**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

**CHAMBERS OF**
**MADELINE COX ARLEO**
**UNITED STATES DISTRICT JUDGE**

**MARTIN LUTHER KING**
**COURTHOUSE**
**50 WALNUT ST. ROOM 4066**
**NEWARK, NJ 07101**
**973-297-4903**

January 29, 2019

VIA ECF

**LETTER ORDER**

**Re: Michael Breen v. Callagy Law, P.C., et al.**
**Civil Action No. 18-14472**

Dear Litigants:

Before the Court is Defendants Callagy Law, P.C.'s ("Callagy") and Michael J. Smikun's ("Smikun," or, together with Callagy, "Defendants") Motion for Attorney's Fees, ECF No. 29, and Plaintiff Michael Breen, Esq.'s ("Plaintiff" or "Breen") Motion to Alter Judgment under Federal Rule of Civil Procedure 59(e), ECF No. 30.[1] For the reasons set forth herein, Defendants' Motion for Attorney's Fees and Plaintiff's Motion to Alter Judgment are **DENIED**.

## I. BACKGROUND

The tortured history of this case begins in the Commonwealth of Kentucky. On May 20, 2009, Plaintiff filed a personal injury action on behalf of non-parties Christopher and Holly Boling (collectively, the "Bolings") in the United States District Court for the Western District of Kentucky (the "Personal Injury Action"). Compl. ¶ 34, ECF No. 1. The Bolings sought damages for injuries Mr. Boling sustained from a gasoline storage container explosion. Id. Before their lawsuit was resolved, the Bolings entered two separate agreements with non-party Cambridge Management Group, LLC ("Cambridge") under which Cambridge advanced $10,000 and $5,000, respectively, to the Bolings, secured by the prospective proceeds from Bolings' personal injury lawsuit with added interest (the "Purchase Agreements"). See id. ¶¶ 35-41. Plaintiff, in his capacity as the Bolings' attorney, executed documents "acknowledging his awareness" of the Purchase Agreements (the "Acknowledgements"). See id. ¶¶ 38, 42. In August 2013, Cambridge assigned its rights under the Purchase Agreements to non-party Prospect Funding Holdings, LLC ("Prospect"). Id. ¶ 43.

[1] Defendants also filed a Motion to Strike Plaintiff's Motion to Alter Judgment. See ECF No. 31. The Court construes Defendants' Motion to Strike as an opposition to Plaintiff's Motion to Alter Judgment because it responds to the arguments Plaintiff raised in that motion.

In or around May 2014, the Personal Injury Action resolved in the Bolings's favor, and Prospect sought to obtain the balance due under the Purchase Agreements. See Smikun Certification, Ex. A ¶¶ 44-49, ECF No. 4.2.[2] The Acknowledgments required Breen to deposit the Personal Injury Action proceeds into his attorney trust account. Id. ¶ 47. But Breen apparently placed the monies into his co-counsel's trust account instead without notifying Prospect. See id. ¶ 50.

On June 19, 2014, Christopher Boling filed a separate action in the Western District of Kentucky, seeking, in part, a declaratory judgment that the Purchase Agreements were unenforceable under Kentucky law (the "Boling Kentucky Lawsuit"). Boling v. Prospect Funding Holdings, LLC, No. 14-00081, 2017 WL 1193064, at *2 (W.D. Ky. Mar. 30, 2017). Defendants represented Prospect in that action. Compl. ¶ 50. Shortly thereafter, Prospect filed an action to compel arbitration against Christopher Boling in the Superior Court of New Jersey. See Prospect Funding Holdings, LLC v. Boling, No. 14-6169, 2015 WL 5095155, at *1 (D.N.J. Aug. 26, 2015). Prospect's state court action was removed to this District and then transferred to and consolidated with the Bolings's action in the Western District of Kentucky. Id. at *1-2.

Despite having its first state court action transferred to Kentucky, Prospect again sought relief under the Purchase Agreements in New Jersey state court. On September 1, 2015, while the Kentucky case was pending, Prospect filed an action in the Superior Court of New Jersey against Breen demanding "an accounting of all monies recovered and disbursed to any parties" related to the Personal Injury Action. See Prospect Funding Holdings, LLC v. Breen, No. 15-07945 (D.N.J.) ("Breen I"), ECF No. 1.8. Breen removed that action to this District, see id., ECF No. 1, and on July 7, 2016, the parties agreed to terminate it without prejudice, id., ECF No. 45.

On March 30, 2017, the Western District of Kentucky held in the Boling Kentucky Lawsuit that the Purchase Agreements were unenforceable under Kentucky usury law. Boling, 2017 WL 1193064, at *6-7. On May 5, 2017, Prospect filed another action against Breen and his law firm—this time in federal court—seeking damages for, among other things, breaches of contract and fiduciary duties arising out of the Acknowledgments and the Purchase Agreements. See ECF No. 4.2, Ex. A ¶¶ 55-80; Prospect Funding Holdings, LLC v. Breen, No. 17-3328 (D.N.J.) ("Breen II"). On February 5, 2018, Judge McNulty dismissed Prospect's complaint on the basis of issue preclusion. See Prospect Funding Holdings, LLC v. Breen, No. 17-3328, 2018 WL 734665, at *9 (D.N.J. Feb. 5, 2018). The Third Circuit affirmed that decision on December 14, 2018. Prospect Funding Holdings, LLC v. Breen, 757 F. App'x 130 (3d Cir. 2018).

On September 30, 2018, Plaintiff filed a new Complaint in this District Court, alleging that

[2] In support of their motion to dismiss Plaintiff's Complaint, ECF No. 4, Defendants attached a copy of the complaint they filed against Plaintiff in an earlier action, Prospect Funding Holdings, LLC v. Breen, No. 17-3328 (D.N.J.). The Court "may take judicial notice of the contents of another Court's docket." Orabi v. Attorney General, 738 F.3d 535, 537 n.1 (3d Cir. 2017). It thus considers this complaint and other documents filed in prior relevant actions between the parties.

Defendants[3] violated the Fair Debt Collection Practice Act ("FDCPA"), 15 U.S.C. § 1962, et. seq., by: (i) initiating Breen II to harass Plaintiff; (ii) using false, deceptive and misleading representations to collect a debt; and (iii) failing to make certain disclosures required by the FDCPA.[4] Compl. ¶¶ 61-69. On June 27, 2019, this Court dismissed the Complaint under Federal Rule of Civil Procedure 12(b)(6) on the grounds that Plaintiff alleged a commercial debt outside of the FDCPA's scope (the "June Order"). ECF No. 28.

On July 15, 2019, Defendants filed the instant Motion for Attorney's Fees pursuant to 15 U.S.C. § 1692k(a)(3) and Federal Rule of Civil Procedure 54. ECF No. 29. Plaintiff filed the instant Motion to Alter Judgment under Rule 59(e) on July 26, 2019. ECF No. 30.

## II. DEFENDANTS' MOTION FOR ATTORNEY'S FEES

### A. Legal Standard

Under the FDCPA, the Court may award "reasonable" attorney's fees to a defendant if it finds "that an action under the section was brought in bad faith and for purpose of harassment." 15 U.S.C. § 1692k(a)(3); see also Marx v. General Revenue Corp., 568 U.S. 371, 385 (2013) ("[A] court has inherent power to award attorney's fees to a defendant when the plaintiff brings an action in bad faith."). Third Circuit courts interpret Section 1692k(a)(3) narrowly. See, e.g., Parker v. Pressler & Pressler, LLP, 650 F. Supp. 2d 326, 347 (D.N.J. 2009) (observing that Section 1692k(a)(e) "appears designed to thwart efforts of a consumer to abuse the statute and avoid responsibility to pay a legitimate debt."); Kondratick v. Beneficial Consumer Disc. Co., No. 04-4895, 2006 WL 305399, at *10 n.4 (E.D.Pa. Feb. 8, 2006). To prevail, the defendant "must provide evidence of [the] plaintiff's bad faith and purposeful harassment." Wattie-Bey v. Modern Recovery Sols., No. 14-1769, 2016 WL 8229211, at *4 (M.D. Pa. Dec. 30, 2016) (citing Puglisi v. Debt Recovery Sols., LLC, 822 F. Supp. 2d 218 (E.D.N.Y. 2011)).

### B. Analysis

Defendants argue that an award of attorney's fees is appropriate under the FDCPA because Plaintiff filed the instant action to retaliate against and harass Defendants. The Court disagrees.

The Court has discretion to award attorney's fees to Defendants if it finds Plaintiff filed this action "in bad faith and for the purpose of harassment." 15 U.S.C. § 1692k(a)(3). Defendants bear the burden of demonstrating bad faith and an intent to harass. See Wattie-Bey, 2016 WL 8229211, at *4. Based on the record, neither situation is present here. The only "evidence" Defendants provided is a letter they sent to Plaintiff before he filed this action, advising him "that his FDCPA claim suffered from several fatal deficiencies," including, among other

[3] Defendants represented Prospect in Breen II.

[4] Plaintiff apparently filed a similar lawsuit in Kentucky but withdrew it "after Defendants sent [him] a Rule 11 Letter." ECF No. 29.1 at 1; see also ECF No. 4.2, Exs. C-E.

things, that he did not incur a "debt" under the FDCPA. See ECF No. 29.1 at 6; ECF No. 4.2, Ex. D. Plaintiff, however, argued in opposition to Defendants' motion to dismiss that the FDCPA applied because the Bolings incurred a debt under the Purchase Agreements for personal, family, or household purposes. See generally ECF No. 7. Defendants appear to suggest that because the Court rejected Plaintiff's theory and granted their motion to dismiss, Plaintiff's filing of this lawsuit over their express warning evidences bad faith.

It is no surprise that Defendants disputed and opposed the theory underlying Plaintiff's FDCPA claim. Such is the nature of litigation. For that reason, a plaintiff's filing of a complaint over an adversary's objection does not alone warrant attorney's fees under Section 1692k(a)(3), and it would be nonsensical to find otherwise. In addition, the Court's dismissal of Plaintiff's FDCPA claim based on the commercial nature of the alleged debt is not evidence that Plaintiff filed the Complaint is bad faith. See Jenkins v. AmeriCredit Fin. Servs., Inc., No. 14-5687, 2017 WL 1325369, at *10 (E.D.N.Y. Feb. 14, 2017) ("[W]hether Plaintiff's underlying debt was valid is not relevant to determining whether his claims arising under the FDCPA were brought in bad faith or for the purpose of harassment.").

Defendants also assert, without evidentiary support, that Plaintiff filed the underlying action to "retaliat[e] against Defendants" for the years-long Boling Kentucky Lawsuit. See Def. Br. at 1-2. Accepting Defendants' argument on its face would ignore the drawn-out procedural history that gave rise to Plaintiff's claim.

Litigation between the parties and their clients has persisted for several years across several different state and federal courts. Before this lawsuit, Defendants pursued Breen II on behalf of Prospect, alleging claims against Plaintiff already resolved by the Western District of Kentucky. See Breen, 757 F. App'x at 134. Defendants' attempt to relitigate those claims did not go unnoticed by the Third Circuit, which cautioned: "A litigant who loses in one court may not rehash old issues in a new court." Id. at 131. Plaintiff, who neither brought that lawsuit nor initiated its appeal, filed the instant action, alleging that Defendants filed Breen II "to harass, oppress, or abuse Plaintiff in connection with the collection of a Debt" in violation of the FDCPA. Compl. ¶ 59. This sequence of events does not indicate that Plaintiff brought this action in bad faith, but rather to recover for a potentially legitimate FDCPA violation. While Plaintiff's Complaint fell short of stating a claim for relief, Plaintiff's mere filing of this action, which brought claims the parties have not previously litigated, is insufficient to demonstrate bad faith or an intent to harass." See Derricotte v. Pressler & Pressler, LLP, No. 10-1323, 2011 WL 2971540, at *8 (D.N.J. July 19, 2011) (denying defendant's application for attorney's fees for failure to demonstrate that plaintiff intended to harass defendants or knew his claim was meritless").

Because Defendants have failed to produce evidence showing that Plaintiff filed this action in bad faith and for the purpose of harassment, their Motion for Attorney's Fees under the FDCPA is denied.[5]

[5] For the same reasons, the Court denies Defendants' request for attorney's fees under Rule 54, which permits a court

## III. PLAINTIFF'S MOTION TO ALTER JUDGMENT

### A. Legal Standard

A motion under Rule 59(e) to reconsider, alter, or amend a judgment or order is an "extraordinary" remedy granted only sparingly. A.K. Stamping Co., Inc. v. Instrument Specialties Co., Inc., 106 F. Supp. 2d 627, 662 (D.N.J. 2000) (internal quotation marks and citation omitted). The Court will not grant relief if the movant "simply repeats the cases and arguments previously analyzed by the court" or "disagree[s] with or relitigates the court's initial decision." Hanover Architectural Serv., P.A. v. Christian Testimony-Morris, N.P., No. 10-5455, 2015 WL 4461327, at *3 (D.N.J. July 21, 2015) (internal citations omitted). Rather, the movant must demonstrate at least one of three grounds for relief: (1) an intervening change in controlling law; (2) new evidence not previously available; or (3) clear error of law or manifest injustice." Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999). The movant bears a high burden to demonstrate that relief under Rule 59(e) is justified. A.K. Stamping Co., Inc., 106 F. Supp. 2d at 662.

### B. Analysis

Plaintiff seeks reconsideration based on two alleged instances of clear error by the Court. First, Plaintiff argues that the Court "overlooked" Breen, 757 F. App'x at 132, claiming that the Third Circuit "expressly rejected the argument that Breen's debt was severable from the overall loan transaction." Pl. Br. at 9, 12, ECF No. 30.1. Second, Plaintiff asserts that the Court "overlooked" his request to amend his Complaint "if the Court found Defendants' Motion [to Dismiss] to have merit." Id. at 13. The Court disagrees.

The Court did not overlook the Third Circuit's decision in Breen, 757 F. App'x 130, when it dismissed Plaintiff's Complaint. Breen affirmed Judge McNulty's dismissal of Prospect's lawsuit against Plaintiff based on issue preclusion. There, the Third Circuit rejected Prospect's argument that the Boling Kentucky Lawsuit decided only whether the Purchase Agreements—and not the Acknowledgements on which Prospect brought Breen II—were valid. Id. at 133. In deciding whether issue preclusion barred Prospect's claim for breach of the Acknowledgments, the panel reasoned that the Acknowledgements and the Purchase Agreements comprised "a single, merged agreement" invalidated by the Kentucky Court. Id. The panel made no findings or conclusions about whether Plaintiff was a "consumer," or the nature of the debt Plaintiff incurred pursuant to the agreement and whether the FDCPA covered such a debt. The June Order thus did not refer to Breen because it was inapplicable to whether Plaintiff's Complaint in the instant action stated a plausible claim for relief under the FDCPA.[6] That Plaintiff disagrees with the Court's

---

to award such fees to a prevailing party if a lawsuit was brought or maintained in bad faith. See Fed. R. Civ. P. 54(d)(2); Marx v. General Revenue Corp., 568 U.S. 371, 376-78 (2013).

[6] The Court dismissed this action because the Complaint alleged the debt Plaintiff "incurred was in connection with his representation of the Bolings, a commercial or business purpose." ECF No. 28. The Court did not refer to the

disposition is insufficient to establish a basis for reconsideration. See Database Am. Inc. v. Bellsouth Advertising Pub. Corp., 825 F. Supp. 1216, 1220 (D.N.J. 1993) ("A party seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden.'") (citations omitted).

Finally, Plaintiff's argument that the Court overlooked his request for leave to amend the Complaint is unavailing. The Court could not overlook Plaintiff's request to file an amended pleading because he never expressly made that request. See ECF No. 7 at 15. Regardless, the Court provided Plaintiff an opportunity to seek leave to amend by dismissing his claims without prejudice. See ECF No. 28. Plaintiff has thus failed to show clear error of law or manifest injustice warranting reconsideration, and his Motion to Alter Judgment is denied.

## IV. CONCLUSION

For the reasons set forth herein, Defendants' Motion for Attorney's Fees, ECF No. 29, and Plaintiff's Motion to Alter Judgment, ECF No. 30, are **DENIED**.[7] Defendants' Motion to Strike, ECF No. 31, is **DENIED** as moot.

**SO ORDERED**.

***s/ Madeline Cox Arleo***
**MADELINE COX ARLEO**
**UNITED STATES DISTRICT JUDGE**

Purchase Agreements and the Acknowledgments as separate transactions.

[7] The parties are cautioned to think twice before filing a Breen III or Breen IV. This is not the Rocky film series. It appears that the time has come for this saga to end.