

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEC 8 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ASHWIN KHOBRAGADE,

Plaintiff-Appellant,

v.

COVIDIEN LP, a Delaware limited
partnership,

Defendant-Appellee.

No. 19-55498

D.C. No. 3:16-cv-00468-WQH-
AGS

Southern District of California,
San Diego

ORDER

Before: TASHIMA, SILVERMAN, and OWENS, Circuit Judges.

Khobragade's motion for ruling (Docket Entry No. 42) is denied.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Khobragade's petition for rehearing en banc (Docket Entry No. 43) is denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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SEP 15 2020

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AGS

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted September 8, 2020**

Before: TASHIMA, SILVERMAN, and OWENS, Circuit Judges.

Ashwin Khobragade appeals pro se from the district court's summary judgment in his action alleging federal and state law claims arising out of defendant's termination of his employment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Living Designs, Inc. v. E.I. Dupont de Nemours &*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Co., 431 F.3d 353, 360 (9th Cir. 2005). We affirm.

Because Khobragade failed to oppose defendant's motion for summary judgment, he has waived any challenge to the district court's summary judgment. *See Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (plaintiff waived challenge to claims that were not raised in opposition to defendant's motion for summary judgment); *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1141 n.6 (9th Cir. 1999) (failure to raise issue at summary judgment waives right to raise issue on appeal).

The district court did not abuse its discretion in denying Khobragade's motions for a further extension of time to file a summary judgment opposition, after previously granting him multiple extensions of time, because Khobragade failed to demonstrate good cause or excusable neglect. *See Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258-60 (9th Cir. 2010) (setting forth standard of review and discussing good cause or excusable neglect requirement for extensions of time).

The district court did not abuse its discretion in denying Khobragade's motions to reopen discovery, for sanctions, for reconstruction of electronic data, and for a protective order because Khobragade presented no basis for the requested discovery or sanctions. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (setting forth the standard of review and noting that a district court

has broad discretion in controlling discovery); *see also Ingenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803, 821 (9th Cir. 2019) (explaining that a district court has wide latitude regarding discovery sanctions).

The district court did not abuse its discretion by denying Khobragade's post-judgment motion for reconsideration because Khobragade failed to demonstrate any basis for relief from the judgment. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for relief under Federal Rules of Civil Procedure 59 and 60).

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

We reject as unsupported by the record Khobragade's contention that the district court did not address his last motion for an extension of time to file a summary judgment opposition.

Khobragade's motion for a ninth extension of time to file a reply brief (Docket Entry No. 37) is denied.

Khobragade's request for reconsideration of this court's August 29, 2019 order denying his motion for sanctions, set forth in the opening brief, is denied.

AFFIRMED.

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FEB 15 2019

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *JK* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ASHWIN KHOBRAGADE, an
individual,

Plaintiff,

v.

COVIDIEN LP, a Delaware
limited partnership,

Defendant.

Case No.: 16cv468

ORDER

HAYES, Judge:

The matters before the Court are the Motion for Summary Judgment filed by Defendant Covidien LP (ECF No. 45), the Motion for Leave to Amend the Complaint filed by Plaintiff Ashwin Khobragade (ECF No. 108), the Motion for Sanctions filed by Plaintiff (ECF No. 122), and the Motion to Declare Plaintiff a Vexatious Litigant filed by Defendant (ECF No. 124).

I. PLAINTIFF'S COMPLAINT

On February 19, 2016, Plaintiff initiated this action by filing a Complaint. (ECF No.

1). Plaintiff brings claims against Defendant Covidien LP for breach of contract; violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c)-(d) based on extortion under § 1961(1), fraud in foreign labor contracting under 18 U.S.C.

1 § 1351(a), and fraud and misuse of immigration documents under 18 U.S.C. § 1546;
 2 promissory estoppel; violation of the California Whistleblower Protection Act (CWPA),
 3 Cal. Lab. Code § 1102.5; intentional infliction of emotional distress (IIED); negligent
 4 infliction of emotional distress (NIED); and fraud. Plaintiff proceeds pro se.

5 Plaintiff alleges that in June 2011, he “was asked to relocate to San Diego” and “told
 6 by his manager that he would definitely receive a raise.” (ECF No. 1 ¶¶ 11, 13). Plaintiff
 7 alleges that in August 2011, he followed instructions to travel to San Diego to find housing,
 8 during which a manager pointed out Covidien offices and told Plaintiff he would receive a
 9 raise for the cost of housing. (ECF No. 1 ¶¶ 14–18). The Complaint alleges that Plaintiff
 10 relocated in September 2011, and “never worked in San Diego, CA” because he was
 11 “temporarily” assigned to “Covidien’s facilities in Tijuana, Mexico” shortly after
 12 relocating. *Id.* ¶¶ 20–21, 26. Plaintiff alleges he repeatedly requested the raise and office
 13 space he had been promised. *Id.* ¶¶ 25, 35. Plaintiff alleges he crossed the border to Tijuana
 14 on foot every day, a “lengthy” process causing Plaintiff to feel unsafe and to experience
 15 “stress and mental anguish.” *Id.* at 4–5.

16 Plaintiff alleges that Covidien applied for an extension of his H1-B visa in April
 17 2012, and that the documents indicated Plaintiff was employed in Massachusetts where the
 18 prevailing wage was significantly less than the San Diego prevailing wage. *Id.* ¶¶ 29–33.
 19 Plaintiff alleges that in April 2012, his visa was extended to August 2015. *Id.* ¶ 34. Plaintiff
 20 alleges that he was told, “[d]uring a conference call with a company attorney,” that his
 21 “employment was at will and could be terminated at any time” and that he “would not be
 22 receiving a pay increase.” *Id.* ¶ 36. Plaintiff alleges “[i]n July 2012, Covidien amended
 23 Plaintiff’s status with USCIS” to indicate Plaintiff was working in San Diego, but that
 24 Plaintiff was “still working in Mexico.” *Id.* ¶ 37. Plaintiff alleges that “[i]n September
 25 2012, Plaintiff was fined for insubordination,” was “placed under a performance
 26 improvement plan that would require him to meet impossible goals,” and was “given
 27 several ‘not able to meet the mark’ letters.” *Id.* ¶¶ 38–40. Plaintiff alleges that he was
 28 “repeatedly harassed with questions and comments trying to induce him to move to

1 Mexico" and that Plaintiff "was directly threatened and intimidated with deportation if he
2 continued to ask for a pay raise and promotion." *Id.* ¶¶ 41–42. Plaintiff alleges that he
3 moved to New Jersey in summer of 2013, and that he was "apprised of Defendant's
4 fraudulent misrepresentations to USCIS" in 2015 when he "finally gained access to his
5 immigration information." *Id.*

6 Plaintiff alleges "lost income" and "severe mental, emotional, physical, and
7 emotional distress, and other damages." *Id.* at 8–9, 10–14. Plaintiff seeks "an Order
8 enjoining Defendant, its officers, agents, employees, and those acting in concert or
9 conspiracy with them, temporarily during the pendency of this action and permanently
10 thereafter from and further violation of 18 U.S.C. §§ 1961 et seq.;" compensatory damages;
11 treble damages and attorneys' fees under 18 U.S.C. § 1964; "punitive and exemplary
12 damages pursuant to Cal. Civil Code § 3294 or as otherwise provided by law"; "civil
13 penalties of up to \$10,000 for each violation" of CWPA; "costs of suit"; prejudgment and
14 postjudgment interest; and "other and further relief as the Court deems just and proper."
15 *Id.* at 14–15.

16 II. DEFENDANT'S EVIDENCE

17 On April 27, 2009, Defendant wrote to Plaintiff offering "the position of R&D
18 engineer . . . in Massachusetts at our Chicopee location." (Ex. 4 to Khobragade Dep., ECF
19 45-4 at 102). The letter states,

20 Your starting salary will be \$2,884.62 bi-weekly, \$75,000 annualized. . . . You
21 will be eligible to participate in the Annual Incentive Plan in FY 2009, which
22 . . . will provide you with a target bonus of 5% percent of your base salary for
23 100 percent achievement of specified company financial performance
24 objectives and individual objectives

25 We both recognize that your employment is at will and that either party at its
26 discretion may terminate this employment arrangement at any time, with or
27 without cause. We also recognized that this offer letter is not meant to be a
28 contract of employment. Please indicate your understanding and acceptance
of this offer by signing below and returning the original to me for our files by
April 30, 2009.

1 *Id.* at 102–03. The letter shows Plaintiff's signature, dated May 1, 2009. *Id.* at 103.
2 Plaintiff alleges that he began to work for Defendant in Massachusetts in June of 2009.
3 (Compl. ¶ 10; ECF No. 1). On May 14, 2009, Defendant wrote to the U.S. Department of
4 Homeland Security, “on behalf of Mr. Ashwin Khobragade . . . so that he may serve our
5 company as a Senior Research Engineer at our Chicopee, Massachusetts facility.” (Ex. 5
6 to Khobragade Dep., ECF No. 45-4 at 105). The letter states,

7 His compensation in this capacity will be \$75,000 annually, plus standard
8 corporate benefits. . . . This letter has been prepared in support of Mr.
9 Khobragade's nonimmigrant petition only, and it is not intended nor should it
be construed as a contract for employment.

10 *Id.* On August 12, 2009, the Department of Homeland Security issued an approval notice
11 of a valid H1B visa for Plaintiff. (Ex. 6 to Khobragade Dep., ECF No. 45-4 at 114).

12 On March 10, 2011, Anabel Paulino of EY Mexico sent Plaintiff an email stating,
13 “We have recently received a request to assist you with your Mexican immigration needs.
14 I am the Global Immigration Coordinator for Covidien that will be overseeing your
15 immigration process.” (Ex. 7 to Khobragade Dep., ECF No. 45-4 at 117). On March 16,
16 2011, Plaintiff responded:

17 Please find attached my job description and Scanned University Degree along
18 with this email. I plan on commuting to Covidien Plant located to Tijuana,
19 Mexico for work daily (7am to 5pm) and return back to my residence in San
Diego after work.

20 *Id.*¹

21 In July or August of 2011, Plaintiff traveled to San Diego, California, and Tijuana,
22 Mexico for “show and tell . . . the driver . . . circle[d] around, showed us the -- that there is
23 a Covidient plant.” (Khobragade Dep. 140:14, 21–23, 143:9–14).

24 Defendant “initially listed the incorrect address for ‘place of employment’ on
25 Plaintiff’s Labor Condition Application.” Def.’s Separate Statement of Undisputed Facts
26

27
28 ¹ This Order reflects original spelling and grammar unless otherwise noted.

¶ 20, ECF No. 45-2; *see also* Khobragade Dep. 164:8–25 (“Q: [T]his is an amended petition. . . . [T]hat’s the correct place of employment, right, Chicopee? A: At this time, July 18, 2012, I was working in Mexico, not in Chicopee, Massachusetts. . . . And I never had any projects in Chicopee, Massachusetts, while I was working in Tijuana.”). *But see*

Def.’s Separate Statement of Undisputed Facts ¶ 21, ECF No. 45-2 (“Covidien amended its LCA petition to reflect the correct place of employment.”).

On September 26, 2012, Plaintiff met with his manager regarding a performance improvement plan. (Khobragade Dep. 181:1–11, ECF No. 45-4). The progress report corresponding to this meeting states,

So far in FY 12 you have only completed two projects You have not added any new projects to supplement for the losses due to project delays. We have discussed about this during the mid year evaluation, monthly one on one meetings and so far no progress has been made to fill the gaps. I have mentioned that projects like pouch material consolidation would help fill the gaps, but there has been lack of effort from you to pull projects ahead. I have brought up my concerns rega[rd]ing lack of communication and commitment from you during our one on one meetings and so far there has been no response from you. . . .

You have missed all your project deadlines and commitments. The two projects that were completed . . . were delayed and you haven’t managed your teams effectively to establish any contingency plans. There were multiple revisions made to the originally established timelines on these projects and those commitments have been missed too. You have not demonstrated adequate knowledge of status of the projects, expected savings, key milestones when discussed during our update meetings. . . .

On multiple occasions you have not worked collaboratively with the support groups to overcome roadblocks. The plant and other team members have to ask for an update on the projects all the time. You have not proactively provided any update. The Yaunkeaur regrind project was delayed and you have not responded to the requests from the team members and provided them necessary updates. The sure grip project that is currently in progress has also not received any updates and the committed deadline has been missed.

(Ex. 13 to Khobragade Dep., ECF No. 45-4 at 121–23). A progress report corresponding to a meeting date of October 10, 2012 is substantially similar. (Ex. 14 to Khobragade Dep., ECF No. 45-4 at 125–27). Between October 25, 2012 and November 19, 2012, Plaintiff

1 exchanged emails with his supervisor and Defendant's HR Programs Representative. (Ex.
2 16 to Khobragade Dep., ECF No. 45-4 at 129–33). In the emails, Plaintiff states that he is
3 "not feeling well" and "terribly sick." *Id.* Plaintiff's supervisor and the HR Programs
4 Representative request that Plaintiff provide a doctor's note upon his return and initiate a
5 short term disability claim. *Id.* On November 15, 2012, the HR Programs Representative
6 wrote:

7 I want to let you know that because you are on an unapproved leave of
8 absence, we will begin to withhold your pay starting on Monday, 11/19/12.
9 Please let me know your expected return to work date today. . . .

10 After you are out for five or more days, you need to call Aetna . . . and initiate
11 a short-term disability claim. Since you have been out for three weeks now
you should have already called Aetna and began the process of getting your
leave approved.

12 *Id.* at 129. Plaintiff's employment with Defendant was terminated on February 19, 2013.

13 Ex. 36 to Khobragade Dep., ECF No. 45-4 at 135; *see also* ECF 1 ¶ 43. The termination
14 letter states,

15 This action is being taken as a result of unapproved, unsubstantiated absences
16 from work and your ongoing disregard of directions of management.

17 Despite numerous requests to obtain verification of absences you have failed
18 to provide substantiation of your need to be out of the office for:

19 December 10, 2012 through December 18, 2012

20 December 27, 2012 through January 6, 2013

21 February 7, 2013 through February 12, 2013

22 As stated in the letter to you dated January 18, 2013, even if you returned to
23 work, we would still need to substantiate all previous leave periods, as you
24 had not done so. Also, it was made clear that you would not be entitled to any
25 further time off. As the above information shows, you have not been able to
26 substantiate all of your time off, and you incurred further unexcused absence
following your return to work.

27 In addition your lack of cooperation in the efforts to obtain information related
28 to your absences and in the request of work activities does not meet the level
of acceptable behavior that is expected of our employees.

29 Your termination is effective immediately.

30 (Ex. 36 to Khobragade Dep., ECF No. 45-4 at 135).

1 On February 9, 2018, Plaintiff was deposed. Plaintiff stated that when he was
2 working in Mexico, he asked his manager “at least 20 times,” “if I am going to get a salary
3 increase.” (Khobragade Dep. 91:6–8, 16). Plaintiff stated that before he was terminated,
4 “discussions would come up” with his managers regarding his objections to working in
5 Mexico. (Khobragade Dep. 127:1–3). Plaintiff stated confirmed that his objections to
6 working in Mexico were his salary, “the distance between where [he] w[as] living and the
7 border, the risk that somebody would put something in [his] car and jeopardize [his] visa
8 status, the fact that a Mexican employee [was] hired to work and he was not helpful to
9 [Plaintiff], and then the rumors and press that [Plaintiff] had heard about dangerous
10 conditions in Mexico.” (Khobragade Dep. 128:13–19).

11 Plaintiff was asked, “Have you ever reported to somebody outside of Covidien that
12 you believe Covidien broke the law?” (Khobragade Dep. 320:7–8). Plaintiff responded “I
13 had complained to EEOC, uh, WHD, OSC, USCIS, EEOC, Department of Labor.” *Id.* at
14 320:11–12. Plaintiff responded to additional questions as follows:

15 Q: Any other reports that you made outside of Covidien that you believe
16 Covidien broke the law?

17 A: Uh, all the agencies I have reported them to. The one I can find, because I
18 was told I need to get authority to sue or the right to sue letter from these
19 agencies before I can file a lawsuit.

20 Q: And all these reports that you --

21 A: Oh, DFEH and FM -- Fair Employment and Housing Commission.

22 Q: And all of these reports that you have just been recounting, those were all
23 post-termination; right?

24 A: Correct.

25 Q: And did you make any reports to anyone outside of Covidien that you
26 believed Covidien had broken the law during your employment?

27 A: No.

28 Q: So during the course of your employment, you never reported that you
thought Covidien had broken the law?

29 A: Correct. I was not aware if there is such a thing where I can complain to
30 agencies, and they would evaluate. I thought that lawyers are my only option
31 if something is wrong with my employment.

32 Q: Did you report to anyone inside or outside of Covidien, during your
33 employment, that you thought Covidien had broken the law?

1 A: During the time of employment, no.
2

3 *Id.* at 320:21–25 to 321:1–23.
4

5 **III. PROCEDURAL BACKGROUND**

6 On May 18, 2018, Defendant filed a motion for summary judgment which was
7 originally set for hearing on June 18, 2018. (ECF No. 45). The initial deadline for Plaintiff
8 to file a response in opposition was June 4, 2018. On June 4, 2018, the Court issued an
9 Order allowing Plaintiff's attorney to withdraw as counsel and allowing Plaintiff to proceed
10 pro se. The Court further granted Plaintiff a twenty-eight-day extension of time to oppose
11 Defendant's motion for summary judgment. (ECF No. 53).

12 On June 29, 2018, the Court granted (ECF No. 56) Plaintiff's second Motion to
13 Enlarge Time (ECF No. 55) to oppose summary judgment, until July 31, 2018.

14 On July 31, 2018, the Court granted (ECF No. 72) Plaintiff's third request (ECF No.
15 64) to continue time to oppose summary judgment, until September 17, 2018.

16 On August 24, 2018, Defendant filed a Motion to Continue pretrial and summary
17 judgment briefing dates, which Plaintiff opposed on the grounds that "it would be
18 counterproductive for [Plaintiff] to prohibit any longer than the time available." (ECF Nos.
19 75–76).

20 On August 28, 2018, the Court granted the Motion to Continue, stating the
21 opposition to summary judgment was due October 8, 2018. (ECF No. 77).

22 On September 21, 2018, Plaintiff filed a Motion to Reopen Discovery. (ECF No.
23 21). Discovery had closed on April 30, 2018 pursuant to the Court's January 31, 2018
24 Order. (ECF No. 24).

25 On October 4, 2018, the Magistrate Judge denied the Motion to Reopen Discovery,
26 stating that "Plaintiff has not demonstrated due diligence . . . in conducting discovery
27 before the summary judgment motion was made and in pursuing his motion to reopen
28 discovery thereafter"; that "prejudice exists to the Defendant who [h]as complied with the

1 deadlines"; and that there was "no good cause for plaintiff's motion to reopen discovery."
2 (ECF No. 93).

3 On October 9, 2018, Plaintiff filed a Motion to Reconsider reopening discovery.
4 (ECF No. 94). On October 11, 2018, Defendant filed a Reply (ECF No. 95) in support of
5 the Motion for Summary Judgment. On October 12, 2018, the Magistrate Judge denied
6 the Motion to Reconsider, stating that Plaintiff "cannot rely on his pro se status as an excuse
7 for his failure to propound his own discovery in this case . . . [Plaintiff] fails to demonstrate
8 any error[,] mistake[,] . . . new law or facts justifying reconsideration." (ECF No. 98).

9 On October 17, 2018, Plaintiff filed a second Motion to reconsider reopening
10 discovery. (ECF No. 100). On October 18, 2018, the Magistrate Judge denied the second
11 Motion to reconsider, stating, "Plaintiff presents no new evidence that would warrant
12 reconsideration." (ECF No. 103).

13 On October 30, 2018, Plaintiff filed a Motion to Amend the Complaint. (ECF No.
14 108). On November 5, 2018, Plaintiff filed a fourth Motion to Extend Time to oppose
15 summary judgment. (ECF No. 113). On November 20, 2018, the Court granted the fourth
16 Motion to Extend Time to oppose summary judgment, until December 20, 2018. (ECF
17 No. 118).

18 On November 9, 2018, Defendant filed a Response (ECF No. 116) in opposition to
19 Plaintiff's Motion to Amend the Complaint. On November 26, 2018, Plaintiff filed a Reply
20 (ECF No. 119) in support of his Motion to Amend the Complaint.

21 On December 14, 2018, Plaintiff filed a fifth Motion to Extend Time to oppose
22 summary judgment. (ECF No. 120). On December 18, 2018, the Court granted the fifth
23 Motion to Extend Time to oppose summary judgment, until January 17, 2019. (ECF No.
24 121). The Court stated that further extensions would not be considered "absent a
25 substantive showing of good cause and excusable neglect." *Id.* at 4.

26 On December 26, 2018, Plaintiff filed an Ex Parte Motion for Sanctions, stating, "I
27 suffered one temporary injury to my top of the eye and lower lip without any stitches in
28 NJ. . . . My left shoulder had been injured in New York City, New York, while unconscious.

1 . . . Someone while on the train came and hit the left temple of my head my shoulder very
2 badly causing huge pain and discomfort 8/8/2018 while on train. . . . [O]n 12/13/2018 a
3 between 3:30am and 6:30am on train #725 on gold line towards union station, such as
4 getting hurt in right shoulder in the month of November 2018.” (ECF No. 122 at 8, 11–
5 13).

6 On January 8, 2019, Defendant filed a Response (ECF No. 123) in opposition to
7 Plaintiff’s Motion for Sanctions.

8 On January 11, 2019, Plaintiff filed a sixth Motion to Extend Time to oppose
9 summary judgment. (ECF No. 126).

10 On January 14, 2019, Defendant filed a Motion to Declare Plaintiff a Vexatious
11 Litigant. (ECF No. 124).

12 On January 15, 2019, the Court denied the sixth Motion to Extend Time to oppose
13 summary judgment, stating that “Plaintiff shall file any response in opposition to the
14 Motion for Summary Judgment (ECF No. 45) on or before January 30, 2019.” (ECF No.
15 127).

16 On January 18, 2019, Plaintiff filed a Response (ECF No. 128) in opposition to
17 Defendant’s Motion to Declare Plaintiff a Vexatious Litigant, and a Reply (ECF No. 129)
18 in support of Plaintiff’s Motion for Sanctions.

19 On January 24, 2019, Plaintiff filed a seventh Motion to Extend Time to oppose
20 summary judgment. (ECF No. 131).

21 On January 25, 2019, Defendant filed a Reply (ECF No. 133) in support of the
22 Motion to Declare Plaintiff a Vexatious Litigant.

23 On January 28, 2018, the Court denied the seventh Motion to Extend Time to oppose
24 summary judgment, “find[ing] that Plaintiff has failed to demonstrate “excusable neglect,”
25 and stating, “The discovery matters Plaintiff raises have been addressed. There is no
26 evidence that Plaintiff has been denied any discovery to which he was entitled. Plaintiff
27 has had over seven additional months to prepare his opposition. The Court finds that
28 further delay would result in prejudice to the Defendant and to the efficient administration

1 of justice. . . . Plaintiff shall file any response in opposition to the Motion for Summary
 2 Judgment (ECF No. 45) on or before January 30, 2019.” (ECF No. 135). The record
 3 reflects that no response in opposition to the Motion for Summary Judgment has been filed.

4 **IV. MOTION FOR SUMMARY JUDGMENT**

5 **A. Legal Standard**

6 “A party may move for summary judgment, identifying each claim or defense—or
 7 the part of each claim or defense—on which summary judgment is sought. The court shall
 8 grant summary judgment if the movant shows that there is no genuine dispute as to any
 9 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
 10 56(a). *Id.* A material fact is relevant to an element of a claim or defense and whose
 11 existence might affect the outcome of the suit. *See Matsushita Elec. Indus. Co., Ltd. v.*
 12 *Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). The materiality of a fact is determined
 13 by the substantive law governing the claim or defense. *See Anderson v. Liberty Lobby,*
 14 *Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986).

15 The party moving for summary judgment “bears the burden of establishing the basis
 16 for its motion and identifying evidence that demonstrates the absence of a genuine issue of
 17 material fact.” *Davis v. United States*, 854 F.3d 594, 598 (9th Cir. 2017) (citing *Celotex*,
 18 477 U.S. at 323); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). The
 19 movant “has no burden to negate or disprove matters on which the non-moving party will
 20 have the burden of proof at trial,” and may instead “point out . . . an absence of evidence
 21 to support the non-moving party’s case.” *Sluimer v. Verity, Inc.*, 606 F.3d 584, 586 (9th
 22 Cir. 2010) (citing *Celotex*, 477 U.S. at 325). “[A]fter . . . the moving party[] satisfie[s] its
 23 initial burden by presenting evidence that demonstrated the absence of any genuine issue
 24 of material fact,” the burden shifts to the nonmovant “to set forth evidence raising a
 25 disputed issue of material fact.” *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035
 26 (9th Cir. 2007); *see Anderson*, 477 U.S. at 256.

27 The nonmovant “defeat[s] summary judgment” by putting forth “evidence such that
 28 a reasonable juror drawing all inferences in favor of the [nonmovant] could return a verdict

1 in the [nonmovant's] favor." *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017)
 2 (quotation omitted); *see Anderson*, 477 U.S. at 255. "[A] plaintiff must set forth non-
 3 speculative evidence of specific facts, not sweeping conclusory allegations." *Cafasso, U.S.*
 4 *ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011); *see Anderson*,
 5 477 U.S. at 256. Courts "generally may not disregard direct evidence on the basis that it
 6 is implausible or incredible." *Burchett v. Bromps*, 466 F. App'x 605, 606 (9th Cir. 2012)
 7 (first citing *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th
 8 Cir. 1987); then citing *McLaughlin v. Liu*, 849 F.2d 1205, 1207–08 (9th Cir. 1988)).

9 Motions for summary judgment cannot be granted "by default," "even if there is a
 10 complete failure to respond to the motion." *Heinemann v. Satterberg*, 731 F.3d 914, 917
 11 (2013) (quotation omitted). Rather, an "opposing party's failure to respond to a fact
 12 asserted" in a motion for summary judgment "permits a court to consider the fact
 13 undisputed." *Id.* (quoting Fed. R. Civ. P. 56(e)(2)) (internal quotation marks omitted).
 14 District courts must "assess whether 'the motion and supporting materials' entitle the
 15 movant to summary judgment." *Id.* (quoting Fed. R. Civ. P. 56(e)(3)). "A district court
 16 does not have a duty to search for evidence that would create a factual dispute. . . . A district
 17 court lacks the power to act as a party's lawyer, even for pro se litigants." *Bias v.*
 18 *Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007) (rejecting the argument "that as a pro se
 19 litigant the district court should have searched the entire record to discover whether there
 20 was any evidence that supports her claims").

21 **B. Discussion**

22 **1. Breach of Contract and Promissory Estoppel**

23 Defendant contends that Plaintiff's breach of contract claim fails because it is time
 24 barred. (ECF No. 45 at 2). Defendant further contends that the breach of contract claim
 25 fails because Plaintiff cannot show the existence of a contract, and Plaintiff was an at-will
 26 employee who ratified his employment conditions. Defendant contends that Plaintiff's
 27 promissory estoppel claim fails because it is time barred. Defendant further contends that
 28 the breach of contract claim fails because Plaintiff cannot establish a clear and

1 unambiguous promise, and Plaintiff cannot show that he reasonably and foreseeably relied
 2 on any such promise.

3 “Under basic contract law ‘[a]n offer must be sufficiently definite, or must call for
 4 such definite terms in the acceptance that the performance promised is reasonably certain.’
 5 . . . To be enforceable, a promise must be definite enough that a court can determine the
 6 scope of the duty and the limits of performance must be sufficiently defined to provide a
 7 rational basis for the assessment of damages.” *Ladas v. Cal. State Auto. Ass’n*, 23 Cal.
 8 Rptr. 2d 810, 814 (Ct. App. 1993). “[P]romises to pay salary increases or bonuses which
 9 are ‘appropriate’ to [the] responsibilities and performance” of the employee “are simply
 10 too vague and indefinite to be enforceable,” and “are not capable of enforcement in a court
 11 of law.” *Rochlis v. Walt Disney Co.*, 23 Cal. Rptr. 2d 793, 799, *as modified* (Ct. App. Oct.
 12 6, 1993), *disapproved of on other grounds by Turner v. Anheuser-Busch, Inc.*, 876 P.2d
 13 1022, 1029 (1994) (disapproving a line of cases allowing constructive discharge claims to
 14 be based on “mere constructive knowledge of the intolerable conditions leading to the
 15 employee’s resignation”). In the employment context, “an at-will employment may be
 16 terminated at any time, an at-will employee may be demoted at any time,” and “[t]he at-
 17 will presumption . . . necessarily authorizes an employer to unilaterally alter the terms of
 18 employment, provided that the alteration does not violate a statute or breach an implied or
 19 express contractual agreement.” *Singh v. Southland Stone, U.S.A., Inc.*, 112 Cal. Rptr. 3d
 20 455, 471 (Ct. App. 2010). “An employee who continues in the employ of the employer
 21 after the employer has given notice of changed terms or conditions of employment has
 22 accepted the changed terms and conditions.” *Id.* at 471–72 (quotation omitted).

23 “Promissory estoppel is an equitable claim that substitutes reliance on a promise as
 24 a substitute for bargained-for consideration. . . . Promissory estoppel does not apply if the
 25 promisee gave actual consideration and, therefore, a cause of action for promissory
 26 estoppel is inconsistent with a cause of action for breach of contract based on the same
 27 facts.” *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 212 Cal.
 28 Rptr. 3d 216, 230 (Ct. App. 2016), *aff’d*, 413 P.3d 650 (Cal. 2018). “The elements of

1 promissory estoppel are (1) a promise, (2) the promisor should reasonably expect the
2 promise to induce action or forbearance on the part of the promisee or a third person, (3)
3 the promise induces action or forbearance by the promisee or a third person, and (4)
4 injustice can be avoided only by enforcement of the promise.” *Id.*

5 “[W]here the primary purpose of an equitable cause of action is to recover money
6 under a contract, the statute of limitations applicable to contract actions governs the
7 equitable claim. . . . [T]he two-year period of section 339, subdivision 1 (action on an
8 obligation not in writing) is applicable.” *Id.* at 229 n.5 (citing Cal. Civ. Proc. Code § 339).
9 “While resolution of the statute of limitations issue is normally a question of fact, where
10 the uncontradicted facts established through discovery are susceptible of only one
11 legitimate inference, summary judgment is proper.” *Romano v. Rockwell Int’l, Inc.*, 926
12 P.2d 1114, 1118 (Cal. 1996) (quotation omitted).

13 The evidence in the record shows that Plaintiff was terminated on February 19, 2013.
14 The record shows that Plaintiff was aware of his salary level and knew of the commute to
15 Tijuana before he was terminated. The record shows that the Complaint was filed on
16 February 19, 2016. The Court finds that Plaintiff’s breach of contract and promissory
17 estoppel claims are barred by the statute of limitations. The evidence in the record further
18 shows that Plaintiff knew he would be working in Tijuana before moving to San Diego.
19 The record contains evidence that Plaintiff was an at-will employee. The record contains
20 evidence that Plaintiff accepted the terms of employment with Defendant despite his
21 complaints. *See Singh*, 112 Cal. Rptr. 3d at 471 (“An employee who continues in the
22 employ of the employer after the employer has given notice of changed terms or conditions
23 of employment has accepted the changed terms and conditions.”). The record contains no
24 evidence to the contrary. The record contains no evidence that Defendant made a specific
25 promise regarding Plaintiff’s compensation. The Court concludes that the evidence is
26 inadequate to support Plaintiff’s breach of contract and promissory estoppel claims.
27 Defendant has carried its burden pursuant to Rule 56 “by presenting evidence that

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1 demonstrate[s] the absence of any genuine issue of material fact.” *See Horphag*, 475 F.3d
2 1035. Plaintiff must “set forth evidence raising a disputed issue of material fact.” *See id.*

3 Plaintiff did not file a response in opposition to the Motion for Summary Judgment.
4 The Court granted Plaintiff extensions of time, allowing him more than six additional
5 months to file a response.² The record does not contain “evidence such that a reasonable
6 juror drawing all inferences” in Plaintiff’s favor “could return a verdict” in his favor. *See*
7 *Zetwick*, 850 F.3d at 441. The Court concludes that Defendant is entitled to summary
8 judgment in its favor as to Plaintiff’s CWPA claim. *See Heinemann*, 731 F.3d at 917
9 (“[T]he motion and supporting materials’ entitle the movant to summary judgment.”).

10 **2. RICO**

11 Defendant contends that Plaintiff’s RICO claim fails because Plaintiff cannot show
12 that Defendant has associated with others to form an enterprise. Defendant further
13 contends that Plaintiff’s RICO claim fails because emotional distress damages are not
14 compensable under RICO.

15 RICO “provides for both criminal and civil liability.” *Odom v. Microsoft Corp.*, 486
16 F.3d 541, 545 (9th Cir. 2007) (citing Pub. L. No. 91-452, § 901, 84 Stat. 922 (1970)
17 (codified at 18 U.S.C. §§ 1961–1968)). “Subsections 1962(a) through (c) prohibit certain
18 ‘pattern[s] of racketeering activity’ in relation to an ‘enterprise.’” *United Bhd. of*
19 *Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep’t, AFL-CIO*, 770 F.3d 834, 837
20 (9th Cir. 2014). “The elements of a civil RICO claim are as follows: (1) conduct (2) of an
21 enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5)
22 causing injury to plaintiff’s business or property.” *Id.* at 837 (citation omitted). “[T]o
23 establish liability under § 1962(c) one must allege and prove the existence of two distinct
24 entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred
25 to by a different name. . . . [L]iability depends on showing that the defendants conducted

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28 ² Plaintiff’s Ex Parte Motion (ECF No. 137) to extend time to oppose summary judgment is denied for the
reasons stated at ECF No. 127 and ECF No. 135.

1 or participated in the conduct of the enterprise's affairs, not just their own affairs." *Cedric*
2 *Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161–63, (2001) (quotation omitted).

3 "To have standing under § 1964(c), a civil RICO plaintiff must show . . . that his
4 alleged harm qualifies as injury to his business or property . . ." *Canyon Cty. v. Syngenta*
5 *Seeds, Inc.*, 519 F.3d 969, 972 (9th Cir. 2008) (citations omitted). "[A]s a matter of law,
6 personal injury, including emotional distress, is not compensable under section 1964(c) of
7 RICO." *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990). A plaintiff "lacks
8 standing to sue under § 1962(c) [if] the injury he suffered was the result of his alleged
9 wrongful termination and was not caused by predicate RICO acts." *Reddy v. Litton Indus.,*
10 *Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cited with approval in Beck v. Prupis*, 529 U.S.
11 494, 500, 507 (2000) ("[A] person may not bring suit under § 1964(c) . . . for injuries
12 caused by an overt act that is not an act of racketeering or otherwise unlawful under the
13 statute.").

14 Pursuant to 18 U.S.C. § 1962(d), it is "unlawful for any person to conspire to violate
15 any of the provisions of subsection (a), (b), or (c) of this section." "Plaintiffs cannot claim
16 that a conspiracy to violate RICO existed if they do not adequately plead a substantive
17 violation of RICO." *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 559 (9th Cir. 2010)
18 (quotation omitted).

19 In this case, evidence in the record shows that Plaintiff was terminated from his
20 employment with Defendant. The record contains no evidence of an entity "distinct" from
21 Defendant. *See Cedric*, 533 U.S. at 161. The record contains no evidence that Defendant
22 "conducted or participated in the conduct of [an] enterprise's affairs, not just [its] own
23 affairs." *See id.* at 163. The record contains no evidence that Defendant engaged in
24 conduct causing physical injury to Plaintiff. *See Berg*, 915 F.2d at 464. The record
25 contains no evidence that Plaintiff's injuries were caused by a predicate RICO act as
26 opposed to Plaintiff's "alleged wrongful termination." *See Reddy*, 912 F.2d at 294.
27 Defendant has carried its burden pursuant to Rule 56 "by presenting evidence that
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1 demonstrate[s] the absence of any genuine issue of material fact." *See Horphag*, 475 F.3d
2 1035. Plaintiff must "set forth evidence raising a disputed issue of material fact." *See id.*

3 Plaintiff did not file a response in opposition to the Motion for Summary Judgment.
4 The record does not contain "evidence such that a reasonable juror drawing all inferences"
5 in Plaintiff's favor "could return a verdict" in his favor. *See Zetwick*, 850 F.3d at 441. The
6 Court concludes that Defendant is entitled to summary judgment in its favor as to Plaintiff's
7 substantive RICO claim. *See Heinemann*, 731 F.3d at 917 ("[T]he motion and supporting
8 materials' entitle the movant to summary judgment."). The Court further concludes that
9 Defendant is entitled to summary judgment in its favor as to Plaintiff's claim of conspiracy
10 to violate RICO. *See Sanford*, 625 F.3d at 559 (dismissing RICO conspiracy claim for lack
11 of a substantive RICO claim).

12 **3. California Whistleblower Protection Act**

13 Defendant contends that Plaintiff's California Whistleblower Protection Act
14 (CWPA) claim fails because Plaintiff cannot show he engaged in protected activity.
15 Defendant further contends that Plaintiff's CWPA claim fails because Plaintiff has no
16 evidence to dispute that Defendant lawfully terminated him.

17 "[U]nder section 1102.5(b), an employer may not retaliate against an employee for
18 disclosing information to a government or law enforcement agency that the employee
19 reasonably believes discloses a violation of, or noncompliance with, a state or federal
20 statute or regulation . . . [or] state or federal "rule." *Patten v. Grant Joint Union High Sch.*
21 *Dist.*, 37 Cal. Rptr. 3d 113, 116–17 (Ct. App. 2005) (citing Cal. Lab. Code § 1102.5). "[A]
22 section 1102.5(b) retaliation cause of action require[s] that . . . the plaintiff establish a
23 prima facie case of retaliation To do that, a plaintiff must show (1) she engaged in a
24 protected activity, (2) her employer subjected her to an adverse employment action, and
25 (3) there is a causal link between the two." *Id.* at 117. If the plaintiff meets this burden,
26 then the defendant must "provide a legitimate, nonretaliatory explanation for its acts," at
27 which point the plaintiff must show "this explanation is merely a pretext for the retaliation."
28 *Id.* at 117.

1 The evidence in the record shows no reports made by Plaintiff regarding unlawful
2 conduct by Defendant. The record contains evidence that Defendant terminated Plaintiff's
3 employment based on unauthorized, unexplained absences and unsatisfactory
4 performance. The record contains no evidence to the contrary. Defendant has carried its
5 burden pursuant to Rule 56 "by presenting evidence that demonstrate[s] the absence of any
6 genuine issue of material fact." *See Horphag*, 475 F.3d 1035. Plaintiff must "set forth
7 evidence raising a disputed issue of material fact." *See id.*

8 Plaintiff did not file a response in opposition to the Motion for Summary Judgment.
9 The Court concludes that Defendant is entitled to summary judgment in its favor as to
10 Plaintiff's CWPA claim. *See Heinemann*, 731 F.3d at 917 ("[T]he motion and supporting
11 materials' entitle the movant to summary judgment.").

12 **4. Intentional and Negligent Infliction of Emotional Distress**

13 Defendant contends that Plaintiff's claims for intentional infliction of emotional
14 distress (IIED) and negligent infliction of emotional distress (NIED) fail because they are
15 preempted by California Labor Code § 3601 and California's workers compensation
16 system. Defendant further contends that Plaintiff's IIED claim fails because Plaintiff
17 cannot prove that Defendant engaged in extreme and outrageous conduct, that Defendant
18 intended or recklessly disregarded the possibility of causing emotional distress, or that
19 Defendant actually and proximately caused Plaintiff severe or extreme emotional distress.
20 Defendant further contends that Plaintiff's NIED claim fails because it is based on
21 Defendant's inherently intentional supervisory employment conduct, which cannot support
22 a cause of action for negligence.

23 To recover for on a claim for IIED, a plaintiff must prove: "(1) extreme and
24 outrageous conduct by the defendant with the intention of causing, or reckless disregard of
25 the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme
26 emotional distress; and (3) actual and proximate causation of the emotional distress by the
27 defendant's outrageous conduct." *Hughes v. Pair*, 209 P.3d 963, 976 (Cal. 2009) (internal
28 quotations and citations omitted). Conduct is "outrageous" if it is "so extreme as to exceed

1 all bounds of that usually tolerated in a civilized community.” *Id.* at 975–76 (concluding
 2 the defendant’s vulgar, threatening, and inappropriate comments “f[e]ll far short of conduct
 3 that is so outrageous that it exceeds all bounds of that usually tolerated in a civilized
 4 community.”) (quotations omitted).

5 To recover on a claim for NIED, a plaintiff must prove “serious emotional distress”
 6 caused by “a breach of duty owed to the plaintiff that is ‘assumed by the defendant or
 7 imposed on the defendant as a matter of law, or that arises out of a relationship between
 8 the two.’” *Burgess v. Superior Court*, 831 P.2d 1197, 1201 (Cal. 1992) (quoting *Marlene*
 9 *F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 770 P.2d 278, 282 (Cal. 1989)). California
 10 courts have allowed NIED claims against a doctor who misdiagnosed the plaintiff’s wife
 11 with syphilis, *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821 (Cal. 1980); a hired
 12 therapist who sexually molested the plaintiff’s sons, *Marlene*, 770 P.2d at 282–83; and a
 13 crematorium that mishandled the remains of the plaintiffs’ close relative, *Christensen v.*
 14 *Superior Court*, 820 P.2d 181, 196–200 (Cal. 1991). “[U]nless the defendant has assumed
 15 a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is
 16 available only if the emotional distress arises out of the defendant’s breach of some other
 17 legal duty and the emotional distress is proximately caused by that breach of duty.” *Potter*
 18 *v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 807–08 (Cal. 1993).

19 “[C]laims for intentional or negligent infliction of emotional distress are preempted
 20 by the exclusivity provisions of the workers’ compensation law.” *Livitsanos v. Superior*
 21 *Court*, 828 P.2d 1195, 1197 (Cal. 1992). When “[t]he alleged wrongful conduct . . .
 22 occur[s] at the worksite, in the normal course of the employer-employee relationship . . .
 23 workers’ compensation is [the] exclusive remedy for any injury that may have resulted.”
 24 *Miklosy v. Regents of Univ. of Cal.*, 188 P.3d 629, 645 (Cal. 2008), superseded on other
 25 grounds by Act of July 15, 2010, 2010 Cal. Legis. Serv. Ch. 104. “[W]hen the misconduct
 26 attributed to the employer is . . . a normal part of the employment relationship, such as
 27 demotions, promotions, criticism of work practices, and frictions in negotiations as to
 28 grievances, an employee suffering emotional distress causing disability may not avoid the

1 exclusive remedy provisions of the Labor Code by characterizing the employer's decisions
 2 as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance
 3 resulting in disability." *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 750 (1987).

4 The evidence in the record shows that Defendant filed immigration papers on
 5 Plaintiff's behalf, and that Plaintiff believes the filings contained errors. The evidence in
 6 the record shows that Plaintiff expressed dissatisfaction with his compensation and
 7 working in Tijuana. The record shows that Plaintiff received criticism regarding his
 8 performance. The record shows that Defendant terminated Plaintiff's employment. The
 9 record contains no evidence that Defendant engaged in wrongful conduct outside the
 10 workplace or beyond "the normal course of the employer-employee relationship." *See*
 11 *Miklosy*, 188 P.3d at 645. The Court concludes that Plaintiff's IIED and NIED are
 12 preempted. The Court further concludes that Defendant's conduct in this matter "fall[s]
 13 far short of conduct that is so outrageous that it exceeds all bounds of that usually tolerated
 14 in a civilized community" as required to prove an IIED claim. *See Hughes*, 209 P.3d at
 15 976. The Court further concludes that the evidence does not show that Defendant "assumed
 16 a duty to plaintiff in which the emotional condition of the plaintiff is an object," or that
 17 "emotional distress ar[ose] out of the defendant's breach" or "[wa]s proximately caused by
 18 that breach of duty," as required to prove an NIED claim. *See Potter*, 863 P.2d 795.
 19 Defendant has carried its burden pursuant to Rule 56 "by presenting evidence that
 20 demonstrate[s] the absence of any genuine issue of material fact." *See Horphag*, 475 F.3d
 21 1035. Plaintiff must "set forth evidence raising a disputed issue of material fact." *See id.*

22 Plaintiff did not file a response in opposition to the Motion for Summary Judgment.
 23 The Court concludes that Defendant is entitled to summary judgment in its favor as to
 24 Plaintiff's IIED and NIED claims. *See Heinemann*, 731 F.3d at 917 ("[T]he motion and
 25 supporting materials' entitle the movant to summary judgment.").

26 5. Fraud

27 Defendant contends that Plaintiff's fraud claim fails because he cannot show
 28 Defendant intentionally misrepresented facts regarding his employment with the intent to

1 induce reliance. Defendant further contends that Plaintiff's fraud claim fails because he
2 cannot show he detrimentally relied on or suffered damages from any such promise.

3 A fraud claim requires proof of "(a) misrepresentation (false representation,
4 concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to
5 defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar*
6 *v. Superior Court*, 909 P.2d 981, 984 (1996). "A declaration of intention, although in the
7 nature of a promise, made in good faith, without intention to deceive, and in the honest
8 expectation that it will be fulfilled, even though it is not carried out, does not constitute a
9 fraud." *Magpali v. Farmers Grp., Inc.*, 55 Cal. Rptr. 2d 225, 231, *as modified on denial of*
10 *reh'g* (Ct. App. 1996) (quotation omitted). "[S]omething more than nonperformance is
11 required to prove the defendant's intent not to perform his promise." *Id.* "[M]aking a
12 promise with an honest but unreasonable intent to perform is wholly different from making
13 one with no intent to perform." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. Rptr.
14 2d 861, 864 (1991).

15 The evidence in the record shows that Plaintiff knew he would be working in
16 Tijuana. The record contains no evidence that Defendant knowingly misrepresented facts
17 regarding Plaintiff's immigration paperwork. The record contains no evidence that
18 Defendant made a specific promise to Plaintiff regarding his salary with the intent not to
19 perform such a promise. The Court concludes that the evidence in the record does not
20 support a fraud claim. Defendant has carried its burden pursuant to Rule 56 "by presenting
21 evidence that demonstrate[s] the absence of any genuine issue of material fact." *See*
22 *Horphag*, 475 F.3d 1035. Plaintiff must "set forth evidence raising a disputed issue of
23 material fact." *See id.*

24 Plaintiff did not file a response in opposition to the Motion for Summary Judgment.
25 The Court concludes that Defendant is entitled to summary judgment in its favor as to
26 Plaintiff's IIED and NIED claims. *See Heinemann*, 731 F.3d at 917 ("[T]he motion and
27 supporting materials' entitle the movant to summary judgment.").

28

6. Conclusion

The Court finds no genuine issues of material fact exist as to Plaintiff's claims for breach of contract, 18 U.S.C. §§ 1962(c)-(d), promissory estoppel, Cal. Lab. Code § 1102.5, intentional infliction of emotional distress, negligent infliction of emotional distress, or fraud, and that Defendant is entitled to judgment as a matter of law on all claims.

V. MOTION TO AMEND

7 Plaintiff seeks to amend his complaint to add twenty-nine new causes of action.
8 Plaintiff proposes additional claims related to employment: wrongful termination;
9 workplace discrimination based on race, national origin, religion, gender, and disability;
10 “Unmerited wage practice”; “Employees Rights Violation”; “Employer mis-classifies
11 employees . . . not complying with Fair Labor Standard Act”; “Wage Claim (including
12 Wage payment and collection Act)”; “Employer didn’t not give me proper tools to perform
13 my job properly : And not even the rights to perform my job”; and “Severance Pay claim.”
14 Plaintiff proposes various additional claims: “False Claims Act”; “Failure to correct
15 harassments”; “Barrier on bringing the lawsuit”; “ABIGEAT Claim”; “Abuse of Power”
16 and “Abuse of Process” claims; “Wrong displacement to further place”; “Financial
17 Inducement”; “Bait and Switch Trap Offense”; “Fraudulent Conciliation offense”;
18 “Physical Injury/retaliation”; “Anti-Slavery Act”; “Intentional libel, Sabotage Slander and
19 defamation”; “Breach of Fiduciary Duty”; “Breach of Warranty”; “Duty of Loyalty offense
20 claim”; and “Professional Negligence.” (ECF No. 108-2 at 2–3). Plaintiff proposes the
21 following allegations:

Plaintiff was transferred . . . to . . . Mexico to be terminated or make conditions that becomes unbearable for me to work that Plaintiff have to quit . . . When Instead they could have transferred me to other location . . . Plaintiff was the only other person of color/national origin/Race in the 1000+ employee company at Mexico, where Plaintiff do not speak the local language of Mexico, where Plaintiff was not even given an office to work for almost a year . . . no resources/technician were given to work for me i.e. with drawing my capabilities and capacity as compared to prior location . . . [T]hey preferred one female employee over the other male employee . . . Plaintiff suffered unfavorable or unfair treatment . . . The defendant lied to the

1 government . . . that I am working . . . in San Diego, Ca . . . when the defendant
2 do not even have a work location in the entire county of San Diego . . . [t]he
3 defendant intentionally lied to the government agency/department that
4 Plaintiff is an Senior Research Engineer, when the defendant had intentionally
5 hired me at a with a title of Research and Development Engineer . . . Plaintiff
6 was driven by the defendant, so and such that Plaintiff spend all my money
7 all over the United States of America, prohibiting the plaintiff to settle in a
8 house having the plaintiff live in a automobile, with the intention of stealing
9 the money from the plaintiff . . . The defendant abuse their power by . . .
10 prohibition in many of the plaintiffs ventures inclusive of but not limiting to
11 the Business education assignment, Law Education activity, Work/Job
12 hunting and many of the plaintiffs Business venture responsibility. . . . The
13 defendant . . . showed me a very higher salary and then retracted that salary at
14 the time of signing the contract before trapping (at the time of hiring) but also
15 did the same by showing a very high salary and then retracting that salary at
16 the time of relocation before trapping (transfer to a new location). . . . The
17 defendant . . . told me that my position . . . has salary up to \$120,000. [T]his
18 money was given to someone in the upper management or rather stole for me
19 to give it to someone else or themselves The defendant hired me for
20 working as a non exempt employee, however . . . started paying me for the
21 hours . . . in Mexico as if Plaintiff was an hourly worker or an exempt worker,
22 and deducting the salary/hours according to the per hour pay when Plaintiff
23 was not in the defendant work location. Wage hour changed from 80 to 75
24 hours . . . without my consent, however the pay remained the same. . . . Being
25 from car being caught and taken to repossession, numerous subway ticket . . .
26 numerous highway traffics violations tickets, restaurants, defendant cafeteria
27 food tampering . . . numerous trolley tickets, sleep deprivation, defendant
trying to drive their agenda . . . defendant was using me as a homosexual
person even when the defendant knows Plaintiff is a heterosexual person, the
defendant still thinks and is trying to use me as their employee The
company used psychological torture techniques/tactics to harass me . . . [T]he
defendant had used my private apartment/apartment complex for their
pleasure or to cause me shocked treatment. . . . The defendant intentionally
had the plaintiff perform the ACL operation on him and was driven by the
defendant to complete it. . . . Plaintiff was trapped in the forced labor
industries, as a trafficked labor. . . . The defendant intentionally committed
libel, slander and defamation acts to the plaintiff from the start as a means to
promote someone else over the defendant, to restrict defendant's salary and
promotion, etc. . . . Plaintiff was a shareholder of the defendant The
defendant having known that my current situation should have given the

1 plaintiff a better severance pay than \$1574.65, as they knew Plaintiff would
 2 not be able to make same kind of money after termination. . . .

3 *Id.* at 13–32. Plaintiff asserts that “Many pivotal events have transpired and revealed
 4 themselves from being hidden/forcefully hidden by the adverse party, since filing of
 5 Plaintiffs’ original complaint.” (ECF No. 108 at 2). Plaintiff contends that Defendant
 6 would not be prejudiced because Defendant has first-hand knowledge of the new facts
 7 alleged. Plaintiff further contends that Defendant would not be prejudiced because the
 8 proposed amended complaint adds no new defendants. Plaintiff asserts that “[t]he
 9 proposed amendments would intend to opening up discovery and the amended claims.” *Id.*
 10 at 3. Plaintiff asserts that “it’s the plaintiff who would be seriously tremendously unduly
 11 prejudiced if the discovery is not reopened, if amending the complaint does not happen.”
 12 (ECF No. 119 at 5). Plaintiff contends the amendments would not be futile and relate back
 13 to the original complaint. Plaintiff contends that the new claims state a claim for relief and
 14 are not time barred.

15 Defendant contends that Plaintiff has not demonstrated good cause to amend under
 16 Rule 16(b) because Plaintiff offers no justification for filing the Motion over a year after
 17 the October 25, 2017 deadline to amend, and over two and a half years after the original
 18 Complaint was filed. Defendant asserts that Plaintiff fails to show his new claims are
 19 premised on facts not known at the time of the original Complaint. Defendant asserts,
 20 “Plaintiff’s professed intent to use the amended complaint as a vehicle to reopen discovery
 21 only further weighs in favor of denying his Motion.” (ECF No. 116 at 12). Defendant
 22 contends that Plaintiff’s proposed amendments are futile, time-barred, do not relate back,
 23 and fail to state a claim. Defendant asserts that seeking to bring new claims at this late
 24 stage in the litigation is an exercise in futility that would cause Defendant undue prejudice.

25 A motion for leave to amend filed after the time period specified in a district court’s
 26 scheduling order is governed by the “good cause” standard of Federal Rule of Civil
 27 Procedure 16(b). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir.
 28 1992). Rule 16(b) provides that a district court must issue a scheduling order that limits

1 “the time to join other parties, amend the pleadings, complete discovery, and file motions.”
 2 Fed. R. Civ. P. 16(b). Rule 16(b) also provides that “[a] schedule may be modified only
 3 for good cause and with the judge’s consent.” *Id.* “Rule 16(b)’s ‘good cause’ standard
 4 primarily considers the diligence of the party seeking amendment. The district court may
 5 modify the pretrial schedule ‘if it cannot reasonably be met despite the diligence of the
 6 party seeking the extension.’” *Johnson*, 975 F.2d at 609 (citing Fed. R. Civ. P. 16 advisory
 7 committee’s notes (1983 amendment)). If the court finds that a plaintiff has shown good
 8 cause pursuant to Federal Rule of Civil Procedure 16(b), the court must then consider
 9 whether leave to amend is proper under Federal Rule of Civil Procedure 15. *Id.* at 608.
 10 “Although the existence or degree of prejudice to the party opposing the modification might
 11 supply additional reasons to deny a motion, the focus of the inquiry is upon the moving
 12 party’s reasons for seeking modification.” *Id.* at 609.

13 Federal Rule of Civil Procedure 15(a) provides that after the time for amendment
 14 “as a matter of course” has passed, “a party may amend its pleading only with the opposing
 15 party’s written consent or the court’s leave.” *Id.* Federal Rule of Civil Procedure 15
 16 mandates that leave to amend “be freely given when justice so requires.” Fed. R. Civ. P.
 17 15(a). In *Foman v. Davis*, the Supreme Court offered several factors for district courts to
 18 consider in deciding whether to grant a motion to amend under Rule 15(a):

19 In the absence of any apparent or declared reason – such as undue delay, bad
 20 faith or dilatory motive on the part of the movant, repeated failure to cure
 21 deficiencies by amendments previously allowed, undue prejudice to the
 22 opposing party by virtue of allowance of the amendment, futility of
 23 amendment, etc. – the leave sought should, as the rules require, be “freely
 24 given.”

25 371 U.S. 178, 182 (1962); *see also Bowles v. Reade*, 198 F.3d 752, 757–58 (9th Cir. 1999)
 26 (“Liberality in granting a plaintiff leave to amend is subject to the qualification that the
 27 amendment not cause undue prejudice to the defendant, is not sought in bad faith, and is
 28 not futile. . . . Additionally, the district court may consider the factor of undue delay. . . .
 Undue delay by itself, however, is insufficient to justify denying a motion to amend.”)

1 (citation omitted). “Not all of the [Foman] factors merit equal weight. . . . [T]he
 2 consideration of prejudice to the opposing party that carries the greatest weight.” *Eminence*
 3 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (citations omitted).

4 “[L]eave to amend should be granted if it appears *at all possible* that the plaintiff
 5 can correct the defect. . . . [T]he rule favoring liberality in amendments to pleadings is
 6 particularly important for the pro se litigant.” *Crowley v. Bannister*, 734 F.3d 967, 977–
 7 78 (9th Cir. 2013) (concluding it abused discretion to deny pro se prisoner plaintiff leave
 8 to amend his second amended complaint that misidentified nurses who allegedly refused
 9 plaintiff medical treatment in violation of the Eighth Amendment) (quotations omitted);
 10 *see also Sharkey v. O’Neal*, 778 F.3d 767, 774 (9th Cir. 2015) (reversing district court that
 11 “provided no explanation for dismissing with prejudice, despite the fact that the operative
 12 complaint was the first and only complaint filed by Sharkey, who was proceeding pro se”).

13 “A district court, however, does not abuse its discretion in denying leave to amend
 14 where amendment would be futile.” *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976
 15 (9th Cir. 2002) (citation omitted); *see also Mpoyo v. Litton Electro-Optical Sys.*, 92 F.
 16 App’x 551, 552 (9th Cir. 2004) (determining “the district court properly denied his motion
 17 to amend the complaint,” where the pro se plaintiff did not make out a *prima facie* case of
 18 retaliation and did not rebut the defendant’s evidence of nondiscriminatory reasons for
 19 discharge, “because [Defendant] would have been substantially prejudiced if [Plaintiff]
 20 was granted leave to amend his complaint, since discovery had already closed and both
 21 parties had already submitted motions for summary judgment”).

22 “The timing of [a] motion” for leave to amend, when filed “after the parties ha[ve]
 23 conducted discovery and a pending summary judgment motion ha[s] been fully briefed,
 24 weighs heavily against allowing leave. A motion for leave to amend is not a vehicle to
 25 circumvent summary judgment.” *Schlacter-Jones v. Gen. Tel. of Cal.*, 936 F.2d 435, 443
 26 (9th Cir. 1991) (affirming district court denial of leave to amend upon “ma[king] a specific
 27 finding of prejudice to the opposing party” and “properly consider[ing] the delay in the
 28 desired amendment, the fact that there was a pending summary judgment motion, and the

1 futility of most of the proposed claims"), *abrogated on other grounds by Cramer v. Consol.*
 2 *Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001); *see also Roberts v. Ariz. Bd. of Regents*,
 3 661 F.2d 796, 798 (9th Cir. 1981) ("Here the district court made a specific finding of
 4 prejudice to the opposing party, noting that the retaliatory discharge issue was raised at the
 5 eleventh hour, after discovery was virtually complete and the Board's motion for summary
 6 judgment was pending before the court."). In *M/V American Queen v. San Diego Marine*
 7 *Construction Corporation*, the Court of Appeals stated that the following "factors form[ed]
 8 the basis of a proper exercise of discretion by the trial court in refusing to allow
 9 amendment": "a delay in making the motion of one and one-half years after the case was
 10 filed," "[n]o facts, newly discovered in that period, were alleged," and "a motion for
 11 summary judgment was pending and possible disposition of the case would be unduly
 12 delayed by granting the motion for leave to amend." 708 F.2d 1483, 1492 (9th Cir. 1983);
 13 *see also Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)
 14 ("[T]he district judge was justified in exercising his discretion not to permit the
 15 amendment. The delay of nearly two years, while not alone enough to support denial, is
 16 nevertheless relevant. . . . In light of the radical shift in direction posed by these claims,
 17 their tenuous nature, and the inordinate delay, we conclude that the district court did not
 18 clearly abuse its discretion in denying leave to amend.").

19 In this case, Plaintiff filed the Motion to amend six months after discovery closed
 20 and over five months after Defendants filed the Motion for Summary Judgment. Plaintiff
 21 does not explain his delay. Plaintiff does not explain why the new allegations were not
 22 known to him at the time he filed his original Complaint. The Court finds the Motion to
 23 amend was filed with undue delay. *See M/V Am. Queen*, 708 F.2d at 1492 (denying leave
 24 to amend proper based on "a delay in making the motion of one and one-half years after
 25 the case was filed," "[n]o facts, newly discovered in that period, were alleged," and "a
 26 motion for summary judgment was pending and possible disposition of the case would be
 27 unduly delayed by granting the motion for leave to amend"). The Court finds that proposed
 28 claims regarding employment classification and wages, and regarding discrimination, pose

1 a “radical shift in direction.” *See Morongo*, 893 F.2d at 1079. The Court finds that the
2 proposed factual allegations are “tenuous” and inadequate to support *prima facie* cases with
3 respect to the proposed causes of action. *See id.* The Court finds that the proposed
4 “amendment[s] would be futile.” *See Flowers*, 295 F.3d at 976. The Court finds that
5 amending the Complaint at this late stage in the litigation would result in “prejudice to the
6 opposing party.” *See Roberts*, 661 F.2d at 798. The Court denies Plaintiff’s Motion for
7 Leave to Amend the Complaint. (ECF No. 108).

8 VI. MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT

9 Defendant requests that the Court declare Plaintiff a vexatious litigant and require
10 Plaintiff to “obtain leave of court before filing any additional pleadings, motions or papers
11 regarding the subject matter at issue in this case or with respect to Covidien, with the sole
12 exception of his MSJ opposition.” (ECF No. 124-1 at 3). Defendant states, “At some
13 point, enough is enough, and Covidien should be relieved from the obligation of responding
14 to Plaintiffs successive, lengthy, and largely unintelligible motions.” *Id.* Defendant
15 references the following motions:

- 16 • Motion for Protective Order (ECF No. 62) – denied. (*See* ECF No. 73)
17 (Minute order denying Plaintiffs Motion because “Plaintiff fails to provide
an adequate basis in law or fact for a protective order.”).
- 18 • Motion for Order to Compel Discovery (ECF No. 79) – denied. (*See* ECF
19 No. 85, 1:18) (“Plaintiffs discovery motions are untimely.”).
- 20 • Motion for Issuance of Subpoenas (ECF No. 81) – denied. (*See* ECF No.
21 85, 1:18) (“Plaintiffs discovery motions are untimely.”).
- 22 • Motion to Compel to Reopen Discovery (ECF No. 89) – denied. (*See* ECF
23 No. 93, 3:9-10) (finding that Covidien has been prejudiced in that it
complies with the deadlines and Plaintiff does not).
- 24 • Motion to Reconsider Reopening Discovery (ECF No. 94) – denied. (*See*
25 ECF No. 98, 2:24-25) (“Plaintiff cannot rely on his pro se status as an
excuse for his failure to propound his own discovery in this case.”).
- 26 • Second Motion to Reconsider Reopening Discovery (ECF No. 100) –
denied. (*See* ECF No. 103) (“Plaintiff presents no new evidence that would
warrant reconsideration.”).
- 27 • Ex Parte Motion to Compel Reconsideration by Plaintiff (ECF No. 105) –
denied. (*See* ECF No. 104, *nunc pro tunc*) (motion previously denied.)

- 1 • Ex Parte Motion for Leave to Amend Complaint (ECF No. 108) – *pending*.
- 2 • Motion for Sanctions (ECF No. 122) – *pending*.
- 3 • Five ex parte requests to continue the deadline for Plaintiff’s response to
Covidien’s Motion for Summary Judgment (“MSJ”) – all of which were
4 granted. (ECF Nos. 48, 55, 64, 113, 120.) . . .
- 5 • [A] request for sanctions totaling \$855 million for alleged bodily and
psychological injuries that have no rational connection to this case,
Covidien, or its attorneys. ECF No. 122.

7 *Id.* at 2–3.

8 Defendant contends that all four factors as articulated in *Molski v. Evergreen*
9 *Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007) are met so as to permit the Court to declare
10 Plaintiff a vexatious litigant. First, Defendant contends that Plaintiff has been given notice
11 and an opportunity to be heard based on its properly noticed motion. Second, Defendant
12 contends that it has provided the Court with an adequate record to find that Plaintiff is
13 abusing the court system. Third, Defendant contends that Plaintiff’s litigation conduct is
14 harassing and frivolous because he has filed fourteen meritless and procedurally deficient
15 motions, which have required Defendant to devote significant time, effort, and expense to
16 oppose. Defendant contends that Plaintiff’s filings are harassing and frivolous, and asserts
17 that he has filed eight ex parte requests within five months, repeating arguments previously
18 raised and rejected by the Court. (ECF No. 133 at 2). Finally, Defendant contends that a
19 pre-filing order is necessary and narrowly tailored. (ECF No. 124-1 at 5). Defendant
20 asserts that “Plaintiff has made it all too clear that, absent a pre-filing bar order, he will
21 continue this frivolous and harassing conduct.” (ECF No. 133 at 2). Defendant contends
22 that it requests a narrowly drafted order to “simply require that Plaintiff seek leave of this
23 Court prior to filing any additional pleadings, motions and/or papers other than his MSJ
24 opposition,” which would “relieve Covidien from the burden associated with reviewing
25 and responding to Plaintiff’s frivolous filings,” and “save Plaintiff (and this Court)
26 significant time and energy associated with Plaintiff’s harassing litigation tactics.” (ECF
27 No. 124-1 at 5).

28

1 Plaintiff asserts that “The pro se plaintiff has not violated any or flagrantly abused
2 the judicial process.” (ECF No. 128 at 9). Plaintiff asserts, “I have not started any other
3 claims in the court of law against this or any other potential defendant. . . . I have not
4 relitigated or file any attempts to relitigate, therefore there is no ground or baring me from
5 bringing any other lawsuit.” *Id.* Plaintiff asserts that Defendant’s Motion is a “dirty little
6 trick” and Defendant is “the one that has harassed, tortured, broken my face, broken my
7 head, broken my lip, broken my shoulder, broken my leg causing pain, agony,
8 embarrassment, distress, scars, trauma, emotional distress and harassment and then saying
9 that it’s the plaintiff that is causing vexation and harassing, that sounds insane and crazy.”
10 *Id.* at 3. Plaintiff lists sixty-two “flagrant and blatant acts of violation of law” including
11 Plaintiff being hit on the head and shoulder while asleep, being “fe[]d very bad thing in my
12 mouth while I was asleep unconsciously” and “force fe[]d to the max”; “constantly being
13 burned . . . when/if I use apple products”; “be[ing] told to do thing/ dictate (synonym like
14 a word of bullet by females by walkie talkie) even though I have no responsibility towards
15 them and it felt like I was been held captive and blocked from doing nothing else but follow
16 their orders in Los Angeles, CA, by a group of feminist group or feminist individual
17 female,” and “a constant some unknown female and a male, not any relation to the plaintiff
18 and always in the background stalking and alternatively either saying the word ‘yes’ or
19 saying the word ‘No’”; being “sprayed with disgusting smell in and around me” and
20 “sprayed on the center of my head so that my hairs are falling,” “[s]omeone putting liquid/s
21 all over my shirt while I am asleep”; and possessions and data being stolen from him. *Id.*
22 at 3–7. Plaintiff requests that the Court “order the declaration that the defendant is an
23 extremely vexatious defendant and sanction them very hefty monetarily and non-
24 monetarily.” *Id.* at 10.

25 “The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent
26 power to enter pre-filing orders against vexatious litigants.” *Molski v. Evergreen Dynasty*
27 *Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). However, “such pre-filing orders should rarely
28 be filed.” *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990). “If used too freely

1 or couched in overly broad terms, injunctions against future litigation may block free
2 access to the courts" and eliminate the "final safeguard for vitally important constitutional
3 rights." *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1525 (9th Cir.
4 1983). Courts "are particularly reluctant to impede access to the courts for a pro se
5 litigant." *Id.* "In light of the seriousness of restricting litigants' access to the courts, pre-
6 filing orders should be a remedy of last resort." *Ringgold-Lockhart v. Cty. of L.A.*, 761
7 F.3d 1057, 1062 (9th Cir. 2014). "When district courts seek to impose pre-filing
8 restrictions, they must: (1) give litigants notice and 'an opportunity to oppose the order
9 before it [is] entered'; (2) compile an adequate record for appellate review, including 'a
10 listing of all the cases and motions that led the district court to conclude that a vexatious
11 litigant order was needed'; (3) make substantive findings of frivolousness or harassment;
12 and (4) tailor the order narrowly so as 'to closely fit the specific vice encountered.'" *Id.* at
13 1062 (quoting *De Long*, 912 F.2d at 1147–48). To apply the third and fourth "substantive
14 factors," courts consider:

15 (1) the litigant's history of litigation and in particular whether it entailed
16 vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in
17 pursuing the litigation, e.g., does the litigant have an objective good faith
18 expectation of prevailing?; (3) whether the litigant is represented by counsel;
19 (4) whether the litigant has caused needless expense to other parties or has
20 posed an unnecessary burden on the courts and their personnel; and (5)
whether other sanctions would be adequate to protect the courts and other
parties.

21 *Id.* at 1062 (quoting *Molski*, 500 F.3d at 1058). "To determine whether the litigation is
22 frivolous, district courts must look at both the number and content of the filings as indicia
23 of the frivolousness of the litigant's claims." *Id.* at 1064 (internal quotations and citation
24 omitted). The court must find "that the number of complaints was inordinate," and that the
25 claims are "patently without merit." *Id.* (quotations omitted). "As an alternative to
26 frivolousness, the district court may . . . find[] that the litigant's filings show a pattern of
27 harassment," and "an intent to harass the defendant or the court." *Id.* (quotations omitted).

28

1 "Finally, courts should consider whether other, less restrictive options, are adequate to
 2 protect the court and parties." *Id.* at 1064-65.

3 Plaintiff proceeds pro se, which weighs against declaring him a vexatious litigant.
 4 The record contains no evidence of Plaintiff filing any other lawsuits against Defendant.
 5 Based on the record, the Court does not find "that the number of complaints [is]
 6 inordinate." *See Ringgold-Lockhart*, 761 F.3d at 1064; *see also Wood*, 705 F.2d at 1525
 7 (affirming injunction against relitigation of a "simple pro se employment dispute" that
 8 evolved into a "morass of litigation, into which [the plaintiff had] pulled over 250
 9 defendants and, at one point, over 30 district courts"); *De Long*, 912 F.2d at 1148
 10 (concluding that district court's finding of frivolousness abused discretion where the
 11 plaintiff had filed three related habeas petitions and two post-judgment motions). The
 12 evidence in the record does not support a finding that "the less restrictive option" of
 13 "sanctions such as costs or fees" would be inadequate. *See Ringgold-Lockhart*, 761 F.3d
 14 at 1065 (concluding the district court abused its discretion by failing to consider whether
 15 "imposing sanctions such as costs or fees on the [plaintiffs] would have been an adequate
 16 deterrent"). The Court denies Defendant's Motion to Declare Plaintiff a Vexatious
 17 Litigant. (ECF No. 124).

18 **VII. MOTION FOR SANCTIONS**

19 Plaintiff requests that the Court impose sanctions in the "amount of
 20 \$855,955,330.33" corresponding to "time spent on the case preparation, that is the pro se
 21 plaintiff (who is acting as an lead attorney for the Plaintiff) his expenses, the delay on
 22 earning making business because of the time, (not taking in account 5+years of wasted
 23 income earning time, with \$20,000 per hour being my past and currently prevailing
 24 consulting service earning rate), making the up[]to date amount to be sanctioned to the
 25 defendant to be \$20,000 per hour x 40 hours x 50 weeks x 5(10/12) years a total payment
 26 amount \$233,333,333.33," as well as "[i]temized costs for the lawsuits that are billable in
 27 the . . . amount equal to \$20,000 per hour my billable income earning rate x 40 hours x 50
 28 weeks x 2(9/12) years = \$110,000,000.00," and "medical and non-medical damages

1 expenses incurred \$622,621,997.00.” (ECF No. 122 at 27–28). Plaintiff contends that the
2 Court has the authority to impose sanctions in this case pursuant to Rule 11 and Rule 37 of
3 the Federal Rules of Civil Procedure and 28 U.S.C. § 1927.

4 Plaintiff lists sixty-two events substantially identical to the list from his opposition
5 to the vexatious litigant motion, asserting “[i]f this is not harassment and unnecessary delay
6 or needlessly increasing the cost of litigation than what is it, demands and screams an
7 ineradicable right to the sanction them very heavily.” *Id.* at 8–13; *see supra* Section III.
8 Plaintiff asserts he has not obtained employment “in part because Defendants in this suit
9 retaliated against me and blacklisted me.” (ECF No. 122 at 18). Plaintiff further asserts,

10 [D]efendant having devised up this game plan from the beginning to thwart
11 the discovery of the plaintiff by blocking/prohibiting them or exhausting the
12 plaintiffs time and win the case on a summary judgment . . . with a bad faith
affidavit or declaration. . . .

13 [D]efendant is using drag, delay and defend tactics to make the international
14 worker(plaintiff) tired, starve the international worker plaintiff to dead
(because he is unable to work and earn money legally), removing all his
15 resources(rental house, car, savings, whatever is left etc) . . . for the past 5
16 years since I have been terminated and trying this tactics officially since the
17 past 3+ years of litigation, by . . . multiplying the proceedings exasperatingly,
18 tactically trying to make the plaintiff leave the country, caused mishap and
mistakes in the plaintiffs legal proceedings and or drop the lawsuit, by directly
or by circumventing causing financial hardship to the plaintiff, demands and
screams an ineradicable right to sanction the defendant extremely heavily.

19
20 *Id.* at 19; *see also* ECF No. 129 at 4–5, 7.

21 Defendant asserts that Plaintiff’s Motion is based on “outlandish allegations which
22 lack any foundation in reality.” (ECF No. 123 at 1). Defendant contends that Rule 37
23 sanctions are improper because there is no order to permit discovery. Defendant further
24 contends that Rule 11 sanctions are improper because Plaintiff has not identified
25 misconduct by Defendant. Defendant further contends that Rule 11 sanctions are improper
26 because Plaintiff failed to serve the Motion on Defendant twenty-one days before filing it
27 with the Court. Defendant further contends that sanctions under 28 U.S.C. § 1927 are
28

1 improper because Plaintiff has provided no evidence that Defendant has multiplied the
2 proceedings unreasonably and vexatiously.

3 “[T]he district court has a broad array of sanctions options at its disposal: Rule 11,
4 28 U.S.C. § 1927, and the court’s inherent authority.” *Christian v. Mattel, Inc.*, 286 F.3d
5 1118, 1131 (9th Cir. 2002) (first citing *B.K.B. v. Maui Police Dep’t.*, 276 F.3d 1091, 1107
6 (9th Cir. 2002) (holding that misconduct committed “in an unreasonable and vexatious
7 manner” that “multiplies the proceedings” violates § 1927), then citing *Fink v. Gomez*, 239
8 F.3d 989, 991–992 (9th Cir. 2001) (holding that sanctions may be imposed under the
9 court’s inherent authority for “bad faith” actions by counsel, “which includes a broad range
10 of willful improper conduct”)). Rule 11 provides:

11 If, after notice and a reasonable opportunity to respond, the court determines
12 that Rule 11(b) has been violated, the court may impose an appropriate
13 sanction upon any attorney, law firm, or party that violated the rule or is
responsible for the violation.

14 Fed. R. Civ. P. 11(c)(1). “[T]he central purpose of Rule 11 is to deter baseless filings in
15 district court Rule 11 imposes a duty on attorneys to certify that they have conducted
16 a reasonable inquiry and have determined that any papers filed with the court are well
17 grounded in fact, legally tenable, and ‘not interposed for any improper purpose.’” *Cooter*
18 & *Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990), superseded by statute on other
19 grounds, Fed. R. Civ. P. 11. “Conduct in depositions, discovery meetings of counsel, oral
20 representations at hearings, and behavior in prior proceedings do not fall within the ambit
21 of Rule 11.” *Christian*, 286 F.3d at 1131. Rule 11 places “stringent notice and filing
22 requirements on parties seeking sanctions.” *Holgate v. Baldwin*, 425 F.3d 671, 677 (9th
23 Cir. 2005). Rule 11 contains a “safe harbor” provision, which requires a party seeking
24 sanctions “to give the opposing party 21 days” to withdraw or otherwise correct the
25 offending paper before filing the motion for sanctions. *Id.* at 678; Fed. R. Civ. P.
26 11(c)(1)(A). Rule 37(b) “empowers the court to take remedial action if a party ‘fails to
27 obey an order to provide or permit discovery.’” *Sali v. Corona Reg’l Med. Ctr.*, 884 F.3d
28

1 1218, 1222 (9th Cir. 2018) (quoting Fed. R. Civ. P. 37(b)(2)(A)). “[W]e read broadly the
2 term order Rule 37’s requirement for an order should . . . include any order relating to
3 discovery.” *Id.* (quotations omitted).

4 In this case, discovery closed on April 30, 2018 pursuant to the Court’s January 31,
5 2018 Order (ECF No. 24). The record contains no evidence that Defendant failed to
6 produce any discovery to which Plaintiff was entitled, or violated an order within the
7 meaning of Rule 37. The record shows that Plaintiff did not satisfy the procedural
8 requirements of the Rule 11 safe harbor. The record does not support a finding that any of
9 Defendant’s filings are baseless within the meaning of Rule 11. The record does not
10 support a finding that Defendant engaged in “unreasonable and vexatious” conduct that
11 “multiplies the proceedings” within the meaning of § 1927. The record does not support a
12 finding that Defendant acted in “bad faith” or engaged in “willful improper conduct”
13 justifying sanctions under the Court’s inherent authority. The Court denies Plaintiff’s
14 Motion for Sanctions. (ECF No. 122).

15 **VIII. CONCLUSION**

16 IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by
17 Defendant Covidien LP (ECF No. 45) is GRANTED.

18 IT IS FURTHER ORDERED that the Motion for Leave to Amend the Complaint
19 filed by Plaintiff Ashwin Khobragade (ECF No. 108) is DENIED.

20 IT IS FURTHER ORDERED that the Motion for Sanctions filed by Plaintiff Ashwin
21 Khobragade (ECF No. 122) is DENIED.

22 IT IS FURTHER ORDERED that the Motion to Declare Plaintiff a Vexatious
23 Litigant filed by Defendant Covidien LP (ECF No. 124) is DENIED.

24
25 DATED: 2/15/19


26 WILLIAM Q. HAYES
27 United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ASHWIN KHOBRAGADE, an
individual,

Case No.: 16cv468

Plaintiff, **ORDER**

v.

COVIDIEN LP, a Delaware
limited partnership,

Defendant.

HAYES, Judge:

The matters before the Court are the Motion for Order Requiring Reconstruction of Electric Data (ECF No. 143) and the Motion for Reconsideration Via Motion to Alter or Amend Judgment (ECF No. 145) filed by Plaintiff Ashwin Khobragade.

I. PROCEDURAL BACKGROUND

On February 19, 2016, Plaintiff initiated this action by filing the Complaint. (ECF No. 1). The Complaint includes claims against Defendant Covidien LP for breach of contract; violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c)–(d) based on extortion under § 1961(1), fraud in foreign labor contracting under 18 U.S.C. § 1351(a), and fraud and misuse of immigration documents under 18 U.S.C. § 1546; promissory estoppel; violation of the California Whistleblower

1 Protection Act (CWPA), Cal. Lab. Code § 1102.5; intentional infliction of emotional
2 distress (IIED); negligent infliction of emotional distress (NIED); and fraud. Plaintiff
3 proceeds pro se.

4 On May 18, 2018, Defendant filed a motion for summary judgment which was
5 originally set for hearing on June 18, 2018. (ECF No. 45). The initial deadline for Plaintiff
6 to file a response in opposition was June 4, 2018. On June 4, 2018, the Court issued an
7 Order allowing Plaintiff's attorney to withdraw as counsel and allowing Plaintiff to proceed
8 pro se. The Court further granted Plaintiff a twenty-eight-day extension of time to oppose
9 Defendant's motion for summary judgment. (ECF No. 53).

10 On June 29, 2018, the Court granted (ECF No. 56) Plaintiff's second Motion to
11 Enlarge Time (ECF No. 55) to oppose summary judgment, until July 31, 2018.

12 On July 31, 2018, the Court granted (ECF No. 72) Plaintiff's third request (ECF No.
13 64) to continue time to oppose summary judgment, until September 17, 2018.

14 On August 24, 2018, Defendant filed a Motion to Continue pretrial and summary
15 judgment briefing dates, which Plaintiff opposed on the grounds that "it would be
16 counterproductive for [Plaintiff] to prohibit any longer than the time available." (ECF Nos.
17 75–76).

18 On August 28, 2018, the Court granted the Motion to Continue, stating the
19 opposition to summary judgment was due October 8, 2018. (ECF No. 77).

20 On September 21, 2018, Plaintiff filed a Motion to Reopen Discovery. (ECF No.
21 21). Discovery closed on April 30, 2018 following the Court's January 31, 2018 Order.
22 (ECF No. 24).

23 On October 4, 2018, the Magistrate Judge denied the Motion to Reopen Discovery,
24 stating that "Plaintiff has not demonstrated due diligence . . . in conducting discovery
25 before the summary judgment motion was made and in pursuing his motion to reopen
26 discovery thereafter"; that "prejudice exists to the Defendant who [h]as complied with the
27 deadlines"; and that there was "no good cause for plaintiff's motion to reopen discovery."
28 (ECF No. 93).

1 On October 9, 2018, Plaintiff filed a Motion to Reconsider reopening discovery.
2 (ECF No. 94). On October 11, 2018, Defendant filed a Reply (ECF No. 95) in support of
3 the Motion for Summary Judgment. On October 12, 2018, the Magistrate Judge denied
4 the Motion to Reconsider, stating that Plaintiff “cannot rely on his pro se status as an excuse
5 for his failure to propound his own discovery in this case [Plaintiff] fails to demonstrate
6 any error[,] mistake[,] . . . new law or facts justifying reconsideration.” (ECF No. 98).

7 On October 17, 2018, Plaintiff filed a second Motion to reconsider reopening
8 discovery. (ECF No. 100). On October 18, 2018, the Magistrate Judge denied the second
9 Motion to reconsider, stating, “Plaintiff presents no new evidence that would warrant
10 reconsideration.” (ECF No. 103).

11 On October 30, 2018, Plaintiff filed a Motion to Amend the Complaint. (ECF No.
12 108). On November 5, 2018, Plaintiff filed a fourth Motion to Extend Time to oppose
13 summary judgment. (ECF No. 113). On November 20, 2018, the Court granted the fourth
14 Motion to Extend Time to oppose summary judgment, until December 20, 2018. (ECF
15 No. 118).

16 On November 9, 2018, Defendant filed a Response (ECF No. 116) in opposition to
17 Plaintiff’s Motion to Amend the Complaint. On November 26, 2018, Plaintiff filed a Reply
18 (ECF No. 119) in support of his Motion to Amend the Complaint.

19 On December 14, 2018, Plaintiff filed a fifth Motion to Extend Time to oppose
20 summary judgment. (ECF No. 120). On December 18, 2018, the Court granted the fifth
21 Motion to Extend Time to oppose summary judgment, until January 17, 2019. (ECF No.
22 121). The Court stated that further extensions would not be considered “absent a
23 substantive showing of good cause and excusable neglect.” *Id.* at 4.

24 On December 26, 2018, Plaintiff filed an Ex Parte Motion for Sanctions, stating, “I
25 suffered one temporary injury to my top of the eye and lower lip without any stitches in
26 NJ. . . . My left shoulder had been injured in New York City, New York, while unconscious.
27 . . . Someone while on the train came and hit the left temple of my head my shoulder very
28 badly causing huge pain and discomfort 8/8/2018 while on train. . . . [O]n 12/13/2018 a

1 between 3:30am and 6:30am on train #725 on gold line towards union station, such as
2 getting hurt in right shoulder in the month of November 2018.” (ECF No. 122 at 8, 11–
3 13).

4 On January 8, 2019, Defendant filed a Response (ECF No. 123) in opposition to
5 Plaintiff’s Motion for Sanctions.

6 On January 11, 2019, Plaintiff filed a sixth Motion to Extend Time to oppose
7 summary judgment. (ECF No. 126).

8 On January 14, 2019, Defendant filed a Motion to Declare Plaintiff a Vexatious
9 Litigant. (ECF No. 124).

10 On January 15, 2019, the Court denied the sixth Motion to Extend Time to oppose
11 summary judgment, stating that “Plaintiff shall file any response in opposition to the
12 Motion for Summary Judgment (ECF No. 45) on or before January 30, 2019.” (ECF No.
13 127).

14 On January 18, 2019, Plaintiff filed a Response (ECF No. 128) in opposition to
15 Defendant’s Motion to Declare Plaintiff a Vexatious Litigant, and a Reply (ECF No. 129)
16 in support of Plaintiff’s Motion for Sanctions.

17 On January 24, 2019, Plaintiff filed a seventh Motion to Extend Time to oppose
18 summary judgment. (ECF No. 131).

19 On January 25, 2019, Defendant filed a Reply (ECF No. 133) in support of the
20 Motion to Declare Plaintiff a Vexatious Litigant.

21 On January 28, 2018, the Court denied the seventh Motion to Extend Time to oppose
22 summary judgment, “find[ing] that Plaintiff has failed to demonstrate “excusable neglect,”
23 and stating, “The discovery matters Plaintiff raises have been addressed. There is no
24 evidence that Plaintiff has been denied any discovery to which he was entitled. Plaintiff
25 has had over seven additional months to prepare his opposition. The Court finds that
26 further delay would result in prejudice to the Defendant and to the efficient administration
27 of justice. . . . Plaintiff shall file any response in opposition to the Motion for Summary
28

1 Judgment (ECF No. 45) on or before January 30, 2019.” (ECF No. 135). No response in
2 opposition to the Motion for Summary Judgment was filed.

3 On February 15, 2019, the Court granted Defendant’s Motion for Summary
4 Judgment, denied Plaintiff’s seventh Motion to Extend Time to oppose summary judgment,
5 denied Plaintiff’s Motion for Leave to Amend Complaint, denied Defendant’s Motion for
6 Sanctions, and denied Defendant’s Motion to Declare Plaintiff a Vexatious Litigant. (ECF
7 No. 140).

8 On February 19, 2019, the Clerk entered judgment in favor of Defendant and against
9 Plaintiff. (ECF No. 141).

10 On March 1, 2019, Plaintiff filed a Motion for Order Requiring Reconstruction of
11 Electric Data (ECF No. 143) and a Motion for Reconsideration to Alter or Amend
12 Judgment (ECF No. 145).

13 On March 13, 2019, Defendant filed responses in opposition to the Motion for Order
14 Requiring Reconstruction of Electric Data (ECF No. 149) and the Motion for
15 Reconsideration Via Motion to Alter or Amend Judgment (ECF No. 150).

16 On March 11, 2019 and March 15, 2019, Plaintiff filed supplemental documents in
17 support of his Motions. (ECF Nos. 148, 152, 154).

18 **II. MOTION FOR ORDER REQUIRING RECONSTRUCTION OF
19 ELECTRIC DATA**

20 Plaintiff seeks an order “requiring Defendant Covidien L[P] to reconstruct the
21 [P]laintiff[’]s electronic data . . . and . . . sanction[ing] the defendant for \$857,000,000.”
22 (ECF No. 143 at 6). Plaintiff contends that he is entitled to such an order according to
23 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) because he had electronic
24 data “with him until the order on motion for summary judgment” and it was “frozen or
25 blocked and or corrupted or hacked rendering it without any data in the documents.” *Id.* at
26 2, 5.

27 Defendant asserts, “Plaintiff’s Motion is entirely unintelligible and clearly lacks any
28 basis in law or fact.” (ECF No. 149 at 2).

1 The excerpts of *Zubulake* cited by Plaintiff relate to discovery and sanctions for
2 spoliation of evidence. The Court finds that Plaintiff does not set forth a legal basis upon
3 which this Court can award the relief he seeks.

4 For the reasons the Court set forth in its February 15, 2019 Order, the record does
5 not support an award of sanctions against Defendant. *See* ECF No. 40 at 32–35.

6 **III. MOTION FOR RECONSIDERATION VIA MOTION TO ALTER OR
7 AMEND JUDGMENT**

8 Plaintiff contends that the grounds of newly discovered evidence, clear error, and
9 manifest injustice support relief under Rule 59(e) because conduct by Defendant interfered
10 with his ability to file a response in opposition to summary judgment. Plaintiff contends
11 that there is mistake, inadvertence, surprise, or excusable neglect within the meaning of
12 Rule 60(b)(1) because the Court did not provide notice of the deadline to file a response in
13 opposition to summary judgment. Plaintiff contends that newly discovered evidence
14 supports relief under Rule 60(b)(2) because Defendant hid evidence from him and he did
15 not get a chance to present evidence regarding summary judgment. Plaintiff contends that
16 fraud within the meaning of Rule 60(b)(3) entitles him to relief because conduct by
17 Defendant interfered with his ability to respond in opposition to summary judgment.
18 Plaintiff contends that relief is justified under Rule 60(b)(6) because Plaintiff conduct by
19 Defendant interfered with his ability to respond in opposition to summary judgment.
20 Plaintiff contends he is entitled to relief under Rule 50, Rule 56, “And Or . . . According to
21 the other rules of Federal Rule of Civil Procedure and or by mandatory case law and or by
22 persuading case law.” (ECF No. 145 at 45).

23 Defendant contends that Plaintiff is not entitled to relief under Rule 59(e) or 60(b)
24 because he demonstrates no new facts, circumstances, or law, as required by the rules.

25 Rule 59(e) states, “A motion to alter or amend a judgment must be filed no later than
26 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e). A district court may alter
27 or amend judgment under Rule 59(e) if “(1) the district court is presented with newly
28 discovered evidence, (2) the district court committed clear error or made an initial decision

1 that was manifestly unjust, or (3) there is an intervening change in controlling law.”
2 *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). Altering or amending
3 a judgment under Rule 59(e) is an “extraordinary remedy to be used sparingly.” *Carroll*
4 *v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). “A motion for reconsideration under Rule
5 59(e) should not be granted, absent highly unusual circumstances, unless the district court
6 is presented with newly discovered evidence, committed clear error, or if there is an
7 intervening change in the controlling law.” *McDowell v. Calderon*, 197 F.3d 1253, 1255
8 (9th Cir. 1999) (quotation omitted).

9 Rule 60(b) states,

10 On motion and just terms, the court may relieve a party or its legal
11 representative from a final judgment, order, or proceeding for . . . (1) mistake,
12 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence
13 that, with reasonable diligence, could not have been discovered in time to
14 move for a new trial under Rule 59(b); (3) fraud (whether previously called
15 intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
16 (4) the judgment is void; (5) the judgment has been satisfied, released or
discharged; it is based on an earlier judgment that has been reversed or
vacated; or applying it prospectively is no longer equitable; or (6) any other
reason that justifies relief.

17 Fed. R. Civ. Proc. 60(b). “The party seeking relief under Rule 60(b)(6) must show
18 ‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Wood v. Ryan*,
19 759 F.3d 1117, 1120 (9th Cir. 2014) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535
20 (2005)). “A motion under Rule 60(b) must be made within a reasonable time—and for
21 reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the
22 date of the proceeding.” Fed. R. Civ. P. 60(c). The burden of proof is on the party bringing
23 the Rule 60(b) motion. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

24 In this case, the Court concludes that the record does not support a finding that any
25 of the grounds for granting a Rule 59(e) motion are present. There are not “highly unusual
26 circumstances” present to justify the “extraordinary remedy” of relief under Rule 59(e).
27 *See McDowell*, 197 F.3d at 1255. The Court further concludes that the record does not
28

1 support a finding that any of the grounds for granting a Rule 60(b) motion are present. The
2 record reflects several occasions on which Plaintiff was notified of the deadline to respond
3 in opposition to summary judgment. The record reflects several opportunities for Plaintiff
4 to respond in opposition to summary judgment. The record does not support a finding of
5 fraud within the meaning of Rule 60(b)(3). Plaintiff has not shown “extraordinary
6 circumstances’ justifying the reopening of a final judgment.” *See Wood*, 759 F.3d at 1120.

7 A notice of appeal must be filed “within 30 days after entry of the judgment or order
8 appealed from.” Fed. R. App. P. 4(a)(1)(A). “Federal Rule of Appellate Procedure
9 4(a)(4)(A) tolls the deadline to file a notice of appeal upon the timely filing of certain
10 motions, including a motion to alter or amend the judgment under Federal Rule of Civil
11 Procedure 59, such that the time to appeal—here, 30 days—runs ‘from the entry of the
12 order disposing of the last such remaining motion.’” *Demaree v. Pederson*, 887 F.3d 870,
13 875 (9th Cir. 2018); *see also Swimmer v. I.R.S.*, 811 F.2d 1343, 1344 (9th Cir. 1987) (“A
14 motion pursuant to Fed. R. Civ. P. 59 . . . extends the time for appeal. . . . A motion pursuant
15 to Fed. R. Civ. P. 60 does not.”), *abrogated on other grounds by Briones v. Riviera Hotel*
16 & *Casino*, 116 F.3d 379 (9th Cir. 1997) *as stated by Middleton v. Guaranteed Rate, Inc.*,
17 684 F. App’x 674, 675 (9th Cir. 2017) (“The filing of the second motion for reconsideration
18 did not toll the time to appeal the underlying judgment.”).

19 **IV. CONCLUSION**

20 IT IS HEREBY ORDERED that the Motion for Order Requiring Reconstruction of
21 Electric Data filed by Plaintiff Ashwin Khobragade (ECF No. 143) is DENIED.

22 IT IS FURTHER ORDERED that the Motion for Reconsideration Via Motion to
23 Alter or Amend Judgment filed by Plaintiff Ashwin Khobragade (ECF No. 145) is
24 DENIED.

25 Dated: April 2, 2019


26 Hon. William Q. Hayes
27 United States District Court
28

**Additional material
from this filing is
available in the
Clerk's Office.**