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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket Nos. 21-1353 & 21-1434

YOSEPH YADESSA KENNO,
Plaintiff - Appellant,

v.

COLORADO GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,
LYUBOV LOGACHEVA, in her individual capacity;
BOB MCINTYRE, in his individual capacity;
DON WISDOM in his individual and official capacity,
Defendants – Appellees.

Decided: April 17, 2023 *
Tenth Circuit Order and Judgement

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* After examining the briefs and appellate records, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are 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 This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

In these consolidated appeals, Yoseph Yadessa Kenno appeals the district court's dismissal of his claims as a sanction for fabrication of evidence, the court's denial of his motion for reconsideration, and the court's award of fees and costs to the defendants. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in each appeal.

BACKGROUND

The Colorado Governor's Office of Information Technology ("GOIT") employed Kenno as a database administrator from January 2017 to December 2018. GOIT terminated Kenno's employment after progressive discipline failed to correct what it viewed as serious performance problems. Kenno, who is black and Ethiopian, appealed his termination to the Colorado State Personnel Board ("Board"). He also filed charges of discrimination and retaliation with the Colorado Civil Rights Division ("CCRD"), which found no probable cause for discrimination or retaliation. In addition, Kenno filed the action underlying these appeals against GOIT and several GOIT employees, asserting multiple claims of discrimination, retaliation, wrongful discharge, and constitutional violations under various federal statutory schemes.

In proceedings before the Board, the CCRD, and the district court, Kenno produced evidence GOIT believed he fabricated or manipulated. GOIT moved for sanctions before the Board. The Board granted GOIT's motion, dismissed Kenno's case with prejudice, and awarded GOIT reasonable costs and attorney fees related to the fabrications.

In the district court, defendants filed a motion to dismiss Kenno's claims as a sanction for fabrication of evidence and also sought an award of costs and attorney fees. After a two-day evidentiary hearing, the district court granted defendants' motion. The court found by clear and convincing evidence that Kenno had fabricated or manipulated an audio file, emails, and a Google domain from which he sent fake recovery emails to his state email account.

Accordingly, exercising its inherent powers, the district court granted defendants' motion, dismissed Kenno's claims with prejudice, awarded defendants their reasonable costs and attorney fees, and entered judgment. Kenno filed a motion for reconsideration, which the district court denied.

Kenno then filed a notice of appeal, giving rise to No. 21-1353. After further post-judgment litigation, Kenno filed another notice of appeal, giving rise to No. 21-1434.

DISCUSSION

I. Dismissal as a Sanction

A. Standard of Review

"A district court has inherent equitable powers to impose the sanction of dismissal with prejudice because of abusive litigation practices during discovery." Garcia v. Berkshire Life Ins. Co. of Am., 569 F.3d 1174, 1179 (10th Cir. 2009). [B]ecause dismissal is such a harsh sanction, it is appropriate only in cases of willfulness, bad faith, or some fault." Xyngular v. Schenkel, 890 F.3d 868, 873 (10th Cir. 2018) (internal quotation marks omitted). Dismissal is warranted where a party has fabricated evidence, Garcia, 569 F.3d at 1181, but the evidence of fabrication must be clear and convincing, Xyngular, 890 F.3d at 873–74.

"We review a court's imposition of sanctions under its inherent power for abuse of discretion." Id. at 872 (internal quotation marks omitted). "An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law or relies on clearly erroneous fact findings."

Id. (internal quotation marks omitted).[12]

Although Kenno had counsel for much of the district court proceedings, including the evidentiary hearing on defendants' sanctions motion, he appears pro se on appeal. We thus construe any of his pro se filings liberally, but we may not act as his advocate. See Yang v. Archuleta, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

B. Audio Recording Manipulation

In late 2017 and early 2018, Kenno attempted to straighten out a problem with GOIT's deposits to his Health Savings Account ("HSA"). Kenno contacted GOIT's human resources department ("HR"), which directed him to the State Benefits department.[13] State Benefits resolved the problem by March 2, 2018. Kenno's supervisor, Lyubov Logacheva, received a request to speak with Kenno from her supervisor, who had told her Kenno had been rude to an HR employee. On March 13, 2018, Logacheva spoke with Kenno about his communications with HR. On April 13, 2018, Logacheva released Kenno's performance evaluation, rating him successful overall but needing improvement in some areas, including communication and accountability for failure to meet deadlines. The need for improvement in accountability stemmed in part from his failure to meet a January 2018 deadline for an Oracle Cloud project. According to Logacheva, Kenno had primary responsibility for the project and a Caucasian co-worker had a secondary role. Kenno submitted a draft document to Logacheva on

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[12] This circuit has suggested five factors a district court should consider before dismissing a case as a sanction. See Garcia, 569 F.3d at 1179. The district court here considered those factors, but Kenno has not taken issue with that part of the court's ruling.

[13] State Benefits is a department within the Department of Personnel and Administration and is separate from GOIT.

the due date, but she found it unsatisfactory. Also on the due date, Kenno and the co-worker had spoken by phone about the project. Kenno recorded that call on his personal cell phone. See Hr'g Ex. MMM.[14] Kenno produced the audio recording of the conversation in his initial discovery disclosures in this case.

In their motion for sanctions, defendants asserted Kenno had manipulated the recording by altering one seventeen-second section of his side of the conversation to make it appear that his co-worker had equal responsibility for the Oracle Cloud project and, on the due date, still needed to make changes to the draft document that was sent to Logacheva. Defendants presented an expert in the field of "audio and visual forensic analysis and enhancement," Angela Malley. R., Vol. 4 at 616:23–24.

Malley testified that her critical-listening analysis of the sound recording and her analysis of the digital audio file uncovered evidence of manipulation, including blips at the beginning and end of the altered section, the sudden lack of any background noise or comments from the co-worker, a sudden and significant increase in the decibel level of that section, and the presence of an encoder associated with a free audio editing tool but not associated with the recording software Kenno claimed he had used to record the conversation.

The district court found by clear and convincing evidence that Kenno manipulated the audio recording to strengthen the merits of his discrimination case by demonstrating pretext because the co-worker was not disciplined

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[14] Unless otherwise indicated, our citations are to the record, supplemental record, and hearing exhibits filed in No. 21-1353. Hearing exhibits are located in Volume 2 of the Supplemental Appendix filed in No. 21-1353. For convenience we simply cite them as "Hr'g Ex."

for presenting an unsatisfactory work product by the due date. The court also noted that Kenno had "previously edited other audio files sent to the CCRD, demonstrating his capability and propensity to manipulate files." R., Vol. 2 at 465.

Kenno's sole appellate argument regarding the audio file is an unsupported, conclusory statement that defendants presented no evidence he had manipulated "any audio file on [his] personal devices." Aplt. Opening Br. at 22. To the extent this statement is meant to suggest that the district court was required to find Kenno used his own personal devices to manipulate the audio, we reject it. To the extent Kenno means to challenge the fundamental proposition on appeal regarding the audio recording—whether clear and convincing evidence showed that he manipulated the audio recording at all, regardless of whether he used his own device—his one-sentence argument is inadequate to preserve appellate review. See United States v. Barrett, 797 F.3d 1207, 1219 (10th Cir. 2015). But regardless, our review shows that clear and convincing evidence supports the district court's finding that Kenno manipulated the audio recording.

C. Fabrication of Emails Related to HSA Issue

1. Four Versions of the HSA Emails

In the district court, at least four different versions of a two-email exchange Kenno allegedly had with Logacheva in March 2018 came to light ("HSA Emails").

On June 28, 2019, Kenno emailed CCRD investigator Megan Bench and provided a link to a 432-page PDF document that contained a version of the HSA Emails ("CCRD Version," Hr'g Ex. C). In this version, Kenno stated in an email purportedly sent to Logacheva on Monday, March 19, 2018, that he had "just got off from a call with these benefits people" about his HSA contributions and they had made discriminatory comments to him: "During the call, they told me how their [department] doesn't doll [sic] out welfare

checks. I wasn't asking for welfare. They were snickering too after telling me this. They wouldn't have mentioned welfare if I wasn't a black guy." Hr'g Ex. C at 1. Logacheva's purported reply indicated that she was "certain they were not discriminating against" Kenno, surmised that he perhaps misunderstood, and admonished him to follow GOIT "Values described in [his] performance plan when communicating with HR and refrain from making similar accusations going forward." Id. Importantly, Kenno's email to Logacheva showed it was not sent from his state email address but from the email address State Benefits had used to communicate with him about his HSA issue.

Although the CCRD Version was the first one Kenno created, GOIT did not obtain it from the CCRD until December 2020, after Kenno produced the other three versions, which we now describe.

In August 2019, Kenno produced in discovery a version of the HSA Emails in PDF format ("Discovery Version," Hr'g Ex. E). The body of the Discovery Version was the same as the CCRD Version, and the send date of Kenno's email to Logacheva was also the same as the CCRD Version (Monday, March 19, 2018). But Kenno's email to Logacheva now showed it was sent from Kenno's state email address, not from the State Benefits email address.

In February 2020, Kenno produced in discovery another version of the HSA Emails, this time in native .msg format[15] ("First MSG Version," Hr'g Ex. B). The First MSG Version had spacing, grammar, and spelling errors not

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[15] According to defendants' computer-forensics expert, "[a]n MSG is a native email format that's associated with Microsoft." R., Vol. 4 at 662:5–6. The district court explained that for purposes of the case, native format is the digital format a computer program uses when creating documents. Id. at 936:17–22.

present in the CCRD or Discovery Versions, and the send date of Kenno's email to Logacheva was "Mon, Mar 18, 2018," Hr'g Ex. B at 1, but in 2018, March 18 fell on a Sunday. Kenno admitted that a copy of the First MSG Version was found on his personal laptop.

Kenno produced the fourth version of the HSA Emails ("Second MSG Version," Hr'g Ex. U) on December 1, 2020, as part of his fourth supplemental disclosures. The Second MSG Version was attached to an email Kenno purportedly sent on June 14, 2018 ("June 14 Email," Hr'g Ex. DDD) to another CCRD employee who was investigating his discrimination charges. In the Second MSG Version, the date of Kenno's email to Logacheva was corrected to Monday, March 19, 2018, but the body of the email had the same spacing, grammar, and spelling errors as the First MSG Version. Defendants' computer-forensics expert, Sarah McDermott, analyzed the header of the Second MSG Version and concluded that this version was addressed to Logacheva but delivered to Kenno's state email address, which was "inconsistent with an authentic email." R., Vol. 4 at 678:13–15. The June 14 Email was not located in CCRD's case files for Kenno's charges or on Kenno's personal laptop.

2. District Court's Ruling on HSA Emails

The district court found by clear and convincing evidence that Kenno fabricated all four versions of the HSA Emails and the June 14 Email. The court noted Kenno alone produced each different version, and the visual differences, which "could only be caused by user manipulation," combined with the timing of his disclosures showed "a clear progression of events consistent with [Kenno] creating the versions at different stages to respond to external developments of the moment." R., Vol. 2 at 465. The court elaborated: Kenno learned from CCRD in June 2019 about a temporal problem with his retaliation claim—Logacheva's adverse performance review occurred in April 2018, but Kenno had asserted in his state discrimination proceedings

that his first protected conduct occurred after that, in May 2018. To remedy that causation problem, Kenno created the CCRD version in an attempt to show he engaged in protected activity in March 2018, but it had erroneous sender information. Next, likely believing no one else would find the CCRD Version, Kenno created the Discovery Version to correct the wrong sender information in the CCRD Version, and when the Board ordered him to turn over native email files in February 2020, he created the First MSG Version with the date, spelling, spacing, and grammar errors not present in the CCRD Version or the Discovery Version. Then, when the Board administrative law judge informed Kenno in November 2020 that she had serious concerns about GOIT's allegations of fabricated evidence, Kenno created the Second MSG Version and attached it to the June 14th Email, which he also fabricated, in an attempt to legitimize the other versions of the HSA Emails.

The district court further observed that Kenno "had the motive, ability, and opportunity to fabricate the emails," taking advantage of an admitted "mistake in the charge of discrimination stating he was discriminated against on or around March 18, 2018, instead of May 18, 2018," and "play[ing] off" the problem with his HSA contributions that was "resolved on March 2, 2018. Id. at 466.[16] The court noted that in proceedings before the CCRD and an unemployment hearing officer, Kenno had never mentioned the HSA Emails or the acts described in them until June 28, 2019, which was when he sent the CCRD Version to Bench.

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[16] Kenno admitted in 2018 to Bench that the charge contained the wrong date. See Hr'g Ex. EE at 2, ¶ 5 (Bench's stipulated testimony); Hr'g Ex. TT (charge referring to March 18, 2018, as the date Logacheva revoked Kenno's telecommuting privilege after he complained of discriminatory treatment).

Prior to that date, the evidence showed Kenno had consistently maintained his first protected activity occurred in May 2018, which was a complaint that a time-reporting requirement was discriminatory.

The court also pointed to testimony from multiple witnesses that the HSA Emails "do not exist in GOIT's system, despite a litigation hold that captured other emails from around the same time concerning [Kenno's] HSA contributions." Id. at 467. And the court relied on Logacheva's testimony that she did not send or receive the HSA Emails, access Kenno's email account, or delete the HSA Emails or any other emails relevant to Kenno's claims.

Finally, the district court explained that although Kenno's expert witness, Franklin Brackin, had concluded the First MSG Version was authentic because it had "passed through certain authentication paths," defendants' expert, McDermott, explained that those "paths pertain to spam and spoofing and do not determine whether an email was actually sent." Id. The court further relied on McDermott's demonstration how an email could be fabricated and how a fabricated email could pass through the

authentication paths that Brackin had relied on.[17]

3. Kenno's Arguments

Kenno contends that the forensic evidence does not support the district court's finding that he fabricated the MSG versions of the HSA Emails. We disagree. But we first note that the district court found the visual differences between the HSA Emails alone were strong evidence of user manipulation, and other circumstantial evidence showed that Kenno had the motive, ability, and opportunity to fabricate the HSA Emails. Kenno has not addressed these findings, in particular the findings concerning fabrication of the two PDF versions (CCRD and Discovery Versions).

Regarding the forensic evidence, Kenno points out that McDermott requested access to his personal electronic devices to look for previous versions of the MSG emails and for software programs that could have been used to create or modify the MSG emails, yet she never located any previous versions or modification software. However, these objects of McDermott's search were but part of a lengthy list of information she sought to analyze if given access to Kenno's devices and email accounts. We therefore reject Kenno's suggestion that McDermott's methodology was

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[17] The district court also found that Kenno manipulated versions of the June 28, 2019 email and the associated 432-page PDF document that he and his expert produced in December 2020. As noted, Kenno used the June 28 email and the PDF document to transmit the CCRD Version to Bench. We need not recite the details of the December 2020 fabrications because in his opening brief, Kenno fails to adequately raise any appellate challenge to the district court's finding that he had manipulated them for his benefit. See Sawyers v. Norton, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)). Nor has Kenno adequately presented any argument in his opening brief concerning the district court's finding that he fabricated the June 14 Email.

flawed. Furthermore, Kenno has not explained, nor do we see, how the failure to find previous versions of the MSG emails or any email-modification programs on Kenno's personal devices undermines either McDermott's analysis of the MSG emails or the other, non-forensic evidence showing Kenno fabricated the HSA Emails. Nor does Kenno's argument account for the possibility that he could have created or modified the MSG emails on a device other than his own.

Kenno next faults McDermott for failing to identify by name a free conversion tool she claims was involved in the creation of the MSG emails. Kenno, however, has not contested that such tools exist.[18] Therefore, McDermott's failure to name one such tool does not undermine the district court's finding that Kenno fabricated or manipulated the MSG emails.

Kenno also argues that the metadata McDermott extracted from the MSG emails showed those emails were created and last modified in March 2018. But McDermott explained how dates in email metadata can be manipulated using a text editor. See R., Vol. 4 at 666:25 to 667:14. And she testified that it would have been possible to fabricate an email in 2019 or 2020 that appears it was sent in 2018, see id. at 728:19–23, provided it was not actually sent through an email system, see id. at 714:14–16, 715:8–12. We therefore reject Kenno's argument.

Kenno also questions the district court's treatment of testimony involving Google's email authentication tool. His

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[18] GOIT uses Gmail. R., Vol. 4 at 731:10–11. The HSA Emails were added to a chain of emails concerning the HSA contribution issue Kenno had with the State Benefits team using GOIT's email system. We therefore fail to see the relevance of Kenno's reply-brief argument concerning whether emails in MSG format can be fabricated through the use of a text editor.

expert, Brackin, testified that the First MSG Version was authentic because its headers passed Google's authentication tool. The district court rejected that opinion based on McDermott's testimony that the headers of a fabricated email could pass through that tool. The court then accepted McDermott's testimony that the original June 28 email to Bench was authentic because its header passed the Google authentication tool. Kenno claims this differential treatment of opinions regarding the use of the authentication tool was unfair. We see no error because there was no question that Kenno actually sent the original June 28 email, but the authenticity of the First MSG Version was very much in question.

Finally, Kenno argues the district court erred by admitting a pre-recorded video demonstration, Hr'g Ex. III, McDermott used to illustrate her testimony that an email can easily be fabricated. He asserts that defendants did not disclose the video until the week before the hearing. GOIT argues the video was merely a demonstrative aid consistent with opinions McDermott expressed in her timely-disclosed expert reports. We see error, but it was harmless. Federal Rule of Civil Procedure 26(a)(2)(B)(iii) requires disclosure, in a timely expert report, of "any exhibits that will be used to summarize or support" an expert's opinion. This procedure was not followed here. But because the video merely illustrated McDermott's opinions that were timely disclosed in her reports, the procedural error was harmless; McDermott's testimony would have been the same without use of the video. See Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially

justified or is harmless.").[19]

D. Fraudulent Google Domain and Email Address

On November 18, 2020, a Google domain and a related recovery email address were created. Soon thereafter, the domain and email address were used to send more than 1700 emails to Kenno's state email account, including a version of the HSA Emails, each purporting to be recovering a previously deleted email. Then, in December 2020, when Kenno and his attorney remotely observed GOIT employee Lilo Santos conduct a search of Kenno's email account for the period of Kenno's employment with GOIT (January 2017 through December 3, 2018), Kenno asked to extend the search through the date of the search. Defendants refused to deviate from the agreed search parameters, and the search ended. GOIT then searched Kenno's email account without the time limitation and discovered the 1700+ emails. Google verified that neither the domain nor the recovery email address were associated with any Google corporate accounts and that it does not have a process for recovering emails in this manner. Google also indicated that Santos was identified as the creator of the domain and it was registered using "lilosantaangelo@gmail.com." Santos testified that the email address was not his, his last name is not "Santaangelo," and he did not create the domain or the recovery email address.

The district court found by clear and convincing evidence that Kenno had created the Google domain and the recovery email address and sent the recovery emails to

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[19] Appended to Kenno's argument about McDermott's use of the video is a perfunctory argument that the district court erred in relying on the testimony of two other GOIT witnesses, Lilo Santos and James Karlin, because their testimony amounted to expert testimony that prejudiced Kenno. See Aplt. Opening Br. at 20. Kenno wholly fails to develop this argument, so it is waived. See Barrett, 797 F.3d at 1219.

cover up his other fabrications. The court reasoned that Kenno's request for the searches to be run through the present showed he knew the fake recovery emails existed in his account, and only he had the motive and the relevant knowledge to plant the emails. Santos did not know what the search terms were going to be until several days after the fraudulent domain was created, the email address used to register the domain did not list Santos's real name or email address, and Santos had no reason to help Kenno.

Kenno argues that in finding he had created the fraudulent Google domain, the district court used a privileged attorney-client communication against him—his demand that the live search include emails through the date of the search. This argument is meritless. Although Kenno claims he directed the demand to his attorney, he waived any privilege by making the statement where others, including defendants' counsel, could hear it. See In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006) ("Because confidentiality is key to the privilege, the attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party." (brackets and internal quotation marks omitted)).[20]

Kenno also contends the district court erred by accepting Google's affidavit that the domain was fraudulent but rejecting Google's certificate of authenticity listing Santos as the registrant. We disagree. The issue boiled down to

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[20] The parties rely on Colorado privilege law, but because this case involves only federal-question jurisdiction, we apply federal common law to any privilege issues. See Fed. R. Evid. 501 (subject to exceptions inapplicable here, "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege"); see also In re Qwest Commc'ns Int'l Inc., 450 F.3d at 1184 (explaining that Rule 501 applies to privilege issues in federal-question cases).

whether Kenno created the domain but attempted to make it appear Santos had done so. The district court found that Kenno did just that, and we cannot say the court clearly erred in that finding.[21]

II. Pre-Judgment Discovery Rulings

Kenno raises several issues concerning discovery rulings entered prior to the district court's dismissal order and judgment. "[D]iscovery rulings are within the broad discretion of the trial court," and we will not disturb them absent "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1386 (10th Cir. 1994) (internal quotation marks omitted).

Kenno argues the district court erred when it allowed defendants' experts unfettered access to his personal laptop and cell phone despite that he had initially retained the company they worked for, Forensic Pursuit, and had shown Forensic Pursuit where privileged information was located on those devices. This argument overlooks the district court's order narrowly circumscribing the contours of Forensic Pursuit's search and establishing a mechanism for Kenno and his counsel to review and object to any information Forensic Pursuit found on grounds such as privilege before it was provided to defendants. See ECF No. 84 at 2–

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[21] Kenno asks us to draw an unspecified adverse inference based on defendants' alleged destruction of evidence. See Aplt. Opening Br. at 22–25. But Kenno did not present this issue to the district court and has made no attempt in his opening brief to show how the alleged destruction of evidence satisfies the standard for plain-error review. Although he asks for plain-error review in his reply brief, that request is not only belated, but also wholly conclusory. Kenno has therefore waived appellate review of this issue. See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130–31 (10th Cir. 2011).

4. We see no abuse of discretion in the district court's handling of the search of Kenno's personal laptop and cell phone.

Kenno complains about the district court's treatment of his request that his expert have direct access to GOIT's Google Vault system, including related audit logs, concerning litigation holds GOIT created.[22] GOIT balked at the request, primarily due to security concerns. Kenno claims GOIT "refused any kind of forensic examination of [its] Google Vault system," Aplt. Opening Br. at 14, and that refusal left his expert unable to analyze any metadata associated with the HSA emails, to examine Logacheva's email account, or to look for disclosures GOIT employee John Bartley had provided to Kenno in August 2018 that, Kenno claims, included the HSA Emails from Kenno's state email account and audio and video files.[23] He argues this resulted in unequal access to data because the court allowed defendants' expert direct access to Kenno's personal laptop and cell phone. He also asserts the district court "declined to order the forensic examination of Defendants' Google Vault." Id. at 16.

Ultimately, however, at a discovery conference on March 24, 2021, the parties agreed, and the district court ruled, that although Kenno's expert could not access the Google Vault system directly, he could observe and direct a

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[22] Google Vault is a system GOIT uses to preserve data for litigation purposes and to search through emails in Google Drive. See R., Vol. 4 at 732:3–9, 735:1–5 (Santos's testimony). Audit logs show who has had access to a Google Vault matter and their activities in the matter. See id. at 501:22–24 (Kenno's statement)).

[23] Bartley provided sworn written testimony that he had disclosed to Kenno only emails for the dates Kenno had requested—May 16, 2018 through July 11, 2018. Kenno stipulated to that testimony, and it was admitted at the evidentiary hearing.

GOIT employee's search of Kenno's email account in the Google Vault system and receive a copy of the results for forensic examination. See R., Vol. 4 at 98:18 to 100:2. Thus, Kenno appears simply mistaken that GOIT would not allow any forensic examination of its Google Vault system. See also generally Suppl. R., Vol. 1, ECF No. 149, Ex. 3 (video recording of agreed-to search of GOIT's Google Vault system performed on March 31, 2021); R., Vol. 4 at 389 to 443 (transcript of hearing before court on June 7, 2021, where additional searches of Google Vault and Kenno's Google Drive were performed). Furthermore, because his attorney acquiesced in the procedure, Kenno cannot now assert error in the district court's refusal to permit his expert to have direct access to the Google Vault system. See United States v. Zubia-Torres, 550 F.3d 1202, 1205 (10th Cir. 2008) (explaining that appellate waiver applies "where a party attempts to reassert an argument that it previously raised and abandoned below").

III. Post-Judgment Rulings

A. Motion to Reconsider

1. Additional Procedural Background

To properly evaluate the district court's denial of Kenno's motion for reconsideration, it is helpful to first review some relevant dates. As mentioned, the parties agreed at the March 24, 2021 discovery conference on a method for searching for native versions of the HSA Emails in Kenno's state email account preserved in the Google Vault matter GOIT created. The court allowed Kenno "to reserve argument on any aspect of that" and to "come back and complain" about any resulting problems. R., Vol. 4 at 99:24–100:2. On March 31, the searches were performed; relevant to Kenno's motion for reconsideration, a blank Google Vault audit log file was produced. On May 5 and 6, the district court held the evidentiary hearing on the motion for sanctions. On June 3, the court held a discovery conference and ordered defendants to provide audit logs of Kenno's Google

Vault. On June 4, defendants provided audit logs ("June 2021 Audit Logs"). At a June 7 hearing, the court and the parties searched and examined Kenno's Google Drive and litigation-hold emails directly, not through Google Vault, and GOIT agreed to produce nine videos it had discovered on Kenno's Google Drive. On June 30, 2021, the district court issued its dismissal order and separate judgment.

Kenno then filed a pro se motion for reconsideration under Rule 59. He argued that four categories of newly discovered evidence required the court to reconsider its dismissal order and to hold a new evidentiary hearing: (1) the June 2021 Audit Logs, which allegedly showed that Santos had accessed Kenno's Google Drive around the time that the 1700+ emails were placed in Kenno's state email account; (2) defects in GOIT's litigation holds and allegedly false hearing testimony regarding them by Santos and Bartley; (3) three of the videos from Kenno's Google Drive that GOIT produced after the June 7 hearing; and (4) assertions that, contrary to evidence presented at the evidentiary hearing, GOIT had a policy to automatically delete emails.[24]

2. The District Court's Order

The district court construed Kenno's motion for reconsideration as seeking Rule 59(e) relief based on "'new evidence previously unavailable'" and denied it. R., Vol. 3 at 899 (quoting Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000)). The court first rejected Kenno's argument that the June 2021 Audit Logs were defective because they did not contain information from 2016, explaining that Kenno had not shown the relevance of audit logs predating his employment with GOIT. The court

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[24] Kenno's theory, apparently, was that the HSA Emails did not exist in his state email account because they had been automatically deleted, if not intentionally deleted.

found Kenno knew of problems with audit logs in March 2021 when he received the blank log, but he never argued that the evidentiary hearing could not proceed without access to the logs, and it was improper to advance a previously available argument in a motion for reconsideration.[25] The court also observed that although production of the June 2021 Audit Logs post-dated the evidentiary hearing, it predated the dismissal order, and Kenno had not sought to reopen the evidentiary hearing record to include information in those logs.

The court next determined that because Kenno had information about all litigation holds in January 2021, he could have raised concerns about the holds at the evidentiary hearing, so his post-judgment argument regarding the holds came too late. The court concluded that his argument that Santos and Bartley provided false testimony about the holds did not warrant Rule 59(e) relief because Santos testified for defendants and was cross-examined at the hearing, the court had considered that testimony, and Kenno had stipulated to Bartley's written testimony.

As to the later-discovered videos, Kenno had argued that Logacheva could have obtained a recording of his voice from them and used it to alter the audio recording of the conversation he and his co-worker had about the Oracle Cloud project. The court found no plausible connection between the videos and the audio recording because the videos did not contain the exact words Kenno spoke in the

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[25] In their response to the motion to reconsider, defendants explained that the March audit log was blank because Kenno requested a search in Google Vault by user yoseph.kenno@state.co.us, and because Kenno's state account was not an authorized Google Vault user, no activity by that user could have taken place, and therefore no activity appeared on the log.

altered section of the audio recording.

Finally, the court determined that Kenno's argument that GOIT had an automatic email-deletion policy, which involved the June 2021 Audit Logs, did not warrant reconsideration because Kenno had ample time after those logs were produced to file a motion to reopen the evidentiary record and request additional discovery but failed to do so. The court also found there had been no showing that the single email-deletion policy Kenno identified would have affected any emails relevant to his case.

3. Kenno's Arguments

Kenno claims the district court should have construed his motion to reconsider as one for a new trial under Rule 59(a) rather than Rule 59(e) and applied the Rule 59(a) standard. We disagree. In substance, Kenno's motion asked the district court to reconsider its ruling on the merits of the sanctions motion, so the court properly characterized it as a Rule 59(e) motion. See Phelps v. Hamilton, 122 F.3d 1309, 1323–24 (10th Cir. 1997) ("[A] motion will be considered under Rule 59(e) . . . when it involves reconsideration of matters properly encompassed in a decision on the merits." (internal quotation marks omitted).

We review the denial of a Rule 59(e) motion for an abuse of discretion, although in doing so we review for legal errors de novo. Burke v. Regalado, 935 F.3d 960, 1044 (10th Cir. 2019). Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008) (internal quotation marks omitted)).

Kenno argues his evidence was new because he obtained it after the evidentiary hearing. As the district court explained, however, Kenno knew about problems with audit logs and litigation holds before the evidentiary hearing but never informed the court that the hearing could not proceed without addressing those problems, and he stipulated

to Bartley's testimony and had cross-examined Santos.

We see no abuse of discretion in the district court's finding that Kenno could have raised these arguments previously. Such arguments are not a proper basis for reconsideration. See id. To the extent the videos and evidence of an automatic email-deletion policy were newly discovered, the court found them irrelevant to the fabrication issues, and we see no abuse of discretion in that finding.

Kenno contends he in fact voiced a concern at the evidentiary hearing about audit logs showing that Logacheva removed files, but the district court struck his testimony. See R., Vol. 4 at 943:5 to 945:25.[26] He also points out that the court granted a request his counsel made at the evidentiary hearing to obtain information from Google about the fraudulent Google domain and the 1700+ emails placed in his state email account. See id. at 966 (court stating it "would allow one post-discovery endeavor per side"). He then complains the court later reversed course when it stated it was not going to reopen the record, see id. at 535:8–12 (June 3 discovery conference); id. at 412:15–16 (June 7 hearing), and then used his failure to seek reopening of the record as to the 2021 Audit Logs as a reason to deny his motion for reconsideration. He adds that it was unfair for the court to ask for and receive copies of two of the videos identified at the June 7 hearing but not the 2021 Audit Logs.

Despite the district court's statements regarding closure of the record, we see no abuse of discretion in its refusal to reconsider its dismissal order based on the June 2021 Audit Logs. At the June 3 conference, when Kenno's

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[26] The court struck Kenno's testimony because it concerned a matter his counsel had represented to defendants' counsel would not be an issue at the hearing.

counsel said he thought he had raised an issue about the audit logs at the evidentiary hearing, see id. at 535:8 to 536:5, the court gave counsel leave to inform the court about it "in an appropriate manner." Id. at 538:12–13. The court did not think it would have held the evidentiary hearing if Kenno had argued he lacked necessary evidence. See id. at 538:1–8. Despite the request for discovery the court granted at the evidentiary hearing and the June 3 invitation, Kenno never asked the court to consider any information he may have obtained from Google or from the June 2021 Audit Logs until his Rule 59(e) motion. Given Kenno's receipt of the blank audit log on March 31, 2021, the court was well within its discretion to deny reconsideration with respect to the June 2021 Audit Logs on the ground that Kenno had allowed the evidentiary hearing to proceed without any argument that he needed additional audit logs to defend himself.

Further, at the June 7 hearing, after the court stated it was "not going to open up the record," the court immediately added that "we also [are] going to ... have Mr. Kenno satisfy himself that there's nothing strange . . . and people aren't conspiring behind his back." Id. at 412:15–17. That statement indicates the court was open to a good-faith motion to reopen the record based on the 2021 Audit Logs, but Kenno never filed one. The court's request for copies of the

two videos that day further supports our view.[27]

B. Motions to Compel Release of Audit Logs

Kenno argues the district court abused its discretion in denying two post-judgment motions he filed pro se seeking production of defendants' entire Google Vault audit logs. See R., Vol. 3 at 653–83 ("First Audit Log Motion"); No. 21-1434, R. at 35–41 ("Second Audit Log Motion"). Kenno filed the First Audit Log Motion while his Rule 59 motion was still pending. He asserted defendants had used Google Vault to enforce email retention policies in state Google accounts since at least 2016, and contrary to the court's June 3, 2021 order, defendants had not disclosed all Google Vault audit logs. The district court denied that motion because it appeared GOIT had disclosed audit logs relevant to the time period at issue and Kenno had not adequately explained why audit logs from 2016—prior to his employment with GOIT—were relevant. See R., Vol. 3 at 696.

Kenno filed the Second Audit Log Motion after the court's denial of his Rule 59 motion. He argued that audit logs from 2016 would show when an automatic email-deletion policy was implemented and that audit logs defendants had produced showed the existence of automatic email-deletion rules between 2017 and 2019. He also argued that audit logs for November 19, 2020 to December 8, 2020 were relevant because they showed defendants had conducted Google Vault searches during that period, indicating that defendants had lied in their sanctions motion when stating

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[27] Kenno represents that he contacted the district court by phone six times on June 24 and 25, 2021 "to schedule a hearing, to no avail." Aplt. Opening Br. at 6. His supporting evidence is a log of calls, presumably to the district court, of one or two minutes duration, at a time when he was still represented by counsel. This fails to call into question the district court's reliance on the lack of a proper motion to reopen the record as a ground for denying the Rule 59(e) motion.

they only performed such a search after refusing Kenno's demand to run the December 9, 2020 search of his state email through the date of that search. The court denied the Second Audit Log Motion because Kenno was asking for reconsideration not only of the denial of his First Audit Log Motion but also of the court's order denying his Rule 59 motion. The court explained that Kenno's "third bite of the apple" was "improper" because he was advancing arguments he had or could have raised previously. No. 21-1434, R. at 391.

We see no abuse of discretion in the district court's denial of the First Audit Log Motion. In that motion, Kenno did not adequately explain the relevance of audit logs for 2016. But even if the court had granted that motion and compelled production of those audit logs, it would have made no difference, because, as we have explained, the court later—and properly—refused to consider audit logs as a basis for granting Kenno's motion for reconsideration. Thus, any error in denying the First Audit Log Motion was harmless because it did not affect Kenno's substantial rights. See Eller v. Trans Union, LLC, 739 F.3d 467, 474 (10th Cir. 2013) ("Even if the trial judge abused his or her discretion in making a decision to exclude evidence, we will overlook the error as harmless unless a party's substantial right was affected." (internal quotation marks omitted)).

We also see no abuse of discretion in the district court's denial of the Second Audit Log Motion on the grounds that Kenno sought reconsideration based on arguments he had or could have previously raised. See Exxon Shipping Co., 554 U.S. at 485 n.5.

C. Motion to Consider CCRD Recording

Kenno filed a pro se post-judgment motion asking the court to consider an audio recording he made of a three-hour telephone conversation he had with CCRD investigator Bench in June 2019 ("CCRD Recording"). He alleged the recording showed he had told Bench the first

discriminatory act occurred on March 18, 2018, and not, as Bench testified, on May 18, 2018. He also asserted that during the conversation, he had played his recording of the January 5, 2018 conversation with his co-worker regarding the Oracle Cloud project and his voice is not altered.

The district court denied Kenno's motion. The court identified a "fundamental issue" with Kenno's request—defendants had "requested a copy of the CCRD Recording during discovery, well before the evidentiary hearing," but Kenno "never produced the recording, arguing that it was [on a cell phone] in Ethiopia and that logistical challenges prevented him from obtaining it." No. 21-1434, R. at 392. The court then faulted Kenno for now seeking to use the recording in his defense because, even when represented by counsel, he "never requested an extension of time or a postponement of the evidentiary hearing in order to obtain the recording." Id. at 393. The court observed that Kenno had "proceeded with his defense against the allegations of fabrication without the CCRD Recording, and Defendants had to present their arguments without it." Id. The court therefore concluded Kenno's belated disclosure was untimely and its use barred under Federal Rule of Civil Procedure 37(c)(1).

Kenno claims the district court's ruling was an abuse of discretion, but he provides no argument. Instead, he asks us to review the motion itself. We deem this argument waived because we do not allow incorporation by reference of district court filings. See United States v. Gordon, 710 F.3d 1124, 1137 n.15 (10th Cir. 2013); 10th Cir. R. 28.3(B). "Allowing litigants to adopt district court filings would provide an effective means of circumventing the page limitations on briefs set forth in the appellate rules and unnecessarily complicate the task of an appellate judge." Fulghum v. Embarq Corp., 785 F.3d 395, 410 (10th Cir. 2015) (internal quotation marks omitted). Even more problematic for purposes of appellate review is that Kenno's motion does

not explain why the district court's denial of the motion was an abuse of discretion. See Nixon v. City & Cnty. of Denver, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong.").

IV. Award of Fees and Costs

Regarding the district court's award of attorney fees and costs to defendants, Kenno states that "[t]he sanctions applied by the court are punitive and unconstitutional." Aplt. Opening Br. at 26. But instead of developing this argument, he asks us to review the arguments he presented in the district court in opposition to defendants' application for attorney and expert fees. We deem this argument waived because we do not allow incorporation by reference of district court filings. See Gordon, 710 F.3d at 1137 n.15; Fulghum, 785 F.3d at 410; 10th Cir. R. 28.3(B). [28]

CONCLUSION

The district court's judgments and post-judgment rulings in these consolidated appeals are affirmed. In No. 21-1454, Kenno has filed a Motion to Supplement the Record and for Judicial Notice. That motion has been docketed in each appeal. We grant the motions to supplement the

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[28] GOIT argues that Kenno's notice of appeal in No. 21-1434, filed on December 16, 2021, is untimely as to the district court's October 12, 2021 order granting defendants' applications for attorney and expert fees and the court's October 14, 2021 judgment as to fees. However, on October 14, 2021, Kenno filed the notice of appeal giving rise to No. 21-1353, and in that notice, he named the October 12 order. That is sufficient to timely appeal the judgment as to fees. See Fed. R. App. P. 4(a)(1)(A) (notice of appeal in civil case not involving United States must be filed "within 30 days after entry of the judgment or order appealed from"); Fed. R. App. P. 4 (a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.").

record in part, limited to ECF Nos. 72, 84, 111, 138, and 201, and we direct the Clerk of this court to supplement the record in each appeal with those documents. We otherwise deny as moot the motions to supplement the record because the remaining docket entries listed in the motions are already part of the records on appeal. We deny the motions to the extent they ask for judicial notice of proceedings before the Colorado State Personnel Board. Although the district court took judicial notice of those proceedings, it decided the case based on the evidence presented in this case, and our review is limited to the record that was before the district court, see Regan-Touhy v. Walgreen Co., 526 F.3d 641, 648 (10th Cir. 2008) ("We generally limit our review on appeal to the record that was before the district court when it made its decision.").

Entered for the Court

Gregory A. Phillips
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket Nos. 21-1353 & 21-1434

YOSEPH YADESSA KENNO,
Plaintiff - Appellant,

v.

COLORADO GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,
LYUBOV LOGACHEVA, in her individual capacity;
BOB MCINTYRE, in his individual capacity;
DON WISDOM in his individual and official capacity,
Defendants – Appellees.

Decided: May 15, 2023
Tenth Circuit's Denial of Petition For Rehearing

Order filed by Judges Tymkovich, Phillips and Eid, denying appellant's petition for rehearing and rehearing en banc filed by Appellant Yoseph Yadessa Kenno.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00165-MEH

YOSEPH YADESSA KENNO,
Plaintiff - Appellant,

v.

COLORADO GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,
LYUBOV LOGACHEVA, in her individual capacity;
BOB MCINTYRE, in his individual capacity;
DON WISDOM in his individual and official capacity,
Defendants – Appellees.

Filed: September 14, 2021
District Court Order Denying Rule 59(a) Motion

Before the Court is Plaintiff's "Opposed Amended Motion for Reconsideration Pursuant to Rule 59" ("Motion"). ECF 150. Plaintiff wishes for the Court to reconsider its order granting Defendants' motion for sanctions. See ECF 101, 134. Specifically, Plaintiff argues that Defendants withheld information that, had the Court considered it, would have resulted in a denial of Defendants' motion. Defendants reject this, asserting that the "new" information does not affect the Court's ruling and that Plaintiff is raising issues that he should have raised earlier. ECF 153. The Court finds that oral argument would not materially assist it in adjudicating the Motion. For the reasons described, Plaintiff's Motion is denied.

BACKGROUND

Because the facts are well known to the parties, the Court incorporates its Findings of Fact from its June 30, 2021 order. Instead of providing a full recitation of those facts here, the Court will emphasize those procedural facts necessary for the adjudication of the Motion.

On May 5 and 6, 2021, this Court held an evidentiary hearing regarding Defendants' motion for sanctions in which Defendants alleged that Plaintiff had fabricated evidence during discovery. ECF 119, 120. Both sides were able to submit exhibits, call witnesses, and cross- examine the other side's witnesses. Id. Following the hearing, the Court asked for two things from the parties. First, each side was to submit a brief on the issue of the state court proceeding's preclusive effect on this Court's findings. The parties submitted briefs on May 26, 2021. ECF 122, 123. Second, the Court requested each side prepare proposed findings of fact and conclusions of law. The parties submitted those on June 9, 2021. ECF 130, 131.

Prior to that, on June 3, 2021, the Court held a discovery conference with the parties. ECF 128. The conference was intended to discuss issues that arose at or after the

evidentiary hearing. Among these was the production of the "Google Vault Audit Logs" ("Audit Logs") by Defendant, which the Court ordered to be produced. Id. Following the discovery conference, the Court converted the upcoming final pretrial conference to a status conference to, in part, address Plaintiff's concerns regarding the Audit Logs. On June 7, 2021, the Court held the status conference at which the parties examined Plaintiff's Google Vault and Google Drive. ECF 129. Other than their proposed findings of facts and conclusions of law, no party filed any document or motion with the Court after the June 7, 2021 status conference and before the Court ruled on the motion for sanctions. On June 30, 2021, the Court issued its order, granting Defendants' motion, and finding that Plaintiff had fabricated three pieces of evidence: (1) the audio file between him and Curtis Stierwalt; (2) all versions of the March 19-20, 2018 HSA emails; and (3) a fraudulent Google domain that sent fake recovery emails. ECF 134 at 39.

LEGAL STANDARDS

"The Tenth Circuit has made it abundantly clear that a motion for reconsideration is not a vehicle for a losing party to revisit issues already addressed." Seabron v. Am. Family Mut. Ins. Co., No. 11-cv-01096-WJM-KMT, 2012 WL 3028224, at *1 (D. Colo. July 24, 2012). "Motions to reconsider are generally an inappropriate vehicle to advance 'new arguments, or supporting facts which were available at the time of the original motion.'" Spring Creek Expl. & Prod. Co., LLC, No. 14-cv-00134-PAB-KMT, 2015 WL 3542699, at *2 (quoting Servants of the Paraclete Does, 204 F.3d 1005, 1012 (10th Cir. 2000)). "Arguments raised for the first time in a motion for reconsideration are not properly before the court and generally need not be addressed." Madison v. Volunteers of Am., No. 12-cv-00333-REB-KMT, 2012 WL 1604683, at *1 (D. Colo. May 8, 2012)

(quotation omitted).

Rule 59(e) motions may be granted only when "the court has misapprehended the facts, a party's position, or the controlling law." Servants of the Paraclete, 204 F.3d at 1012. The basis for granting reconsideration is extremely limited: Grounds warranting a motion to reconsider 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. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing. Id. (citations omitted). "A motion to reconsider . . . should be denied unless it clearly demonstrates manifest error of law or fact or presents newly discovered evidence." Nat'l Bus. Brokers, Ltd. v. Jim Williamson Products, Inc., 115 F. Supp. 2d 1250, 1256 (D. Colo. 2000) (quotation omitted).

ANALYSIS

Plaintiff focuses on the "new evidence previously unavailable." He cites to four pieces of evidence for why the Court should reconsider its order: (i) recently obtained Audit Logs; (ii) false testimony regarding litigation holds; (iii) withheld videos; and (iv) various assertions alleging that Defendant Colorado Governor's Office of Information Technology ("GOIT") had an auto-deletion email policy in contravention of evidence presented at the evidentiary hearing.

I. Audit Logs

Plaintiff's primary argument for reconsideration is that he did not have the Audit Logs available to him. Mot. at 12. The Court ordered Defendants to produce the Audit Logs on June 3, 2021. ECF 128. Defendants produced them on June 4, 2021. ECF 153-2. Plaintiff does not deny that Defendants produced some of the Audit Logs on that date, see ECF 155 at 1, ¶ 7, but he argues that Defendants fell short in producing all Audit Logs. Specifically, he contends that

the Audit Logs should contain information from 2016. Id. ¶ 8. Moreover, Plaintiff asserts that when he requested the Audit Logs the first time, in March 2021, he received a blank log. Mot. at 14.

On August 16, 2021, Plaintiff filed an "emergency" motion requesting discovery from and sanctions against Defendants regarding the Audit Logs. ECF 155. He argued that information from 2016 was not produced in the Audit Logs. On August 17, 2021, the Court denied Plaintiff's motion, holding that he has made no showing that information from 2016 would be relevant to his case. ECF 157. That same reasoning applies here. Plaintiff worked for GOIT from January 2017 until December 3, 2018. ECF 134 at 1, ¶ 1. Those Audit Logs regarding that timeframe were produced to Plaintiff. ECF 153-2. Even if the Court had ordered Defendants to produce Audit Logs from 2016, Plaintiff has not demonstrated how this new information would be pertinent for the Court to reconsider its ruling.

But a more crucial problem persists with Plaintiff's argument. He is raising this issue of the Audit Logs for the first time with his Motion. When he raised the issue with Defendants in March 2021, Plaintiff was on notice of the allegedly deficient Audit Logs. From January 22, 2021 to July 19, 2021, Plaintiff was represented by competent counsel. ECF 103, 141. Yet, neither Plaintiff nor his counsel indicated that the Audit Logs were crucial to defending against Defendants' motion; in other words, no argument was made that an evidentiary hearing on the motion could not be held because Plaintiff did not have access to the Audit Logs. Further, in the roughly twenty-six days between the production of the Audit Logs and this Court's ruling, Plaintiff filed no motion seeking to reopen the evidentiary hearing record to include information regarding the Audit Logs. Only after the Court granted Defendants' motion is Plaintiff raising the issue of the importance of the audit logs

to his alleged innocence of fabrication. This is not a valid argument on a motion for reconsideration. See Servants of Paraclete, 204 F.3d at 1012 ("It is not appropriate to . . . advance arguments that could have been raised in prior briefing.").

II. False Testimony and Litigation Holds

Similarly, Plaintiff's contention that Defendants' litigation holds were defective is unpersuasive. He notes that the first litigation hold ("Kenno 6-15-2018") only preserved emails within a two-week time frame. Mot. at 3, ¶ 4. However, a broader hold, OIT20180706-LH, was put in place for pertinent emails sent on or after January 1, 2018. ECF 153-3, ECF 154, Exh. C. Defendants provided information showing the existence of all litigation holds in January 2021. ECF 153-4, Exh. D; ECF 153-5, Exh. E. Thus, Plaintiff had ample opportunity, including at the evidentiary hearing, to raise concerns regarding the litigation holds. At this point, new arguments concerning these holds are not properly asserted in a motion for reconsideration. See Servants of Paraclete, 204 F.3d at 1012.

Moreover, Plaintiff's arguments regarding the allegedly false testimony of Lilo Santos and John Bartley fail to convince the Court to reconsider its order. First, Mr. Santos testified at the evidentiary hearing. Plaintiff, through counsel, had the opportunity to cross examine—and impeach—Mr. Santos on inconsistencies from prior testimony. To the extent Plaintiff did so, the Court considered it in its original order. To the extent Plaintiff failed to do so, he has waived the ability to raise the argument on a motion for reconsideration. Second, Plaintiff stipulated to the testimony of Mr. Bartley. ECF 120-2, Exh. ZZZ. If there were issues with his testimony, Plaintiff should not have stipulated to it. "A motion for reconsideration is not an avenue for a party to reargue issues by rehashing facts and arguments already addressed or available, yet neglected, in the original

proceeding." O'Hanlon v. AccessU2 Mobile Solutions, LLC, No. 18-cv-00185-RJB- NYW, 2018 WL 2561047, at *2 (D. Colo. Apr. 10, 2018). Plaintiff has failed to set forth an appropriate basis for reconsideration, so the Court cannot grant reconsideration based on this issue.

III. Withheld Videos

Other pieces of evidence Plaintiff points to are allegedly withheld videos. Plaintiff argues that the discovery of two videos in his Google Drive in June 2021 undermines the Court's findings that he fabricated evidence. Mot. at 16. He implies that the existence of these videos demonstrates how Lyubov Logacheva, Plaintiff's supervisor, could have obtained the recording of his voice to alter the audio recording between him and Mr. Stierwalt. Id. But Plaintiff does not contend that the audio implanted into the audio recording is contained in the videos; in other words, the exact words uttered by Plaintiff are not found in the videos. ECF 149, Exh. 26; ECF 149, Exh. 27. Nor could they reasonably be expected to be: the audio recording was specific to the Oracle Cloud project and the conversation with Mr. Stierwalt. In failing to demonstrate a plausible connection between these videos and the evidence considered, pointing to these later discovered[29] videos does little in way of convincing the

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[29] Defendants contend that one video, the so-called "Segregation Video," was created by Plaintiff on July 10, 2018. Resp. at 11. If true, this video would not constitute proper evidence for a Rule 59 motion because it was available to Plaintiff before the Court's order. However, Defendants do not cite to the record for that proposition. In his Motion, Plaintiff explicitly states that he had no idea about the second video, titled "wilsonlying." Mot. at 16. His lack of a similar statement with regard to the first video may indicate that Defendants are correct as to Plaintiff's prior knowledge. Regardless, even if the Court considered both videos as proper evidence to raise in a motion for reconsideration, they fail to convince the Court that reconsideration is necessary and proper.

Court of the necessity of reconsidering its order.

IV. Defendants' Alleged Auto-Deletion Policy

In his Motion, Plaintiff hints at an argument that Defendants lied about having a mechanism by which emails were automatically deleted. E.g., Mot. at 7, ¶ 41 ("[I]n a YouTube video recently uncovered, Mr. Santos himself instructs Defendants' employees how to preserve emails that will otherwise be automatically deleted by Defendants' email retention policy."). In his reply, Plaintiff provides more substantive discussion regarding this argument, connecting it to the Audit Logs. Reply at 4–5. Plaintiff attached a declaration from Matthew Hosburgh, a forensic expert, in support of his contention. Exh. 53. For the same reasons described concerning the Audit Logs, Plaintiff's argument fails; namely, although the Audit Logs were produced after the evidentiary hearing, Plaintiff had ample time before the Court's order to file a motion to reopen evidence and request additional discovery. See Spring Creek Expl. & Prod. Co., 2015 WL 3542699, at *2 (motions to reconsider are not meant for parties to raise "'new arguments, or supporting facts which were available at the time of the original motion.'") (citation omitted).

Even if the Court considered Mr. Hosburgh's opinion, it fails to satisfy Plaintiff's burden of showing the necessity of reconsideration. After reviewing the Audit Logs, Mr. Hosburgh opines that on June 12, 2016 an email retention policy was implemented to automatically delete emails after one day if the email was from "jose.crespo@state.co.us" and contained the keyword "FAREWELL." Exh. 53 ¶ 14a. While this may be evidence that Defendants had some automatic email deletion policy, it hardly shows that the deletion policy would have affected any evidence regarding Defendants' motion for sanctions. The highly specific nature of this alleged policy does not implicate the HSA emails, the audio recording, or the fabricated domain and recovery

emails. Furthermore, Plaintiff's other contentions regarding this argument do not convince the Court to reconsider its order. First, Plaintiff cites to the Employee Handbook, but that document only provides general guidance on how long employees should retain various types of emails, not an email deletion policy. Exh. 29 at 23–24. Second, Plaintiff cites to a "recently uncovered" YouTube video of Mr. Santos instructing Defendants' employees on how to preserve emails that otherwise would be automatically deleted. Mot. at 8, ¶ 41. Yet, that video does not give any indication that it is directed at GOIT employees and instead appears to pertain to other agencies with auto-deletion policies. ECF 149, Exh. 7; ECF 149, Exh. 8. Third, Plaintiff cites to news articles, but none of them state that GOIT has an auto-deletion policy. Exh. 9–11. Thus, reconsideration is not warranted.[30]

CONCLUSION

A fundamental flaw permeates Plaintiff's Motion. While he complains about Defendants' alleged conduct throughout his briefing (e.g., their alleged willful failure to

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[30] The Court notes that Plaintiff makes additional arguments in his reply. With the exception of one, the Court finds that these other arguments are largely duplicative of those discussed in this Order and otherwise improper for a Rule 59 motion in that they should have been raised earlier. Servants of Paraclete, 204 F.3d at 1012. The one exception is that Plaintiff contends that the phone containing the audio recording of him and Megan Bench has been located in Ethiopia. Reply at 10. While the last-minute discovery is incredible, unless that recording absolves Plaintiff of any wrongdoing regarding the HSA emails, the audio recording with Mr. Sierwalt, and the creation of the fraudulent domain and recovery emails, then the audio does not create the need for reconsideration. As the audio likely would only concern the HSA emails, this piece of evidence (the contents of which are still unknown) is insufficient for Plaintiff to meet his burden.

produce the Audit Logs), he ignores the fact that the Court's order was based on his conduct, not theirs. Defendants presented clear, convincing, and compelling evidence—the substance of which Plaintiff hardly addresses—that Plaintiff fabricated multiple pieces of evidence in this case. For instance, expert reports and testimony provided a foundation for understanding how Plaintiff could and did accomplish his fabrications. The evidence revealed that all versions of the HSA emails were produced by him. Various testimony established that only Plaintiff, not Mr. Santos or Ms. Logacheva, had any motive to create a fraudulent domain and insert thousands of emails into his Google Drive. Plaintiff's Motion addressed none of these concerns. The Audit Logs, disagreement over testimony, videos that do not affect the fabricated evidence, and untimely arguments over email deletion policies do not satisfy Plaintiff's burden for reconsideration.

Accordingly, and for the reasons stated in this Order, Plaintiff's Motion [filed July 30, 2021; ECF 150] is denied.[31] Previously, the Court ordered Plaintiff file a response to Defendants' motion for costs and fees no later than five business days from the date of this ruling. ECF 152. Defendants subsequently filed a supplemental motion for attorney fees. ECF 162. Given this new filing, Plaintiff's pro se status, and the Court's experience with recent delays in mailing, the Court sua sponte amends its previous order to allow Plaintiff to file a consolidated response to both ECF 138 and ECF 162 on or before September 30, 2021 (i.e., twelve business

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[31] The Court adds that even if Plaintiff's Motion had been granted, reconsideration likely would mean the need to reopen the evidentiary record to address Defendants' allegations of additional fabricated evidence, including, but not limited to, a June 10, 2018 video recording produced in discovery by Plaintiff. See ECF 134 at 38–39.

days).

Dated at Denver, Colorado, this 14th day of September, 2021.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty, United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00165-MEH

YOSEPH YADESSA KENNO,
Plaintiff - Appellant,

v.

COLORADO GOVERNOR'S OFFICE OF INFOR-
MATION TECHNOLOGY,
LYUBOV LOGACHEVA, in her individual capacity;
BOB MCINTYRE, in his individual capacity;
DON WISDOM in his individual and official capacity,
Defendants – Appellees.

Filed: June 30, 2021
District Court Order of Dismissal

Before the Court is Defendants' Motion for Sanctions ("Motion"). ECF 101. Defendants allege that Plaintiff has fabricated various pieces of evidence in this case. Due to that fabrication, Defendants request dismissal of Plaintiff's claims and an award of fees and costs. Plaintiff denies any fabrication. The Court held an evidentiary hearing on May 5 and 6, 2021. In light of the material presented both in the briefing and at the hearing, the Court issues the following Findings of Facts and Conclusions of Law. Based on those, Defendants' Motion is granted.

FINDINGS OF FACT

1. Plaintiff worked for Defendant Colorado Governor's Office of Information Technology ("GOIT") as a database administrator from January 2017 until GOIT terminated his employment on December 3, 2018. Exh. CCCC, ¶¶ 2–4.

2. Defendant Lyubov Logacheva was Plaintiff's direct supervisor. ECF 124, Tr., 5:4–5 Ms. Logacheva was involved in the decision to hire Plaintiff. Id. at 5:6–8. Defendant Bob McIntyre was Ms. Logacheva's supervisor. Id. at 14:13–18.

3. From June 2018 through mid-2019 Plaintiff filed appeals with the State Personnel Board and the Unemployment Insurance Division, and charges with the CCRD and EEOC. On January 18, 2019, Plaintiff filed this lawsuit. ECF 1. On February 12, 2019, Plaintiff filed a First Amended Complaint. ECF 5. On March 9, 2020, Plaintiff filed a Second Amended Complaint. ECF 61. On May 6, 2020, Plaintiff filed his Third Amended Complaint. ECF 71.

GOIT Email and Litigation Preservation Systems

4. GOIT uses Google Suite applications, including Gmail, Google Drive, and Google Vault. Testimony of Lilo Santos.

5. Between 2017 and 2019, GOIT did not have a mechanism for the automatic deletion or purging of emails after a certain period. Exh. AAAA, ¶ 6; Testimony of Mr. Santos.

6. Google Vault is a platform that, among other things, preserves state email and other types of accounts and allows for Google Vault administrators to search through users'

accounts. Testimony of Mr. Santos.

7. An administrator cannot delete, alter, change, or send emails from those users' accounts using Google Vault. Id.; Exh. AAAA, ¶ 7. Only a user can delete emails from his or her GOIT email account. Exh. AAAA, ¶ 7.

8. Google Vault preserves emails through litigation holds. Testimony of Mr. Santos. Once a litigation hold is in place on a user's account, no one can delete emails from the preserved hold in Google Vault. Id.; Exh. AAAA, ¶ 7.

9. Prior to August 2018, a litigation hold was in place on Plaintiff's GOIT email account. Testimony of Mr. Santos; Exh. HH, ¶ 5.

Oracle Cloud Project

10. In late 2017, Plaintiff volunteered for a project to evaluate Oracle Cloud. ECF 124, Tr., 5:22–6:2; Exh. 14, 69:16–21. His Caucasian coworker, Curtis Stierwalt, was assigned to the project in a secondary role. ECF 124, Tr., 6:2–11; Exh. 14, 40:23–25, 69:21–70:5. Plaintiff was responsible for meeting the project deadlines. Exh. I, 40–41; Exh. 14, 72:21–73:2, 76:6–10.

11. Ms. Logacheva set a deadline of January 5, 2018 for Plaintiff to deliver a set of guidelines for the team on how to use Oracle Cloud. ECF 124, Tr., 6:19–23.

12. On January 5, 2018, Plaintiff and Mr. Stierwalt spoke on the phone about the document due that day. Exh. MMM. Plaintiff recorded the phone call on his personal cell phone. ECF 125, Tr. 224:4–15. Plaintiff stated he did so using an application called "ACR Call Recorder." Id. at 224:14–16; Exh. A, 17.

13. Ms. Logacheva never directly or remotely accessed Plaintiff's cell phone. ECF 124, Tr. 17:1–6. Plaintiff never provided Ms. Logacheva with any audio recordings. Id. at 16:23–25.

14. On January 5, 2018, at 2:31 p.m., Plaintiff emailed Ms. Logacheva a Google Drive link to a document titled "Oracle Cloud – Usage Guidelines(Draft)." Exh. JJJ. In this email,

Plaintiff wrote:
Lyubov,

Thats our initial draft ready. Because its Friday, my suggestion for you to chillax and not be bothered with it til Monday. Fridays are for peace and harmony; no one has got time to open a document and be disappointed. Ya know what mean. Come Monday, I think you will thoroughly refreshed by it. So, wait until Monday . . . is my suggestion.

Yoseph Kenno
Database Administrator

Id. (errors in original).

15. Ms. Logacheva did open the document on January 5, 2018 and found it unsatisfactory. ECF 124, Tr., 6:24–7:4, 10:17–22; 11:17–19.

HSA Contribution Problem

16. Sometime in late 2017, Plaintiff discovered an issue with his Health Savings Account (HSA). Exh. BB, 9; Exh. CCCC, ¶ 9. Specifically, GOIT's portion of the contributions were being accounted for on Plaintiff's paycheck but were not actually being distributed into his HSA. ECF 124, Tr., 122:15–22.

17. Plaintiff worked with the State Benefits team, which is part of the Department of Personnel and Administration, on this issue. The team used the email address state_benefits@state.co.us to communicate on the problem. Exh. BB, 8–9; Exh. CCCC, ¶ 9. On February 23, 2018, after the issue had not yet been resolved, Plaintiff emailed Ms. Logacheva and Mr. McIntyre, requesting assistance. Exh. BB, 7; Exh. CCCC, ¶ 10.

18. Mr. McIntyre referred Plaintiff to Holly Bruton, GOIT's Senior Human Resources Coordinator. Exh. BB, 7; Exh. CCCC, ¶ 10. Ms. Logacheva did not respond to Plaintiff's email at that time, as she was on vacation. ECF 124, Tr.,

17:16–18:10.

19. Plaintiff never again emailed Ms. Logacheva directly about his HSA, and Ms. Logacheva never emailed Plaintiff about his HSA. Id. at 18:25–19:14, 19:25–20:5, 39:6–8.

20. On February 27, 2018, Ms. Bruton contacted the State Benefits team about the missing HSA contributions. Exh. BB, 4.

21. On March 2, 2018, State Benefits emailed Plaintiff informing him that the problem had been corrected and the missing contributions would be deposited into his HSA at the end of the month. Id. at 1. Plaintiff replied that day, stating, "Perfect. Thank you." Id.; Exh. CCCC, ¶ 11. This email appears to be Plaintiff's last communication with State Benefits. Exh. BB, 1.

22. Plaintiff never met any State Benefits team member face-to-face. Exh. CCCC, ¶ 12; ECF 125, Tr. 192:9–11.

23. Upon returning from vacation, Ms. Logacheva received a request from Mr. McIntyre for her to speak to Plaintiff about his behavior toward, and communication with, a member of GOIT's HR team. ECF 124, Tr., 22:22–23:11, 35:14–25. Ms. Logacheva understood that Mr. McIntyre stated Plaintiff had been rude to the employee regarding some benefits related issue. Id. at 35:14–36:4.

24. On March 13, 2018, during a one-on-one meeting, Ms. Logacheva complied with Mr. McIntyre's request and spoke to Plaintiff about his communication with GOIT's HR. Id. at 22:22–23:11; Exh. 1.

2018 Performance Management Actions and Discrimination Claim

25. On April 13, 2018, Ms. Logacheva released Plaintiff's written annual performance evaluation to him to review and sign. ECF 124, Tr.,12:4–11; Exh. CC, 2; Exh. CCCC, ¶ 13. Plaintiff was rated overall as "Successful" or "2," but was rated as "Needs Improvement" or "1" in some areas, including communication and accountability. ECF 124, Tr.,

12:21–13:9.
26. Plaintiff's failure to meet the January 5, 2018 deadline related to the Oracle Cloud project was one reason why Plaintiff was poorly rated as to accountability. Id. at 13:6–18.
27. Ms. Logacheva stated in the performance evaluation that Plaintiff was still not demonstrating appropriate work conduct and not understanding the importance of meeting deadlines. Exh. CC, 1–2. In an email exchange, Plaintiff disagreed with this language and asked for specifics. Id. at 2.
28. Ms. Logacheva replied with examples of unprofessional communication including Plaintiff's behavior toward GOIT's HR, on which she counseled him on March 13, 2018. Id. at 1; ECF 124, Tr., 23:17–24:22. Plaintiff replied, stating, "HR admitted fault in their attempt to discriminate against me by not paying me what I [sic] was rightfully mine." Exh. CC, 1.
29. After Plaintiff disputed his performance evaluation, Mr. McIntyre asked Ms. Logacheva to change some wording in the review. ECF 124, Tr., 40:24–41:4.
30. On May 18, 2018, Plaintiff complained about a new work requirement ("time- reporting requirement") he believed was "nakedly unjust." Exh. LL, 5. This time-reporting requirement applied to Plaintiff and other coworkers who worked on Oracle databases. Exh. I, 42–44.
31. Because Plaintiff's performance as to his communication and accountability had not improved, on May 31, 2018, Ms. Logacheva, after consulting with Mr. McIntyre, informed Plaintiff he would no longer be permitted to work from home and that he would be placed on a performance improvement plan ("PIP"). ECF 124, Tr., 13:19–14:2, 26:23–27:11.
32. On June 11, 2018, Plaintiff was placed on a PIP. Exh. CCCC, ¶ 34; Exh. 5. The PIP listed examples of Plaintiff's inadequate performance, including the missed January 5,

2018 Oracle Cloud project deadline. Exh. 5, 2. Ms. Logacheva also included the manner in which Plaintiff behaved while raising a claim of discrimination against HR on April 13, 2018. Id.

33. On July 10, 2018, Plaintiff sent an email to several GOIT employees, including John Bartley, with the subject "A new low" that contained a Google Drive link to a video. Exh. WWW; Exh. GG, 5; Exh. ZZZ, ¶ 4.

34. That same date, Plaintiff was placed on administrative leave. Exh. CCCC, ¶ 35. As of that date, Plaintiff no longer had access to his GOIT Gmail account or Google Drive. Id.

35. On July 17, 2018, Mr. Bartley forwarded the "A new low" email to the Attorney General's office. Exh. WWW; Exh. ZZZ, ¶ 4. The video link in the email was a Google Drive link: https://drive.google.com/open?id=1-jD-smsSFEhY1FiQo-4DDQnDxPNv1A5T. Exh. WWW; Exh. ZZZ, ¶ 4.

36. On July 19, 2018, Plaintiff forwarded the "A new low" email to submit an informal grievance to Mr. McIntyre and to inform Mr. Bartley that Plaintiff had filed a charge of discrimination with the Board. Exh. XXX. The video link in that email is a YouTube link rather than a Google Drive link: https://youtu.be/iL8rk7F6Wgc. Id.

37. On August 2, 2018, Don Wisdom held a pre-disciplinary meeting with Plaintiff. Exh. GG, 2; Exh. VVV, 2. After that meeting, Plaintiff requested GOIT provide him, in a PST file, emails from his GOIT account dated May 18, 2018 to July 11, 2018. Exh. GG, 2; Exh. VVV, 2; ECF 124, Tr., 65:22–66:6. He did not ask for emails from March 2018. Id.

38. OIT's Active Directory team delivered the requested emails, and Mr. Bartley sent them to Plaintiff via a Google Drive link. Exh. YYY; Exh. TTT; Exh. UUU; Exh. VVV; Exh. ZZZ, ¶¶ 7–9; Exh. CCCC, ¶ 36.

GOIT Internal Discrimination Investigation

39. In June 2018, Plaintiff made a claim to HR alleging that the removal of his work- from-home privileges and his

PIP were in retaliation for his complaint on May 18, 2018, regarding the time-reporting requirement. Exh. I, 42, 45. Mr. Bartley, then a GOIT HR Business Partner, conducted an investigation into Plaintiff's claims. Id. at 37.

40. During the investigation, Plaintiff alleged that Ms. Logacheva discriminated against him by citing his failure to meet the Oracle Cloud project deadlines in his performance review, while his Caucasian coworker, Mr. Stierwalt, was not similarly disciplined. Id. at 40

41. On June 28, 2018, Mr. Bartley issued a report of his investigation findings concluding that GOIT did not discriminate or retaliate against Plaintiff. Id. 37–46. The report noted that only Plaintiff was disciplined for missing the Oracle Cloud project deadlines because Mr. Stierwalt was assigned to the project in a secondary or backup role. Id. at 40–41.

42. Plaintiff received a copy of Mr. Bartley's report and later submitted it to the CCRD. ECF 124, Tr., 57:1–58:4; Exh. I, 37–46.

CCRD Investigation

43. Plaintiff filed three charges of discrimination and retaliation with the CCRD. Exh.CCCC, ¶ 17. Each charge was assigned a case number within CCRD's case management system, Case Connect. Exh. LL, 1, 7, 10; Exh. EE, ¶ 4; Exh. BBBB, ¶¶ 3, 9.

44. Within Case Connect, documents and files can be uploaded or downloaded. Exh.BBBB. Only a document's owner—the person who uploaded it—can view or download the document. Id. at ¶ 12.

45. On June 7, 2018, Plaintiff uploaded a document titled, "State.co.us Executive Branch Mail – Follow-up on our Team meeting." Exh. LL, 2; Exh. BBBB, ¶ 10. Included in the chain is an email from Plaintiff to Ms. Logacheva dated May 18, 2018 at 9:42 a.m. Exh. LL at 6. In this email, Plaintiff complains about the new time-reporting requirement. Id. Plaintiff did not upload the March 19-20, 2018 HSA

emails which are the subject of Defendants' Motion.

46. CCRD Intake Specialist Anna Hughes assisted Plaintiff with filing the charges. ECF 124, Tr. 142:19–21. Plaintiff's first charge of discrimination incorrectly stated, as contemporaneously admitted by Plaintiff, that his first protected activity occurred in March 2018. Exh. EE, ¶ 5; Exh. TT.

47. Ms. Hughes and Plaintiff spoke on the phone on June 12, 2018. Exh. KKK; Exh. FFF; Exh. CCCC, ¶ 38. During the call, Plaintiff stated he initially complained of discrimination on May 18, 2018 based on new work requirements. Exh. KKK, 1. Plaintiff did not mention State Benefits, or anything related to his HSA or the HSA emails. Id.

48. On June 14, 2018, at 3:08 p.m., Ms. Hughes emailed Plaintiff asking him to forward any documentation pertinent to his claims of discrimination. Exh. LLL; Exh. FFF. Plaintiff responded at 3:16 p.m. and attached some "SPD" and EEOC paperwork. Id.

49. On October 31, 2018, Plaintiff submitted numerous files, including several audio files, to the CCRD in support of his claims of discrimination and retaliation. Exh. LL, 1.

50. One of these files was titled "Exhibit-R2 Curtis Stierwalt_7204281698_2018_01_05_14_34_03.mp3." Id; Exh. MMM.

51. On June 12, 2019, Plaintiff spoke for approximately three hours with CCRD Investigator Megan Bench regarding his discrimination and retaliation claims. Exh. EE, ¶ 5; Exh. OO; Exh. FFF; Exh. CCCC, ¶ 18. Plaintiff surreptitiously recorded the call and informed Ms. Bench of that fact afterwards. Exh. PP, 1–3; Exh. FFF; Exh. CCCC, ¶ 18.

52. Plaintiff told Ms. Bench he would not provide her with a copy of the recording unless he could review it and then provide it under his "terms." Exh. PP, 1–3. When GOIT requested a copy of the June 12, 2019 recorded phone call, Plaintiff claimed it was no longer available because the phone on which it was recorded had been sent to Ethiopia.

ECF 125, Tr. 199:15–25.

53. During the call, and in a subsequent email exchange, Ms. Bench told Plaintiff that, because he did not raise any discrimination complaints with GOIT prior to being informed of performance problems at least as of April 2018, his retaliation claim did not appear to have merit. Exh. PP, 7–8.

54. On the call, Plaintiff told Ms. Bench that his first protected activity occurred in May 2018, not March 2018. ECF 125, Tr. 195:19–196:2; Exh. EE, ¶¶ 5, 7; Exh. OO, 2–3; Exh. CCCC,¶¶ 18–19. In an email dated June 13, 2019, Ms. Bench reiterated Plaintiff's statement that the first protected activity occurred in May 2018, after he was aware of performance issues. Exh. PP, 6– 7.

55. On July 1, 2019, Ms. Bench stated that Plaintiff had provided edited audio and video recordings to the CCRD. Exh. PP, 2.

56. On June 28, 2019, Plaintiff sent an email from his personal Gmail account, yosephkenno@gmail.com, to Ms. Bench. Exh. H; Exh. EE, ¶ 8. This email contained a Google Drive link to a 432-page PDF document titled "Supplemental Response2 Final," which was a fifteen-page rebuttal statement with over 400 pages of exhibits attached. Exh. H; Exh. EE, ¶ 8; Exh. FFF.

57. Plaintiff admits he emailed this document to Ms. Bench via a Google Drive link. ECF 125, Tr., 164:17–21.

58. Ms. Bench accessed the Google Drive link on June 28, 2019 and downloaded a copy of the 432-page document ("Original PDF Document"). Exh. EE, ¶ 8; Exh. I; Exh. BBBB, ¶ 7; Exh. FFF. That day, she uploaded the Original PDF Document to Case Connect. Exh. BBBB, ¶¶ 5–8.

59. Because Ms. Bench uploaded the Original PDF Document to Case Connect, she was the document's "owner." Exh. LL, 1, 7, 10; Exh. BBBB, ¶ 6. Only she, as the document's owner, could view or download the document from

Case Connect. Exh. BBBB, ¶ 12.

Events Leading to Discovery of Alleged Fabricated and Manipulated Evidence

60. On August 23, 2019, as part of his mandatory disclosures, Plaintiff disclosed several audio and video files and numerous emails in PDF format. Exh. QQ.

61. GOIT investigated Plaintiff's disclosures and suspected some audio and video files and emails had been fabricated or manipulated. Exh. RR, 10, 13.

62. Exhibit MMM was one file GOIT believed had been manipulated. Testimony of Angela Malley; Exh. FF, 2.

63. Plaintiff's August 23, 2019 mandatory disclosures included the March 19-20, 2018 email exchange between Plaintiff and Ms. Logacheva concerning Plaintiff's HSA contributions ("HSA Emails"), Bates labeled Kenno_1282 ("Discovery Version"). GOIT could not locate this email exchange in its preserved emails. ECF 125, Tr. 204:18–205:2; Testimony of Mr. Santos; Testimony of Sara McDermott; Exh. E; Exh. QQ.

64. The March 19, 2018 email, purportedly sent from Plaintiff to Ms. Logacheva stated:

Lyubov,

I just got off the phone with these benefits people. After promising to contributing to my HSA, they are now saying they can't do it. This is maddening because I have been trying to get them to contribution to my HSA for 8 months now. During the call, they told me how their dept doesn't doll out welfare checks. I wasn't asking for welfare. They were snickering too after telling me this. They wouldn't have mentioned welfare if I wasn't a black guy. I want to be treated fairly, just like everyone else.

So, unless these people do the right thing, I'll submit a

discrimination grievance on them. This is so demeaning.

Yoseph Kenno
Database Administrator
Exh. E (errors in original).
65. The email dated March 20, 2018, purportedly Ms. Logacheva's response to Plaintiff's March 19th email, read:
Yoseph,

Your should remember this is a workplace. Your communication should always be respectful to everyone, most importantly, to your supervisor. I am certain they were not discriminating against you. May be you misunderstood?

You can contact OIT HR for help. Please follow the OIT Values described in your performance plan when communicating with HR and refrain from making similar accusations going forward.
Thank you, Lyubov Logacheva
Database Services Manager
For Oracle, Informix, Adabas
Id. (errors in original).
66. Mr. Santos conducted a search of Plaintiff's GOIT email account and Ms. Logacheva's email account using the keywords "HSA," "welfare," and "demeaning." Exh. HH, ¶ 6. None of these searches returned the HSA emails at issue in this case. Testimony of Mr. Santos; Exh. HH, ¶ 6. A search for just "HSA" did return other emails related to Plaintiff's HSA contributions, dated January and February 2018. Testimony of Mr. Santos; Exh. HH, ¶ 6; Exh. AAA.
67. Ms. Logacheva also searched her email account for emails containing the term "HSA." ECF 124, Tr., 20:18–21:1. This search returned emails dated February 2018. Id. It did not return the March 19-20, 2018 HSA email exchange produced by Plaintiff. Id.
68. Though he claimed that his termination was

discriminatory, Plaintiff did not submit the HSA Emails as evidence in hearings regarding his unemployment claim. Exh. NN.

69. Instead, Plaintiff repeatedly identified the May 18, 2018 email as his first protected conduct. Exh. CCCC, ¶¶ 14–16; Exh. MM; Exh. NN. An example of this was the timeline made by Plaintiff that he submitted to his unemployment hearing officer. ECF 101-20. He also explicitly stated that Ms. Logacheva first retaliated against him on May 31, 2018 and by issuing the PIP in response to his May 18, 2018 protected activity. Exh. NN.

70. On December 17, 2019, GOIT retained Forensic Pursuit to forensically analyze Plaintiff's personal laptop, cell phone, and individual files. Exh. A, 6; Testimony of Ms. McDermott; Testimony of Ms. Malley.

71. Plaintiff retained Cyopsis to perform certain forensic analysis. ECF 124, Tr. 75:9– 76:6.

72. In January 2020, GOIT filed a motion to compel inspection of Plaintiff's personal Samsung Galaxy S8 cell phone and Dell XPS laptop in the state administrative case, putting Plaintiff on notice that GOIT had concerns that he had fabricated emails. Exh. CCCC, ¶ 21.

73. On February 20, 2020, Plaintiff produced some emails in native format, including the March 19-20, 2018 email exchange regarding the HSA contributions ("First MSG Version"). Exh. B; Exh. CCCC, ¶ 22.

74. The First MSG Version of the HSA emails has several differences from the Discovery Version, including spacing, grammar, and spelling errors. Compare Exh. B with Exh. E; see Exh. AA. This version also shows that the email purportedly sent from Plaintiff to Ms. Logacheva was sent on Monday, March 18, 2018. Exh. B. March 18, 2018 was in fact a Sunday.

75. In February 2020, GOIT submitted a Colorado Open Records Act ("CORA") request to the CCRD, requesting the entire case file for Plaintiff's charges of discrimination. See

Exh. WW. The CCRD case file contained another PDF version of the HSA emails ("CCRD Version"). Exh. C. In the CCRD version, the email purportedly sent from Plaintiff to Ms. Logacheva, dated March 19, 2018, showed it was sent from the email address "state_benefits@state.co.us." Id.

76. The CCRD Version was submitted to the CCRD by Plaintiff on June 28, 2019 as part of the 432-page PDF document titled "Supplemental Response2 Final." Exh. I, 61.

77. Plaintiff claims he preserved, or downloaded and saved, the First MSG Version, but not the Discovery or CCRD Versions, to his personal computer. ECF 125, Tr. 166:8–14.

78. In April 2020, GOIT filed a motion to compel inspection of Plaintiff's personal cell phone and laptop in this Court. Exh. RR. Plaintiff understood at that time that GOIT alleged he had fabricated the HSA Emails specifically. Exh. CCCC, ¶ 24.

79. In February 2020, Forensic Pursuit obtained forensic images of Plaintiff's laptop and cell phone. Exh. A, 7. In July 2020, Forensic Pursuit reacquired complete forensic images of the laptop. Id. at 19–20, 24. Evidence that the system date and time had been manually changed was found on the laptop. Id. at 29–30.

80. Several emails, including the First MSG Version, were located on the laptop. Id. at 7, 36.

The Allegedly Fabricated Audio (Exhibit MMM)

81. Exhibit MMM was found on Plaintiff's laptop as an .mp3 file. Exh. A, 34; Testimony of Ms. Malley.

82. Ms. Malley forensically analyzed Exhibit MMM and found evidence of fabrication. Exh. FF; Testimony of Ms. Malley.

83. At approximately the 01:03.115 mark, a "blip" can be heard in the audio without the assistance of any forensic or other auditory analysis tools. Exh. FF, 3; Testimony of Ms. Malley. A second blip can be heard at 01:20.636. Exh. FF, 3; Testimony of Ms. Malley.

84. From 01:03.115 to 01:20.636, there are inconsistencies

in the timbre and content of that section. Exh. FF, 3. A shift in the audio spectrum also occurs containing a higher volume of lower frequencies than the rest of the recording. Id.; Testimony of Ms. Malley. The audio spectrum in this section contains changes in the decibels, suggesting it was recorded in a different location or at a different time than the rest of the audio. Exh. FF, 3–7; Testimony of Ms. Malley.

85. The blips can visually be seen using an industry-standard audio analysis tool called Izotope. Testimony of Ms. Malley; Exh. GGG.

86. Additionally, in between the two blips, even without the assistance of any audio analysis tool, it is apparent that there is no background noise, and Mr. Stierwalt makes no sounds whatsoever. Exh. MMM.

87. The EXIF metadata for Exh. MMM indicates an encoder, LAME3.99r, was used on the file. Exh. FF, 2; Testimony of Ms. Malley. The encoder LAME is also associated with Audacity, an audio editing program that is free to the public. Exh. OOO, 12–17; Testimony of Ms. Malley. LAME is not associated with ACR and does not appear in the metadata of a file created using ACR. Testimony of Ms. Malley; Exh. OOO, 2.

88. Ms. Malley's forensic analysis indicates that the audible, visual, and forensic difference between the audio section found at 1:03–1:20, coupled with metadata of Exhibit MMM revealing that it was created using an audio editing tool, Audacity, demonstrate to a reasonable degree of scientific certainty that section 1:03–1:20 of Exhibit MMM was recorded on a different date or in a different location than the rest of the audio file. Testimony of Ms. Malley; Exh. PPP.

Litigation Regarding Alleged Fabricated and Manipulated Evidence

89. In a Second Supplemental Disclosure dated September 2020, Plaintiff produced multiple versions of the 432-page PDF document, "Supplemental Response2 Final," that

Plaintiff supposedly submitted to the CCRD on June 28, 2019. See Exh. XX.

90. In October 2020, GOIT filed a Motion for Sanctions with the Board seeking dismissal of Plaintiff's appeals with prejudice and an award of fees and costs. Order Granting Respondent's Motion for Sanctions; Order of Dismissal and Notice of Appeal Rights ("ALJ Order").

Plaintiff's Fourth Supplemental Disclosures and Expert Analysis

91. On December 1, 2020, Plaintiff served his Fourth Supplemental Disclosures, including two native emails allegedly sent from Plaintiff to the CCRD. Exh. CCC; Exh. CCCC, ¶ 29. Ms. McDermott, of Forensic Pursuit, forensically analyzed the emails in Plaintiff's Fourth Supplemental disclosures to determine whether they were authentic. Exh. G, 5–6; Testimony of Ms. McDermott.

92. The first email in Plaintiff's Fourth Supplemental Disclosures, dated June 28, 2019, 12:02 p.m., purported to be the email Plaintiff sent to Ms. Bench by which he submitted the "Supplemental Response2 Final" PDF document ("Plaintiff's June 28th Email"). Exh. O; Exh. CCCC, ¶ 30.

93. Plaintiff's June 28th Email has a PDF attachment titled "Supplemental Response2 Final" and appears to have Google Drink link that connects to a document with the same title. Exh. O. However, the link is broken. Testimony of Ms. McDermott; Exh. A, 103. The only way this link could be broken is through user manipulation. Testimony of Ms. McDermott; Exh. G, 22

94. The header of Plaintiff's June 28th Email contains four different dates, with the received date falling thirteen months after the email was purportedly sent. Testimony of Ms. McDermott; Exh. G, 18–19; Exh. X. The additional dates are not consistent with an authentic email. Testimony of Ms. McDermott; Exh. G, 19.

95. The email's header also indicates the email was received by "gmail.api.google.com" or Google API. Testimony

of. Ms. McDermott; Exh. G, 19; Exh. X. Google API is a developer mode for programmers and/or coders, allowing for command line instructions to send emails, upload attachments, and modify content. Testimony of Ms. McDermott; Exh. G, 19, 44. Google API can be used to manipulate emails. Testimony of Ms. McDermott.

96. Forensic Pursuit requested that the CCRD directly send it the original email received by Ms. Bench on June 28, 2019. Testimony of Ms. McDermott; Exh. G, 5. Ms. McDermott analyzed this email (hereafter, "Original and Authentic June 28th Email"). Testimony of Ms. McDermott; Ex. G, 5–12.

97. The header of the Original and Authentic June 28th Email contains a sent date and time of June 28, 2019, 12:02:24 p.m., and a received date and time of June 28, 2019, 12:02:43 p.m. Exh. W. The short time between when this email was sent and when it was received is consistent with an authentic email. Exh. G, 1, 7; Testimony of Ms. McDermott.

98. The header of the Original and Authentic June 28th Email does not contain evidence of Google API. Testimony of Ms. McDermott; Exh. G, 1, 10.

99. The Original and Authentic June 28th Email contains an active Google Drive link to a document titled "Supplemental Response2 Final." It does not have a PDF attachment. Exh. G, 1-2, 12; Exh. H; Testimony of Ms. McDermott.

100. Forensic Pursuit also compared the original "Supplemental Response2 Final" sent to the CCRD with the one attached to the email in Plaintiff's Fourth Supplemental Disclosures. Testimony of Ms. McDermott.

101. The version sent to the CCRD contained thirty-nine user comments by the user "yosep" and an embedded audio file. Testimony of Ms. McDermott; Exh. G, 12. The HSA emails on page 61 matches the CCRD Version and lists the sender's address as state_benefits@state.co.us. Compare

Exh. C with Exh. I, 61. On the other hand, the PDF attached to Plaintiff's June 28th email had no user comments, no embedded files, and contained the HSA Emails on page 61 showing the March 19, 2018 email was sent by Plaintiff. Testimony of Ms. McDermott; Exh. G, 24–25; Exh. Q.

102. On December 14, 2020, Ms. McDermott accessed the Google Drive link in the Original and Authentic June 28th Email. Testimony of Ms. McDermott; Exh. G, 15. She noted that the document had a recorded owner of Yoseph Kenno and a last modify date of October 22, 2020. Testimony of Ms. McDermott; Exh. G, 15. This date indicates that someone made changes to the document after it was sent to Ms. Bench on June 28, 2019. Testimony of Ms. McDermott; Exh. G, The HSA email in the Google Drive link PDF document matched the version produced by Plaintiff on December 1, 2020, in that the sender's email address had been fixed on page 61.

103. On December 29, 2020, Plaintiff's expert, Cyopsis, sent an email dated June 28, 2019 to Forensic Pursuit in a zip file. Testimony of Ms. McDermott; Exh. G, 6, 26; Exh. R; Exh. CCCC, ¶ 41. Ms. McDermott forensically analyzed this email ("Cyopsis' June 28th Email"). Testimony of Ms. McDermott; Exh. G, 26–29.

104. Cyopsis' June 28th Email contained an active Google Drive link and did not have a PDF attachment. Testimony of Ms. McDermott; Exh. G, 29; Exh. R; Exh. CCCC, ¶ 41.

105. Ms. McDermott accessed the Google Drive link in Cyopsis' June 28th Email. Testimony of Ms. McDermott; Exh. G, 29. The link took her to the same URL as the link contained in the Original and Authentic June 28th Email. Testimony of Ms. McDermott; Exh. G, 29. She analyzed the PDF document found at that URL. Testimony of Ms. McDermott; Exh. G, 29.

106. Ms. McDermott noted the document was 432-pages long, had a recorded owner of Yoseph Kenno, and a last

modify date of December 23, 2020. Testimony of Ms. McDermott; Exh. G, 29. The document contained no user comments, had no embedded audio player or file, and contained a version of the HSA emails that matched the Discovery Version. Testimony of Ms. McDermott; Exh. G, 29.

107. The header of Cyopsis' June 28th Email contains several header dates, including a received date that was thirteen months after the sent date. Exh. Y. The additional dates are not consistent with an authentic email. Testimony of Ms. McDermott; Ex. G, 31. The additional dates are also associated with Google API, in the same way as Plaintiff's June 28th Email. Exh. Y.

108. The second email contained in Plaintiff's Fourth Supplemental Disclosures, dated June 14, 2018, 3:22 p.m., purported to be an email Plaintiff sent to Ms. Hughes ("June 14th Email"). Exh. DDD; Exh. CCCC, ¶ 32.

109. The June 14th Email was not located on Plaintiff's laptop. Exh. A, 107. This email is not located in CCRD's case files for Plaintiff's charges of discrimination. Exh. LLL.

110. Attached to the June 14th Email was a zip file containing two additional native format (MSG) emails, one of which is another version of the HSA emails ("Second MSG Version"). Exh. DDD; Exh. U.

111. The header of the Second MSG Version indicates the email was addressed "To" lyubov.logacheva@state.co.us but was "Delivered To" yoseph.kenno@state.co.us. Exh. Z. This discrepancy is not consistent with an authentic email. Testimony of Ms. McDermott; Exh. G, 32.

112. Based on her analysis of several versions of the HSA emails, Ms. McDermott concluded to a reasonable degree of scientific certainty that Plaintiff fabricated the HSA email and manipulated the June 28th Emails that Plaintiff had produced. Testimony of Ms. McDermott.

113. Plaintiff's expert, Francis Brackin of Cyopsis, concluded that the First MSG Version was authentic. ECF 124, Tr., 85:22–86:1. However, Mr. Brackin did not analyze

any other version of the HSA Emails and could not explain why the versions differed. Id. at 76:11–19, 104:18–105:5. Mr. Brackin's methods of authentication cannot determine whether the First MSG Version was actually sent. Testimony of Ms. McDermott.

114. As to the wrong date in the First MSG Version, Mr. Brackin's report suggested that Ms. Logacheva could have changed the date of the email supposedly sent by Plaintiff when she replied on March 20, 2018. But Mr. Brackin admitted that this theory cannot explain why the PDF versions of this email produced to the CCRD and in discovery have the corrected date. Nor could he explain the error in the sender's email address in the CCRD Version. Testimony of Mr. Brackin.

115. Mr. Brackin could not explain how Cyopsis' June 28th Email could be authentic and have four dates in the header. ECF 124, Tr., 103:12–18. He also could not explain why Plaintiff's version differed from the Original and Authentic June 28th Email. Id. at 104:8–17.

116. Emails that appear authentic both visually in native format and forensically from analysis of their headers can be easily manipulated using free software that comes preinstalled on Windows computers. Testimony of Ms. McDermott; Exh. A, 93; Exh. III. A fabricated email will even pass traditional email authentication tools, making it appear as though the email was sent and received. Testimony of Ms. McDermott; Exh. III.

Alleged Fraudulent Google Emails

117. On November 18, 2020, a domain titled "internal-gsuites-recovery.co" was created. See Exh. KK; Exh. QQQ. An email address named gmail_recovery_admin@internal-gsuites- recovery.co was also created. See Exh. KK; Exh. QQQ.

118. Although the domain name and email address appear to be a Google administrative recovery account, Google LLC verified neither was associated with any Google corporate

accounts. Exh. JJ, ¶¶ 2–3; Exh. KK.

119. From November 18 through November 23, 2020, Plaintiff, through his former counsel, requested that GOIT run live searches of his state email account. Exh. ZZ, 1, 12.

120. Defendants' counsel discussed this with Mr. Santos and confirmed that searches could be run. Mr. Santos did not receive confirmation that the searches would be run until December 7, 2020. Testimony of Mr. Santos; Exh. HH, ¶ 8. Mr. Santos was not told the specific search terms and date parameters that would be used until December 9, 2020. Exh. HH, ¶ 8.

121. On December 9, 2020, Plaintiff, his former counsel, and GOIT's counsel remotely observed Mr. Santos conduct the searches of Plaintiff's GOIT email account via Google Vault based on the agreed upon parameters. Exh. AAA; Exh. CCCC, ¶ 40. The remote searches were recorded. Exh. AAA; Exh. CCCC, ¶ 40.

122. During the searches, Plaintiff objected to the timeframe parameters and requested the searches include emails through the present date. Exh. AAA; Exh. CCCC, ¶ 40.

123. Plaintiff terminated the remote live searches when Defendants refused to deviate from the agreed upon search parameters. Exh. AAA. That day, GOIT searched Plaintiff's email account with no time limitations. Testimony of Mr. Santos; Exh. HH, ¶ 11. This searched returned a large number of emails from 2020. Id.

124. Between November 30, 2020 and December 3, 2020, over 1,700 emails were sent from gmail_recovery_admin@internal-gsuites-recovery.co to Plaintiff's state email. Testimony of Mr. Santos; Exh. HH, ¶ 11. Each email contained a subject beginning with "Email Archive Recovery" and purported to be "recovering" an email supposedly previously deleted. E.g., Exh. II.

125. The header of some of these emails indicated they

were sent using Google API. Exh. KK, 4.
126. One of the "recovery" emails was the purported March 19-20, 2018 HSA email exchange. Exh. II.
127. Google LLC verified it does not have a process for recovering emails in this manner. Exh. JJ, ¶¶ 2–3.
128. Defendants subpoenaed Google LLC for information related to the internal-gsuites- recovery.co domain created on November 18, 2020. Testimony of Mr. Santos; Exh. HH, ¶ 13. Google's responsive documents indicated Mr. Santos was identified as the creator of the domain, and registered it using the email address lilosantaanagelo@gmail.com, which was also created on November 18, 2020. Exh. QQQ; Exh. RRR; Exh. SSS.
129. Mr. Santos does not have an email address lilosantaangelo@gmail.com and his last name is not "Santaangelo." Testimony of Mr. Santos; Exh. HH, ¶ 14. Mr. Santos did not create the domain internal-gsuites-recovery.co or the email addresses gmail_recovery_admin@internal- gsuites-recovery.co and lilosantaangelo@gmail.com. Id.
State Personnel Board Hearing
130. On April 7-9, 2021, a State Personnel Board ALJ presided over an evidentiary hearing on GOIT's Motion for Sanctions. ALJ Order.
131. On May 3, 2021, the ALJ concluded that Plaintiff fabricated the HSA emails and created the fraudulent Google recovery emails in an attempt to cover up his initial fabrication. Id. at 7, 9. The ALJ dismissed Plaintiff's case with prejudice and awarded GOIT its reasonable attorney fees and costs related to the fabrication. Id. at 9–11.

ANALYSIS

A. Preliminary Matters

Before the Court proceeds to the merit of Defendants' Motion, it is necessary to address two preliminary matters. First, Defendants requested this Court take judicial notice of the State Personnel Board ALJ's proceedings and

decision in this matter. Second, Plaintiff has moved to strike a portion of Ms. McDermott's testimony regarding the June 14th Email. The Court will address these in turn.

1. Judicial Notice

At the conclusion of the evidentiary hearing, the Court directed the parties to file cross briefs on what preclusive effect, if any, the State Personnel Board's proceedings would have on this case. The parties filed their briefs on May 26, 2021. ECF 122, 123. Both parties agreed that there would need to be a final judgment in the state proceedings in order for there to be any preclusive effect on this Court's factfinding. Further, the parties agreed that the ALJ's order was not a final judgment. Defendants argued that the ALJ's order would become final when the State Personnel Board adopted it, but if Plaintiff appealed that adoption to the Colorado Court of Appeals, Defendants conceded "that the Board's Order will not be entitled to preclusive [e]ffect until such appeal is complete." ECF 122 at 2. In Plaintiff's Proposed Findings of Facts and Conclusions of Law, "Plaintiff's counsel represents that the matter is now on appeal."[32] ECF 131 at 1. Accepting this proffer, and noting no dispute from Defendants on the law, the Court finds that there is no preclusive effect by the ongoing state proceedings.

However, in Defendants' brief on the issue, Defendants requested that the Court take judicial notice of the ALJ's Order. ECF 122 at 6. This was not the first time Defendants made this request, since Defendants moved for the Court to take judicial notice of the ALJ's Order at the conclusion of the evidentiary hearing. Plaintiff objected to this request.

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[32] In either case, if the matter is on appeal to the State Personnel Board or to the Colorado Court of Appeals, the outcome at this stage is the same.

The Court directed the parties to include a discussion of judicial notice in their briefing on the preclusive effect. Plaintiff did not address the issue of judicial notice in his brief.

Fed. R. Evid. 201(b) provides that the Court may take judicial notice of a fact that is "not subject to reasonable dispute" because it "can be accurately and readily determined from sources who accuracy cannot reasonably be questioned." Under Rule 201(c), the taking of judicial notice is mandatory if a party requests it and provides the court with the necessary information. Fed. R. Evid. 201(c).

Here, Defendants want the Court to take notice of a decision from a state administrative body. The Court may take notice of "facts which are a matter of public record." Tal v. Hogan, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006). Moreover, it is both common and proper for a court to take judicial notice of orders of other courts and administrative agencies. See Papai v. Harbor Tug and Barge Co., 67 F.3d 203, 208 n.5 (9th Cir. 1995); Rivera-Bottzeck v. Ortiz, 241 F. App'x 485, 487 (10th Cir. 2007). Finally, while the ultimate outcome of the state proceedings will be determined after appeal, the fact that the ALJ made a decision and what that decision is are not subject to reasonable dispute. Accordingly, the Court takes judicial notice of the ALJ's order.[33]

2. Motion to Strike

At the evidentiary hearing, Plaintiff made an oral motion to strike the testimony of Ms. McDermott regarding the authenticity of the June 14th Email. Plaintiff's counsel argued that Ms. McDermott's conclusion that the June

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[33] Although the Court takes judicial notice of the order, the Findings of Fact and the Conclusions of Law in this order are not reached because the ALJ may have reached a similar conclusion but are based on the evidence presented to this Court.

14th Email was not authentic was not contained in her report and thus should be stricken. "A party seeking to introduce expert testimony at trial must disclose to the opposing party a written report that includes 'a complete statement of all opinions the witness will express and the basis and reasons for them.'" TDN Money Sys., Inc. v. Everi Payments, Inc., No. 2:15-cv-02197 JCM (NJK), 2017 WL 5148359, at *4 (D. Nev. Nov. 6, 2017) (quoting Fed. R. Civ. P. 26(a)(2)(B)). As part of this rule, "[a]n expert witness may not testify to subject matter beyond the scope of the witness's expert report unless the failure to include that information in the report was 'substantially justified or harmless.'" Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 725 F.3d 1377, 1381 (Fed. Cir. 2013). The purpose of this rule is to "provide opposing parties reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." Id.

The Court finds that the failure to include Ms. McDermott's conclusion in a supplemental report was neither substantially justified nor harmless. Defendants' counsel proffered that they had asked Ms. McDermott to conduct additional analysis following the hearing before the ALJ. Assuming testimony at that hearing understandably created the need for additional expert testimony, Defendants still had the obligation to supplement their expert disclosures. Fed. R. Civ. P. 26(e). Doing so would have allowed Plaintiff's counsel to reasonably prepare for Ms. McDermott's testimony. Therefore, the Court grants Plaintiff's motion to strike that portion of Ms. McDermott's testimony.

B. Legal Standards Concerning Sanctions

District courts have the "ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991). "A district court has inherent equitable powers to impose the sanction of dismissal with prejudice because of abusive

litigation practices during discovery." Garcia v. Berkshire Life Ins. Co. of Am., 569 F.3d 1174, 1179 (10th Cir. 2009). Because dismissal is a harsh remedy, "due process requires that the discovery violation be predicated upon 'willfulness, bad faith, or [some] fault of petitioner.'" Archibeque v. Atchison, Topeka and Santa Fe Railway Co., 70 F.3d 1172, 1174 (10th Cir. 1995). While dismissal is among the harshest remedies, it is warranted in cases where a party has fabricated evidence. Id. at 1175. The party seeking dismissal must demonstrate the sanctionable conduct by clear and convincing evidence. Xyngular v. Schenkel, 890 F.3d 868, 873–74 (10th Cir. 2018).

C. Fabrication of Evidence

Defendants have shown by clear and convincing evidence that Plaintiff fabricated Exhibit MMM, and the March 19-20, 2018 HSA Emails, and created a fraudulent Google Domain, all in an attempt to strengthen the merits of his case or hide prior fabrication.

1. Exhibit MMM: The Audio Recording

Defendants' expert, Angel Malley, conducted an analysis which demonstrates that the audio is not authentic. There are blips at roughly the 1:03 and 1:20 minute marks which can be heard with the naked ear, indicating a change in the audio. It is clear that the change occurs when only Plaintiff is speaking and all other background noise disappears. Ms. Malley's testimony and report, which confirmed the change in audio through visual representation of the sound, showed that the audio in between the blips was recorded in a different place and time than the other audio. Ms. Malley also analyzed the metadata contained in Exhibit MMM, and through this analysis determined that Exhibit MMM was not created using a program called ACR, as Plaintiff alleged, but instead was made using Audacity, a common tool used to edit audio recordings.

Importantly, Plaintiff does not dispute that the audio file is not authentic, but rather he denies manipulating the

file. As way of explanation, Plaintiff testified that he believed his supervisor, Ms. Logacheva, manipulated the audio. This strains all credulity. The change in the audio is only as to statements made by Plaintiff. For Ms. Logacheva to alter this audio, she would have to have access to Plaintiff's voice in a way that would allow her to reconstruct the full statement made by Plaintiff in the audio. There is no evidence (or explanation) as to how Ms. Logacheva could have obtained Plaintiff's voice in this manner. Furthermore, Plaintiff testified the call was recorded on his personal cell phone. Yet, Ms. Logacheva never accessed Plaintiff's phone, nor did Plaintiff ever provide her with any recordings.

Notably, the audio in between the blips only benefits Plaintiff. In other words, Exhibit MMM is material to Plaintiff's case and, had it been authentic, would strengthen the merits. Exhibit MMM pertains to the Oracle Cloud assignment for which Plaintiff was cited for missing deadlines. Only Plaintiff was reprimanded for missing the Oracle Cloud project deadlines. Mr. Stierwalt was not reprimanded because he was assigned to the project in a secondary capacity. The manipulated audio is Plaintiff's attempt to demonstrate pretext by showing that Mr. Stierwalt was equally responsible for the project and still needed to make changes to the draft document sent to Ms. Logacheva. Plaintiff provided no credible explanation for why anyone other than him would have any reason to create a file that establishes pretext for Ms. Logacheva's action. Lastly, the evidence reveals that this would not be Plaintiff's first manipulation of audio files. Plaintiff previously edited other audio files sent to the CCRD, demonstrating his capability and propensity to manipulate files.

Therefore, the Court finds that the record demonstrates by clear and convincing evidence that Plaintiff fabricated this audio file.

2. HSA Emails

a. Evidence of Fabrication

As an initial matter, there are at least four versions of what should be the same two-email exchange. Plaintiff alone produced each different version. The visual differences between the various versions could only be caused by user manipulation. The visual differences and the timing of Plaintiff's disclosure of the varying versions give rise to a clear progression of events consistent with Plaintiff creating the versions at different stages to respond to the external developments of the moment. For example, in June 2019, Ms. Bench alerted Plaintiff to a flaw in his retaliation claim, namely that he was told of performance concerns before engaging in protected conduct. Plaintiff created the first PDF version of the email exchange with the erroneous sender (the CCRD Version) to remedy this potential problem in his claim. Then, probably anticipating that no one else would learn of the CCRD Version, Plaintiff corrected his mistake in the Discovery Version. Subsequently, in February 2020, Plaintiff was ordered to immediately turn over native email files. At this point, he created the First MSG version. The First MSG version contains differences to both PDF versions.

In November 2020, the Board ALJ warned Plaintiff that she had serious concerns about GOIT's allegations and that his case could be dismissed and GOIT could be awarded a large amount of fees and costs. In response, Plaintiff created the Second MSG Version and attached it to an email purportedly sent to Ms. Hughes in June 2018, long before Ms. Bench had expressed a problem with his retaliation claim. But the header of the Second MSG Version demonstrates that it is not authentic, namely that the "Delivered To" and "To" sections of the header do not match.

Plaintiff also had the motive, ability, and opportunity to fabricate the emails. Plaintiff seized on a mistake in the charge of discrimination stating he was discriminated against on or around March 18, 2018 instead of May 18,

2018, and he played off real events concerning problems with contributions into his HSA that were resolved on March 2, 2018. Specifically, on February 23, 2018, Plaintiff had emailed Ms. Logacheva about the contribution issue and never received a response because she was on vacation, which Plaintiff claimed to be a lack of care— something he referenced in his April 13, 2018 email. He was also able to shift his real accusation against GOIT's HR to an accusation about the Department of Personnel and Administration's State Benefits team.

The fact that Plaintiff never mentioned the HSA Emails before June 28, 2019 also supports the conclusion that he fabricated them after the fact. First, Plaintiff spoke to Ms. Hughes on June 12, 2018. Her notes do not mention anything about HSA contributions, State Benefits' making a comment about "welfare," Ms. Logacheva dismissing a complaint of discrimination, or anything occurring in March 2018. Plaintiff likewise submitted documents to the unemployment hearing officer in early 2019, including a detailed timeline and explanation of events he created, as well as other exhibits, all of which identify May 2018 as the first relevant event and first instance of protected conduct. Finally, Plaintiff spoke to Ms. Bench on the phone for three hours and, as her notes and testimony show, he did not mention the HSA issue or emails and specifically stated his first protected activity occurred in May 2018.[34]

Other supporting evidence includes multiple witnesses' testimony that the emails do not exist in GOIT's system, despite a litigation hold that captured other emails from

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[34] It is also noteworthy that Plaintiff recorded this conversation, provided edited portions to Ms. Bench, but then never fully produced it in this litigation. The proffered explanation for this is that the phone was sent to Ethiopia and is unrecoverable at this point.

around the same time concerning Plaintiff's HSA contributions. Ms. Logacheva testified that she did not send or receive the HSA Emails, did not have access to Plaintiff's email account, did not delete the HSA Emails, and did not delete any emails relevant to Plaintiff's claims. She also testified that she would not have used the language in her purported March 20, 2018 response.

Contrary to Ms. McDermott, Mr. Brackin concluded that the First MSG Version was authentic because the header indicates it passed through certain authentication paths, such as DMARC and DKIM. But Ms. McDermott testified that these authentication paths pertain to spam and spoofing and do not determine whether an email was actually sent. Ms. McDermott demonstrated how a fabricated email could be created in a video, and that email passed through all authentication paths Mr. Brackin relied on to conclude the First MSG Version is authentic.

b. Plaintiff's explanations

Like with the audio recording, all of Plaintiff's attempts to account for the differences in the various emails are implausible. Plaintiff claims that, even though he produced every version of the HSA Emails, he had nothing to do with their creation. Instead, he claims, the CCRD Version, Discovery Version, and First MSG Version all originated from a Google Drive link Mr. Bartley sent to him on August 3, 2018. The Court finds this claim is not credible for several reasons. First, Plaintiff asked Mr. Bartley to send him emails from a specific date range, which did not include March 2018. GOIT provided only those from the date range requested. Second, even assuming the August 3, 2018 Google Drive link did contain emails outside the requested date range, Plaintiff has no explanation for where the CCRD and Discovery Versions came from. If, as Plaintiff claims, only the First MSG Version is authentic and he did not create the other two versions, someone else must have done it and then inserted them into his email account as

native emails. Plaintiff presented no evidence to suggest how or why this happened sometime prior to August 2018. Third, Plaintiff testified that he saved the First MSG Version to his laptop, but he failed to explain how he produced two different PDF versions at two different points in time, once to the CCRD and once to GOIT in discovery. He also fails to explain how these two PDF versions can possibly differ from each other and from the native MSG versions absent fabrication. Fourth, Plaintiff testified he was aware of GOIT's concerns regarding fabrication in January 2020, that he knew there were multiple versions of the HSA Emails in August 2020, and that he saw all three versions in native format in the Google Drive link in August and September 2020. Yet, he failed to download much less disclose the three native versions. Plaintiff's claim that three versions originated from the August 3rd Google Drive link is not plausible.

Plaintiff next insinuates, as with the audio file, that Ms. Logacheva had a role in the inconsistencies or in deleting the emails. Plaintiff tries to account for the incorrect date on the First MSG Version through the expert testimony of Mr. Brackin, suggesting that Ms. Logacheva could have changed the date to March 18, 2018, when she replied back on March 20, 2018. However, Mr. Brackin admitted that this could not explain how the PDF versions produced by Plaintiff then had the correct date. As for Plaintiff's claim that Ms. Logacheva could have deleted emails, he has presented no evidence to support this. Ms. Logacheva testified that she did not access Plaintiff's email account nor delete any emails relevant to Plaintiff's claims. Multiple witnesses testified that only Plaintiff could have deleted emails in his state account prior to the litigation hold taking place. Jim Karlin, the Enterprise Active Directory and Messaging Administrator for GOIT, provided testimony that demonstrated that GOIT had no email purge policy in place from 2017 to 2019, indicating that these emails were not

automatically deleted. And Mr. Santos testified that a litigation hold was in place at least as of August 2018, when Plaintiff first claims to have seen the emails in the Google Drive link. Once this hold was in place, no one could have deleted the emails from Google Vault.

Plaintiff also argues that circumstantial evidence suggests that the March 19-20, 2018 HSA email exchange occurred. Specifically, Plaintiff claims that when, on April 13, 2018, Ms. Logacheva wrote that a "communication with [GOIT] HR on some benefits" was an example of Plaintiff's unprofessional communications, she was referring to the HSA Emails. Plaintiff also claims that Ms. Logacheva referred to the HSA Emails during a May 31, 2018 one-on-one meeting, within the PIP, and during her deposition. But the weight of the evidence demonstrates that Ms. Logacheva was instead referring to Plaintiff's allegation of discrimination against GOIT's HR, first raised to her on April 13, 2018, in response to Ms. Logacheva providing Plaintiff with a poor performance review.

Next, Plaintiff suggests that he failed to mention the HSA Emails before June 28, 2019 because he did not consider Ms. Logacheva's March 20, 2018 email response to be discrimination. Rather, he claims that Ms. Logacheva retaliated against Plaintiff in May for his March 2018 complaint of discrimination. However, Plaintiff claimed in June 2019 that the time-reporting requirement was retaliation for something another coworker had previously said, not for any email he sent in March 2018. Similarly, Plaintiff specifically told the unemployment hearing officer in written submissions that the next action Plaintiff challenged as discriminatory—the removal of his work from home privileges—was in retaliation for Plaintiff's May 18, 2018 protected conduct. Likewise, to the extent Plaintiff asserts that the PIP was retaliation for his supposed March 2018 HSA email, the record belies that assertion. Plaintiff told the hearing officer that the PIP was in retaliation for the May

18, 2018 protected activity. In other words, the record shows Plaintiff believed Ms. Logacheva was retaliating for his May emails, not any March emails, necessarily including the HSA Emails. Moreover, Plaintiff explicitly stated to Ms. Bench that his first protected activity occurred on May 18, 2018. Thus, even accepting Plaintiff's distinction between Ms. Logacheva's actions as discriminatory or retaliatory as true, both the HSA Emails and the May 18th email cannot be Plaintiff's first instance of protected activity.

Plaintiff also insinuates that GOIT's email system simply has issues and implies that these issues could have caused multiple versions of the HSA Emails to occur but then later disappear. But the email issues Plaintiff raised at the hearing have rational explanations other than fabrication. Plaintiff presented emails that, at first glance, appear to have been sent multiple times with different content or different attachments, but, unlike the HSA Emails, these emails are drafts being repeatedly saved as evidenced by the fact that they have slightly different times. The HSA Emails all have the exact same time and thus cannot be drafts.

Plaintiff's last attempt to show issues with GOIT's system was Exhibit 15, a compilation of separate GOIT document productions. In discussing this exhibit, Plaintiff testified that he did not change the link from Google Drive to YouTube. Yet, the link remained a Google Drive link up until Plaintiff sent an email from his personal Gmail account on July 19, 2018. One reasonable explanation for this is that Plaintiff changed the link to YouTube because he no longer had access to his state Google Drive. Because the change occurred after the email chain was sent from a personal Gmail account, the changed link cannot be attributed to GOIT's system.

Thus, the Court finds that Plaintiff has not provided evidence sufficient to rebut the clear and convincing evidence that he fabricated these initial versions of the March 19-20,

2018 HSA email exchange.

3. June 14th Email, June 28th Emails, and PDF Document

Plaintiff claims he sent the Second MSG Version to Ms. Hughes on June 14, 2018, definitively proving that he did not fabricate the CCRD Version a year later. The evidence, however, demonstrates that Plaintiff fabricated the June 14th Email in an attempt to legitimize the HSA Emails, and manipulated Plaintiff's and Cyopsis' June 28th Emails, and associated PDF documents, in an attempt to prove that the version he sent to Ms. Bench had the correct email address, not the State Benefits' email address.

a. June 14th Email

Plaintiff produced this email nearly a year after Defendants first raised concerns of fabrication. The eleventh-hour disclosure alone is highly suspicious, given that Plaintiff asserts this email conclusively proves the HSA Emails are real. More likely, Plaintiff fabricated the June 14th Email after the ALJ stated that she had serious concerns about Plaintiff's fabrication and warned Plaintiff of potential consequences.

As the Court mentioned earlier, Ms. McDermott's testimony regarding the Second MSG Version not being authentic is stricken. However, the circumstantial evidence surrounding this email, coupled with the other findings in this Order, establish by clear and convincing evidence that Plaintiff fabricated the email. The suspicious timing of the disclosure, evidence showing how easy one can fabricate an email, Ms. Hughes' notes indicating that Plaintiff described events beginning in May, not March, 2018, the Second MSG Version not being found on Plaintiff's laptop, and the fact that Plaintiff was unable to explain where he obtained it from all convincingly point to Plaintiff's fabrication of the June 14th Email.

b. June 28th Emails and PDF Document

Plaintiff also manipulated the June 28th Emails and

the associated PDF document. Plaintiff's June 28th Email, disclosed on December 1, 2020, purports to be what he actually sent Ms. Bench on that date. But Plaintiff's version does not match the Original and Authentic Version, and there is no evidence to suspect the Original has been manipulated. In fact, both experts agree it is authentic.

By contrast, substantial evidence supports the notion that Plaintiff's and Cyopsis' June 28th Emails are manipulated. Ms. McDermott concluded as such based on 1) the numerous dates in the headers; 2) the presence of Google API, which could have been used to accomplish the manipulations; 3) the broken Google Drive link in Plaintiff's version, which could only have occurred through user manipulation; 4) the PDF attachment added to Plaintiff's version; and 5) the modify date of December 23, 2020 in Cyopsis' version. Cyopsis did not rebut these conclusions and failed to even analyze Plaintiff's June 28th Email. Also, Plaintiff offered no explanation as to why Cyopsis' June 28th Email differs from what Plaintiff produced when they are supposed to be the same email. Because Plaintiff produced both versions, and because no one else has any reason to manipulate the emails, it is reasonable to conclude that he manipulated each email in different ways.

As for the PDF document, the only tenable explanation for the several versions of the PDF document is that Plaintiff manipulated them. Ms. Bench testified that she downloaded the document from the Google Drive link in the Original and Authentic Email on June 28, 2018. Mr. Andrews testified that the only document titled "Supplemental Response2 Final" was uploaded by Ms. Bench, which was uploaded to Case Connect shortly after the email was sent. Exhibit I, containing the incorrect "state_benefits" sender, is the document by which Plaintiff sent the CCRD version of the HSA Emails to the CCRD.

The evidence shows the document attached to Plaintiff's June 28th Email was manipulated. Plaintiff admitted that

he sent the document to Ms. Bench via a Google Drive link, not a PDF attachment. Because Ms. Bench immediately accessed the document via that link, Plaintiff had no reason to send her a duplicative PDF attachment. Importantly, the PDF attachment does not match what Ms. Bench downloaded. Unlike Exhibit I, the PDF attachment has no user comments, has no embedded audio file or player, and has the correct email address in the HSA Emails. Although Plaintiff claims that he was optimizing the PDF document to make it smaller and that process removed the comments and audio file, that explanation does not fit with the documentary evidence. Ms. McDermott testified that the PDF attachment, without the comments and audio file, was a bigger file than the PDF downloaded by Ms. Bench, with the comments and audio file. Ms. McDermott also testified that optimization would have reduced a file's size, not increased it. Thus, optimizing a PDF cannot account for the changed email address on the HSA Email.

Plaintiff also manipulated the PDF document found in the Google Drive link contained in the Original and Authentic June 28th Email on October 22, 2020 and December 23, 2020. The document Ms. Bench downloaded showed State Benefits as the sender of the HSA Email, whereas the document more recently edited in the Google Drive link showed Plaintiff as the sender. Only Plaintiff had any motive to change the email address in the PDF document and he provided no explanation why the document currently found in the link differed from what was in the link on June 28, 2019.

4. Fraudulent Google Domain and Email Address

The evidence shows that Plaintiff created the fraudulent Google domain and sent the recovery emails to his GOIT email account. Google LLC verified that the domain and email are fraudulent and that Google has no method to restore or recover emails in the way Plaintiff attempted to do here. Plaintiff's motive was clear: this scheme, had it

been believed, would demonstrate that the HSA emails existed in GOIT's email system.

Although Google LLC returned documents showing that Mr. Santos registered the domain with Google, Mr. Santos did not have the relevant knowledge (much less motive) to do this. He was only aware of Plaintiff through this litigation and had no reason to assist Plaintiff by inserting these emails into Plaintiff's account. And there is no disputing that the emails are meant to help Plaintiff's argument that the HSA Emails are real. Moreover, Mr. Santos did not know what the search terms would actually be until several days after the fraudulent domain had been created. Lastly, the email address used to register the fraudulent Google Domain did not list Mr. Santos' real name or email address.

Most damning, however, is the evidence that proves that only Plaintiff knew the fake recovery emails existed in his account. Plaintiff requested the live searches be run. Plaintiff determined the search terms. The video recording of the searches shows that Plaintiff demanded the searches be run through the present, meaning only he knew the emails were there, because there would be no reason to believe emails from December 2020 would be in his account when the HSA Emails were supposedly sent in March 2018. The clear and convincing evidence is that Plaintiff created the fraudulent Google domain and sent the recovery emails to his account in an attempt to help cover up his other fabrications.

D. Dismissal of Plaintiff's Claims and an Award of Fees and Costs Are Warranted.

In determining whether dismissal is appropriate, a Court evaluates five factors: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions. Garcia, 569

F.3d at 1179.

Fabricating evidence and willfully providing false answers during discovery are without doubt abusive litigation practices that justify the sanction of dismissal with prejudice. Archibeque, 70 F.3d at 1175. Indeed, "[s]ubmitting a false discovery document—or fabricating evidence—has been referred to as 'the most egregious misconduct which justifies a finding of fraud upon the Court.'" Salgam v. Advanced Software Sys., Inc., No. 118CV00029AJTTCB, 2020 WL 6322857, at *4 (E.D. Va. July 2, 2020) (citing Davis v. Crescent Elec. Co., No. CIV 12-5008, 2016 WL 1625291, at *3 (S.D. Apr. 21, 2016) (citations omitted)).

Here, the degree of actual prejudice to Defendants is apparent and substantial. Defendants have had to essentially fight two battles: one based on the merits of Plaintiff's allegations and the other based on Plaintiff's fabrication of evidence. Defendants have had to engage experts specifically to combat Plaintiff's production of manipulated documents. Surely, the time and expense Defendants have devoted to fraudulent evidence has been significant. The Court finds a large degree of actual prejudice to Defendants.

Similarly, Plaintiff's actions have caused unnecessary interference with the judicial process. While seeking relief in this lawsuit (with his otherwise potentially legitimate claims), Plaintiff engaged in conduct that has now cast "doubt on the veracity of all of [his] submissions throughout [the] litigation." Garcia, 569 F.3d at 1180. Indeed, even after the evidentiary hearing, Defendants continue to find evidence they believe has been fabricated, including a June 10, 2018 video recorded by Plaintiff. The true scale of Plaintiff's fabrication in this case may never be known. But what is known is the significant degree of fraud on the Court and interference with the judicial process.

The remaining three factors also warrant dismissal with prejudice and an award of fees and costs. The Court has found that Plaintiff has fabricated the evidence at issue

in Defendants' Motion; hence, the culpability of Plaintiff is self-evident. Moreover, Plaintiff has been warned that such a finding could lead to the dismissal of his claims. Finally, a lesser sanction would not do in this case. Plaintiff has demonstrated a continued pattern of fabricating evidence and then fabricating more evidence to conceal or explain away his prior actions. The Court has no indication that such behavior would stop given the chance. Dismissal of Plaintiff's case is warranted based on his conduct alone, but, given the egregious nature of his manipulation of evidence, dismissal will also serve as a deterrent to others who may think about trying what Plaintiff did here.

CONCLUSIONS OF LAW

I. By clear and convincing evidence, Plaintiff fabricated the audio file, submitted as Exhibit MMM, between him and Mr. Stierwalt.

II. By clear and convincing evidence, Plaintiff fabricated all submitted versions of the March 19-20, 2018 HSA Emails.

III. By clear and convincing evidence, Plaintiff created a fraudulent Google domain and sent fake recovery emails to his account.

IV. Defendants are entitled to an award of their reasonable costs and fees.

CONCLUSION

In light of clear and convincing evidence of egregious fraud and fabrication of evidence, Defendants' Motion [filed January 20, 2021; ECF 101] is granted. Plaintiff's claims are dismissed with prejudice and judgment shall be entered in favor of Defendants. Defendants shall be awarded their reasonable fees and costs associated with litigating this

case.

SO ORDERED.

Dated at Denver, Colorado, this 30th day of June, 2021.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States, Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00165-MEH

YOSEPH YADESSA KENNO,
Plaintiff - Appellant,

v.

COLORADO GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,
LYUBOV LOGACHEVA, in her individual capacity;
BOB MCINTYRE, in his individual capacity;
DON WISDOM in his individual and official capacity,
Defendants – Appellees.

Filed: June 30, 2021
Entered: July 2, 2021
District Court's Amended Final Judgement

PURSUANT to and in accordance with Fed. R. Civ. P. 58(a) and the orders entered in this case, FINAL JUDGMENT is entered.

Pursuant to the Order [ECF 134, issued on June 30, 2021] of Magistrate Judge Michael E. Hegarty granting the Defendants' [ECF 101, filed January 20, 2021] Motion for Sanctions which order is incorporated by reference, it is

ORDERED that judgment shall enter IN FAVOR of the Defendant, Colorado Governor's Office of Information Technology, and AGAINST the Plaintiff, Yoseph Yadessa Kenno, on all claims for relief and causes of action asserted in this case. The Defendant shall be awarded their fees and costs incurred in investigating and demonstrating that Plaintiff fabricated material evidence as stated in the [ECF 134] Order.

Dated at Denver, Colorado, this 30th day of June 2021.

FOR THE COURT:
Jeffrey P. Colwell, Clerk

By s/ C. Thompson
Christopher Thompson Deputy Clerk.