

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FREDERICK O. SILVER,
Plaintiff,

v.

HEATHER DYSTRUP-CHIANG, SCOTT
LESCHER, MICHAEL HUFFAKER,
PRIME NOW LLC,
Defendants.

Case No. 2:20-cv-01339-RAJ

**ORDER GRANTING MOTION
TO DISMISS**

I. INTRODUCTION

This matter comes before the Court on Defendants’ Motion to Dismiss Plaintiff’s Seconded Amended Complaint and for a Vexatious Litigant Order. Dkt. # 50. Plaintiff did not file a response. For the reasons below, Defendants’ motion to dismiss is **GRANTED.**

II. DISCUSSION

On September 8, 2020, Plaintiff Frederick O. Silver (“Plaintiff”), proceeding *pro se*, initiated this lawsuit against Defendants Heather Dystrup-Chiang, Scott Lescher, Michael Huffaker, and Prime Now LLC (collectively, “Defendants”) under the Fair Debt Collection Practices Act. Dkt. # 49. Plaintiff subsequently amended his complaint, Dkt. # 11, and Defendants moved to dismiss it. Dkt. # 17. On September 17, 2021, the Court granted Defendants’ motion and dismissed the claims, finding that Plaintiff’s First

1 Amended Complaint contained no factual allegations as required under Federal Rule of
2 Civil Procedure 8(a). Dkt. # 48. Several days later, Plaintiff filed a Second Amended
3 Complaint alleging facts related to the debt at issue. Dkt. # 49.

4 Defendants again moved to dismiss the claims and also requested a vexatious
5 litigant order requiring Plaintiff to obtain approval from the Court before filing any new
6 claims against Defendants. Dkt. # 50. Plaintiff did not timely respond to the motion.
7 After Defendants filed a reply noting Plaintiff's failure to respond, Plaintiff filed a one-
8 page statement noting that the Court "has not instructed [him] to file a response to the
9 [m]otion to dismiss." Dkt. # 52 at 1. Under Local Civil Rule 7(b)(2), "if a party fails to
10 file papers in opposition to a motion, such failure may be considered by the court as an
11 admission that the motion has merit." Local Rules W.D. Wash. 7(b)(2). Nevertheless,
12 the Court prefers to address the merits of the case in reaching a judgment.

13 The Court will address Defendants' motion to dismiss and request for a vexatious
14 litigant order in turn.

15 **A. Motion to Dismiss**

16 Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint
17 for failure to state a claim. The court must assume the truth of the complaint's factual
18 allegations and credit all reasonable inferences arising from those allegations. *Sanders v.*
19 *Brown*, 504 F.3d 903, 910 (9th Cir. 2007). A court "need not accept as true conclusory
20 allegations that are contradicted by documents referred to in the complaint." *Manzarek v.*
21 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Instead, the
22 plaintiff must point to factual allegations that "state a claim to relief that is plausible on
23 its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 568 (2007). The complaint avoids
24 dismissal if there is "any set of facts consistent with the allegations in the complaint" that
25 would entitle the plaintiff to relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 678
26 (2009).

27 In the Second Amended Complaint, Plaintiff alleges that he was contracted to

1 “perform labor functions” as a Prime Fresh Associate at a compensation rate of \$15 per
2 hour. Dkt. # 49 ¶ 11. Plaintiff alleges that Defendants deducted a total of \$417.81 from
3 his paycheck over two pay periods. *Id.* ¶¶ 12-13. After contacting Defendants’
4 payroll/human resources department to inquire about the deduction, Plaintiff was
5 informed that Defendants were collecting a debt on behalf of third-party collector Clark
6 County Nevada. *Id.* ¶ 14. Plaintiff identified the debt as a child support debt. *Id.* ¶ 16.

7 Based on these facts, Plaintiff alleges four claims: (1) violation of the Fair Debt
8 Collection Practices Act (“FDCPA”); (2) violation of the Texas Finance Code, or
9 specifically, the Texas Debt Collection Practices Act; (3) invasion of privacy; and (4)
10 “unreasonable collection efforts.” *Id.* ¶¶ 19–31.

11 In considering a claim under the FDCPA, a court must first determine “whether or
12 not the dispute involves a ‘debt’ within the meaning of the statute.” *Turner v. Cook*, 362
13 F.3d 1219, 1227 (9th Cir. 2004). Under the FDCPA, a “debt” is defined as “any
14 obligation or alleged obligation of a consumer to pay money arising out of a transaction
15 in which the money, property, insurance, or services which are the subject of the
16 transaction are primarily for personal, family, or household purposes.” 15 U.S.C.
17 § 1692a(5). Although the statute does not define “transaction,” it has been widely
18 interpreted by courts as limited “to those obligations to pay arising from consensual
19 transactions, where parties negotiate or contract for consumer-related goods or services.”
20 *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir.
21 1997).

22 Based on this interpretation, courts have held that an obligation to pay child
23 support does not constitute a “debt” under the FDCPA. *See e.g. Mabe v. G.C. Servs. Ltd.*
24 *P’ship*, 32 F.3d 86, 88 (4th Cir. 1994) (holding that “child support obligations . . . do not
25 qualify as ‘debts’ under the FDCPA because they were not incurred to receive consumer
26 goods or services”); *Campbell v. Baldwin*, 90 F. Supp. 2d 754, 757 (E.D. Tex. 2000)
27 (noting that “courts have been unanimous in holding that child support payments are not

1 a ‘debt’ covered by the [FDCPA]”); *Battye v. Child Support Servs., Inc.*, 873 F. Supp.
2 103, 105 (N.D. Ill. 1994) (holding that the child support obligations do not constitute
3 ‘debt’ under the FDCPA because they “were not incurred as a ‘consumer,’ nor do they
4 arise out of a ‘transaction’ in which [the plaintiff] obtained credit in order to pay for
5 personal goods or services”); *Brown v. Child Support Advocs.*, 878 F. Supp. 1451, 1454
6 (D. Utah 1994) (holding that “child support payments are not “debts” within the meaning
7 of the [FDCPA]”). Because Plaintiff’s debt is based on his child support obligations, his
8 claim for protection under the FDCPA fails.

9 His claim under the Texas Debt Collection Practices Act (“TDCPA”) fails for the
10 same reason. Similar to the limitations of the FDCPA, the TDCPA provides a narrow
11 definition of “consumer debt” as “an alleged obligation, primarily for personal, family, or
12 household purposes and arising from a transaction or alleged transaction.” *Matzen v.*
13 *McLane*, 604 S.W.3d 91, 106–07 (Tex. App. 2020). A “consumer” is defined as a
14 “claimant [who] sought or acquired goods or services by purchase or lease, and those
15 goods or services must form the basis of the complaint.” *Id.* at 106. Because a child
16 support obligation does not arise from a transaction involving the purchase or lease of
17 goods or service, Plaintiff’s claim does not fall within the ambit of the TDCPA. This
18 claim therefore fails.

19 With respect to Plaintiff’s claim of invasion of privacy, the Court finds that
20 Plaintiff has not pleaded factual allegations to plausibly support such a claim. Plaintiff
21 asserts that Defendants “[i]ntentionally intruded on Plaintiff’s solitude, seclusion, or
22 Private affairs, and as such intrusion [sic] would be highly offensive to a reasonable
23 person or a Consumer as defined [by the FDCPA].” This conclusory statement provides
24 no facts to support a claim. Dkt. # 49 ¶ 27. Similarly, Plaintiff fails to allege any facts to
25 support his claim for “unreasonable collection efforts.” Indeed, Plaintiff merely states
26 that Defendants deducted child support from two paychecks. He asserts no facts as to the
27 “unreasonability” of the collection efforts, nor does he plausibly allege that the child

1 support was wrongly deducted.

2 For the foregoing reasons, the Court **DISMISSES** all of Plaintiffs' claims.
3 Because the complaint "could not possibly be cured by the allegation of other facts," the
4 Court **GRANTS** the motion to dismiss with prejudice. *Lopez v. Smith*, 203 F.3d 1122,
5 1127 (9th Cir. 2000) (*en banc*) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.
6 1995)).

7 **B. Motion for Vexatious Litigant Order**

8 Defendants next move the Court to declare Plaintiff a vexatious litigant and enter
9 an order requiring Plaintiff to obtain leave from the Court before filing any new claims
10 against Defendants. Dkt. # 50 at 10. Defendants point to three prior actions filed by
11 Plaintiff—asserting similar claims based on Plaintiff's child support obligations in district
12 courts in Texas and Nevada—in support of their motion. Dkt. # 50 at 6-7. As described
13 below, each of the actions was found to be meritless and all claims were dismissed.

14 In *Silver v. Toyota Motor Manufacturing, Texas, Inc.*, Plaintiff had alleged that the
15 defendant, his prior employer, had been improperly deducting unauthorized amounts in
16 violation of the Fair Labor Standards Act, the Texas Labor Code, and the Employee
17 Retirement Income Security Act. No. SA-19-MC-01397-DAE, 2020 WL 734481 *2
18 (W.D. Tex. Feb. 13, 2020). The court concluded that the claims had no merit, finding no
19 legal basis for Plaintiff to challenge his deductions, which included income-tax
20 deductions, child support payments and related wage garnishment fees. *Id.* The court
21 also noted Plaintiff's litigious history and prior classification as a vexatious litigant:

22 On April 18, 2019, Plaintiff was enjoined from filing any civil lawsuit in the San
23 Antonio Division of the United States District Court for the Western District of
24 Texas without first seeking leave and obtaining permission from a district judge in
25 this district. *Silver v. Bemporad*, No. 5:19-cv-284-XR [#15]. This Court entered
26 the prefiling injunction upon the classification of Plaintiff as a vexatious litigant,
27 noting that he has filed numerous cases in the past few years, all of which have
28 been dismissed at the pleadings stage and that, in each case, Plaintiff engaged in
frivolous motion practice. *Id.* Plaintiff was warned that further frivolous filings or
motions could result in the imposition of monetary sanctions. *Id.* Plaintiff has

1 attempted to file a number of additional lawsuits since the imposition of the
2 injunction.

3 *Id.* at *1.

4 In *Silver v. Clark County Nevada*, Plaintiff alleged that the defendants, including a
5 county judge, district attorney, and family court hearing master, had violated his rights by
6 forcing him to pay child support. No. 220CV00682GMNVCF, 2020 WL 2199611, at *2
7 (D. Nev. May 6, 2020). The court dismissed the complaint and entered an order deeming
8 Plaintiff a vexatious litigant who could not file any additional actions in the District of
9 Nevada without first seeking leave of the court. *Id.* at *5. The court noted that the action
10 before it was “not the first time [Plaintiff] has filed a frivolous lawsuit that this Court
11 dismissed regarding his child support obligations against many of the same defendants.”

12 *Id.* Indeed, the court explained, Plaintiff “has a history of filing pro se vexatious and
13 duplicative lawsuits. [Plaintiff] does not have a good faith motive in pursuing frivolous
14 litigation and he has abused the judicial process by filing lawsuits that he knows will be
15 dismissed.” *Id.* at *4.

16 In *Silver v. Clark County, Nevada*, a different case filed in the same court, Plaintiff
17 asserted the same claims as those before this Court: violations of the FDCPA, the Texas
18 Finance Code, and “unreasonable collection efforts” based on defendants’ collection of
19 child support debt. No. 219CV00032APGBNW, 2021 WL 3671183, at *1 (D. Nev. Aug.
20 17, 2021). In its order dismissing Plaintiff’s claims, the court noted that Plaintiff “has
21 been told previously in another case in this district asserting similar claims [that] a child
22 support order is not a ‘debt’ within the FDCPA’s meaning.” *Id.* at *2.

23 With respect to the action before this Court, Plaintiff has filed numerous motions,
24 including three separate motions seeking sanctions from Defendants and their counsel,
25 Dkt. ## 21, 28, & 30, a motion requesting recusal from the undersigned, Dkt. # 35, and a
26 motion seeking to depose Defendants’ counsel and have them served subpoenas by U.S.
27 Marshal. Dkt. # 42. The Court denied all motions for sanctions. The Chief Judge denied
28 the motion for recusal, concluding that Plaintiff failed to provide “any reasonable basis”

1 for recusal. Dkt. # 46 at 2.

2 District courts have “the inherent power to enter pre-filing orders against
3 vexatious litigants.” *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir.
4 2007) (citing 28 U.S.C. § 1651(a)). The Ninth Circuit has outlined four factors for
5 district courts to consider before entering pre-filing orders: (1) the litigant must be given
6 notice and a chance to be heard before the order is entered; (2) the district court must
7 compile “an adequate record for review”; (3) the district court “must make substantive
8 findings about the frivolous or harassing nature of the plaintiff’s litigation”; and (4) a
9 vexatious litigant order “must be narrowly tailored to closely fit the specific vice
10 encountered.” *Id.* Having considered each factor, the Court deems Plaintiff a vexatious
11 litigant and orders that he may not file any additional motions, pleadings, or materials
12 against Defendants without leave of the Court.

13 First, the Court finds that Plaintiff had “fair notice of the possibility that he might
14 be declared a vexatious litigant and have a pre-filing order entered against him” because
15 he received Defendants’ motion requesting as much. *Id.* at 1059; Dkt. ## 50, 52.
16 Plaintiff had the opportunity to oppose¹ the motion but chose not to do so. Second, the
17 Court’s discussion of Plaintiff’s prior duplicative filings in other courts asserting the
18 same claims despite repeat dismissals provides an adequate record for review. Third,
19 Plaintiff’s litigation includes more than ten frivolous lawsuits filed across three districts
20 courts asserting similar claims. Plaintiff has filed duplicative, baseless motions in the
21 action before this Court. For these reasons, the Court finds that Plaintiff has engaged in
22 frivolous and harassing motions practice. Fourth, the Court’s order is narrowly tailored
23 to address Plaintiff’s demonstrated pattern of filing of duplicative, frivolous actions. He

24 ¹ The Court need not conduct an oral hearing to provide Plaintiff a chance to be heard.”
25 *See Pac. Harbor Cap., Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir.
26 2000) (holding that “an opportunity to be heard does not require an oral or evidentiary
27 hearing on the issue . . . [and that] [t]he opportunity to brief the issue fully satisfies due
process requirements”).

1 is not barred from seeking relief from this Court; he is only barred from wasting judicial
2 resources by filing frivolous, duplicative, and harassing pleadings.

3 **III. CONCLUSION**

4 For the reasons stated above, the Court **GRANTS** Defendants' Motion to Dismiss
5 with prejudice. Dkt. # 50. The Court **GRANTS** Defendants' request for entry of a
6 vexatious litigant order. *Id.* It is hereby **ORDERED** that Plaintiff Frederick O. Silver
7 may not file any additional pleadings, motions, or other materials against Defendants
8 Heather Dystrup-Chiang, Scott Lescher, Michael Huffaker, and Prime Now LLC, or any
9 corporate parent, subsidiary, or affiliate of Prime Now LLC without permission of the
10 Court. All other pending motions are **DENIED** as moot. Dkt. ## 39, 42.

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12 DATED this 11th day of March, 2022.

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15 The Honorable Richard A. Jones
16 United States District Judge
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