APPENDIX
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Petitioner-Appellee, v. DAVID ZOOK, Respondent-Appellant.	No. 22-1060 (D.C. No. 1:21-CV-01077-RM) (D. Colo.)

ORDER AND JUDGMENT*

(Filed Dec. 6, 2022)

Before **TYMKOVICH**, **PHILLIPS**, and **EID**, Circuit Judges.

After receiving a confidential complaint from a former tenant of a late-nineteenth century apartment building that the property was in disrepair and paint was constantly chipping off the building, the

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Environmental Protection Agency (EPA) issued an administrative subpoena to the building's landlord, David Zook. The subpoena sought documents concerning whether Zook warned his tenants of the risks of lead-based paint, as required by what is commonly known as the "Lead Disclosure Rule," *see* 40 C.F.R. §§ 745.100 to 745.119. After Zook refused to comply with the subpoena, the United States filed a petition for judicial enforcement. The district court issued Zook an order to show cause why the petition should not be granted. Representing himself, Zook responded and moved to quash the subpoena. The district court denied Zook's motion and granted the petition, determining the subpoena was within the EPA's legitimate statutory authority and was not unduly burdensome. Zook filed a post-judgment motion, which the district court denied. Zook appeals pro se.[1] Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Jurisdictional Scope of Appeal

We first address the scope of our jurisdiction because, in a civil case, a timely notice of appeal "is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). The district court entered judgment on October 28, 2021. On November 29, 2021, Zook filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). Because the motion was filed beyond Rule 59(e)'s 28-day deadline,

[1] We liberally construe Zook's pro se filings but may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

however, the court treated it as one for relief under Rule 60 and, on February 1, 2022, denied it.

Because the United States is a party, Zook had to file his notice of appeal "within 60 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(B)(i). He filed his notice of appeal on February 28, 2022. His notice of appeal was therefore timely as to the February 1 order denying his post-judgment motion but untimely as to the October 28 judgment unless his post-judgment motion tolled the time to appeal under Federal Rule of Appellate Procedure 4(a)(4). Such a motion tolls the time for appeal only if it is filed "within the time allowed by" the Federal Rules of Civil Procedure. Fed. R. App. P. 4(a)(4)(A).[2] A Rule 59(e) motion "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). And to be timely for purposes of appellate Rule 4(a)(4)(A), a Rule 60 motion must be "filed no later than 28 days after the judgment is entered." Fed. R. App. P. 4(a)(4)(A)(vi). Because Zook filed his post-judgment motion 32 days after

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[2] Zook's notice of appeal named "the final judgment entered on February 1, 2022, denying his Motion to Alter or Amend the Order entered on October 28, 2021." R. at 88. Naming only the order denying the post-judgment motion would have been sufficient to include the final judgment in this appeal if the post-judgment motion was one described in Rule 4(a)(4)(A). *See* Fed. R. App. P. 3(c)(5)(B) ("In a civil case, a notice of appeal encompasses the final judgment . . . if the notice designates . . . an order described in Rule 4(a)(4)(A)."). But as we explain, the post-judgment motion was not one described in Rule 4(a)(4)(A) because it was not filed within the time period Rule 4(a)(4)(A) requires for the motion to toll the appeal deadline.

entry of the district court's judgment, it did not toll the time to appeal.

Zook contests this conclusion, arguing that because the court served the judgment to him by mail, Federal Rule of Civil Procedure 6(d) provided him with an additional three days to file a timely post-judgment motion under either Rule 59(e) or Rule 60, and therefore his post-judgment motion was timely filed on Monday, November 29, 2021.[3] However, as Zook recognizes, *Parker v. Board of Public Utilities*, 77 F.3d 1289 (10th Cir. 1996), forecloses his argument. In *Parker*, this court held "that the three-day mail provision of Rule 6([d]) is not applicable to a motion pursuant to Rule 59(e) and does not extend the [28-day] time period under that rule." *Id.* at 1291.[4] We reached this conclusion because the extra time Rule 6(d) affords is available only when a party may or must act within a specified time *after service* and service is by mail. *See id.* In

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[3] With the three extra days, a timely post-judgment motion would have been due on Sunday, November 28, so the deadline would have been extended to Monday, November 29. *See* Fed. R. Civ. P. 6(a)(3)(A).

[4] When *Parker* was decided, the relevant provision was Rule 6(e), and Rule 59(e) had a 10-day deadline. Rule 59(e) now has a 28-day deadline. And Rule 6(e) has since been redesignated Rule 6(d) and revised, but it is materially unchanged in substance, providing:

> **Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

contrast, Rule 59(e)'s time period "is triggered by *entry of the judgment,*" not by service, and Rule 6(b)(2) prohibits a court from extending Rule 59(e)'s time period. *Id.* (emphasis added). Likewise, to toll the appeal period, a Rule 60 motion must be "filed no later than 28 days *after the judgment is entered.*" Fed. R. App. P. 4(a)(4)(A)(vi) (emphasis added).

Because Zook's post-judgment motion was filed more than 28 days after entry of the judgment, it was properly construed as a Rule 60(b) motion and it did not toll the time to file a notice of appeal. Consequently, Zook's notice of appeal is timely only with respect to the order denying his post-judgment motion, and our jurisdiction is limited to review of that order. *See Bowles*, 551 U.S. at 214; *see also Lebahn v. Owens*, 813 F.3d 1300, 1305 (10th Cir. 2016) ("[A]ppeal from the denial of [a] Rule 60(b) motion raises for review only the district court's order of denial and not the underlying judgment itself." (brackets and internal quotation marks omitted)). We reject Zook's suggestion that we equitably toll the appeal period or overrule *Parker*. *See Bowles*, 551 U.S. at 214 (explaining that courts lack "authority to create equitable exceptions to jurisdictional requirements"); *United States v. White*, 782 F.3d 1118, 1126-27 (10th Cir. 2015) ("[O]ne panel of this court cannot overrule the judgment of another panel absent en banc consideration or an intervening Supreme Court decision that is contrary to or invalidates

our previous analysis." (internal quotation marks omitted)).[5]

II. Merits

We review the denial of a Rule 60(b) motion for "an abuse of discretion, keeping in mind that Rule 60(b) relief is extraordinary and may only be granted in exceptional circumstances." *Lebahn*, 813 F.3d at 1306 (internal quotation marks omitted). "We will not reverse the district court's decision on a Rule 60(b) motion unless that decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Id.* (internal quotation marks omitted).

A. Legal error in application of substantive standard

In its petition for judicial enforcement, the United States argued its subpoena should be judicially enforced under the standards set out in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). In *Morton Salt*, the Supreme Court held that an administrative subpoena "is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* at 652. In response, Zook argued that *Morton Salt*'s "reasonable relevance" standard applies to corporations, not individuals like him, because in *Morton Salt*, the Supreme Court observed that "corporations can claim

[5] Neither condition is present here.

no equality with individuals in the enjoyment of a right to privacy," *id.* Zook instead suggested a more stringent reasonable-suspicion standard should apply to subpoenas directed at individuals. The district court rejected that position.

In his Rule 60(b) motion, Zook argued the district court made a legal error in applying *Morton Salt*'s reasonable-relevance standard and again urged a reasonable-suspicion standard. The district court denied relief, finding Zook's argument to be "merely a rehashing of an argument he previously made and which [the] Court previously rejected. A motion for reconsideration is not an appropriate mechanism to ask the Court to revisit issues already addressed." R. at 81-82.

On appeal, Zook repeats his substantive argument that the *Morton Salt* standard does not apply to administrative subpoenas directed at individuals. But we see no abuse of discretion in the district court's resolution of his Rule 60(b) argument regarding *Morton Salt*'s applicability. "Rule 60(b) relief is not properly granted where a party merely revisits the original issues and seeks to challenge the legal correctness of the district court's judgment by arguing that the district court misapplied the law or misunderstood [the party's] position." *Lebahn*, 813 F.3d at 1306 (internal quotation marks omitted).

B. Zook's reply in support of his Rule 60(b) motion

We next address Zook's argument concerning the reply in support of his Rule 60(b) motion he filed with the district court. He asserts that although he timely submitted the reply, the district court's clerk's office failed to file it. The district court then issued its ruling in which it noted Zook had failed to file a reply. He thereafter re-submitted the reply, and it was properly filed. He argues the reply may have proved "crucial" for its discussion of *Parks v. FDIC*, 65 F.3d 207 (1st Cir. 1995). Aplt. Opening Br. at 10. *Parks* took the view that "the standard for judicial enforcement of administrative subpoenas of a private citizen's private papers is stricter than that for corporate papers," 65 F.3d at 211. *Parks* concluded that the proper test in the case of a private citizen is "a Fourth Amendment standard of reasonableness that stops short of probable cause," *id.* at 214, which it termed "reasonable suspicion" or "individualized suspicion," *id.* at 214-15.

We do not think the district court would have granted Rule 60(b) relief if it had been aware of Zook's reliance on *Parks*. That reliance was no more than another piece of his rehashed reasonable-suspicion argument the district court properly declined to consider because it was an improper basis for Rule 60(b) relief. Offering additional support in a reply brief for an argument inappropriately raised in a Rule 60(b) motion would not have led to a different result. Further, the First Circuit withdrew *Parks* and vacated its judgment upon granting a petition for rehearing en banc. *See*

Parks v. FDIC, No. 94-2262 (1st Cir. Nov. 20, 1995) (docket entry). The First Circuit ultimately vacated the district court's order enforcing the FDIC's subpoena "[w]ithout passing on the merits," and remanded with instructions that the district court dismiss the proceedings without prejudice to a later enforcement action. *See id.* (Mar. 15, 1996 docket entry). We are confident *Parks* would not have persuaded the district court to overlook the impropriety of his rehashed argument and to grant Rule 60(b) relief.

C. Whether Zook was targeted for an illegitimate reason

In his response to the show-cause order, Zook asserted that the former tenant informed the EPA about peeling paint at his building in an effort to extort or blackmail Zook for the return of her full security deposit and that the EPA was complicit in that alleged crime. In his Rule 60(b) motion, Zook argued the district court failed to address this assertion, claiming it was relevant because "the court, as a matter of public policy, ought not acquiesce [sic] the EPA in its improper assistance to and rewarding of persons who would feloniously misuse this important agency." R. at 62.

The district court assumed Zook was correct about the informant's motives but observed he had provided no authority, nor was the court aware of any, requiring "it to conclude that when an agency acts on the basis of a tip from someone with allegedly improper motives, the *agency's* actions that follow become improper." R.

at 80. The court further observed that Zook had "provided no evidence beyond his own assertions the informant had improper motives," *id.*, and that he failed to "demonstrate[] that the EPA acted, or sought to act, in an abusive manner towards him," which would be "prohibited" under *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946), R. at 83.

On appeal, Zook contends the court overlooked his statement regarding alleged cooperation between the informant and the EPA, and because that statement was in a sworn pleading, it put the burden on the EPA to produce contrary evidence. When the EPA failed to do so, he concludes, the court was required to infer that the EPA had abused its power. We disagree. As noted, the court credited his statement as to the informant's motives but concluded he had not shown the EPA's actions were abusive. And contrary to Zook's position, the burden to show an agency has abused the subpoena process is on the respondent to the subpoena, and "unsupported allegations" are insufficient to meet that burden. *SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 515 (10th Cir. 1980). Even though Zook's statement was in a sworn pleading, it was still unsupported. We therefore see no error in the district court's rejection of this argument for lack of supporting authority or any evidence of an improper purpose.

III. Conclusion

The district court's Order On Motion To Alter Or Amend Judgment is affirmed.

Entered for the Court

Allison H. Eid
Circuit Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 21-cv-01077-RM

UNITED STATES OF AMERICA,

Petitioner,

v.

BOULDER MANSION LLC, and DAVID ZOOK,

Respondents.

ORDER TO SHOW CAUSE

(Filed Apr. 20, 2021)

This matter is before the Court on the United States of America's Petition for Order Enforcing Toxic Substances Control Act Subpoena (the "Petition") (ECF No. 1). After considering the Petition, and attachments, it is hereby ORDERED that:

(1) A copy of this Order to Show Cause, together with the Petition, Declaration of Kristin Jendrek, and subpoena *duces tecum*, shall be served upon Respondents in accordance with Fed. R. Civ. P. 4 within 21 days of the date of this Order to Show Cause or as soon as possible;

(2) That proof of service done in accordance with paragraph 1 above shall be filed with the Clerk of the Court as soon as practicable;

(3) That within 21 days of service upon Respondents, in accordance with paragraph 1 above, Respondents shall SHOW CAUSE, in writing, as to why they should not be compelled to comply with and obey the United States Environmental Protection Agency's subpoena *duces tecum* served upon them;

(4) That Petitioner may file a reply within 14 days of the filing of any response; and

(5) That the failure to respond to this Order to Show Cause by Respondents will result in the Court making a determination on the Petition without Respondents' input.

DATED this 20th day of April, 2021.

BY THE COURT:

/s/ Raymond P. Moore
RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 21-cv-01077-RM

UNITED STATES OF AMERICA,

Petitioner,

v.

DAVID ZOOK,

Respondent.

ORDER ON PETITION

(Filed Oct. 28, 2021)

This matter is before the Court on the Petition for Order Enforcing Toxic Substances Control Act Subpoena ("Petition") (ECF No. 1) of Petitioner United States, acting on behalf of the Regional Administrator for the United States Environmental Protection Agency ("the EPA") and Respondent David Zook's Motion to Quash (ECF No. 11). The Petition is fully briefed by the EPA and Respondent Zook. Upon consideration of the Petition and the applicable rules and case law, and being otherwise fully advised, the Court finds and orders as follows.

I. BACKGROUND

At issue here is the EPA's petition for this Court to issue an order directing Respondent Zook to comply

with the EPA's administrative subpoena seeking information regarding his compliance with the Disclosure of Known Lead-Based Paint and/or Lead-Based Hazards Upon Sale or Lease of Residential Property, (the "Lead Disclosure Rule"), a provision of the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2697; 42 U.S.C. § 4852d.

In December of 2019 the EPA received a complaint from a former tenant of a multi-unit rental property, built in 1891, and located at 806 E. Boulder Street in Colorado Springs, Colorado, (the "Boulder Street Property"), indicating that the property was in disrepair and specifically that the exterior paint was chipping off the building and falling to the ground. According to property and business records obtained by the EPA, Respondent Zook had formed an LLC to which he had transferred ownership of the Boulder Street Property.[1]

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[1] The name of Respondent Zook's original LLC was Boulder Mansion LLC. However, after repeated attempts to serve Boulder Mansion LLC with this Court's Order to Show Cause, the EPA discovered that "Articles of Dissolution of Limited Liability Company" had been filed with the Colorado Secretary of State, dissolving Boulder Mansion LLC. The day after Boulder Mansion LLC was dissolved, ownership of the Boulder Street Property was transferred by quitclaim deed to a newly formed entity, 806 Building LLC. The EPA therefore voluntarily dismissed Boulder Mansion LLC from this case. Respondent Zook filed his Response to this Court's Order to Show Cause after Boulder Mansion LLC had been dismissed from the case but has never asserted that he is not still the Lessor of the Boulder Street Property. The Court also takes judicial notice of the fact that Colorado Secretary of State's record reflects that 806 Building LLC has the same principal office mailing address as that used by Respondent Zook in his filing in this Court. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir.

The EPA therefore mailed an Information Request Letter to Respondent Zook in his capacity as the Landlord and owner of the Boulder Street Property. Respondent Zook did not respond to the EPA's letter. In February of 2020, the EPA corresponded with Respondent Zook by email, at which time he questioned the EPA's authority to make such a request for information.

The EPA responded to Respondent Zook with citations to its statutory and regulatory authority to request such information and granted him an extension of time to respond to the request for information until late March 2020. Respondent Zook responded again by questioning the EPA's authority to make such a request. The EPA again responded with citations to authority and provided Respondent Zook with an additional extension of time to respond until mid-April. Respondent Zook failed to respond to the communications from the EPA or to provide the requested information.

At that point, on May 27, 2020, the EPA issued a subpoena pursuant to the Toxic Substances Control Act, served by certified mail, requiring Respondent Zook to submit the requested documents within 30 days of receipt of the subpoena. On July 8, 2020, the EPA sent a copy of the subpoena to Respondent Zook via email. Respondent Zook again declined to provide the requested information, responding only that the

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2006) (noting that a court may take judicial notice of facts which are a matter of public record).

EPA should provide the "proper predicate for [this] use of government resources." The EPA again sent Respondent Zook information regarding the Lead Disclosure Rule and its regulatory requirements. Having again received no response from Respondent Zook, the Department of Justice made an attempt to contact him in September of 2020 to inquire about the status of his subpoena response.

Having received no response from Respondent Zook to its repeated requests, the EPA filed this petition for an order enforcing the subpoena in April of 2021. This Court issued an Order to Show Cause why Respondent Zook should not be compelled to comply with the EPA's subpoena. (ECF No. 6.) Respondent Zook filed a Response to Order to Show Cause and Motion to Quash Subpoena pro se. (ECF No. 11.)

II. DISCUSSION

A. The Petition

In its Petition, the EPA argues the subpoenas should be judicially enforced under the standards set forth in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) and *McLane v. EEOC*, 137 S.Ct. 1159 (2017). Under *Morton Salt* an administrative subpoena "is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 652,; *see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984), (noting that the "constitutional requirements for administrative subpoenas" are "'that the subpoena

be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome'") (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)); *Becker v. Kroll*, 494 F.3d 904, 916 (10th Cir. 2007) (stating that "[t]he Fourth Amendment requires only that an [administrative] subpoena" meets these standards, citing *City of Seattle*).

In response, Respondent Zook asserts that the EPA "has here embarked upon a colossal, wasteful and misguided abuse of power." Specifically, Respondent Zook argues that (1) the EPA lacks reasonable suspicion that he violated the Lead Disclosure rule because it began its inquiry as a result of false information provided by an angry former tenant who, he claims, made an unreliable complaint; (2) the EPA lacks the power to issue a subpoena specifically pursuant to the Toxic Substances Control Act; (3) the subpoena fails to meet the *Morton Salt* requirements because it is not reasonably relevant, too indefinite, and unduly burdensome; and (4) that the subpoena violates his rights under the Fifth Amendment because the EPA is threatening to impose civil penalties for failure to comply. Respondent Zook also requests an award of his attorney fees.

B. Reasonable Basis

Respondent Zook's first argument is that the anonymous complaint filed with the EPA could not give rise to "even a reasonable suspicion that any requirement of [the Toxic Substances Control Act], Lead

Disclosure Rule, was being violated." He contends that the unit occupied by the person he believes to have filed the complaint[2] was an efficiency, and thus a 0-bedroom dwelling which is not subject to the Lead Disclosure Rule. *See* 15 U.S.C. § 2681 (defining "Target housing" that is subject to the Lead Disclosure Rule); 40 C.F.R. § 745.103 (same). He also asserts that chipped paint is not addressed by the Lead Disclosure Rule.

As an initial matter, the Court notes that Respondent Zook is incorrect that the Lead Disclosure Rule does not address chipped paint. In fact, the Toxic Substances Control Act specifically defines "Lead-based paint hazard" to include "lead contaminated paint that is deteriorated," and "Deteriorated paint" to include "any interior or exterior paint that is peeling, chipping, chalking or cracking or any paint located on an interior or exterior surface or fixture that is damaged or deteriorated." 15 U.S.C. §§ 2681(3), (10).

In any event, Respondent Zook misapprehends what is required to support the issuance of an administrative subpoena. The Supreme Court long ago concluded that, if Congress so authorizes, an administrative agency can use its subpoena power in order to

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[2] Although Respondent Zook asserts that he knows the identity of the person who filed the complaint, there is no evidence in the record before the Court to support his conclusion and the EPA has not confirmed or denied his belief. Ultimately, however, the Court concludes that the identity of the person who filed the complaint is irrelevant because the inquiry was authorized for the reasons set forth in this order.

determine the extent to which a regulation applies in a given case. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 214 (1946); *see also E.E.O.C. v. Peat, Marwick, Mitchell and Co.*, 775 F.2d 928, 930 (8th Cir. 1985) (noting that "[t]he authority to investigate violations includes the authority to investigate coverage under the statute"). "It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. . . . [A]nd the documents sought are relevant to the inquiry." *Oklahoma Press Pub.*, 327 U.S. at 209. Congress can authorize an agency, such as the EPA, to investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt Co.*, 338 U.S. at 642-43.

Thus, as long as it is lawfully authorized by Congress, and the information sought is relevant to that legitimate investigation, the EPA is authorized to issue a subpoena even without meeting a particular threshold of suspicion. The fact, therefore, that the person Respondent Zook believes to have complained might have lived in a unit not covered by the Lead Disclosure Rule is not dispositive here. The Toxic Substances Control Act specifically defines "Target housing," for the purposes of the Lead Disclosure Rule, as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling (unless any child who is less than 6 years of age resides or is expected to reside in such housing)." 15 U.S.C. § 2681. Respondent Zook does not dispute that his multi-unit building was constructed in 1891 and, thus,

falls within the definition of "target housing." Nor does he assert that every unit in that building is a 0-bedroom dwelling. Thus, as long as its subpoena's inquiry "is within the authority of the agency, the demand is not to indefinite and the information sought is reasonably relevant," *Morton Salt Co.*, 338 U.S. at 652, the EPA is entitled to investigate whether the Lead Disclosure Rule applies to Respondent Zook's property or properties.

C. Subpoena Power under the Toxic Substances Control Act

As noted above, in order to issue an investigative subpoena, a federal agency must do so pursuant to the authority granted to it by Congress. *Id.* Respondent Zook asserts that the Toxic Substances Control Act does not authorize the EPA to issue any sort of subpoena. Respondent Zook is simply mistaken. Under the Toxic Substances Control Act, Congress has specifically stated that,

> In carrying out this chapter [the Toxic Substances Control Act], the Administrator may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary. . . . In the event of contumacy, failure, or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper

> shall have jurisdiction to order any such person to comply with such subpoena.

15 U.S.C. § 2610. Thus, under the Toxic Substances Control Act, Congress has expressly granted the power to the EPA to issue subpoenas in order to carry out its mandate "to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment and to take action with respect to chemical substances and mixtures which are imminent hazards." 15 U.S.C. § 2601; *see also* 15 U.S.C. § 2602(1) (defining the term "Administrator" as "the Administrator of the Environmental Protection Agency").

D. *Morton Salt Co.* Requirements

Respondent Zook argues that the EPA subpoena in this case does not meet any of the *Morton Salt Co.* requirements and is "manifestly unreasonable." The Court will look at each of the *Morton Salt Co.* requirements in turn.

1. Reasonably Relevant

In *Morton Salt Co.*, the Supreme Court concluded that, in order to be proper, an administrative subpoena must be reasonably relevant to a legitimate area of inquiry. 338 U.S. at 652; *see also In re Gimbel*, 77 F.3d 593, 599 (2d Cir. 1996) (noting that agencies, "when authorized by Congress, may utilize their subpoena power to obtain information that is relevant to a legitimate area of inquiry").

In this case, the Court has already concluded that the EPA could legitimately inquire into Respondent Zook's compliance with the Lead Disclosure Rule pursuant to authority granted to it by Congress in the Toxic Substances Control Act. The question, then, is whether the information requested in the subpoena is sufficiently relevant to that area of legitimate inquiry. Courts have held that they must generally defer to an agency's own appraisal of relevance, so long as it is not "obviously wrong." *F.T.C. v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980); *Resol. Tr. Corp. v. Greif*, 906 F. Supp. 1457, 1464 (D. Kan. 1995); *see also Phillips Petroleum Co. v. Lujan*, 951 F.2d 257, 259 (10th Cir. 1991) (noting "the substantial deference [courts] afford to the actions of administrative agencies in compliance with their statutory enforcement obligations. Indeed, unless the agency's order can be considered 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' [courts] cannot set it aside" (quoting 5 U.S.C. § 706(2)(A)).

Respondent Zook does not articulate any support for his contention that the requests in the subpoena are not reasonably relevant to the EPA's inquiry regarding his compliance with the Lead Disclosure Rule. Nevertheless, as ordered by the Court, the EPA filed a copy of the subpoena (ECF No. 8) in response to the Order to Show Cause and the Court has reviewed it. The Court now concludes that the information requested is reasonably relevant to the legitimate inquiry of the EPA. Among other things, the subpoena requests (1) a list of all residential real properties

owned, sold, or leased by Respondent Zook since May 1, 2017; (2) copies of any leases or rental agreements as well as any lead disclosures for all transactions involving the Boulder Street Property since May 1, 2017; (3) the same information for 10% of the transactions involving other target housing to which Respondent Zook has been a party since May 1, 2017; (4) information regarding the occupants of any of the above-mentioned properties; and (5) any information pertaining to the presence or absence of lead-based paint or lead-based paint hazards in the above-mentioned properties. All of this information is clearly relevant to the EPA's inquiry as to whether or not Respondent Zook's properties are subject to the Lead Disclosure Rule, and, if they are, whether he has complied with the Rule's requirements. Therefore, the Court concludes that the information requested in the subpoena meets the requirement of reasonable relevancy.

2. Sufficiently Definite

Morton Salt Co. cautions that an administrative subpoena cannot be "too indefinite" if it is to fall within the legitimate authority of the issuing agency. Respondent Zook does not offer much to support his contention that the subpoena fails to meet this requirement, other than to object that it requests information about not only the Boulder Street Property, but also any other properties he owns. He concludes that this is inappropriate because it reflects an investigation not directed at a particular property, but

rather at him personally, as an individual. The Court disagrees.

The Supreme Court has upheld administrative subpoenas directed against individuals, just as it has those directed against corporate entities. *See, e.g., Fisher v. United States*, 425 U.S. 391, 414 (1976) (upholding IRS subpoenas for certain tax preparation documents related to personal returns); *Shapiro v. United States*, 335 U.S. 1, 4, 33-36 (1948) (upholding subpoena from the Price Administrator seeking the sales and inventory records belonging to an individual wholesaler of produce). Thus, Respondent Zook's argument on that account is unsuccessful. Furthermore, the Court notes that it is *his* compliance with the Lead Disclosure Rule that the EPA seeks to verify – if Respondent Zook owns more than one property that may be covered by the rule, the EPA does not overreach by inquiring about all such properties.

The Court also notes that other courts have previously enforced virtually identical subpoenas in other cases. *See United States v. Andersen*, 109 F.Supp.3d 1049, 1053 (N.D. Ind. 2014); *United States v. Silverwood Realtors*, No. 99 C 6625, 2000 WL 631373, at *5 (N.D. Ill. May 15, 2000). As the Court noted in *Andersen*, lessors are required, pursuant to the Lead Disclosure Rule, to keep for three years the precise records requested by the subpoena. *Andersen*, 109 F.Supp.3d at 1052-53; *see also* 40 C.F.R. § 745.113. The Court agrees with those jurisdictions that for all of these reasons, the request is sufficiently definite.

3. Not Unduly Burdensome

The Court notes, "The burden of showing that the request is unreasonable is on the subpoenaed party . . . (and) is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982) (quoting *F.T.C. v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977), alterations original). Respondent Zook has failed to carry that burden here.

"Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Texaco*, 555 F.2d at 882. "Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of business." *Id.*; *see also E.E.O.C. v. Sears, Roebuck & Co.*, No. 10-cv-00288-WDM-KMT, 2010 WL 2692169, at *5 (D. Colo. June 8, 2010) (noting that compliance with a subpoena may be excused if such compliance will threaten to unduly disrupt or seriously hinder normal operations of the business or if the cost of gathering the requested information would be unduly burdensome in light of the company's normal operating costs).

Respondent Zook has made no showing that responding to this subpoena would unduly disrupt or hinder his business. He simply states, without evidentiary support, that a subpoena like this one can cause

"untold inconvenience, anxiety and expense." Such a conclusory statement does not meet his burden. Therefore, the Court cannot conclude that the EPA's subpoena was unduly burdensome in this case.

E. Fifth Amendment Privilege

Respondent Zook asserts that the subpoena violates his right under the Fifth Amendment not to be compelled to incriminate himself. The Supreme Court, however, adopted the "required records" doctrine as an exception to the Fifth Amendment in cases just like this one. *See Grosso v. United States*, 390 U.S. 62, 67-68 (1968); *Shapiro v. United States*, 335 U.S. 1, 32-35 (1948). Pursuant to the required records doctrine, "the privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are appropriate subjects of governmental regulation, and the enforcement of restrictions validly established.'" *Shapiro*, 335 U.S. at 33 (quoting *Davis v. United States*, 328 U.S. 582, 589 (1946)). Phrased another way, the required records doctrine applies when three conditions are satisfied:

> First, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed 'public aspects' which render them at least analogous to public documents.

Grosso, 390 U.S. at 67-68. In this case, the documents requested meet all three of these prongs.

First, the EPA, in seeking the information from Respondent Zook, is attempting to enforce the regulatory scheme created by Congress in the Toxic Substances Control Act and, more specifically, the Lead Disclosure Rule. If an individual could refuse to comply with a request for information by invoking the privilege, the regulatory purpose of the statute would be frustrated. *See In re Grand Jury Subpoena*, 21 F.3d 226, 230 (8th Cir. 1994) (concluding that a proprietor of a car dealership could be compelled to disclose certain records relating to odometer readings as part of an investigation of a possible criminal violation of federal odometer tampering laws because, in part, to permit him to invoke the Fifth Amendment would frustrate the regulatory scheme involved).

Second, the lease agreements and other documentation requested in the subpoena is also the sort of information regularly kept by lessors for business purposes, even independent of this regulatory scheme.

And third, with regard to the "public aspect" prong, the Court notes that "records required to be created under an *otherwise valid* regulatory regime necessarily have 'public aspects' for purposes of the required records exception to the Fifth Amendment production privilege." *In re Grand Jury Subpoena Dated Feb. 2, 2012*, 741 F.3d 339, 351 (2d Cir. 2013) (alterations original); *see also United States v. Matkari*, No. CV-18-MC-00051-MSK-KLM, 2019 WL 1253684,

at *9 (D. Colo. Mar. 19, 2019) (same). In essence, by engaging in the regulated activity of leasing apartments, Respondent Zook "is deemed to have waived his privilege as to the production of those records which are required to be kept." *In re Grand Jury Subpoena*, 21 F.3d at 230.

Finally, "[t]he possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production." *Baltimore City Dept. of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555 (1990). "[T]he Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws." *Id.* at 556. Thus, where a civil regulatory requirement is generally applicable to the public at large, and where it does not require the disclosure of "inherently illegal activity," a person can be compelled to make a disclosure even though, in some cases such a disclosure would "compel incriminating testimony." *Id.* at 557-58.

For all of these reasons, the Court concludes that Respondent Zook cannot invoke his Fifth Amendment privilege in order to refuse to produce the documents requested in the EPA's subpoena.

F. Attorney Fees

Respondent Zook asserts that he is entitled to attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. The Court agrees with the EPA, that Respondent Zook is not the prevailing party in this

action, *id.* at (a)(1), and, in any event, he is not entitled to fees because he is a pro se party, *Demarest v. Manspeaker*, 948 F.2d 655, 655 (10th Cir. 1991). Therefore, his request for attorney fees is denied.

III. CONCLUSION

In summary, the subpoena was issued pursuant to a reasonable basis, it was within the EPA's authority under the Toxic Substances Control Act, it met the requirements for enforceability under *Morton Salt Co.*, and Respondent Zook cannot invoke his Fifth Amendment privilege in order to avoid complying with the subpoena. Accordingly, based on the foregoing, it is **ORDERED**

(1) That Petition for Order Enforcing Toxic Substances Control Act Subpoena (ECF No. 1) is GRANTED and Respondent Zook, shall produce all requested information on or before November 29, 2021;

(2) That Respondent Zook's Motion to Quash Subpoena and accompanying request for attorney fees (ECF No. 11) is DENIED; and

(3) That the Clerk shall close this case.

DATED this 28th day of October, 2021.

BY THE COURT:

/s/ Raymond P. Moore
RAYMOND P. MOORE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-01077-RM

UNITED STATES OF AMERICA,

Petitioner,

v.

DAVID ZOOK,

Respondent.

FINAL JUDGMENT

(Filed Oct. 28, 2021)

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order entered on October 28, 2021, by Judge Raymond P_ Moore, it is

ORDERED that judgment is entered in favor of Petitioner and against Respondent. It is

FURTHER ORDERED that this case is closed.

Dated at Denver, Colorado, this 28th day of October, 2021.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/C. Pearson, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 21-cv-01077-RM

UNITED STATES OF AMERICA,

Petitioner,

v.

DAVID ZOOK,

Respondent.

ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

(Filed Feb. 1, 2022)

This matter is before the Court on Respondent Zook's Motion to Alter or Amend Judgment. (ECF No. 15.) The Petitioner, the United States Environmental Protection Agency, ("EPA"), filed a Response in Opposition to the Motion. (ECF No. 16.) Zook failed to timely file a Reply and requested an extension of time in which to do so, which the Court granted. (ECF Nos. 17, 18.) Zook has nevertheless failed to file a Reply. Upon consideration of the Motion, the Response, and the applicable rules and case law, and being otherwise fully advised, the Court finds and orders as follows.

I. BACKGROUND

In October 2021, this Court issued an Order directing Zook to comply with the EPA's administrative subpoena seeking information regarding his compliance with the Disclosure of Known Lead-Based Paint and/or Lead-Based Hazards Upon Sale or Lease of Residential Property, (the "Lead Disclosure Rule"), a provision of the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2697; 42 U.S.C. § 4852d. (ECF No. 13.) The Court issued that Order upon the Petition of the EPA. (ECF No. 1.) The EPA filed the petition following repeated attempts to obtain information from Zook, who is the owner of a piece of rental property in Colorado Springs, Colorado. Rather than respond to the requests, Zook repeatedly questioned the EPA's authority to make such requests for information. The EPA ultimately issued a subpoena to Zook requiring him to submit the EPA's requested documents within 30 days. When Zook again failed to respond, the EPA filed its Petition in this Court.

On October 28, 2021, this Court issued its Order in which it concluded that the subpoena was issued pursuant to a reasonable basis, it was within the EPA's authority under the Toxic Substances Control Act, it met the requirements for enforceability under *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), (the key authority on the propriety of administrative subpoenas), and that Zook could not invoke his Fifth Amendment privilege in order to avoid complying with the subpoena. (ECF No. 13.)

Zook filed the Motion to Alter or Amend Judgment on November 29, 2021, characterizing his Motion as having been brought pursuant to Fed. R. Civ. P. 59. (ECF No. 15.) In his Motion, Zook asserted that "[t]he court has misapprehended some facts; highlighted some irrelevant facts[1]; neglected to address some issues raised by Respondent and in some instances, misconstrued the applicable law." Specifically, Zook asserts that this Court misapprehended his arguments that (1) the fact that his building suffered from chipped paint is "simply irrelevant to the only responsibility he has under the Act – to provide the 13 page [lead paint] pamphlet;" and (2) the EPA's subpoena power has limits and while Zook does not dispute that the EPA has the power to issue subpoenas, he disputes that they can issue them "at random, without any reasonable predicate." Zook argues that the Court failed to address his arguments that (1) the EPA acted in reliance on an informant who was attempting to blackmail/extort him, thus the informant lacked credibility and, moreover, the EPA should not, as a policy matter, assist

[1] Zook asserts that this Court highlighted certain irrelevant facts in its previous Order. The facts cited in his motion, however, were not necessary to the Court's legal analysis. Specifically, the Court included a discussion of the EPA's attempts in this case to cooperate with Zook to obtain the requested information, and the Court mentioned that it had reviewed the records of the Colorado Secretary of State in order to determine who, exactly, the respondent is in this case. That information was included to provide certain background information to the reader. Therefore, any purported error in including those facts had no impact on the outcome of the Court's analysis and provides no basis for the relief Zook seeks.

individuals who would manipulate the Agency for improper purposes; and (2) the informant lived in an "exempted, zero bedroom unit," and therefore the informant's lease could not provide the EPA with reason to believe Zook violated the Lead Disclosure Rule. Finally, Zook asserts that the Court misapplied the law, by (1) incorrectly analyzing his case under *Morton Salt*, which he contends can only be used to analyze subpoenas on corporations, and (2) concluding that the EPA does not need to have a reasonable basis to believe that he violated the Lead Disclosure Rule before issuing a subpoena to him.

II. LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 59(e), a party may file a motion to alter or amend a judgment "no later than 28 days after the entry of the judgment." "'Grounds for granting a Rule 59(e) motion include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.'" *Monge v. RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 611 (10th Cir. 2012) (quoting *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1153 (10th Cir. 2012)). It "cannot be used to expand a judgment to encompass new issues which could have been raised prior to issuance of the judgment." *Steele v. Young*, 11 F.3d 1518, 1520 (10th Cir. 1993). "He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943).

Fed. R. Civ. P. 60(b), on the other hand, provides that a court can provide relief from a final judgment, order, or proceeding for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered earlier; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void judgment; (5) a satisfied judgment; or (6) any other reason that justifies relief. A motion under Rule 60(b) "must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991) (citation omitted). A "district court has substantial discretion in connection with a Rule 60(b) motion." *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990). The burden is on the moving party to prove relief is warranted under Rule 60(b). *See id.*

III. DISCUSSION

As an initial matter, the Court notes that Zook filed his motion for relief under Fed. R. Civ. P. 59(e) out of time – this Court issued its order on October 28, 2021. (ECF No. 13.) Any motion under Rule 59(e), therefore, had to be filed no later than November 25, 2021, but Zook filed his motion on November 29, 2021. (ECF No. 15.) The Court can, however, construe Zook's motion as one brought under Rule 60. And in the

Court's view, in this case the distinction does not matter, because under either Rule, Zook is arguing that the Judgment should be amended because of this Court's mistakes of law and fact. The Court will consider Zook's contentions in turn.

A. Facts Misapprehended

Zook first argues that the Court did not understand his positions as he articulated them in his opposition to the EPA's Petition. First, he asserts that he never intended to argue that the informant/former tenant's complaint of chipping paint on the exterior of the building was false; rather he was arguing that that information was irrelevant to any duty he had under the Lead Disclosure Rule. He argues that his only duty under that Rule is to provide tenants with a 13-page pamphlet on information about lead hazards.

The relevance of the chipped paint, however, is not that Zook necessarily has any independent duty to prevent, mitigate, or repair it. Rather, the relevance of the chipped paint is that it formed one of the bases upon which the EPA suspected that Zook's property might contain lead-based hazards. Under the Lead Disclosure Rule, a lessor of target housing has an obligation to make a disclosure to prospective tenants regarding "the presence of any known lead-based paint and/or lead-based paint hazards." 40 C.F.R. § 745.107(a)(2). Chipped paint is one such "lead-based hazard" that a landlord of target housing is obligated to disclose. Thus, its presence at Zook's rental property is relevant

to any determination by the EPA as to whether Zook was complying with the Lead Disclosure Rule or not.

Zook next argues that this court did not understand his argument regarding the EPA's subpoena power. Specifically, he asserts that "no one would dispute the agency has the power to issue subpoenas," but that "such subpoena power has limits and Respondent questions those limits." (ECF No. 15.) He goes on to argue that the EPA exceeded the limits of its authority because it issued the subpoena in this case "'willy/nilly,' i.e., at random, without any reasonable predicate."

As the Court explained in its Order, however, Zook misapprehends what is required to support the issuance of an administrative subpoena. The Court disagrees with Zook that the EPA acted arbitrarily in this matter – the EPA acted within the scope of the authority granted to it by Congress. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 209, 214 (1946) ("It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. . . . [A]nd the documents sought are relevant to the inquiry."). In this case, the EPA suspected that Zook might be in violation of the Lead Disclosure Rule and it sought to investigate that question – that is within its powers as authorized by Congress. The fact that Zook may believe that a federal agency should not have such a power is not pertinent to the analysis.

The Court's conclusions, therefore, remain unchanged despite Zook's explanations regarding the Court's alleged misunderstandings of his arguments.

B. Issues Unaddressed

Zook next argues that this Court must amend its Judgment because it failed to address two of his arguments in its prior Order. First, he argues that the informant who contacted the EPA regarding his property was engaging in "a clear-cut case of criminal extortion/blackmail," and that therefore "the credibility of the informant is destroyed." He adds that "the court, as a matter of public policy, ought not acquiesce [sic.] the EPA in its improper assistance to and rewarding of persons who would feloniously misuse this important agency." Even assuming that Zook were correct, and the informant here was engaged in some sort of criminal scheme, Zook presents this Court with no authority, and the Court is aware of none, that would require it to conclude that when an agency acts on the basis of a tip from someone with allegedly improper motives, the *agency's* actions that follow become improper. Furthermore, Zook has provided no evidence beyond his own assertions the informant had improper motives. In fact, he presents no evidence beyond his own assumptions regarding the informant's identity. In any event, it was Zook's burden to demonstrate that the Judgment must be set aside on this basis, and he has failed to meet that burden.

Zook next argues that the Court failed to address his argument that "the informant's living unit was an exempted, zero-bedroom unit," and that therefore the EPA could not legally rely on information obtained from that person to support any reasonable belief that Zook had violated the Lead Disclosure Rule. Once again, however, Zook has failed to articulate any legal support for this argument. Moreover, as the Court explained in its Order, "as long as it is lawfully authorized by Congress, and the information sought is relevant to that legitimate investigation, the EPA is authorized to issue a subpoena even without meeting a particular threshold of suspicion." (ECF No. 13, pp. 5-6.)

Neither of Zook's arguments on these allegedly unaddressed issues persuade the Court that the analysis in its original Order was in error or that the Judgment must be amended.

C. *Morton Salt*

Zook's next argument is that the Court committed a legal error when it applied the reasoning of *Morton Salt*, 338 U.S. 632, because that opinion applied only to administrative subpoenas served on corporations. The Court directly addressed this contention in the prior Order, however. Specifically, the Order explains that

> The Supreme Court has upheld administrative subpoenas directed against individuals, just as it has those directed against corporate entities. *See, e.g.*, *Fisher v. United States*, 425

> U.S. 91, 414 (1976) (upholding IRS subpoenas for certain tax preparation documents related to personal returns); *Shapiro v. United States*, 335 U.S. 1, 4, 33-36 (1948) (upholding subpoena from the Price Administrator seeking the sales and inventory records belonging to an individual wholesaler of produce).

(ECF No. 13, p. 9.) As the Court also explained, "other courts have enforced virtually identical subpoenas in other cases." *Id.*

Zook's argument about the applicability of the rule of *Morton Salt* to him as an individual is merely a rehashing of an argument he previously made and which this Court previously rejected. A motion for reconsideration is not an appropriate mechanism to ask the Court to revisit issues already addressed. *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018).

To the extent that Zook argues that the Judgment must be amended because individuals must be permitted to challenge administrative subpoenas directed at them under the Fourth and Fifth Amendments, the Court has never suggested that such a challenge would be improper. Rather, the Court concluded that no violation of Zook's Fourth or Fifth Amendment rights took place in this case. The Court analyzed Zook's contentions under the Constitution and concluded that they lacked merit in this case.

Therefore, Zook is not entitled to relief on this ground.

D. Reasonable Basis

Zook's final substantive argument is that the Court's reasoning is circular in that it would find a subpoena has a reasonable basis "independent of any consideration of the particular facts or the particular individual, if it is issued pursuant to a subject matter that Congress has authorized and the matters sought would be relevant to that subject matter." (ECF No. 15.) He argues that the Court's analysis ignores any question of whether or not the administrative agency has a reasonable basis to believe that a party is not complying with the law. As explained above and in the prior Order, the Supreme Court has concluded that such a reasonable basis is not required, and this Court is bound by that precedent. *See Walling*, 327 U.S. 186 at 201, 215-16. While the agency may not act arbitrarily, it can use its subpoena power to investigate and procure evidence and is not limited to attempting to prove a pending charge or complaint. *Id.*

Zook's more fundamental concern, however, appears to be that if that reasoning is correct, then administrative subpoenas could be used to target and abuse individual citizens. Zook offers no evidence, however, that he has been randomly targeted or personally targeted for an illegitimate reason. He contends that the informant was attempting to extort or blackmail him, but he offers no proof of that allegation beyond his own assertions. At no point has he demonstrated that the EPA acted, or sought to act, in an abusive manner towards him. Such abusive practices would be

prohibited, *Walling*, 327 U.S. at 216, but Zook's case does not raise that question for the Court's resolution.

IV. CONCLUSION

For the reasons set forth in this Order, Respondent Zook's Motion to Alter or Amend Judgment is DENIED.

DATED this 1st day of February, 2022.

BY THE COURT:

/s/ Raymond P. Moore
RAYMOND P. MOORE
United States District Judge