaetz from filing future complaints against Defend-ants, a procedure which poses administrative and other difficulties of its own. Expe-rience teaches that litigation over whether a new complaint violates the precise terms of an injunction may merely add a layer of complication to what should be an ordinary motion-to-dismiss analysis, accompanied by (if appropriate) a motion for sanctions.

I therefore decline—at the present time—to issue an order enjoining Kaetz from filing further claims against these Defendants.

[17] Kaetz's motion for reconsideration would have been denied even if I had not yet dismissed his complaint. In the District of New Jer-

V. CONCLUSION

For the reasons set forth above, Kaetz's motions to strike Defendants' motions to dismiss are **DENIED**, Defendants' motions to dismiss the complaint are **GRANTED**, and Kaetz's motion for reconsideration of this Court's administrative termination of his summary judgment motion is **DENIED**.

The collateral estoppel dismissal (Part III.A, *supra*) and denial of reconsideration (Part IV, *supra*) are entered **with prejudice,** because amendment would be futile and the matters have been thoroughly litigated elsewhere. The remaining rulings are entered without prejudice to the submission, within 30 days, of a proposed amended complaint.

sey, motions for reconsideration are governed by Local Civil Rule 7.1(i). Reconsideration is an "extraordinary remedy," to be granted "sparingly." NL Indus. Inc. v. Commercial Union Ins. Co., 935 F. Supp. 513, 516 (D.N.J. 1996). A party seeking to persuade the court that reconsideration is appropriate bears the burden of demonstrating one of the following: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (internal citation omitted); see also Crisdon v. N.J. Dep't of Educ., 464 F. App'x 47, 49 (3d Cir. 2012) ("The purpose of a motion for reconsideration ... is to correct manifest errors of law or fact or to present newly discovered evidence.") (internal citation omitted). "The Court will grant a motion for reconsideration only where its prior decision has overlooked a factual or legal issue that may alter the disposition of the matter." Andreyko v. Sunrise Sr. Living, Inc., 993 F. Supp. 2d 475, 478 (D.N.J. 2014). Here, Kaetz points to no new evidence, no change in controlling law, and no error of law that requires reconsideration of a routine administrative action this Court properly took in overseeing and managing its docket. It is obviously logical to decide whether a plaintiff has stated a cause of action at all before addressing a plaintiff's motion for summary judgment, and the Court has done no more than that.

An appropriate order follows.

Dated: March 30, 2023

/s/ Kevin McNulty
Hon. Kevin McNulty
United States District Judge

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2592

WILLIAM F. KAETZ,
Appellant

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION; EXPERIAN; TRANSUNION; EQUIFAX

On Appeal from the United States District Court for the District of New Jersey
(D.C. No. 2-16-cv-09225)
District Judge: Honorable Claire C. Cecchi

Submitted Pursuant to Third Circuit L.A.R. 34.1(a) on March 25, 2022

Before: KRAUSE, BIBAS, and SCIRICA, Circuit Judges

(Opinion filed: April 4, 2022)

OPINION[1]

PER CURIAM

William Kaetz, proceeding pro se, appeals orders of the United States District Court for the District of New Jersey dismissing his second amended complaint and denying his mo- tion for reconsideration. We will affirm the judgment of the District Court.

Kaetz filed a complaint against Educational Credit Management Corporation ("ECMC"), and three credit reporting agencies, Experian, Equifax, and TransUnion (together, the "CRAs"), arising from actions taken to collect and report his student loan debt.[2] Kaetz alleged that in 2012, he filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of New Jersey. He listed ECMC in his petition as a creditor with claims totaling $15,835, which represented his student loans. The Bankruptcy Court granted Kaetz a discharge in 2013. Kaetz alleged that, after the discharge and completion of his bankruptcy case, ECMC used harassing telephone calls and letters to collect the debt. ECMC also informed the CRAs about his debt and the CRAs published the information on his credit report. Kaetz averred that the debt was discharged and that he disputed the debt without success.

Kaetz claimed that the defendants violated the Fair Debt Collection Practices Act, that the CRAs violated the Fair Credit Reporting Act, and that the defendants were in civil con-

[1] This disposition is not an opinion of the full Court and pur-suant to I.O.P. 5.7 does not constitute binding precedent

[2] The operative complaint is Kaetz's second amended complaint filed on November 29, 2017.

tempt of the Bankruptcy Court's discharge order. He also raised constitutional claims challenging, among other things, the constitutionality of the Bankruptcy Code provision excepting student loan debt from discharge, 11 U.S.C. § 523(a)(8).

ECMC moved to dismiss Kaetz's second amended complaint for failure to state a claim upon which relief could be granted. Experian and Equifax filed a joint motion to dismiss, which TransUnion joined. The District Court granted the motions and dismissed Kaetz's complaint. It ruled that many of Kaetz's claims failed because their premise—that his student loan debt was discharged in his bankruptcy case—was incorrect. The District Court explained that student loan debt is presumptively nondischargeable under § 523(a)(8) and that Kaetz had not filed an adversary proceeding to determine whether his debt could be discharged.

Kaetz filed a motion for reconsideration. Relevant here, he disputed the District Court's conclusion that his student loan debts were not discharged in his bankruptcy case. He argued that he was not required to file an adversary proceeding and that he rebutted the presumption that his debt was nondischargeable by satisfying the exception in § 523(a)(8) for undue hardship. The District Court ruled that Kaetz had provided no reason justifying reconsideration of its prior decision and denied relief. It stated that Kaetz did not point to a change in law, new evidence, a clear error of law or fact, or manifest injustice, but had restated arguments he had made in opposition to the defendants' motion to dismiss. The District Court reiterated that his student loan debt was not discharged in his bankruptcy case. This appeal followed.

We have jurisdiction pursuant to 28 U.S.C. § 1291.[3] We

[3] 2 The District Court granted Kaetz leave to amend one of his claims against ECMC, but Kaetz did not do so. Kaetz has stated that he stands on his second amended complaint and there is thus no issue as to our appellate jurisdiction. See

exercise plenary review over the District Court's order dismissing Kaetz's complaint. Finkelman v. Nat'l Football League, 810 F.3d 187, 192 (3d Cir. 2016). We review the District Court's denial of his motion for reconsideration for abuse of discretion. Gibson v. State Farm Mut. Auto. Ins. Co., 994 F.3d 182, 186 (3d Cir. 2021). We review its legal determinations on reconsideration de novo and its factual findings for clear error. Id.

Kaetz primarily argues on appeal that the District Court erred in ruling that he was required to file an adversary proceeding in Bankruptcy Court to determine the dischargeability of his student loan debt. The applicable statute provides that "[a] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt" for certain educational loans "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). "Section 523(a)(8) renders student loan debt presumptively nondischargeable 'unless' a determination of undue hardship is made." United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 277 n.13 (2010).

Kaetz correctly states that § 538(a)(8) does not provide that an adversary proceeding is required to determine whether student loan debt may be discharged. However, as the District Court recognized, "the Bankruptcy Rules require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors." Espinosa, 559 U.S. at 268–69. Kaetz contends that the Supreme Court's statement in Espinosa in this regard is dicta.[4] Regardless of whether that

Weber v. McGrogan, 939 F.3d 232, 240 (3d Cir. 2019). We also conclude that, while the District Court did not acknowledge TransUnion's joinder in the motion to dismiss filed by Experian and Equifax, there remain no unresolved issues for resolution by the District Court. Aluminum Co. of Am. v. Beazer East, Inc., 124 F.3d 551, 557 (3d Cir. 1997)

[4] Espinosa held that a Bankruptcy Court legally erred in confirming a Chapter 13 plan that discharged student loan debt without an undue hardship finding, but that

statement is dicta, the Bankruptcy Rules set forth the applicable procedure. See Fed. R. Bankr. P. 7001(6) (providing that adversary proceedings include "a proceeding to determine the dischargeability of a debt"); Fed. R. Bankr. P. 7001, Adv. Committee Notes (stating the rules govern procedural aspects of litigation involving matters referred to in Rule 7001); see also Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 451-52 (2004) (discussing the filing of an adversary proceeding under the Bankruptcy Rules to discharge student loan debt).

Kaetz also contends that the Bankruptcy Court's determination that he was indigent satisfied the undue hardship exception in § 538(a)(8) and rebutted the presumption that his debt was nondischargeable. Even if an undue hardship determination could have been made in Kaetz's bankruptcy case outside of an adversary proceeding, a finding of indigence is not the same as an undue hardship determination under §538(a)(8). See In re Faish, 72 F.3d 298, 306 (3d Cir. 1995) (holding bankruptcy courts within the Third Circuit must apply the undue hardship test in Brunner v. New York State Higher Educational Services Corporation, 831 F.2d 395 (2d Cir. 1987) (per curiam)); see also Hood, 541 U.S. at 450 ("Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.").

Kaetz also argues that § 523(a)(8) is unconstitutionally vague. His argument on appeal, however, is based on the fact that the statute does not direct the filing of an adversary proceeding. As discussed above, the Bankruptcy Rules address the applicable procedure. Kaetz has not established that the statute is constitutionally infirm.[5]

the error was not a basis for relief under Federal Rule of Civil Procedure 60(b)(4). Id. at 275-76

[5] In his reply brief, Kaetz contends that the term "undue hardship" is unconstitutionally vague. To the extent this argument was raised below, Kaetz has forfeited it by not presenting it in his opening brief. There are no exceptional circumstances

Kaetz has not shown that the District Court erred in dismissing his second amended complaint or in denying his motion for reconsideration. Accordingly, we will affirm the judgment of the District Court.[6]

excusing the forfeiture. See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist., 877 F.3d 136, 148 (3d Cir. 2017). Similarly, we do not consider Kaetz's argument that his loan should be discharged because the institution where he enrolled misrepresented the nature of its pro-gram, which was not developed in his opening brief.

[6] Kaetz's pending motions, which seek leave to file and/or amend various documents, are granted.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM F. KAETZ, Plaintiff, v. EDUCATIONAL CREDIT MANAGEMENT CORPORATION, ET AL., Defendants.	Civil Action No.: 2:16-cv-09225 OPINION

CECCHI, District Judge.

I. INTRODUCTION

This matter comes before the Court on the motion of Educational Credit Management Corporation ("Defendant ECMC") to dismiss Plaintiff William F. Kaetz's ("Plaintiff') Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 58) and Equifax Information Services LLC ("Defendant Equifax") and Experian Information Solutions Inc.'s ("Defendant Experian") joint motion to dismiss Plaintiffs Second Amended Complaint pursuant to Fed. R. Civ. **P.** 12(b)(6) (ECF No. 59). The Court has given careful consideration to the submissions from each party. Pursuant to Fed. R. Civ. P. 78(b), no oral argument was heard. For the reasons that follow, Defendants' Motion to Dismiss is granted.

II. BACKGROUND

In September 2007, Plaintiff signed a Master Promissory Note requesting student aid under the Federal Family Education Loan Program ("FFEL Program"). ECF No. 59-1 at 2. When

Plaintiff failed to honor his repayment obligations under the Note, the loans went into default and the initial loan provider, Citibank, filed a default claim. Id. Thereafter, Defendant ECMC assumed all responsibilities as the designated guaranty agency for Plaintiffs defaulted loans. Id. Defendant ECMC is a not-for-profit corporation created under the direction of the U.S. Department of Education "to provide specialized guarantor service pursuant to [FFEL Program], including accepting transfer of title of certain student loan accounts on which the student loan borrower has filed a bankruptcy proceeding." Id.

On August 7, 2012, Plaintiff filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey.[1] ECF No. 57 at 2-3. Plaintiff listed Defendant ECMC as a creditor holding an unsecured non- priority claim in the amount of$15,835.00, incurred in July 2010. Id. at 3. On January 28, 2013, the Honorable Morris Stem, United States Bankruptcy Judge, granted Plaintiff "a discharge under section 727 of title 11, United States Code." Id. Under 11 U.S.C. § 523(a)(8), educational benefits or loans are exempt from discharge under section 727, unless "exempting such debt from discharge under this paragraph would impose an undue hardship on the debtor." 11 U.S.C. § 523(a)(8).

On December 13, 2016, Plaintiff filed his Complaint with this Court, contending that, despite the discharge he received on January 28, 2013, Defendant ECMC "continued debt collection

[1] Plaintiff does not include as an attachment to his Complaint a copy of his voluntary petition. On a motion to dismiss, however, the Court may consider the allegations in the complaint, any exhibits attached to the complaint, matters of public record, and undisputedly authentic documents upon which the plaintiffs complaint is based. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). A document falls into the latter category even where the complaint does not cite or "explicitly rely[]" on it; "[r]ather, the essential requirement is that the plaintiffs claim be 'based on that document.'" *Brusco v. Harleysville Ins. Co.*, No. 14-914, 2014 WL 2916716, at *5 (D.N.J. June 26, 2014) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)). Here, Plaintiffs Complaint explicitly relies on his voluntary petition, which Plaintiff argues "discharg[ed] all debts that included debts managed by [Defendant]." (ECF No. 1 at 3). As such, this Court will properly consider Plaintiffs voluntary petition with Defendant's Motion to Dismiss.

practices" and "furnished fraudulent information to the other defendants[:] Experian, TransUnion, and Equifax." ECF No. 1 at 3. On January 25, 2017, Defendant ECMC filed its First Motion to Dismiss.[2] ECF No. 10. In that motion, Defendant ECMC argued that Plaintiff failed to state a claim upon which relief may be granted because: (1) Plaintiff's debts are student loans, governed by 11 U.S.C. § 523(a)(8), and therefore were not automatically discharged on January 28, 2013; and (2) Defendant "is required by statute to report certain information to consumer reporting agencies," and the information Defendant furnished was entirely accurate. ECF No. 11 at 6-7. After considering the parties' submissions (ECF Nos. 17, 21, 25), the Court granted Defendant ECMC's First Motion to Dismiss[2] Plaintiff's Complaint without prejudice. ECF No. 35.

Thereafter, Plaintiff filed an Amended Complaint on October 12, 2017. ECF No. 41. On October 23, 2017, Plaintiff requested leave to amend his Amended Complaint (ECF No. 48), which the Court granted (EFC No. 54). Plaintiff subsequently filed a Second Amended Complaint. ECF No. 57. Defendant Equifax and Defendant Experian jointly moved to dismiss Plaintiff's Second Amended Complaint. ECF No. 58. Defendant ECMC also moved to dismiss Plaintiff's Second Amended Complaint. ECF No. 59. Plaintiff opposes the instant motions. ECF Nos. 63, 64). Defendants Equifax and Experian replied to Plaintiff's opposition. ECF No. 67.

III. LEGAL STANDARD

A. Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6)

For a complaint to survive dismissal pursuant to Fed. R. Civ. P. 12(b)(6), it "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 Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). In evaluating the sufficiency

[2] Experian, TransUnion, and Equifax, the remaining three defendants in this case, did not join Defendant's First Motion to Dismiss.

of a complaint, the Court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *See Phillips v. Cty. of Allegheny,* 515 F.3d 224,234 (3d Cir. 2008). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. Furthermore, "[a] pleading that offers 'labels and conclusions' ... will not do. Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal,* 556 U.S. at 678 (citations omitted). A *pro se* litigant's complaint is held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner,* 404 U.S. 519, 520 (1972). A *prose* complaint "can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble,* 429 U.S. 97, 106 (1976) (quoting *Haines,* 404 U.S. at 520-21); *see also Bacon v. Minner,* 229 F. App'x 96, 100 (3d Cir. 2007).

IV. DISCUSSION

Plaintiff brings seven causes of action in his Second Amended Complaint: (1) Violation of the Tenth Amendment of the U.S. Constitution as to Defendant ECMC, (2) Facial Challenge to the Legitimacy of Alleged Student Loans under the Tenth Amendment as to Defendant ECMC, (3) Facial Challenge to 11 U.S.C. § 523 (a)(8), (4) As Applied Challenge to 11 U.S.C. § 523 (a)(8), (5) Violation of the Fair Debt Collection Practices Act as to Defendant ECMC, Defendant Equifax, and Defendant Experian (collectively "Defendants"), (6) Violation of the Fair Credit Reporting Act as to Defendants, and (7) Civil Contempt of Order for United States Bankruptcy Court. ECF No. 57 at 1-2. Defendant ECMC asserts that Plaintiffs Second Amended Complaint fails to state a cause of action because Plaintiffs federal student loans with ECMC were not discharged in his bankruptcy case and accordingly any acts taken by Defendants to collect the debt were legitimate. ECF No. 59-2 at 5. Defendants Equifax and Experian argue that "the only cause of action even potentially applicable to a consumer reporting agency such as Equifax and Experian is the sixth cause of action alleging a violation of FCRA" and further asserts that Plaintiffs FCRA claim fails as a matter of law because Plaintiff is unable to prove the inaccuracy of the information. ECF No. 58 at 3, 9-10. For the reasons set forth below, Defendants' motions to dismiss Plaintiffs Second Amended Complaint are granted.

A. Tenth Amendment

Plaintiff claims in Counts 1 and 2 that the existence of both the Federal Department of Education and Defendant ECMC, an entity created under the direction of the U.S. Department of Education, are unconstitutional under the Tenth Amendment because "[n]owhere in the Constitution is the federal government delegated the power to regulate or fund elementary or secondary education." ECF No. 57 at 6. According to Plaintiff, his student loans issued by Defendant ECMC pursuant to the federal government's FFEL Program are also unconstitutional under the Tenth Amendment because they are based on illegal practices. Id. at 7.[3]

Plaintiffs Tenth Amendment arguments concerning the existence of the Department of Education and Defendant ECMC fail because the U.S. Constitution gives the Federal Government the power to create departments to oversee matters that affect the general welfare of U.S. citizens. U.S. Const. Art. 2. Additionally, Congress has the authority to employ federal funding for education programs, such as the FFEL Program that was created under the Higher Education Act of 1965 to address the need for financial assistance of students seeking higher education. 20 U.S.C. § 1071. Therefore, any arguments that Plaintiffs student loans were issued in violation of the Tenth Amendment are misplaced.

B. 11 U.S.C. 523 § (a)(8)

Plaintiff next challenges the constitutionality of 11 U.S.C. 523 § (a)(8), which provides exceptions to bankruptcy discharge. ECF No. 57 at 8-13. In the relevant bankruptcy proceedings, Plaintiff was granted a discharge under section 727 of title 11,

[3] The Court notes that Plaintiffs student loans were issued by Citibank ELT Student Loan Corp. ("Citibank"), which is not part of the federal government

United States Code. Id. at 2-3. A discharge of debt under section 727 does not discharge any debt "for an obligation to repay funds received as an education benefit" unless "excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor." 11 U.S.C. 523 § (a)(8), The debts at issue here are educational loans. ECF No. 57 at 2-3. Under section 523(a)(8), student loan debt is "presumptively nondischargable 'unless' a determination of undue hardship is made." United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); see also In re Sperazza, 366 B.R. 397, 407 (Bankr. E.D. Pa. 2007) (noting that neither party suggested plaintiffs debts to Education Credit Management Corporation, the same defendant here, were anything other than educational loans and therefore "the obligations [were] presumptively nondischargeable"); In re Jones, 392 B.R. 116, 124-25 (Bankr. E.D. Pa. 2008) (same). The Bankruptcy Rules "require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors." Espinosa, 559 U.S. 260; see also In re Miller, No. 06-1082, 2006 WL 2361819, at *3 (Bankr. W.D. Pa. Aug. 14, 2006); In re Kahl, 240 B.R. 524, 530 (Bankr. E.D. Pa. 1999).

Plaintiff argues that the statute is unconstitutional both on its face and as applied because it is vague and therefore violates Plaintiffs due process rights. ECF No. 57 at 8-13. However, Plaintiff also writes in his Second Amended Complaint that "[t]he Statute is fine" and that "[t]he law is not that ambiguous and it does not need interpretation." Id. at 8, 11. Plaintiff seemingly contends that the statute itself is not unconstitutional but rather that "the vagueness doctrine... also should apply to the techniques courts use to decide on legal definitions and requirements." See id. at 9-11 ("The Statute is fine, its relying on courts and opponents to do what's right does not work."). From these statements in the Second Amended Complaint and Plaintiffs brief in opposition, the Court discerns that Plaintiff is challenging how this section of the Bankruptcy Code, 11 U.S.C. § 523 (a)(8), was implemented in his case. The Court finds that, based on Plaintiffs allegations and a review of the underlying bankruptcy order, the statute was properly applied in Plaintiffs proceedings.

Plaintiff contends that his student loan debts were automatically discharged under the undue hardship exception because "11 U.S.C. 523 (a)(8) is neutral and self-executing to creditors and debtors meaning immediately effective without further action, legislation or legal steps, no other process required." ECF No. 57 at 9. As stated above, however, an individual seeking discharge under the undue hardship exception must commence an adversary proceeding in Bankruptcy Court to determine whether his student loan debts were eligible to be discharged. Here, because Plaintiff does not allege that he commenced an adversary proceeding to determine whether his student loans were dischargeable, Plaintiffs debts were not discharged through the bankruptcy proceedings. Accordingly, Plaintiffs claims fail.

C. Fair Debt Collection Practices Act

Next, Plaintiff purports to bring a claim under the Fair Debt Collection Practices Act ("FDCPA"), alleging that Defendants "used unfair or unconscionable means to collect or attempt to collect a fraudulent debt" and "engaged in conduct to harass, oppress, intimidate and abuse the plaintiff in violation of the FDCPA. ECF No. 57 at 14. Defendants Experian and Equifax argue that the FDCPA is inapplicable to consumer reporting agencies like Experian and Equifax because FDCPA was enacted to eliminate abusive debt collection practices by *debt collectors, see* 15 U.S.C. § 1692 et. seq., not by consumer reporting agencies. ECF No. 67 at 3-4. Defendant ECMC does not argue about the FDCPA's applicability but instead asserts that Plaintiffs student loans were not discharged in Plaintiffs Chapter 7 bankruptcy proceedings, and therefore, Plaintiff fails to state a claim upon which relief may be granted. ECF No. 59-2 at 4.

First, as to Defendants Experian and Equifax, the Court finds that Plaintiff has failed to plead sufficient facts to show that Experian and Equifax engaged in debt collection under the FDCPA. The goal of the FDCPA is to control the collection practices of debt collectors. 15 U.S.C. § 1692k; *Brown* v. *Card Service Ctr.,* 464 F.3d 450,453 (3d Cir. 2006) ("[T]he [FDCPA] provides consumers with a private cause of action against debt collectors who fail to comply with the Act."). A debt collector is defined under the act as any business with the principal purpose of collecting debts, or who regularly collects or attempts to collect debts owed to another. 15 U.S.C. § 1692(a)(6). As Plaintiff does not allege that Defendants Experian and Equifax regularly collect debt or engage in debt collection, the statute does not apply. Moreover, even if the statute did apply to these Defendants, Plaintiff does not allege that Defendants Experian and Equifax attempted to collect any debt from him, much less that Defendants Experian and Equifax engaged in any harassment or abuse in connection with the collection of Plaintiffs debt, such as the threat of violence or profane language, or the use of false, deceptive, or misleading statements. Accordingly, Plaintiff has not plead sufficient facts to support his FDCPA claims against Defendants Experian and Equifax.

Plaintiff further contends that Defendant ECMC violated the FDCPA by attempting to collect Plaintiffs debt after the January 2013 Bankruptcy Court Order that, according to Plaintiff, discharged his student loan debt. ECF No. 57 at 3. Specifically, Plaintiff states that Defendant ECMC contacted Plaintiff with "phone calls, letters and credit reporting for each account that became ruthless harassment debt collection activities" and further contends that Defendant ECMC "represented the law fraudulently." Id. at 3-4. According to Plaintiff, Defendant violated multiple sections of the FDCPA, namely sections 1672d, 1692e, 1692f and 1692g. The Court addresses Plaintiffs arguments as to each section of the FDCPA below.

First, under 15 U.S.C. § 1692d, a debt collector may not "engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Such conduct includes in relevant part (l)"[t]he use or threat of use of violence," (2)"[t]he use of obscene or profane language," (3)"[t]he publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency," (4)"[t]he advertisement for sale of any debt to coerce payment," (5)"[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously," and (6)"the placement of telephone calls without meaningful disclosure of the caller's identity." 15 U.S.C. § 1692d. To state a claim pursuant to § 1692d(5), a plaintiff must allege not only that the debt collector contacted him by telephone repeatedly or continuously but also that he did so with intent to annoy, abuse or harass him. *Corson v. Accounts Receivable Management, Inc.*, 2013 WL 4047577, at *6 (D.N.J. Aug. 9, 2013).

According to Plaintiff, Defendant ECMC made telephone calls and sent letters to Plaintiff that "became ruthless harassment" in violation of the FDCPA. ECF No. 57 at 3. However, Plaintiff does not provide facts to support this assertion. Plaintiff does not allege how many phone calls or letters he received, nor does he allege over what time period this occurred. *Cf Shand-Pistilli v. Prof'l Account Servs., Inc.*, 2010 WL 2978029, at *4 (E.D.Pa. July 26, 2010) (analyzing the number and pattern of phone calls to ascertain whether plaintiff stated a sufficient claim under section 1692d). As such, the Court cannot discern from Plaintiff's allegations whether Defendants called repeatedly or continuously or whether this was done with the intent to harass, oppress or abuse Plaintiff. Thus, the Court finds that Plaintiff has not sufficiently pled a violation of 15 U.S.C. § 1692d.

Second, Plaintiffs arguments pursuant to 15 U.S.C. § 1692e fail because this section requires that the debt collector make false or misleading representations. 15 U.S.C. § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."). Here, as discussed above, Plaintiffs student loan debts were not discharged through the related bankruptcy proceedings and therefore attempts to collect this debt are not in and of themselves false, deceptive, or misleading. Absent any allegations that Defendant ECMC falsely represented the amount or character of the debt, Plaintiff has failed to plead sufficient facts to support a violation of§ 1692e.

Third, a debt collector is.also prohibited from utilizing "unfair or unconscionable means to collect or attempt to collect any debt" under 15 U.S.C. § 1692f. While Plaintiff alleges that "Defendants used unfair or unconscionable means to collect or attempt to collect a fraudulent debt" (ECF No. 57 at 14), this conclusory statement is insufficient to support Plaintiffs claim as there are no specific facts to support this assertion.

Finally, Plaintiff alleges that Defendant ECMC acted in violation of 15 U.S.C. § 1692g, which governs the procedures for disputing and validating debts. According to this subsection, if a consumer notifies a debt collector in writing within a thirty-day period that the debt is disputed, the debt collector must obtain verification of the debt or a copy of the judgment and mail this verification to the consumer. 15 U.S.C. § 1692g(a). Plaintiff argues that the debts were not validated after he contacted Defendants to dispute the debt, as prohibited under the FDCPA. ECF No. 57 at 4, 14. Defendant ECMC counters that Plaintiffs claim is baseless because Plaintiffs loans remained due according to the Bankruptcy Court decision and therefore, Defendant ECMC acted in accordance with the statutory requirements and its fiduciary obligations in reporting this outstanding debt. ECF No. 59-1 at 3 (citing 20 U.S.C. §1080a; 34 C.F.R. § 682.410(b)(5)). Plaintiff acknowledges that Defendant ECMC responded to Plaintiffs attempts to dispute the debt but asserts that their response "represented the law fraudulently" and "furnished inaccurate information." ECF No. 57 at 4. Because the Bankruptcy Court order accurately verified that Plaintiffs educational loan debt remained outstanding, the Court finds that Plaintiff has failed to plead sufficient facts to support his claim that Defendant ECMC violated 15 U.S.C. § 1692g.

As such, Plaintiff has failed to articulate any facts entitling him to relief for a violation of the FDCPA and the Court will dismiss Plaintiffs claim.

D. Fair Credit Reporting Act

Plaintiff also purports to bring a claim under two different subsections of the Fair Credit Reporting Act ("FCRA"). Plaintiff asserts that Defendants acted in violation 15 U.S.C. § 1681s-2(a)(l)(A) & (B), which prohibits the furnishing of inaccurate information, by publishing false information about the alleged student loans on Plaintiffs credit report. ECF No. 57 at 4-5, 15.

Additionally, Plaintiff argues that Defendants are liable under 15 U.S.C. § 1681e(b) of FCRA because they negligently and willfully failed "to ensure the maximum level of accuracy in reporting consumer-credit information." ECF No. 57 at 15. Defendants counter that Plaintiff cannot prevail under either subsection because the disputed information was accurate, and Defendants are required to disclose such information by law. ECF No. 58 at 9-1O; ECF No. 59-2 at 5-6.

"The FCRA was enacted to protect consumers from the transmission of inaccurate information about them, and to establish credit reporting practices that use accurate information." *Harris v. Pa. Higher Educ. Assistance Agency/Am. Educ. Servs.,* No. 16-2963, 2017 WL 2691170, at *2 (3d Cir. June 22, 2017). A person acts in violation of 15 U.S.C. § 1681s-2 when he furnishes consumer information that he knows or has reasonable cause to believe is inaccurate. *Taggart v. Nw. Mortg., Inc.,* No. 09-1281, 2010 WL 114946, at *9 (E.D. Pa. Jan. 11, 2010), *aff'd,* 539 F. App'x 42 (3d Cir. 2013). Similarly, accuracy is a threshold element of§ 1681e(b) and, accordingly, Plaintiff bears the burden of proving that information was inaccurate. *See Cortez v. Trans Union, LLC,* 617 F.3d 688, 708 (3d Cir. 2010) (stating that "inaccurate information" is a requirement for§ 1681e(b) claims). Here, Plaintiff has not sufficiently alleged that the disputed information is inaccurate. While Plaintiff contends that his student loan debts were discharged after the Bankruptcy Court's decision, these debts are presumptively non- dischargeable, as discussed above. Therefore, the information relied upon by Defendants was accurate and Plaintiffs FCRA claims must fail.

E. Civil Contempt

Finally, Plaintiff asserts that Defendants acted in civil contempt of the January 28, 2013 order of the Honorable Morris Stem of the United States Bankruptcy Court. A court may hold a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. *Taggart v. Lorenzen,* 139 S.Ct. 1795, 1801 (2019). Here, as explained above, Defendants did not act in violation of a bankruptcy discharge order because Plaintiffs student loans were not discharged in Plaintiffs Chapter 7 bankruptcy proceedings. Therefore, Plaintiff has failed to plead sufficient facts to show that Defendants acted in civil contempt.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted and Plaintiffs Second Amended Complaint is dismissed with prejudice as to Counts 1-4 and 6-7. As to Count 5, Plaintiffs Complaint is dismissed without prejudice. If Plaintiff wishes, he may file a third amended complaint within twenty-one (21) days of this Opinion. However, Plaintiff is limited to raising allegations under 15 U.S.C. § 1692d(5) and may only bring such claim against Defendant ECMC. An appropriate Order follows this Opinion.

DATED: September 30, 2019 s/ Clair C. Cecchi

CLAIRE C. CECCHI, U.S.D.J.