No. 20-_____

In The

Supreme Court of the United States

JACK JORDAN,

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX

Jack Jordan
Pro Se
6225 Northlake Drive
Parkville, Missouri 64152
jack.jordan@emobilawyer.com
(816) 746-1955

United States Court of Appeals
For the Eighth Circuit

No. 19-1743

Jack Jordan

Plaintiff - Appellant

v.

U.S. Department of Labor

Defendant - Appellee

Appeal from United States District Court
for the Western District of Missouri - St. Joseph

Submitted: February 12, 2020
Filed: February 21, 2020
[Unpublished]

Before BENTON, SHEPHERD, and KELLY, Circuit Judges.

PER CURIAM.

Jack Jordan appeals following the district court's[1] adverse grant of summary judgment in his pro se Freedom of Information Act (FOIA) action. After a careful

[1]The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

review, we conclude that the district court did not err in dismissing some claims as duplicative of another pending litigation, see United States Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 489 n.6 (8th Cir. 1990) (district court's decision to dismiss an action in deference to a pending action in another court is reviewed for abuse of discretion); and in granting summary judgment as to the remaining claims, see Madel v. United States Dep't of Justice, 784 F.3d 448, 451 (8th Cir. 2015) (grant of summary judgment is reviewed de novo; summary judgment is appropriate where an agency proves that it has fully discharged its obligations under FOIA). Accordingly, we affirm. See 8th Cir. R. 47B.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

JACK JORDAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-06129-CV-SJ-ODS
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	

ORDER AND OPINION (1) GRANTING DEFENDANT'S MOTION TO PARTIALLY DISMISS CASE, (2) GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME TO RESPOND TO PLAINTIFF'S SUMMARY JUDGMENT MOTION, (3) WITHDRAWING PLAINTIFF'S MOTION REGARDING RULE 26(F) CONFERENCE, AND (4) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO RULE ON DEFENDANT'S MOTION FOR EXTENSION OF TIME AND ENLARGE TIME TO FILE PROPOSED SCHEDULING ORDER

Pending are (1) Plaintiff's Motion for Summary Judgment (Doc. #6), (2) Defendant's Motion to Partially Dismiss Case (Doc. #13), (3) Defendant's Motion for Extension of Time to Respond to Plaintiff's Motion for Summary Judgment (Doc. #15), (4) Plaintiff's Motion Regarding Rule 26(f) Conference (Doc. #22), and (5) Plaintiff's Motion to Rule on Defendant's Motion for Extension of Time and Enlarge Time to File Proposed Scheduling Order (Doc. #23). Plaintiff's summary judgment motion is not fully briefed, but the Court, as explained *infra*, issues rulings on the other motions.

I. BACKGROUND

Plaintiff Jack Jordan alleges Defendant U.S. Department of Labor failed to release documents pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, with regard to two FOIA requests. Doc. #1, ¶ 1. The first request (F2018-850930) pertains to Plaintiff's February 2018 request to Defendant for the release of the following documents in Word or unlocked PDF format: (1) all letters from Office of Administrative Law Judges ("OALJ") to Plaintiff's FOIA requests; (2) the letter from Chief Administrative Law Judge ("ALJ") Henley to Plaintiff dated May 15, 2017, regarding how to address ALJ misconduct; and (3) the letter from Chief ALJ Henley to Plaintiff dated February 2,

2018, refusing to meet with Plaintiff regarding ALJ misconduct. *Id*., ¶ 2. Defendant denied Plaintiff's request. *Id*., ¶ 13. Plaintiff asks the Court to order Defendant to release all letters responsive to the request. Doc. #1, at 15.

The second request (F2018-858557) is Plaintiff's April 2018 request, which sought release of Defendant's records concerning "emails sent by employees of DynCorp International LLC ("DI") on July 30 or 31, 2013 with the subject line: 'WPS – next steps & actions'" in the possession of Defendant's Benefits Review Board ("BRB"). *Id.*, ¶ 4. "On July 30, 2013, the emails were sent by DI employee Darin Powers ('Powers') to Brian Cox ('Cox') and Robert Huber ('Huber') and other recipients ('Powers' emails'). On July 31, 2013, the emails were sent by DI employee Huber to Powers and Cox and other recipients ('Huber's emails')." *Id*. Plaintiff seeks release of the emails "in the form…transmitted to the BRB by any person at any time after January 2, 2018[,] along with any documentation establishing the date of transmission to and receipt by the BRB." *Id*., ¶ 15. Defendant denied the FOIA request, stating the BRB would not "take any action with respect to Powers' email until it is appropriate to do so in connection with the pending FOIA litigation." *Id.*, ¶¶ 16-17 (internal quotations omitted). Plaintiff asks the Court to direct Defendant to produce "all responsive records containing Powers' emails," and other records responsive to his FOIA request. *Id.* at 15.

On October 26, 2018, Defendant moved to dismiss the portions of Plaintiff's Complaint concerning FOIA Request No. F2018-858557 because they are duplicative of litigation being pursued by Plaintiff in another federal court. Doc. #13. While the parties briefed the motion to dismiss, other motions were filed, which the Court addresses *infra*.

II. PLAINTIFF'S LAWSUIT IN THE D.C. DISTRICT COURT

In 2016, Plaintiff submitted five FOIA requests to Defendant seeking release of emails related to Defense Base Act Case No. 2015-DBA Proceedings, a case in which Plaintiff, an attorney, is representing his wife against DynCorp International. *Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 219-24 (D.D.C. 2017). Plaintiff sought, among other things, unredacted DynCorp emails dated July 30 or July 31, 2013, with the subject line of "WPS – next steps & actions." *Id*. at 220. Defendant refused to produce unredacted copies of two emails, claiming attorney-client privilege. *Id*. at 220.

In September 2016, Plaintiff filed suit in the United States District Court for the District of Columbia seeking disclosure of "previously undisclosed versions" of the DynCorp emails. *Id*. The DynCorp emails consists of five emails. Claiming attorney-client privilege, Defendant redacted two emails, only releasing the sender, recipients, date, and subject line. *Id*. at 221. "The chronologically first email ('the Powers email') spans roughly three pages. The second email ('the Huber email') spans roughly half of a page." *Id*.

In August 2017, after conducting an *in camera* review of the emails, the D.C. District Court concluded the content of the Powers' email was protected by the attorney-client privilege, and granted summary judgment in favor of Defendant with regard to that email. *Id*. at 227-32. But the D.C. District Court determined Defendant did not adequately why it withheld the Huber email, and directed Defendant to release the email or file a renewed motion for summary judgment. *Id*. Defendant chose the latter. In March 2018, the D.C. District Court denied Defendant's renewed motion for summary judgment, finding the Huber email was not protected by privilege. *Jordan v. U.S. Dep't of Labor*, 308 F. Supp. 3d 24, 42-44 (D.D.C. 2018). The D.C. District Court directed Defendant to release the Huber email to Plaintiff. *Id*. at 44.

In May 2018, Plaintiff appealed the March 2018 decision (and other decisions issued by the D.C. District Court). In October 2018, the United States Court of Appeals for the District of Columbia affirmed the D.C. District Court's decision. Doc. #20-2.

> Notwithstanding appellant's speculation to the contrary, there is no reason to doubt the district court's finding that an in camera review revealed the Powers email contains an explicit request for legal advice…. To the extent appellant seeks disclosure of the parts of the Powers email that read "attorney-client privilege" and seek an explicit request for legal advice, the district court did not err in declining to require disclosure of such disjointed words that have "minimal or no information content."

Doc. #20-2 (citation omitted). Earlier this month, Plaintiff moved for a rehearing en banc, which remains pending.[1]

[1] In December 2017, Plaintiff filed another FOIA lawsuit in the D.C. District Court against Defendant. Therein, Plaintiff seeks disclosure of records showing expenditure of resources in litigating the D.C. District Court lawsuit, and records pertaining "directly or indirectly" to that lawsuit, Plaintiff, or the Judge involved in both lawsuits. *Jordan v. U.S. Dep't of Labor*, 315 F. Supp. 3d 584, 588 (D.D.C. 2018). This lawsuit remains pending.

III. DEFENDANT'S MOTION FOR PARTIAL DISMISSAL

Federal courts have a "virtually unflagging obligation…to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 534 (8th Cir. 2009). No particular rule establishes how a district court must handle identical issues raised in matters pending in different federal courts. *Brewer v. Swinson*, 837 F.2d 802, 804 (8th Cir. 1988) (citing *Colo. River*, 424 U.S. at 817). Nonetheless, the Eighth Circuit has determined a plaintiff "should not be allowed to litigate the same issue at the same time in more than one federal court." *Blakley v. Schlumberger Tech. Corp.*, 648 F.3d 921, 932 (8th Cir. 2011) (citations and internal quotations omitted). Further, the "dismissal of duplicative claims comports with" the Eighth Circuit's long-standing "general principle" of "avoid[ing] duplicative litigation." *Id.* (citations omitted).

When determining whether to abstain due to a concurrent federal proceeding, the "threshold issue" is whether the proceedings are duplicative or parallel. *See Neb. Inv. Fin. Auth. v. Gen. Elec. Capital Corp.*, No. 4:14-CV-3242, 2016 WL 8376457, at *2 (D. Neb. Jan. 21, 2016) (citations omitted); *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 849 F. Supp. 2d 881, 888 (D. Minn. 2012) (citation omitted). Cases are parallel or duplicative when the same issues are being litigated at the same time in more than one federal court. *Blakley*, 648 F.3d at 932 (citation omitted). If cases assert different legal theories but rely on a "common nucleus of operative fact" and seek essentially the same relief in both cases, the cases are considered the same. *See Ritchie*, 849 F. Supp. 2d at 889 (citing *Friez v. First Am. Bank & Trust of Minot,* 324 F.3d 580, 581 (8th Cir. 2003)).

In the D.C. District Court and this Court, Plaintiff, pursuant to FOIA, seeks disclosure of emails sent on July 30 and 31, 2013, by DynCorp employees with the subject line "WPS – next steps & actions." *Compare Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 219-24 (D.D.C. 2017), *with* Doc. #1, ¶¶ 4-7, 17-18, 20, 22-35, 38-40. In fact, Plaintiff specifically discusses the D.C. District Court lawsuit in his Complaint, alleging that Court improperly granted summary judgment in Defendant's favor, and arguing the D.C. District Court improperly inferred Powers' emails were for legal advice. Doc. #1, ¶¶ 7, 17, 31, 36-40. Although the Court of Appeals for the District of Columbia affirmed the D.C. District Court's decision that Powers' email was exempt from

disclosure, Plaintiff asks this Court to order Defendant to release "all responsive records containing Powers' emails," and "any record containing Huber's emails." *Id*. at 15.

Plaintiff argues the two matters are different because the "FOIA request at issue in this case pertains, essentially, only to Powers' emails," and in particular, "Powers' emails to Cox and Huber." Doc. #16, at 6-7. Plaintiff contends Defendant "failed to address any particular communication to any person," and "failed to show that the DC Lawsuit addressed *any* aspect *whatsoever* of Powers' emails to Cox and Huber…" *Id*. at 7 (emphasis in original), 12-19, 22-23. Plaintiff, however, fails to mention Powers' email was sent, not only to Cox and Huber, but three other individuals, including his attorney. Doc. #1-2, at 3. That is, it was one email sent to five individuals.

The D.C. District Court, after conducting an *in camera* review of this email, found the Power's email "contained privileged communications between an attorney and his client," as well as "an express request for legal advice." 273 F. Supp. 3d at 232. Yet, as revealed by his response to the motion to dismiss, Plaintiff seeks to relitigate whether Defendant properly redacted the Powers' email, asserting arguments he did or could have made before the D.C. District Court. Doc. #16, at 7-23. Upon review of the D.C. District Court lawsuit and the Complaint filed in this matter, the Court finds this matter is parallel or duplicative of the matter litigated in the D.C. District Court.

Where two federal courts simultaneously exercise jurisdiction over matters involving the same claims, one federal court may defer to the other federal court based upon considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952); *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 849 F. Supp. 2d 881, 888 (D. Minn. 2012) (citation omitted). This Court may also consider the relative progress of the two actions; whether a suit was filed for a vexatious, reactive, or tactical purpose; and "whether the forum in which the first case was filed adequately protects the rights of the litigants in the second case." *Ritchie*, 342 U.S. at 90-91 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 21-22 (1983), and *Federated Rural Elec. Ins. Corp. v. Ark. Elec. Cooperatives, Inc.,* 48 F.3d 294, 299 (8th Cir. 1995)). District courts have ample discretion to stay or dismiss a matter based upon a duplicative federal proceeding. *Kerotest*, 342 U.S. at 183-84.

The Court has considered these factors. The D.C. District Court issued a decision related to the second FOIA request Plaintiff seeks to appeal in this matter. Thus, the conservation of judicial resources, comprehensive disposition of litigation, and the progress of that action weigh in favor of this Court deferring to the D.C. District Court. Plaintiff does not contend, much less set forth evidence, his rights were or are not adequately protected in the D.C. District Court lawsuit. As best the Court can discern, Plaintiff filed numerous motions in the D.C. District Court, and there is no indication Plaintiff's rights were not adequately protected.

Plaintiff raises other various other arguments in response to Defendant's motion for partial dismiss. By way of example, Plaintiff contends Defendant waived its argument because it "merely *cited* two rules" and "did not even explicitly state the basis for its motion." Doc. #16, at 10-11 (emphasis in original). The Court disagrees, and finds Defendant provided a basis and legal authority for its motion. To the extent not specifically addressed *supra*, the Court overrules Plaintiff's other objections to Defendant's motion for partial dismissal. Based upon the foregoing, the Court grants Defendant's motion, and dismisses Plaintiff's claims associated with and/or based upon FOIA Request F2018-858557 without prejudice.[2]

IV. OTHER FULLY BRIEFED MOTIONS

A. Defendant's Request for Extension of Time

Defendant filed a request to extend its deadline to respond to Plaintiff's summary judgment motion until ten days after the Court issues its ruling on Defendant's Motion to Dismiss. Doc. #15. Plaintiff's opposed Defendant's request. Doc. #17. The Court overrules Plaintiff's objection, and grants Defendant's request. Defendant shall file its response to Plaintiff's summary judgment motion by no later than ten days after the date of this Order. Absent extenuating circumstances, no additional extensions of time will

[2] Although not raised by Defendant, the doctrine of res judicata likely precludes Plaintiff from relitigating his FOIA request related to Powers' email. "The doctrine of res judicata applies to repetitive suits involving the same cause of action." *Lundquist v. Rice Mem'l Hosp.*, 238 F.3d 975, 977 (8th Cir. 2001) (citation omitted). "Final judgment on the merits of an action precludes the same parties from relitigating issues that were or could have been raised in that action." *Id*. (citation omitted).

be granted with regard to Defendant's response to Plaintiff's summary judgment motion. Pursuant to Local Rule 7.0(c)(3), Plaintiff may file reply suggestions within fourteen days after Defendant's response is filed.

B. Plaintiff's December 2018 Motions

On December 4, 2018, Plaintiff filed a motion asking the Court to direct Defendant to participate in the parties' Rule 26(f) conference by noon on December 6, 2018. Doc. #22. Two days later, Plaintiff stated he was withdrawing his December 4, 2018 motion. Doc. #23. The Court will construe Plaintiff's filing as seeking permission to withdraw his earlier motion. The Court grants Plaintiff's request, and Plaintiff's December 4, 2018 motion (Doc. #22) is withdrawn.

In his December 6, 2018 motion, Plaintiff also asked the Court to direct Defendant to respond to Plaintiff's summary judgment motion within seven days, and extend the deadline for the parties' joint proposed scheduling order from December 17, 2018, to seven days after Defendant files its response to Plaintiff's summary judgment motion. Plaintiff's request is granted in part and denied in part. As set forth *supra*, the Court has directed Defendant to file its response to Plaintiff's summary judgment motion within ten days of the date of this Order. The Court declines to shorten that timeframe. The Court grants Plaintiff's request to extend the deadline for the parties to submit their joint proposed scheduling order. The parties shall file their joint proposed scheduling order by no later than fourteen days after Defendant files its response to Plaintiff's summary judgment motion.

V. PARTIES' COMMUNICATIONS GOING FORWARD

The briefing in this matter reveals, at a minimum, communication issues between the parties' counsel. Counsel are reminded that they must adhere to the Principles of Civility. Doc. #10, at 4. Going forward, the Court expects the parties to work together to schedule matters, respect the time and schedule of others, and avoid unwarranted attacks on the opposing party or his/its counsel. When a party intends to request an extension of time, counsel shall meet and confer in good faith prior to filing any such

motion. The Court expects the parties and their counsel to agree to reasonable requests for extensions.[3]

VI. CONCLUSION

For the foregoing reasons, Defendant's Motion to Partially Dismiss Case (Doc. #13) is granted; Defendant's Motion for Extension of Time to Respond to Plaintiff's Motion for Summary Judgment (Doc. #15) is granted, and Defendant shall file its response to Plaintiff's summary judgment within ten days of this Order; Plaintiff's Motion Regarding Rule 26(f) Conference (Doc. #22) is withdrawn pursuant to his request; and Plaintiff's Motion to Rule on Defendant's Motion for Extension of Time and to Enlarge Time to File Proposed Scheduling Order (Doc. #23) is granted in part and denied in part.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
DATE: December 14, 2018 ORTRIE D. SMITH, SENIOR JUDGE
UNITED STATES DISTRICT COURT

[3] The Court's expectation should come as no surprise to Plaintiff who was informed of the D.C. District Court's similar expectation. "In this District, requests for extensions of short durations are routine. The civility of most counsel appearing before this Court results in most requests of this nature premised on prearranged vacations and the press of business being unopposed." 308 F. Supp. 3d at 37.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

JACK JORDAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-06129-CV-SJ-ODS
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	

ORDER (1) GRANTING PLAINTIFF'S RULE 58 MOTION, (2) DENYING PLAINTIFF'S RULE 60 MOTIONS, AND (3) DENYING PLAINTIFF'S MOTION FOR ORDER

Currently pending are several motions. This Order only addresses Plaintiff's Rule 58 motion, Plaintiff's Rule 60 motions, and Plaintiff's motion for order. For the following reasons, Plaintiff's Rule 58 motion (Doc. #28) is granted, but Plaintiff's Rule 60 motions (Docs. #27, 29) and Plaintiff's motion for order (Doc. #30) are denied.

I. BACKGROUND

Plaintiff Jack Jordan alleges Defendant United States Department of Labor ("DOL") failed to release documents pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, with regard to two FOIA requests. Doc. #1, ¶ 1. FOIA Request F2018-850930 sought production of certain letters sent from the Office of Administrative Law Judges to Plaintiff. *Id*. ¶ 2. FOIA Request F2018-858557 requested release of "emails sent by employees of DynCorp International LLC ("DI") on July 30 or 31, 2013 with the subject line: 'WPS – next steps & actions.'" *Id.* ¶¶ 4, 15. The DOL denied both requests. *Id*. ¶¶ 13, 16-17. In his Complaint, Plaintiff asked the Court to order the DOL to produce all documents responsive to both FOIA requests.

The DOL moved to dismiss Plaintiff's claims related to FOIA Request F2018-858557 because they were duplicative of litigation brought by Plaintiff in the United States District Court for the District of Columbia. *Jordan v. U.S. Dep't of Labor*, No. 16-1868 (D.D.C.) ("D.C. Lawsuit"). On December 14, 2018, the Court granted the DOL's

motion, and dismissed without prejudice Plaintiff's claims based upon FOIA Request F2018-858557. Doc. #24.

Shortly thereafter, Plaintiff filed four motions asking the Court to (a) set out its judgment in a separate document (Doc. #28); (b) grant him relief with regard to the Court's consideration of the treatment of inferences and the DOL's credibility in the D.C. Lawsuit (Doc. #27); (c) grant him relief with regard to the Court's consideration of the "progress of" the D.C. Lawsuit and "deferring" to Judge Contreras because of alleged fraud, misrepresentation, and misconduct by the DOL and the Department of Justice ("DOJ") (Doc. #29); and (d) direct the DOL to publicly file Powers' emails to Cox and Huber (Doc. #30). The DOL opposes Plaintiff's motions. Doc. #36.

II. DISCUSSION

A. Plaintiff's Rule 58(a) Motion (Doc. #28)

Pursuant to Rule 58, Plaintiff asks the Court to set out its judgment in a separate document. The DOL opposes Plaintiff's request because not all claims have been adjudicated. In his reply, Plaintiff clarifies he is asking that "*whenever* the Court does enter judgment," it does so in a separate document. Doc. #40.

"Every judgment…must be set out in a separate document…." Fed. R. Civ. P. 58(a). "A party may request that judgment be set out in a separate document…" Fed. R. Civ. P. 58(d). Once all claims have been adjudicated and an appealable order is entered, the Court, as it always does, will issue its judgment in a separate document. Fed. R. Civ. P. 54, 58; L.R. 58.1. Plaintiff's motion is granted.

B. Plaintiff's Rule 60 Motions (Docs. #27 and 29)

Plaintiff filed two Rule 60 motions. In his first Rule 60 motion, Plaintiff asks the Court grant him relief with respect to the Court's "consideration of the treatment of inferences and the DOL's credibility by Judge Contreras in the D.C. Lawsuit when [this Court] stated that to the 'best' of [its] ability to 'discern,' the record of the D[.]C[.] Lawsuit gave 'no indication' that 'Plaintiff's rights were not adequately protected.'" Doc. #27, at 2. In his second Rule 60 motion, Plaintiff asks the Court to "reverse its decision dismissing claims related to FOIA Request F2018-858557" because this Court did not

properly consider the "progress of" the D.C. Lawsuit, should not have "'deferr[ed] to Judge Contreras," and failed to consider the "fraud, misrepresentation and egregious misconduct" by the DOL and DOJ. Doc. #29, at 6. The DOL opposes the motions, arguing Rule 60 does not apply to interlocutory orders. In his reply, Plaintiff argues the Court is permitted to grant him Rule 60 relief from the D.C. District Court's judgment. Doc. #41, at 4.

(1) This Court's December 14, 2018 Order

"The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). Relevant to Plaintiff's motions, "the court may relieve a party…from a final judgment, order, or proceeding for…fraud…, misrepresentation, or misconduct by an opposing party," or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(3), (6). But Rule 60(b) only applies to final judgments and orders. *Gonzalez v. Crosby*, 545 U.S. 524, 527 (2005); *Interstate Power Co. v. Kan. City Power & Light Co.*, 992 F.2d 804, 807 (8th Cir. 1993) (noting Rule 60(b) only applies to motions seeking relief from final judgments).[1] Plaintiff's Rule 60 motions – at least the initial briefing of his Rule 60 motions – were directed at this Court's December 14, 2018 Order, which dismissed without prejudice some of Plaintiff's claims. That Order is not a final judgment. Therefore, Plaintiff's Rule 60 motions are denied to the extent they sought relief from this Court's December 14, 2018 Order.

(2) The D.C. District Court's Judgment

In his reply, Plaintiff repositions the target of his Rule 60 motions, arguing this Court may grant him relief from the D.C. District Court's judgment. Doc. #41, at 4. Curiously, Plaintiff's new position conflicts with what he told the Court in response to the DOL's partial motion to dismiss: "So the DC Lawsuit is ongoing and Plaintiff is not

[1] *See also* Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment ("The addition of the qualifying word 'final' emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule….").

seeking to have this Court review any D.C. court's rulings." Doc. #16, at 9 n.3. Nevertheless, both the Eighth Circuit and this Court generally do not consider new arguments raised in a party's reply brief. *See United States v. Morris*, 723 F.3d 934, 942 (8th Cir. 2013) (citations omitted); *Harris v. Daviess-DeKalb Cty. Reg'l Jail*, No. 14-6069, 2016 WL 3645201, at *9 (W.D. Mo. June 30, 2016). For this reason alone, the Court denies Plaintiff's Rule 60 motions.

Even if the Court were to consider Plaintiff's Rule 60 motions as they relate to the D.C. District Court's judgment, it would still deny the motions. "Relief under Rule 60(b) ordinarily is obtained by motion in the court that rendered the judgment." 11 Charles Alan Wright, et al., Federal Practice and Procedure § 2865 (3d ed. 2018). An advisory committee note to an amendment to Rule 60(b), however, indicates Rule 60(b) may be used to seek relief from a judgment by filing a motion with the court in which the judgment was rendered, or by "filing a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment." Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment. Several courts have discussed Rule 60(b)'s application to a judgment rendered by another court, but those cases are limited to specific circumstances, such as Rule 60(b)(4) motions arguing the rendering court's judgment is void.[2] *E.g.*, *Budget Blinds, Inc. v. White*, 536 F.3d 244, 254 (3d Cir. 2008); *Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 395 (5th Cir. 2001); *Morris v. Peterson*, 759 F.2d 809, 811 (10th Cir. 1985); *Indian Head Nat'l Bank of Nashua v. Brunelle*, 689 F.2d 245, 249-50 (1st Cir. 1982); *Covington Indus., Inc. v. Resintex A.G.*, 629 F.2d 730, 733 (2d Cir. 1980).

Plaintiff's motions are not analogous to the unique circumstances where courts granted relief from a judgment entered by another court. Plaintiff not only commenced the D.C. Lawsuit, but he actively participated in the litigation. On August 4, 2017, the D.C. District Court granted in part and denied in part the DOL's motion for summary

[2] Rule 60(b)(4) allows a party to seek relief from a final judgment that is void, and "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." Fed. R. Civ. P. 60(b)(4); *U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010); *Baldwin v. Credit Based Asset Servicing & Securitization*, 516 F.3d 734, 737 (8th Cir. 2008).

judgment, finding, among other things, the DOL properly withheld production of the Powers' email dated July 30, 2013. No. 16-1868 (D.D.C.) (Docs. #38-39). That order did not adjudicate all claims in the D.C. Lawsuit, and thus, was not an appealable order. On March 30, 2018, the D.C. District Court, *inter alia*, entered its judgment in favor of Plaintiff with respect to the Huber email. *Id.* (Docs. # 59-60). This order was final and appealable. *Id.* Plaintiff appealed the D.C. District Court's decision. In October 2018, the United States Court of Appeals for the District of Columbia affirmed the D.C. District Court's decision. *Jordan v. U.S. Dep't of Labor*, No. 18-5128 (D.C. Cir.); Doc. #20-2. Plaintiff then requested a rehearing, which was denied. The Court of Appeals issued its mandate on February 1, 2019.

Plaintiff seeks relief from the D.C. District Court's judgment in the form of Rule 60 motions filed in this Court.[3] But Plaintiff does not provide legal authority to support his argument, which alone justifies this Court's denial of his motions. In addition, Plaintiff is not entitled to relief under Rule 60(b)(3) because he failed to "show by clear and convincing evidence that his opponent engaged in a fraud or misrepresentation that prevented [him] from fully and fairly presenting his case" in the D.C. District Court. *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) (citation omitted). Perhaps most critical to his Rule 60 motions, Plaintiff did not demonstrate exceptional circumstances warranting the "extraordinary relief" he seeks and justifying this Court's "intrusion into the sanctity of a final judgment" and disregard of "comity among the federal district courts." *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999); *Budget Blinds*, 536 F.3d at 251-52. Rather, as discussed *infra*, Plaintiff's Rule 60(b) motions are nothing more than requests that the Court reconsider its ruling on the DOL's partial motion to dismiss, or another opportunity for Plaintiff to relitigate the claims already adjudicated by the D.C. District Court. For these reasons, the Court denies Plaintiff's Rule 60 motions.

[3] Plaintiff did not file this action for the specific purpose of seeking relief from the D.C. District Court's judgment. According to the Complaint, Plaintiff seeks release of documents responsive to his FOIA requests. Doc. #1, at 15.

(3) Reconsideration

Even if the Court were to construe Plaintiff's Rule 60(b) motions as motions for reconsideration of its December 14, 2018 Order, his motions fail. Motions for reconsideration are "nothing more than Rule 60(b) motions when directed at non-final orders." *Elder-Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir. 2006). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 721 (8th Cir. 2010). "Such a motion is to be granted only in exceptional circumstances requiring extraordinary relief." *Minn. Supply Co. v. Raymond Corp*., 472 F.3d 524, 534 (8th Cir. 2006). "[A] district court should not grant a motion to reconsider an interlocutory order unless the moving party demonstrates (1) that it did not have a fair opportunity to argue the matter previously, and (2) that granting the motion is necessary to correct a significant error." *Lexington Ins. Co. v. MGB Partners, Inc.*, No. 07-0468-DGK, 2009 WL 10672420, at *3 (W.D. Mo. July 13, 2009).

In its December 14, 2018 Order, the Court discussed, among other things, the standard to be applied when faced with a matter duplicative (in part) of a lawsuit filed in another federal court, the factors to be weighed, the similarities between Plaintiff's claims in the D.C. Lawsuit and his claims in this matter, and the progress of the D.C. Lawsuit. Doc. #24, at 2-6. The Court determined "the conservation of judicial resources, comprehensive disposition of litigation, and the progress of that action weigh in favor of this Court deferring to the D.C. District Court." *Id*. at 6. The Court also noted that Plaintiff, in response to the DOL's partial motion to dismiss, did "not contend, much less set forth evidence, his rights were or are not adequately protected" in the D.C. Lawsuit. *Id*.[4] Nonetheless, in the pending motions, Plaintiff attempts to take yet another bite at the apple, arguing extensively about the D.C. Lawsuit.

Plaintiff reargues the substantive issues addressed in the D.C. Lawsuit; attacks the D.C. District Court's judgment; and disparages the DOL, the DOJ, the attorneys

[4] In one Rule 60 motion, Plaintiff argues he "did actually establish that his rights were egregiously and intentionally violated by multiple D.C. courts," identifying the adverse decisions by the D.C. District Court. Doc. #27, at 3 (citing Doc. #16, at 9 n.3). But he does not demonstrate adverse rulings amounted to inadequately protected rights.

involved in the lawsuit, and even the judge. Plaintiff criticizes the factual and legal underpinnings of the D.C. District Court's judgment, arguing, among other things, the DOL did not meet its burden of establishing privilege, the judgment was based on "obvious falsehoods," and the order violated federal law. Doc. #27, at 4-15; Doc. #29, at 10-25, 29-34, 36-38; Doc. #41, at 5-10. Additionally, he contends the DOL, the DOJ, and their counsel engaged in "extraordinary misconduct," made misrepresentations and false declarations, "lured a federal judge into knowingly misrepresenting facts…and violating federal law," "helped perpetrate a fraud on multiple courts," made "blatantly deceitful[]" contentions, "falsely" denied allegations, and "created evidence." Doc. #27, at 5-8, 10-11, 13, 15; Doc. #29, at 8, 12-13, 15-21, 24-25, 28-31, 33-34, 36-38; Doc. #41, at 5-10. And Plaintiff argues not only that the D.C. District Court's decision was illegal, but that Judge Contreras[5] willfully violated Plaintiff's rights, "knowingly and egregiously violated federal law," helped the DOL conceal Powers' email, engaged in egregious misconduct, "concealed the truth," made knowing misrepresentations, "conceal[ed]…evidence," violated the law, and "especially clearly and deliberately flaunted (in three published opinions) deliberate and egregious abuses of discretion and power." Doc. #27, at 4-15; Doc. #29, at 8, 12-16, 21, 24, 27, 30-32, 36; Doc. #41, at 5-10.

Plaintiff's Rule 60 motions are attempts to undermine a preexisting, final judgment entered by the D.C. District Court, and/or efforts to relitigate claims already adjudicated. His arguments are based upon the parties' conduct, arguments, and representations, and the judge's decisions and findings in D.C. Lawsuit. But a motion for reconsideration may not be used for this purpose. A motion for reconsideration "serve[s] a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 414 (8th Cir. 1988) (quoting *Rothwell Cotton Co. v. Rosenthal & Co.,* 827 F.2d 246, 251 (7th Cir.), *as amended,* 835 F.2d 710 (7th Cir. 1987)); *see also Broadway v. Norris*, 193 F.3d 987, 989-90 (8th Cir. 1999) (stating Rule 60(b) authorizes relief based on certain circumstances, and "is not a vehicle for simple reargument on the merits."); *Dale &*

[5] "Judge Contreras" is mentioned more than 100 times in Plaintiff's Rule 60 motions. *See* Docs. #27, 29.

Selby Superette & Deli v. U.S. Dep't of Agric., 838 F.Supp. 1346, 1348 (D.M inn. 1993) (stating a motion to reconsider should not be utilized to relitigate issues but "afford an opportunity for relief in extraordinary circumstances.").

Plaintiff has not demonstrated he did not have a fair opportunity to argue the issues in the D.C. District Court[6] or this Court, and he has not shown that granting his motions is necessary to correct a significant error. *Lexington Ins. Co.*, 2009 WL 10672420, at *3. Further, Plaintiff has not established exceptional circumstances requiring this Court to grant him the extraordinary relief he seeks. Thus, Plaintiff's Rule 60 motions, even when construed as motions for reconsideration, are denied.

C. Motion for Order (Doc. #30)

Plaintiff also asks the Court to direct the DOL to file a copy of Powers' emails to Cox and Huber. Docs. #30, 39. Although the DOL represents it produced these emails, Plaintiff contends the DOL has failed to do so. The DOL opposes the motion, stating it complied with the disclosures ordered in the D.C. Lawsuit, and even if it had not, the Plaintiff's remedy lies with the D.C. District Court. Doc. #36, at 3.

It is unclear from the briefing if these emails are the subject of a discovery dispute. If they are, Plaintiff failed to comply with Local Rule 37.1 before filing his motion to order. For this reason, Plaintiff's motion is denied.

Even if these emails are not the subject of a discovery dispute, the Court will not entertain a motion seeking production of emails related to claims adjudicated in another district court and have been dismissed by this Court. For this additional reason, Plaintiff's motion is denied. The relief Plaintiff seeks should be requested in the D.C. District Court, the D.C. Court of Appeals, or with the DOL's Administrative Review Board, with which he recently sought review of an administrative law judge's orders related to the emails. Doc. #36-1, at 27 n.5 (confirming he "already is pursuing Powers'

[6] In one of his motions, Plaintiff discloses he briefed one issue – i.e., the DOL's representations as to its redaction of emails – on three separate occasions in the D.C. Lawsuit. Doc. #29, at 20-21. This is but one of the many opportunities Plaintiff had to argue his claims in the D.C. District Court.

emails in FOIA suits in the D.C. Circuit, as well as in a second case in D.C. District Court and in a third case in the Western District of Missouri (Eighth Circuit)."

The Court's decision to dismiss Plaintiff's claims associated with Powers' and Huber's emails was clear. Yet, Plaintiff's motions focused on those claims. *See* Doc. #27, at 3-14; Doc. #29, at 7-25, 27-33, 36-38; Doc. #30, at 1-9, 12-13; Doc. #39, at 2-6; Doc. #41, at 5-11. To be clear: the only claims pending in this matter are those associated with Plaintiff's FOIA request (F2018-850930) that sought production of certain letters from the Office of Administrative Law Judges to Plaintiff.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Rule 58(a) motion (Doc. #28) is granted, Plaintiff's Rule 60 motions (Docs. #27 and 29) are denied, and Plaintiff's motion for order (Doc. #30) is denied.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, SENIOR JUDGE
UNITED STATES DISTRICT COURT

DATE: March 11, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

JACK JORDAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-06129-CV-SJ-ODS
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	

ORDER AND OPINION (1) DENYING PLAINTIFF'S MOTION TO RECONSIDER, (2) DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, (3) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND (4) DENYING AS MOOT PLAINTIFF'S MOTION TO JOIN A PARTY, DEFENDANT'S MOTION FOR PROTECTIVE ORDER, AND PLAINTIFF'S MOTION FOR ORDER

Six motions are currently pending. For the reasons below, Plaintiff's Motion to Reconsider (Doc. #50) is denied; Plaintiff's Motion for Partial Summary Judgment (Doc. #6) is denied; Defendant's Motion for Summary Judgment (Doc. #35) is granted; and the remaining motions – i.e., Plaintiff's Motion to Join a Party (Doc. #37), Defendant's Motion for Protective Order (Doc. #51), and Plaintiff's Motion to Reconsider (Doc. #54), which the Court construes as a Motion for Order – are denied as moot.

I. BACKGROUND

Plaintiff Jack Jordan alleges Defendant United States Department of Labor ("DOL") failed to release documents pursuant to the Freedom of Information Act ("FOIA"). Doc. #1, ¶ 1. FOIA Request F2018-850930 sought release of certain letters sent from the Office of Administrative Law Judges ("OALJ")[1] to Plaintiff. *Id*. ¶ 2. FOIA Request F2018-858557 sought release of "emails sent by employees of DynCorp International LLC ("DI") on July 30 or 31, 2013 with the subject line: 'WPS – next steps & actions.'" *Id.* ¶¶ 4, 15. The DOL denied both requests. *Id*. ¶¶ 13, 16-17.

The DOL moved to dismiss Plaintiff's claims related to Request 858557 because they were duplicative of litigation brought by Plaintiff in the United States District Court for

[1] The OALJ is the DOL's administrative trial court.

the District of Columbia. *Jordan v. U.S. Dep't of Labor*, No. 16-1868 (D.D.C.) ("D.C. Lawsuit"). On December 14, 2018, the Court granted the DOL's motion, and dismissed without prejudice Plaintiff's claims based upon Request 858557. Doc. #24. Pursuant to Rule 60 of the Federal Rules of Civil Procedure, Plaintiff sought relief from the Court's December 14, 2018 Order. Docs. #27, 29. On March 11, 2019, the Court denied Plaintiff's motions, and to the extent he was also seeking reconsideration of the Court's December 14, 2018 Order, the Court denied that request. Doc. #49.

On March 12, 2019, Plaintiff filed a motion to reconsider the Court's December 14, 2018 Order. Doc. #50. Both parties move for summary judgment. Docs. #6, 35. Plaintiff also moves to join Ferissa Talley as a party, Defendant moves for a protective order, and Plaintiff filed a "motion to reconsider," which asks the Court to issue a decision on Plaintiff's previously filed motion to reconsider. Docs. #37, 51, 54. The two summary judgment motions, Plaintiff's motion to reconsider, and Plaintiff's motion to join became fully briefed in March 2019. The remaining two motions are not fully briefed, but additional briefing is not necessary given the Court's rulings in this Order.

II. DISCUSSION

A. Motion to Reconsider

Plaintiff moves for reconsideration of the Court's December 14, 2018 Order, arguing the Court lacked discretionary authority to dismiss his claims, and erred in concluding he failed to address how his rights were violated in the D.C. Lawsuit.[2] Under Rule 54(b), district courts have the "inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment." *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1016-17 (8th Cir. 2007); Fed. R. Civ. P. 54(b). "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 721 (8th Cir. 2010). "Such a motion is to be granted only in exceptional circumstances requiring extraordinary relief." *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 534 (8th Cir. 2006).

[2] On March 27, 2019, Plaintiff filed "Corrections to Plaintiff's Motion to Reconsider," containing three clarifications to his motion. Doc. #53. Although Plaintiff did not seek leave to amend his motion, the Court considered Plaintiff's clarifications.

When considering Plaintiff's Rule 60(b) motions (Docs. #27, 29), the Court also construed those motions as seeking reconsideration. Doc. #49, at 6-8.[3] In doing so, the Court determined Plaintiff did not show that granting his motions was necessary to correct a manifest error of law or fact and did not establish exceptional circumstances requiring the Court to grant him extraordinary relief. *Id*. Plaintiff's recent motion to reconsider reiterates similar arguments he advanced in his Rule 60 motions. *Compare* Doc. #27, at 10-15 *and* Doc. #29, at 33-38, *with* Doc. #41, at 4-11. Once more, Plaintiff has not shown a manifest error of law or fact and has not demonstrated exceptional circumstances exist to grant him extraordinary relief. Accordingly, Plaintiff's motion to reconsider is denied.

B. Motions for Summary Judgment

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Williams v. City of St. Louis*, 783 F.2d 114, 115 (8th Cir. 1986). "[W]hile the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011) (quotation omitted). Inadmissible evidence may not be used to support or defeat a summary judgment motion. *Brooks v. Tri-Sys., Inc.*, 425 F.3d 1109, 1111 (8th Cir. 2005) (citation omitted). The Court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences reasonably drawn from the evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588-89 (1986); *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984).

In his briefing, Plaintiff repeatedly relies on his complaint to establish facts, support arguments, and controvert the DOL's facts. Doc. #6-1, at 7-14, 24-28; Doc. #48, at 8.[4] A party "cannot simply rely on assertions in the pleadings to survive a motion for summary

[3] Citations to page numbers refer to the pagination automatically generated by CM/ECF.

[4] Plaintiff may have done so because he believed the DOL admitted the allegations in the complaint when it failed to answer. Doc. #6-1, at 15. But the Court granted the DOL leave to file its answer out of time. Doc. #12. Thereafter, Plaintiff did not file an amended motion for summary judgment citing evidence to support his purported facts.

judgment." *Krein v. DBA Corp.*, 327 F.3d 723, 726 (8th Cir. 2003). Similarly, Plaintiff sets forth "facts" but does not cite anything in support. Doc. #6-1, at 7, 11; Doc. #48, at 7, 9-12. The failure to cite anything in support violates the Federal Rules of Civil Procedure and this Court's Local Rules. Fed. R. Civ. P. 56(c); L. R. 56.1(b). The Court has not considered facts solely supported by the complaint or facts not supported by admissible evidence.

When responding to the summary judgment motions, Plaintiff and Defendant did not respond to all of the moving party's facts. When a party fails to address facts, the party is deemed to have admitted those facts. L. R. 56.1(b) (stating "[a] party opposing a motion for summary judgment must admit[] or controvert[] each separately numbered paragraph in the movant's statement of facts…. Unless specifically controverted by the opposing party, all facts set forth in the statement of the movant are deemed admitted…."); *Nationwide Prop. & Cas. Ins. Co. v. Faircloth*, 845 F.3d 378, 382 (8th Cir. 2016) (citations omitted). Regarding facts supported by admissible evidence but not addressed by the responding party, the Court finds the responding party has admitted those facts.[5]

(1) The Freedom of Information Act

The FOIA "ensure[s] that government is conducted in the open" and "provide[s] wide-ranging public access to government documents." *Miller v. U.S. Dep't of Agric.*, 13 F.3d 260, 262 (8th Cir. 1993); *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985). "FOIA represents a carefully balanced scheme of public rights and agency obligations designed to foster greater access to agency records than existed prior to its enactment." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). The FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions for specific categories of material." *Milner v. Dep't of Navy*, 562 U.S. 562, 564 (2011). The nine exemptions "are 'explicitly made exclusive,' and must be 'narrowly construed.'" *Id.* (quoting *FBI v. Abramson,* 456 U.S. 615, 630 (1982)).

This Court reviews an agency's FOIA decision *de novo*. 5 U.S.C. § 552(a)(4)(B) (2016). "[S]ummary judgment is available to a defendant agency where 'the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA

[5] The Court notes the DOL's Fact 63 is missing. Doc. #35, at 6.

requester.'" *Mo. Coal. for Env't Found. v. U.S. Army Corps of Eng'rs*, 542 F. 3d 1204, 1209 (8th Cir. 2008) (quoting *Miller*, 779 F.2d at 1382). To discharge this burden, the agency "must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [the FOIA's] inspection requirements." *Miller*, 779 F.2d at 1382-83 (citation omitted); 5 U.S.C. § 552(a)(4)(B).

(2) Request 858557

Plaintiff seeks summary judgment on his claims arising from Request 858557. However, the Court dismissed Plaintiff's claims associated with this FOIA request. Doc. #24. Therefore, Plaintiff's motion for summary judgment on his claims arising from Request 858557 is denied.

(3) Request 850930

Both parties move for summary judgment on Plaintiff's claims based upon Request 850930, made by Plaintiff on February 7, 2018. Doc. #35-2, at 3-4. Plaintiff asked the DOL to produce the following records in "either MS Word or an unlocked PDF copy": (1) ALJ Almanza's January 17, 2018 decision in Case No. 2016-SOX-00042; (2) all letters from the OALJ to Plaintiff regarding any of his FOIA requests; (3) the May 15, 2017 letter from Chief ALJ Henley to Plaintiff regarding how to address ALJ misconduct; and (4) the February 2, 2018 letter from Chief ALJ Henley to Plaintiff refusing to meet with Plaintiff about ALJ misconduct. Doc. #35-1, at 2; Doc. #35-2, at 2-4. Plaintiff's request asked that an "electronic copy be forwarded to me (1) by email and (2) in the format in which it was created or maintained by the OALJ, *e.g.*, either MS Word or an unlocked PDF." Doc. #35-2, at 3. He reminded the OALJ that it was "required to provide the record in any form or format requested," and "should, to the extent practicable, communicate with [Plaintiff] using the method that is most likely to increase the speed and efficiency of the communication… such as email." *Id*. at 3-4 (citations omitted).

On April 3, 2018, the DOL (specifically, OALJ Chief ALJ Henley) responded to the request, stating all responsive letters were previously provided to Plaintiff in paper copy or as a PDF format attachment to an email. Doc. #35-1, at 2; Doc. #35-2, at 5. The DOL also provided Plaintiff with the web address where ALJ Almanza's decision was located in PDF format. Doc. #35-1, at 3; Doc. #35-2, at 5. The DOL informed Plaintiff it was not

required "to create documents or modify existing documents to make them releasable under FOIA." *Id*. The DOL declined to create "new PDF versions of the documents already released to [Plaintiff], both because such documents do not currently exist and because, if generated from the source Word documents, they would have to be modified by scrubbing of metadata." *Id.* The DOL also declined "to create new versions of the source Word documents with metadata scrubbed…because it would contain information about OALJ's deliberative process protected by FOIA Exemption 5." Doc. #35-1, at 3; Doc. #35-2, at 5-6.

On May 3, 2018, Plaintiff appealed the denial, arguing the DOL was "required to provide the record in any form or format requested," and had to create or modify existing documents to make them releasable under the FOIA. Doc. #35-1, at 3; Doc. #35-2, at 7-9. On August 22, 2018, Plaintiff supplemented his appeal with a letter. Doc. #35-2, at 10-14. Therein, he stated what he meant by "unlocked PDF":

> By "unlocked PDF," I mean a PDF that is *not* created by scanning in a paper copy or locked using password protection. I mean a PDF that was created by (1) starting with an MS Word or PDF document (that was not created by scanning a paper copy) and (2) saving it in PDF without password protection so the document can be, *e.g.*, highlighted, annotated using a "comment" function, and filed as exhibits via federal courts' electronic filing systems.

Id. at 13; *see also* Doc. #6-1, at 27-28. Plaintiff also asserted that, even if the DOL "previously disclosed the requested records in less useful formats," the DOL was not relieved from its obligation under the FOIA to respond to his request and produce the documents in the requested formats. *Id*.

The next day, on August 23, 2018, Plaintiff sent an email asking why the Office of Solicitor had not acknowledged receipt of his FOIA requests. Doc. #35-1, at 3; Doc. #35-2, at 15. On August 28, 2018, Plaintiff filed this lawsuit. Doc. #1. On September 10, 2018, the FOIA Appeals Unit sent a letter to Plaintiff acknowledging receipt of his appeal. Doc. #35-1, at 3; Doc. #35-2, at 16.[6] Plaintiff does not contest the reasonableness of the DOL's

[6] The parties do not discuss whether Plaintiff exhausted his administrative remedies, which is generally a prerequisite to bringing a FOIA lawsuit. *Elnashar v. U.S. Dep't of Justice*, 446 F.3d 792, 796 (8th Cir. 2006); 5 U.S.C. § 552(a)(6)(C)(i). A person is deemed to have exhausted his administrative remedies if the agency does not comply with the applicable time provisions. 5 U.S.C. § 552(6)(C)(i). The DOL has twenty business days to respond to and process FOIA requests and appeals. 29 C.F.R. § 70.25(a); 5 U.S.C. § 552(a)(6)(A)(ii). There is no evidence indicating the DOL responded to or processed

search for documents responsive to Request 850930. But he contends the DOL violated the FOIA by not providing the responsive records in a requested format.

(a) ALJ Almanza's January 17, 2018 Decision

In his FOIA request, Plaintiff asked for ALJ Almanza's January 17, 2018 decision ("the ALJ's decision") in ALJ Case No. 2016-SOX-00042. Doc. #35-2, at 2-4. However, in his complaint, Plaintiff neither mentions ALJ Almanza's decision nor alleges the DOL violated the FOIA by failing to reproduce the ALJ's decision. *See* Doc. #1. By failing to set forth allegations related to the ALJ's decision, Plaintiff has not set forth a claim arising from the DOL's response to his FOIA request for the ALJ's decision. Fed. R. Civ. P. 8(a). Even if the Court were to overlook that Plaintiff is a licensed attorney and liberally construe the complaint as it would in a matter involving a non-attorney pro se plaintiff, Plaintiff does not assert the essence of a claim associated with the DOL's production of the ALJ's decision. *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015) (citation omitted) (stating, even if the plaintiff is pro se, the essence of an allegation must be discernible, and the complaint must state a claim as a matter of law). Thus, Plaintiff fails to state a claim upon which relief may be granted with regard to his claims associated with the DOL's response to his request for ALJ Almanza's decision.

Even if the Court were to find Plaintiff sufficiently stated such a claim, the DOL is entitled to summary judgment on his claim associated with his request for the ALJ's decision. In response to his FOIA request, the DOL directed Plaintiff to the website where the ALJ's decision was and still is publicly available in PDF format. Doc. #35-2, at 15; https://www.oalj.dol.gov/DECISIONS/ALJ/SOX/2016/JORDAN_JACK_v_DYNCORP_INTERNATIONA_2016SOX00042_(JAN_17_2018)_080822_ORDER_PD.PDF#search=jack%20jordan (last visited Apr. 9, 2019). The document is not password protected. *Id*. Although he does not mention the ALJ's decision in his summary judgment motion, Plaintiff, in response to the DOL's summary judgment motion, states he has not abandoned his request for the decision and wants it produced in unlocked PDF format. Doc. #48, at 10; Doc. #48-1, at 3.

Plaintiff's FOIA appeal within twenty business days. Thus, Plaintiff is deemed to have exhausted his administrative remedies.

Federal agencies must "make available for public inspection in electronic format – final opinions…made in the adjudication of cases…." 5 U.S.C. § 552(a)(2)(A). The obligation to make records available in response to a FOIA request does not encompass records the agency must make publicly available in electronic format. 5 U.S.C. § 552(a)(3)(A) (stating agencies "shall make the records promptly available" when properly requested "[e]xcept with respect to records made available under paragraphs (1) and (2) of this subsection…."). Plaintiff does not dispute that ALJ's decision was and still is publicly available in electronic format.[7] And he does not contend the DOL's decision to make ALJ's decision publicly available violates the FOIA.

Plaintiff fails to set forth legal authority demonstrating the DOL violated the FOIA when it made the ALJ's decision publicly available in PDF format, or the DOL, in response to his FOIA request, violated the FOIA when it provided the website where the ALJ's decision was located but did not reproduce the record. And the Court has not found legal authority supporting Plaintiff's argument. Accordingly, the DOL's motion for summary judgment with respect to Plaintiff's request for the ALJ's decision is granted.

(b) Letters from the OALJ to Plaintiff

For the remainder of Request 850930, Plaintiff asked for letters sent from the OALJ to him regarding any of his FOIA requests, and the letters sent from Chief ALJ Henley to him on May 15, 2017, and February 2, 2018. Doc. #35-2, at 3-4. It is undisputed that Plaintiff received forty letters responsive to his request, and it is further undisputed that he received those letters in PDF format and/or paper copy.[8] Doc. #6-1, at 14; Doc. #35, at 4-6, 11-12; Doc. #35-1, at 4-7; Doc. #35-3; Doc. #35-5; Doc. #35-4; Doc. #35-6; Doc. #35-7; Doc. #48, at 7-8. It is uncontroverted that the produced documents were not redacted,

[7] Also, as Plaintiff notes, the ALJ's decision was filed with this Court on February 15, 2019, in unlocked PDF format. Doc. #48, at 9-10 (citing Doc. #35-7).

[8] According to the DOL, "[a] small number" of letters may have been produced in paper copy only. Doc. #35, at 4-6, 12, 14; Doc. #35-1, at 2, 4-7. On October 17, 2016, Plaintiff informed the DOL that there was no need to mail paper copies of letters to him, and he preferred to receive electronic copies. Doc. #35, at 12; Doc. #35-1, at 5-6. Four of the responsive letters were sent to Plaintiff before his October 17, 2016 email, and those four letters may have been sent via paper copy only. *Id*. To date, Plaintiff has not identified which, if any, responsive letters were not provided to him in PDF format.

and no responsive documents were withheld from Plaintiff.[9] Doc. #35, at 4-6; Doc. #35-1, at 7; Doc. #48, at 7. Plaintiff, however, argues the DOL violated the FOIA by not producing the letters in his requested format(s).

FOIA requires federal agencies to provide a record "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section." 5 U.S.C. § 552(a)(3)(B). According to the DOL's regulations, a "component[10] will provide the record in the form or format requested if the record is readily reproducible in that form or format, provided the requester has agreed to pay and/or has paid" any required fees. 29 C.F.R. § 70.21(c). "Each component should make reasonable efforts to maintain its records in commonly reproducible forms or formats." *Id*. "Nothing in 5 U.S.C. § 552…requires that any agency or component create a new record in order to respond to a request for records." 29 C.F.R. § 70.5.

Plaintiff requested the responsive records be provided "in either MS Word or an unlocked PDF copy." Doc. #35-2, at 3 (emphasis added). He asked the DOL to provide the "electronic cop[ies]" of the letters to him via email "in the format in which it was created or maintained by the OALJ, *e.g.*, either MS Word or an unlocked PDF." *Id*. (emphasis added). The DOL provided the letters to Plaintiff via scanned PDFs attached to emails, although some unidentified letters may have been provided to Plaintiff in paper copy only. Doc. #35, at 4-6, 13; Doc. #35-1, at 2, 4-6. Plaintiff does not present any evidence that the letters the DOL sent to him in PDF format were password protected, or he was unable to open or access the PDF files. The same letters were filed with this Court in PDF format, and those documents are not password protected. Doc. #35-1, at 7; Docs. #35-3, 35-4, 35-5, 35-6, 35-7. By producing these letters to Plaintiff in a PDF format that is not protected by password, the DOL properly responded to Plaintiff's request to provide the

[9] Plaintiff argues responsive documents were withheld because the DOL failed to release the responsive documents in a requested format. Doc. #48, at 7. Plaintiff presents nothing countering the DOL's evidence that all responsive letters were provided to him.

[10] The DOL contains twenty-five "components." 29 C.F.R. app. A, Part 70. Relevant here, the Office of the Solicitor and the OALJ are listed as components of the DOL.

responsive documents to him in unlocked PDF format, one the formats requested by Plaintiff. In doing so, the DOL did not violate the FOIA.[11]

Plaintiff's request also asked that the responsive letters be provided "in the format in which [they were] created or maintained by the OALJ." Doc. #35-2, at 3. This sentence was followed by "*e.g.*, either MS Word or an unlocked PDF." *Id.* "E.g.," an abbreviation for *exempli gratia*, means "for example." *E.g.*, Black's Law Dictionary (10th ed. 2014). When viewing this sentence along with the opening line to Plaintiff's FOIA request, it is difficult to determine if Plaintiff is requesting the responsive documents be produced in Word or unlocked PDF, and/or he is asking that the documents be provided in whatever format is utilized by the DOL, which, for example, could be Word or PDF format. Regardless, the DOL provided the documents in unlocked PDF format, which is the format utilized by the DOL to maintain those records. Doc. #35, at 12; #35-1, at 4-7.

As set forth *supra*, section II(B)(3), it was not until more than three months after Plaintiff appealed the DOL's denial of his FOIA request that he described what he allegedly meant by "unlocked PDF." Doc. #35-2, at 10-14. "By 'unlocked PDF,' I mean a PDF that is *not* created by scanning in a paper copy or locked using password protection." *Id*. at 13. Plaintiff sought a PDF created by taking a Word or PDF document (not created by scanning a paper copy) and saving the file "in PDF without password protection" so that he could highlight and annotate the letters and file them as "exhibits via federal courts' electronic filing systems." *Id*.; *see also* Doc. #6-1, at 14, 29. Plaintiff did not wait for a response to his letter, filing this lawsuit seven days later. Doc. #1. Even when liberally construing his FOIA request, the DOL could not have known Plaintiff sought the type of PDF format he later detailed. Furthermore, Plaintiff cannot expand his FOIA request and/or modify the requested format when appealing the DOL's denial or in this lawsuit when he did not request this more particular unlocked PDF format in his initial FOIA request.

[11] Because the requested documents have already been produced, this matter is rendered moot. *Urban v. United States*, 72 F.3d 94, 95 (8th Cir. 1995) (citing *In re Wade,* 969 F.2d 241, 248 (7th Cir. 1992)); *see also United Transportation Union Local 418 v. Boardman*, No. C07-4100-MWB, 2008 WL 2600176, at *8 (N.D. Iowa June 24, 2008) (collecting cases).

Plaintiff also argues his FOIA request was not limited to the versions of the letters that were "signed," bear a signature, or are in "final" form. Doc. #48, at 8, 17. He contends the DOL could have omitted the signatures and date stamps and released most, if not all, of the requested records in Word format. *Id.* at 7. In support of its summary judgment motion, DOL provides the declaration of Todd Smyth, a Senior Staff Attorney with the OALJ since 1989 and whose responsibilities, during the relevant timeframe, included advising OALJ FOIA personnel on FOIA requests. Doc. #35-1.[12] Smith explains that once the letters to Plaintiff were drafted, they were printed, hand signed, sometimes hand-dated or date-stamped, and scanned as a PDF. *Id*. at 6 n.6. Smyth states "[n]o records of the final letters sent to Plaintiff exist in any format other than signed paper copies or final format PDF copies. All other copies of the letters are unsigned drafts." *Id*. at 7.

Plaintiff argues the DOL limited his request to only those letters that were signed even though his request did not seek only "final" and/or "hand-signed" letters. Doc. #48, at 18. But Plaintiff's request did not ask for anything other than "[a]ll letters from the OALJ" to Plaintiff regarding any of his FOIA requests. Doc. #35-2, at 3. Furthermore, Plaintiff's request indicated he was asking for the documents in "the format in which [they were] created or maintained." *Id*. (emphasis added). While the draft letters in Word were not sent to Plaintiff in response to his FOIA request, the final, signed copies of the letters were sent to Plaintiff. Doc. #35-1, at 7. The DOL did not violate the FOIA when it sent Plaintiff the responsive letters in PDF format, which was one of the (two) formats requested by him, and was also the format in which the DOL maintained the letters sent to Plaintiff.

The purpose of the FOIA is to provide greater access to government records. *Milner*, 562 U.S. at 564; *Kissinger*, 445 U.S. at 150; *Miller*, 13 F.3d at 262. The DOL has

[12] Plaintiff argues Smyth's Declaration is not admissible because he does not establish he has personal knowledge, states conclusions instead of facts, and fails to show he is competent to testify. Doc. #48, at 13. In the declaration, Smyth sets forth, among other things, his knowledge of and experience with FOIA requests, his review of the DOL's records related to Plaintiff's FOIA requests, his explanation about the DOL's search for records responsive to Plaintiff's FOIA requests, the DOL's communications with Plaintiff, identification of documents produced to Plaintiff, whether the responsive documents exist in the format requested by Plaintiff, and confirmation that no document was withheld by the DOL in response to Request 850930. Doc. #35-1. Smyth set forth sufficient facts showing he has personal knowledge, and established he was competent to testify.

established it fully discharged its obligations under the FOIA in that Plaintiff was given access to the very documents he sought in one of the formats he sought. Accordingly, the DOL's motion for summary judgment is granted in its favor.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Reconsider is denied, Plaintiff's Motion for Partial Summary Judgment is denied, Defendant's Motion for Summary Judgment is granted, and the remaining motions are denied as moot.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
DATE: April 9, 2019 ORTRIE D. SMITH, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

JACK JORDAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-06129-CV-SJ-ODS
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	

ORDER DENYING PLAINTIFF'S RULE 60 MOTION

Now pending is Plaintiff's "Motion for FRCP 60 Relief for Fraud, Misconduct and Misrepresentation." Doc. #60. For the following reasons, the motion is denied.

I. BACKGROUND

On December 14, 2018, the Court dismissed Plaintiff's claims related to FOIA Request F2018-858557. Doc. #24. On March 11, 2019, the Court denied two Rule 60 motions wherein Plaintiff sought relief from the Court's decision dismissing those claims. Docs. #27, 29, 49. On April 9, 2019, the Court denied Plaintiff's motion to reconsider in which he asked for reconsideration of the Court's Order dismissing his claims. Doc. #50. That same day, the Court also granted Defendant's motion for summary judgment on Plaintiff's remaining claims. Doc. #55. Within hours, Plaintiff filed a Notice of Appeal. Doc. #57. On April 24, 2019, Plaintiff filed another Rule 60 motion, again requesting relief from the Court's Order dismissing his claims related to FOIA Request F2018-858557. Doc. #60. Defendant filed its response on April 25, 2019, and Plaintiff filed his reply the same day. Docs. #61-62.

II. DISCUSSION

"As a general rule, a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal…confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Hunter v. Underwood*, 362

F.3d 468, 475 (8th Cir. 2004) (internal quotations and citations omitted). "[A] district court may consider a Rule 60(b) motion, filed after a notice of appeal, on the merits and deny it." *Brode v. Cohn*, 966 F.2d 1237, 1240 (8th Cir. 1992); *see also In re Kieffer-Mickes, Inc.*, 226 B.R. 204, 209-10 (B.A.P. 8th Cir. 1998) (stating "the law in this circuit is clear," and "[a] motion for relief from a judgment or order filed after a notice of appeal…may be considered on its merits and *denied,* but not *granted,* by the trial court."); *Cross v. Ramey*, No. 18-1135, 2018 WL 4383334, at *1 (E.D. Mo. Sept. 14, 2018) (citation omitted). If a district court decides to grant the Rule 60 motion, "counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered." *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (8th Cir. 1977) (citation omitted); *see also Winter v. Cerro Gordo Cty. Conservation Bd.*, 925 F.2d 1069, 1073 (8th Cir. 1991) (citation omitted); *Rindahl v. Kaemingk*, No. 4:17-CV-04088-RAL, 2017 WL 5634611, at *1 (D.S.D. Nov. 21, 2017).

This is Plaintiff's fourth attempt to seek relief from the Court's December 14, 2018 Order dismissing his claims related to Request F2018-858557. Docs. #27, 29, 50, 60. Generally speaking, the latest attempt reiterates its predecessors. But, as Plaintiff knows, Rule 60 is not to be utilized for reargument. Doc. #49, at 7 (citing *Broadway v. Norris,* 193 F.3d 987, 989-90 (8th Cir. 1999). For this reason alone, Plaintiff's motion is denied. Upon review of the merits of the latest motion, the Court finds Plaintiff's argument do not provide a valid basis for the Court to reconsider its December 14, 2018 Order. Plaintiff does not demonstrate "exceptional circumstances" warranting "extraordinary relief." *Middleton v. McDonald*, 388 F.3d 614, 616 (8th Cir. 2004) (citation omitted). The Court finds Plaintiff's Rule 60 motion is without merit, and therefore, denies the motion.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Rule 60 motion is denied.

IT IS SO ORDERED.

DATE: April 29, 2019

/s/ Ortrie D. Smith
ORTRIE D. SMITH, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

JACK JORDAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 18-06129-CV-SJ-ODS
	)	
U.S. DEPARTMENT OF LABOR,	)	
	)	
Defendant.	)	

ORDER AND OPINION (1) DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, (2) DENYING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT AND ALTER OR AMEND JUDGMENT, (3) DENYING PLAINTIFF'S RULE 52 MOTION, AND (4) DENYING PLAINTIFF'S RULE 60 MOTION

Pending are Plaintiff's Motion to Alter or Amend Judgment (Doc. #64), Plaintiff's Motion to Amend the Complaint and Alter or Amend Judgment Regarding ALJ Order (Doc. #65), Plaintiff's Rule 52 Motion (Doc. #66), and Plaintiff's Second Motion for FRCP 60 Relief for Fraud, Misconduct, and Misrepresentation (Doc. #67). For the following reasons, Plaintiff's motions are denied.

I. BACKGROUND

In this matter, Plaintiff asserted claims under the Freedom of Information Act ("FOIA") related to two FOIA Requests – i.e., F2018-850930 and F2018-858557. Doc. #1. On December 14, 2018, the Court dismissed Plaintiff's claims related to FOIA Request F2018-858557 because Plaintiff previously litigated claims associated with that request in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia ("the D.C. Lawsuit"). Doc. #24. Between the Court's December 14, 2018 Order and April 9, 2019, Plaintiff filed, among other things, two Rule 60 motions and a motion to reconsider, asking for relief from the Court's December 14, 2018 Order. Docs. #27, 29, 50. Those motions were denied. Doc. #49, 55.

On April 9, 2019, the Court granted Defendant's motion for summary judgment, and denied Plaintiff's cross-motion for summary judgment. Doc. #55. Plaintiff

immediately appealed the Court's decision. However, on April 24, 2019, Plaintiff filed yet another Rule 60 motion seeking relief from the Court's December 14, 2018 Order. Doc. #60. The Court denied Plaintiff's Rule 60 motion. Doc. #63.

Between May 3, 2019, and May 9, 2019, Plaintiff filed four additional motions,[1] which are discussed in further detail *infra*. Docs. #64-67. Defendant opposes the motions. Doc. #71. Plaintiff filed replies in further support of his motions. Docs. #73-76. The motions are now fully briefed.

II. DISCUSSION

A. Plaintiff's Rule 59 Motion (Doc. #64)

Plaintiff asks the Court to "vacate or reverse its summary judgment [order] and at least afford Plaintiff a trial" pursuant to Rule 59(a) and 59(e) of the Federal Rules of Civil Procedure. Doc. #64, at 6.[2] Rule 59(a) permits a court to grant a new trial for jury trials and nonjury trials. Fed. R. Civ. P. 59(a). Nothing within Rule 59(a) permits the Court to grant Plaintiff relief from entry of summary judgment. Accordingly, Plaintiff's request for relief under Rule 59(a) is denied.

Rule 59(e) governs a motion to alter or amend a judgment, and provides a district court with the opportunity to correct "manifest errors of law or fact or to present newly discovered evidence." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (citations and quotations omitted). Rule 59(e) does not permit a party to rehash previously raised arguments. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation mitted). Nor does Rule 59(e) allow a party to offer or raise new legal arguments or theories that could have been raised prior to entry of judgment. *Metro. St. Louis Sewer Dist.*, 440 F.3d at 934.

---

[1] The Court's Local Rules limit a party's suggestions in support of a motion to fifteen pages. L.R. 7.0(d)(1)(A). Each of Plaintiff's four motions exceed the Local Rule's page limitation, and when combined, contain more than 150 pages of legal arguments. Docs. #64-67. Throughout this litigation, Plaintiff has routinely disregarded the Court's Local Rule briefing requirements. However, given his pro se status and notwithstanding the fact that Plaintiff is an attorney, the Court has granted Plaintiff leniency in this regard.

[2] Page references relate to the pagination the Court's CM/ECF system applies to filings, and not the pagination utilized by the parties.

(1) Smyth's Declaration

For the first basis of his motion, Plaintiff points to a declaration provided by Department of Labor ("DOL") Senior Attorney Todd Smyth that was filed in the D.C. Lawsuit in 2016. According to Plaintiff, Smyth's 2016 declaration contained "many falsehoods," and Smyth "knowingly falsely declared that he had personal knowledge" and "provided evidence showing why he lied." Doc. #64, at 7-9, 26-28. Relying on his Complaint and his briefing on various motions, Plaintiff argues he "proved" Smyth's declaration was false throughout this litigation. *Id*. at 9-10. Plaintiff maintains Defendant, which supposedly knew about Smyth's allegedly false representations, still chose Smyth to submit a declaration in support of its motion for summary judgment in this matter. *Id*. at 11. According to Plaintiff, the Court "*repeatedly* refrained from ever addressing or even acknowledging any issue that Plaintiff presented regarding Smyth's perjury or credibility" and improperly relied on Smyth's declaration. *Id*. at 12-13 (emphasis in original).

Plaintiff's argument fails because, first and foremost, he previously raised this argument. In its April 9, 2019 Order, the Court found Plaintiff relied on allegations and arguments – not admissible evidence – to support many of his purported facts. Doc. #55, at 3-4. In addition, Plaintiff, in attempting to dispute Defendant's facts, did not cite anything in the record to support his contention or did not cite admissible evidence. *Id*. at 4. He also failed to respond to some of Defendant's facts. *Id*. A party's failure to properly support or challenge a fact violates Federal Rules of Civil Procedure 56(c) and the Court's Local Rules. *Id.* Thus, the Court could not consider Plaintiff's facts or his challenges to Defendant's facts, including facts pertaining to Smyth's declaration, that were not supported by the record. *Id.* The Court also rejected Plaintiff's argument that Smyth's declaration was not admissible because "Smyth set forth sufficient facts showing he has personal knowledge, and established he was competent to testify." Doc. #55, at 11 n.12. Because this argument was already raised and addressed, Plaintiff's motion is denied.[3]

[3] This issue was also litigated and addressed in the D.C. Lawsuit. In that matter, the Honorable Rudolph Contreras found Smyth demonstrated he had personal knowledge, and determined Plaintiff failed to substantiate his argument that Smyth's "factual

(2) Plaintiff's Facts and the Court's April 9, 2019 Order

Plaintiff contends the Court failed to address the facts he set forth in his summary judgment briefing that Defendant failed to controvert. Doc. #64, at 13-14, 29-30. Plaintiff specifically points to Facts 70, 72, 73, 78, and 80. Doc. #64, at 13, 19, 25 (citing Doc. #48). But the portions of these facts Plaintiff claims the Court purportedly failed to address were solely supported by Plaintiff's Complaint and/or his declaration, or in some instances, nothing at all.

Plaintiff must cite to admissible evidence to support or controvert a fact, and he cannot rely on allegations to support or controvert a fact. Doc. #55, at 3-4. With regard to the portions of his declaration on which he relies for these facts, Plaintiff points to (1) his testimony about how he reproduced or converted a Word document in unlocked PDF format, (2) an email he sent to Defendant's counsel in February 2019 clarifying his FOIA request that was the subject of the motions for summary judgment, and (3) a statement that each fact stated in his response to Defendant's summary judgment motion and his cross motion "is within my personal knowledge and is incorporated herein as if set forth expressly herein." Plaintiff also utilizes his declaration to establish, among other things, Defendant failed to produce evidence establishing it released any requested record in the requested format. As explained *supra*, the Court could not and did not consider facts that were not supported by admissible evidence. Doc. #55, at 3-4. Because Plaintiff did not establish certain facts, the Court could not deem those same facts uncontroverted due to Defendant's failure to respond.

Plaintiff also argues the Court, in its April 9, 2019 Order, made improper inferences and contentions, "deceptively" chose its words, made misstatements and misrepresentations, "attempted to create doubt about the meaning" of Plaintiff's FOIA request, and "asserted another defense for the DOL based on clear falsehoods." Doc. #64, at 13-22, 33-40. The Court's Order was based upon the record before it and the parties' arguments. Regardless, Plaintiff does not present evidence of "manifest errors

---

assertions were very clearly false." *Jordan v. U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 228-29 n.16 (D.D.C. 2017) (denying Plaintiff's motions to compel the deposition of Smyth, compel production of evidence related to Smyth's declaration, and strike Smyth's declaration).

of law or fact or to present newly discovered evidence." *Metro. St. Louis Sewer Dist.*, 440 F.3d at 933. Accordingly, Plaintiff's motion is denied.

B. Plaintiff's Rule 15 and Rule 59 Motion (Doc. #65)

Pursuant to Rule 15(b)(2), Plaintiff asks that the Court treat his "Complaint as having been amended to include the ALJ order dated 1/17/18." Doc. #65, at 5. "Rule 15(b) provides parties with methods to amend a pleading any time **during or after trial**," and does not apply to a "situation where the parties intended to amend the complaint before trial." *Cook v. Bella Villa*, 582 F.3d 840, 852 (8th Cir. 2009) (emphasis added). "Rule 15(b), on its face, serves to conform the pleadings to the evidence '[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties.'" *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett*, 708 F.2d 326, 329 (8th Cir. 1983) (quoting Fed. R. Civ. P. 15(b)(2)); *see also Fanning v. Potter*, 614 F.3d 845, 851 (8th Cir. 2010) (stating Rule 15(b)(2) "provides for an issue not raised in the pleadings to be tried by the parties' express or implied consent.").

Plaintiff does not cite to legal authority demonstrating Rule 15(b)(2) provides a basis for the relief he seeks. Importantly, Plaintiff's claims were not tried. Rather, the Court entered summary judgment in Defendant's favor. Yet, Plaintiff moves to amend his Complaint after Defendant filed its summary judgment motion stating the ALJ's order was not at issue,[4] after the Court issued its ruling on the parties' summary judgment motions, and after judgment was entered. Rule 15(b)(2) does not provide an avenue for the relief Plaintiff seeks.

Moreover, the relief sought by Plaintiff is unnecessary because the Court considered Plaintiff's claim associated with the ALJ's decision in its decision on the parties' motions for summary judgment. While this Court found Plaintiff failed to state a claim for relief related to the ALJ's decision, the Court also analyzed Plaintiff's claim as if it had been included in his Complaint. Doc. #55, at 7-8. The Court concluded Plaintiff failed to establish Defendant violated FOIA with regard to the ALJ's decision. *Id*. at 8.

[4] Defendant stated the ALJ's order "is not at issue in this litigation" and referred to Plaintiff's Complaint. Doc. #35, at 12 n.7. Plaintiff's Complaint does not mention the ALJ's January 17, 2018 Order. Doc. #1.

Given the Court's consideration of the claim, Plaintiff's motion for leave to amend is futile.[5] For this additional reason, Plaintiff's motion is denied.

In this same motion, pursuant to Rule 59(e),[6] Plaintiff requests the Court vacate its summary judgment ruling with regard to the ALJ's order. Doc. #65, at 5. For the reasons stated above and because Plaintiff does not present evidence of "manifest errors of law or fact or to present newly discovered evidence," the Court denies Plaintiff's motion.

C. Plaintiff's Rule 52(b) Motion (Doc. #66)

Pursuant to Rule 52(b), Plaintiff "requests the Court specially find facts and separately state conclusions of law" with regard to orders dated October 23, 2018; December 14, 2018; and April 9, 2019. Doc. #66. "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). Rule 52(b), upon which Plaintiff relies for this motion, allows a party to ask the Court to "amend its findings – or make additional findings – and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). However, when issuing a ruling on a Rule 12 or Rule 56 motion, "[t]he court is not required to state findings or conclusions or, unless these rules provide otherwise, on any other motion." Fed. R. Civ. P. 52(a)(3). Plaintiff's motion fails because this matter was not tried, and the Court issued rulings on motions (not after a trial). Therefore, Plaintiff's Rule 52(b) motion is denied.

This motion also contains two other requests, although they do not seem to be tied to Rule 52. Plaintiff asks the Court to vacate its October 23, 2018 Order, which granted Defendant's motion to enlarge the time for Defendant to respond to Plaintiff's Complaint, and deem all factual allegations in the Complaint as admitted. He also requests the Court amend its judgment dismissing Plaintiff's claims related to FOIA Request F2018-858557, and reconsider its rulings on the parties' summary judgment

[5] Plaintiff concedes, "[t]he DOL finally did release the ALJ Order in a Requested Format." Doc. #65, at 23. But Plaintiff does not explain how his claim associated with the ALJ's order is not rendered moot by Defendant's release of the order.

[6] Plaintiff also seeks relief under Rule 59(a), but as explained *supra*, Rule 59(a) is not a proper basis for the relief he seeks.

motions. To the extent Plaintiff is asking the Court to reconsider these rulings, his motion is denied because he asks to modify a procedural order after judgment has been entered. Fed. R. Civ. P. 54(b). In addition, Plaintiff has already asked for relief from the Court's orders granting Defendant's motion to dismiss and motion for summary judgment. He presents no compelling evidence, authority, or argument justifying a reversal of the Court's prior decisions. Accordingly, Plaintiff's motion is granted.

D. Plaintiff's Rule 60 Motion (Doc. #67)

Finally, Plaintiff asks the Court to reinstate his claims related to FOIA Request F2018-858557 and order Defendant to file FOIA compliant versions of the emails sought in the request. Plaintiff brings his motion pursuant to Rule 60(b)(3) and Rule 60(b)(6), which allow a court to relieve a party from final judgment for "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party," and "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(3), 60(b)(6).

Plaintiff contends he presents "new" evidence that Judge Contreras, the District Court Judge in the D.C. Lawsuit, "knowingly misrepresented the only 'fact' that potentially supported his judgment as well as the DOL's contentions in this case that Powers' email is privileged and may be withheld." Doc. #67, at 9. This argument is based on a decision that Judge Contreras issued on May 8, 2019, in a case filed by Plaintiff in 2017.[7] Therein, Judge Contreras denied Plaintiff's motion for reconsideration of an order denying Plaintiff's request to release emails he sought pursuant to a FOIA request. *Jordan v. Dep't of Justice*, No. 17-cv-2702-RC (D.D.C. May 8, 2019) (Doc. #44). Plaintiff claims Judge Contreras "asserted additional falsehoods" and made misrepresentations about his previous findings and rulings in this order. Doc. #67, at 19-23.

Other than Judge Contreras's recent decision, Plaintiff's latest Rule 60 motion is similar, if not identical, to his previous Rule 60 motion. *Compare* Doc. #60 *with* Doc. #67. The Court already addressed those arguments. Doc. #63. Plaintiff's additional

[7] According to Judge Contreras, Plaintiff filed a lawsuit in 2017 seeking to compel the Department of Justice to disclose its records pursuant to the lawsuit filed by Plaintiff in 2016, which this Court refers to as the D.C. Lawsuit.

arguments related to the recent decision by Judge Contreras does not change the Court's analysis and does not provide a basis for granting Plaintiff relief pursuant to Rule 60. Accordingly, the Court denies Plaintiff's latest Rule 60 motion.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Alter or Amend Judgment, Plaintiff's Motion to Amend the Complaint and Alter or Amend Judgment, Plaintiff's Rule 52 Motion, and Plaintiff's Rule 60 Motion are denied.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
DATE: June 27, 2019 ORTRIE D. SMITH, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1743

Jack R. T. Jordan

Appellant

v.

U.S. Department of Labor

Appellee

Appeal from U.S. District Court for the Western District of Missouri - St. Joseph
(5:18-cv-06129-ODS)

ORDER

The petition for rehearing by the panel is denied.

April 28, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

1. **The U.S. Constitution, Amendment I (Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances) provides:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. **The U.S. Constitution, Amendment V (Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation), in relevant part, provides:**

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. **The U.S. Constitution, Amendment X (Reserved Powers to States) provides:**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

4. **The U.S. Constitution, Article III (The Judiciary), in relevant part, provides:**

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.1

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

5. The U.S. Constitution, Article VI (Debts Validated--Supreme Law of Land--Oath of Office), in relevant part, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

6. 5 U.S.C. 552(a)(2)(D) provides:

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format . . .

(D) copies of all records, regardless of form or format--

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times.

7. 5 U.S.C. 552(a)(3)(A) through (D) provides:

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except

when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term “search” means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

8. 5 U.S.C. 552(a)(4)(B) and (C) provide:

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency’s determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

9. 5 U.S.C. 552(a)(6)(A), in relevant part, provides:

Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of--

(I) such determination and the reasons therefor . . . and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

10. 5 U.S.C. 552(a)(6)(B)(iv) provides:

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

11. 5 U.S.C. 552(a)(6)(C)(i) provides:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

12. 5 U.S.C. 552(a)(8)(A) provides:

An agency shall--

(i) withhold information under this section only if--

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information.

13. 5 U.S.C. 552(d) provides:

This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

14. 5 U.S.C. 702 (Right of review) in pertinent part provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

15. 5 U.S.C. 703 (Form and venue of proceeding) provides:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

16. 5 U.S.C. 704 (Actions reviewable) provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

17. 5 U.S.C. 706 (Scope of review) provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.