

No. 23-_____

IN THE
Supreme Court of the United States

RONALD RAGAN, JR.,

Petitioner,

v.

BERKSHIRE HATHAWAY AUTOMOTIVE, INC.,

Respondent.

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

PETITION APPENDIX

APPENDIX CONTENTS		
<i>Date</i>	<i>Description</i>	<i>Appendix Page</i>
Feb. 2, 2024	Panel Opinion of the U.S. Court of Appeals for the Eight Circuit	A1
Mar. 10, 2022	District Court Order Granting Judgment on the Pleadings	A7
Oct. 11, 2022	District Court Order Denying Clarification and Reconsideration	A23

United States Court of Appeals
For the Eighth Circuit

No. 22-3355

Ronald Ragan, Jr.

Plaintiff - Appellant

v.

Berkshire Hathaway Automotive, Inc.

Defendant - Appellee

Appeal from United States District Court
for the Western District of Missouri

Submitted: December 13, 2023
Filed: February 2, 2024

Before SMITH, Chief Judge, GRUENDER and GRASZ, Circuit Judges.

GRASZ, Circuit Judge.

Ronald Ragan claims Berkshire Hathaway Automotive Inc. (BHA) copied his single-page car dealership customer intake form (“Guest Sheet”) without his permission. Under federal copyright law, this case boils down to whether the Guest Sheet exhibits a sufficient degree of creativity. It does not, and for that reason, we affirm.

I. Background

Ragan claims he created a document called the Guest Sheet that purportedly helps car dealerships sell cars. The Guest Sheet consists of questions, prompts, headings, fill-in-the-blank lines, and checkboxes. In 1999, the United States Copyright Office issued a certificate of registration to Ragan for the Guest Sheet.

Around 2000, Ragan claims the Van Tuyl Group, Inc., a privately-owned auto dealership, copied and used the Guest Sheet. Ragan notified Van Tuyl of the supposed infringement. In return, Van Tuyl's insurer, American International Group, Inc., sued Ragan, seeking a declaratory judgment that Van Tuyl was not infringing on Ragan's copyright and the copyright was void and unenforceable. That lawsuit was later dismissed for lack of personal jurisdiction.

In 2015, BHA acquired Van Tuyl. Ragan claims that after acquiring Van Tuyl, BHA continued to use the Guest Sheet. After Ragan complained, BHA allegedly agreed to modify the form but continued using it. Ragan then commenced this lawsuit, claiming copyright infringement. BHA moved for judgment on the pleadings, asserting the Guest Sheet was not copyrightable. The district court¹ granted BHA's motion and entered judgment against Ragan. This appeal followed.

II. Analysis

On appeal, Ragan argues the district court erred by finding the Guest Sheet uncopyrightable. We review a grant of judgment on the pleadings *de novo*, "viewing all facts pleaded by the nonmoving party as true and granting all reasonable inferences in favor of that party." *Henson v. Union Pac. R.R. Co.*, 3 F.4th 1075, 1080 (8th Cir. 2021) (quoting *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir.

¹The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

2009)). Where no dispute about the facts exists, we will address copyrightability as a question of law. *See Toro Co. v. R & R Prods. Co.*, 787 F.2d 1208, 1213 (8th Cir. 1986).

Ragan contends he owns the copyright to the Guest Sheet. The Copyright Act extends copyright protection only to “original works of authorship.” 17 U.S.C. § 102(a). This originality requirement is imposed by the Constitution, as well as the text of the Copyright Act itself. *See Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.”). To meet this requirement, a work must be “independently created by the author (as opposed to copied from other works), and . . . possess[] at least some minimal degree of creativity.” *Id.* at 345.

Although Ragan claims the Guest Sheet is an “elegant” form “distilled [from] years of . . . experience,” it noticeably lacks the requisite originality of a copyrightable work. It is a basic customer intake sheet containing fewer than 100 words seeking basic information:

GUEST SHEET



GUEST NAME _____

ADDRESS _____

CITY / STATE / ZIP _____

TELEPHONE RESIDENCE _____ WORK _____

SALESMAN _____

How Did You Hear About Us?

<input type="checkbox"/> TV <input type="checkbox"/> Radio Station Listened To _____ <input type="checkbox"/> Referral <input type="checkbox"/> Be Back	<input type="checkbox"/> Newspaper <input type="checkbox"/> Previous Customer <input type="checkbox"/> Walk In <input type="checkbox"/> Location
--	---

Vehicle Considered

<input type="checkbox"/> New <input type="checkbox"/> Car Stock# _____ Year _____ Make _____	<input type="checkbox"/> Used <input type="checkbox"/> Truck
---	---

Basic Requirements Needed on this Vehicle?

Trade Info

Year _____ Make _____ Miles _____ Payoff _____ Lender _____ Current Payment _____ Payment's Left _____	Why are you considering transportation at this time? _____ _____ _____
--	---

Drive Home Today Budget

Desired Monthly Payment _____ up to _____ Desired Cash Down _____ up to _____
--

Case 4:18-cv-01010-HFS Document 93-1 Filed 08/24/21 Page 2 of 4 Exhibit A

Ragan claims the selection and arrangement of the words used as section headings and question prompts make the Guest Sheet sufficiently original. But the “mere selection” of words does not make a work copyrightable. *Feist*, 499 U.S. at 362–63 (explaining the act of selecting which words to include in a utilitarian work is not enough to meet the originality requirement). The Guest Sheet still must exhibit some degree of creativity, which it fails to do, mainly because it does not convey information. *See Kregos v. Associated Press*, 937 F.2d 700, 708 (2d Cir. 1991) (“[A] form that conveys no information and serves only to provide blank space for recording information contains no expression or selection of information that could possibly warrant copyright protection.”). *See also Utopia Provider Sys., Inc. v. Pro-*

Med Clinical Sys., L.L.C., 596 F.3d 1313, 1323–24 (11th Cir. 2010) (holding a form asking for basic information ranging from “name, date of birth, [and] sex” to “the history of the present illness” and “medical and social history” did not convey adequate information).

The Guest Sheet does not tell a car salesperson how to do his or her job; it is merely a means of capturing and retaining information routinely considered when a car salesperson seeks to sell a car. *See id.* at 1324. As the district court explained, “the Guest Sheet in and of itself does nothing more than request basic information which, at most, may simply assist a salesperson [to] tailor his or her sales pitch.” Thus, we conclude the Guest Sheet is a form designed to record, not convey, information. *See, e.g., Bibbero Sys., Inc. v. Colwell Sys., Inc.*, 893 F.2d 1104, 1108 (9th Cir. 1990) (finding medical “superbills” uncopyrightable because superbills fail to convey information). For these reasons, the Guest Sheet is not entitled to copyright protection.

Ragan also claims the district court ignored the statutory presumption of copyright validity granted to the Guest Sheet by the certificate of registration. Specifically, he argues judgment on the pleadings was improper because BHA put forth no affirmative evidence—beyond the registered work—to rebut the *prima facie* presumption of copyright validity. Ragan is correct that the Guest Sheet’s registration certificate creates a statutory presumption of copyrightability. *See* 17 U.S.C. § 410(c) (“In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.”). But Section 401(c) does not impose any requirements on *how* a defendant must meet its burden. *See id.* (“The evidentiary weight to be accorded the certificate of a registration made thereafter *shall be within the discretion of the court.*”) (emphasis added). Thus, the copyrightability of the Guest Sheet can be determined by an examination of the Guest Sheet alone, as the district court recognized. *See, e.g., Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 414 (2d Cir. 1985) (“Once defendant’s response to plaintiff’s claim put in issue whether

. . . forms were copyrightable, [the district court] correctly reasoned that the ‘mute testimony’ of the forms put him in as good a position as the Copyright Office to decide the issue.”).

III. Conclusion

Because the Guest Sheet lacks the requisite originality for protection, we affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD RAGAN, JR.,)
)
 Plaintiff,)
)
) Case No. 4:18-cv-01010-HFS
 v.)
)
 BERKSHIRE HATHAWAY)
 AUTOMOTIVE, INC.,)
)
 Defendant.)

ORDER

In this copyright infringement action, defendant, Berkshire Hathaway Automotive Inc. ("BHA"), has filed a motion for judgment on the pleadings requesting that plaintiff's claims be dismissed. (Doc. 92). Plaintiff, Ronald Ragan, Jr., has filed a motion for leave to file Declarations as a matter of right, or to Confirm Right to File. (Doc. 110). Both motions have been fully briefed, and are ready to be ruled.

Background

Ragan states that he owns The Art of Sales, which provides recruitment, hiring, and training services for automotive dealerships. (Doc. 19, First Amended

Complaint: ¶ 9). Ragan also states that he created an original work called the Guest Sheet¹ as a sales tool to assist automobile salespersons, which is a questionnaire comprised of categories of questions including: (1) the guest's personal information including name, address, telephone number, and place of employment; (2) How did you hear about us; (3) vehicle considered; (4) trade information; and (5) drive home today budget. (Id: ¶¶ 11-12). Ragan states that the Guest Sheet was registered on June 3, 1999, in the United States Copyright Office under Registration Number TXu913-170. (Id: ¶ 13).

Ragan also states that on or about 2000, Van Tuyl, a privately-owned auto dealership, copied and created an identical form as the Guest Sheet for use by its automotive dealerships to assist in the sale of automobiles. (Id: ¶¶ 14, 29-30). Ragan notified Van Tuyl of the alleged infringement, and on or about July 13, 2000, American International Group, Inc. (AIG)² filed suit against Ragan in the District of Arizona seeking a declaratory judgment that Van Tuyl was not infringing on plaintiff's copyright – which AIG claimed was void, invalid and unenforceable. (Id: ¶¶ 33-34). On June 20, 2001, the lawsuit was dismissed for lack of personal

¹ Attached as Exh. A.

² Self-defined on their website as a leading global insurance organization.

jurisdiction, and although Ragan believed that Van Tuyl stopped using the Guest Sheet, he alleges that usage continued. (Id: ¶¶ 35-37).

In the first quarter of 2015, BHA acquired Van Tuyl and renamed it Berkshire Automotive Group, Inc. (BHA). (Id: ¶¶ 19). In August of 2017, Ragan learned that BHA continued using the Guest Sheet, and after Ragan complained, BHA allegedly agreed to modify the form, but continued using it. (Id: ¶¶ 41-43). Ragan then commenced this one-count action asserting copyright infringement in violation of 17 U.S.C. §§ 501 et seq (the Copyright Act).

Standard of Review

When considering a motion for judgment on the pleadings under Fed.R.Civ. 12(c), all factual allegations set out in the complaint must be accepted as true, and construed in the light most favorable to the plaintiff, drawing all inferences in his favor. Judgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law. Ashley county, Ark. v. Pfizer, inc., 552 F.3d 659, 665 (8th Cir. 2009); Wishnatsky v. Rovner, 433 F.3d 608, 610 (8th Cir. 2006).

A motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss under Fed.R.Civ.P. 12(b)(6) in that all material facts are alleged as true in order to determine if the complaint states a claim to relief

that is plausible on its face. Baude v. City of St. Louis, 476 F.Supp.3d 900 (E.D.Mo. 2020); citing, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id. Although the complaint need not contain detailed factual allegations, it must contain sufficient factual allegations to raise a right to relief beyond the speculative level. Id; citing, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Discussion

The Copyright Act provides that copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Moore v. Kroger Company, 2014 WL 825428 *3 (N.D.Ca.); citing, 17 U.S.C. § 102(a). The *sine qua non* of copyright is originality, and to qualify for copyright protection, a work must be original to the author. Id. In other words, the work must have been independently created by the author (as opposed to copied from other works), and it must possess at least some minimal degree of creativity. Id.

To establish a claim for copyright infringement, a plaintiff must demonstrate: (1) ownership of the allegedly infringed work, and (2) copying of constituent

elements of the work that are original. Id. Plaintiff claims ownership of the Guest Sheet and submits a copy of its registration with the United States Copyright Office on June 3, 1999, under registration number TXu913-170. To that end, Ragan's claim finds support in Moore, which held that with respect to the first requirement, a copyright issued by an agency with expertise is presumptively valid. citing, Bibbero Sys. Inc. v. Colwell Sys. Inc., 731 F.Supp. 403 (N.D.Ca. 1988)(sometimes referred to as "*Bibbero 1*"); see also, 17 U.S.C. § 401(c).

Presumptive validity is rebuttable, but requires a very high -but not insuperable- burden of proof to overcome the presumption. Consequently, courts frequently deny copyright protection for authors who have been issued a certificate of registration. Moore, at * 3.

With this in mind, BHA argues that the copyright of the Guest Sheet is invalid under the Blank Form Doctrine. Initially known as the "blank forms rule," the Supreme Court held that forms consisting of ruled lines and labeled columns displaying how a certain bookkeeping system should be implemented could not be the subject of copyright. Moore, at, * 3 -*4; citing, Baker v. Selden, 101 U.S. 99, 107 (1879). The blank forms rule was subsequently codified at 37 C.F.R. § 202.1(c) to include various blank forms such as time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like – in

other words, forms that are “ ‘designed for recording information and do not in themselves convey information’ “. Moore, at *4.

On the other hand, it has been held that where text is integrated with blank forms, the forms have explanatory force because of the accompanying copyrightable textual material. Moore, at *5; citing, Bibbero Sys., Inc. v. Colwell Sys., Inc., 893 F.2d 1104, 1108 (9th Cir. 1990)(sometimes referred to as “*Bibbero II*”). For example, combination of instruction book and blank forms constituting an integrated work has been held to be copyrightable as well as forms with inseparable instructions. *Bibbero II*, 893 F.2d at 1106-07. Unless the instructions are far too simple to be copyrighted as text in and of themselves. Id.

In Utopia Provider Systems, Inc. v. Pro-Med Clinical Systems, L.L.C., 596 F.3d 1313 (11th Cir. 2010), two hospital employees, McHale and Plummer, created a prototype template used to develop a system of templates for use in hospital emergency rooms, named “ED Maximus.” Id., at 1316. McHale and Plummer formed their own company “Utopia” to own and manage the rights in ED Maximus, that was later submitted to the United States Copyright Office for issuance of a certificate of Registration, which was received as a compilation of terms. Id., at 1316, -18. In the interim, McHale and Plummer entered into an agreement with defendant Pro-Med Clinical Systems, L.L.C. “Pro-Med” giving it an exclusive royalty-

bearing license to sell, market, service, distribute and otherwise use its rights associated with the ED Maximus charts. Id. at 1316-17. The parties also agreed that Pro-Med could use the licensed materials from ED Maximus to formulate a product called Pro-Med Maximus, and would owe Utopia 50% of revenue collected from the sale, licensing or other distribution of the Pro-med Maximus. Id. at 1317.

A dispute arose a few years later, and McHale and Plummer filed suit against Pro-Med for, among other things, copyright infringement; in its answer, Pro-Med asserted an affirmative defense claiming that ED Maximus was not copyrightable under the Blank Form doctrine. Id. at 1318. The district court agreed finding that ED Maximus was a series of blank forms which did not convey information. Id. at 1319.

The district court was affirmed on appeal, and in reliance on Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991), the Eleventh Circuit noted that the *sine qua non* of copyright is originality. Utopia, 596 F3d, at 1319. As such, and in reliance on 17 U.S.C. § 102(b), copyright protection does not extend to anything in the work of authorship that constitutes an idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodies in such work. Id. at 1320. The court further noted, as held in its prior decision in John H. Harland Co.

v. Clarke Checks, Inc., 711 F.2d 966, 971, that examples of blank forms included time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information. Utopia, at 1320.

In reviewing the ED Maximus form, the court found that was a set of charts for physician use to record a patient's medical history and present symptoms, and prior to completion, did not convey any information about the patient; and the only way the forms could convey information would be if they conveyed information to the doctors about what questions should be asked of the patient. Id, at 1320-21.

The Eleventh Circuit found that the primary question regarding the copyrightability of blank forms rested with whether the challenged form "conveys information," and looked to the Second Circuit's decision in Kregos v. Associated Press, 937 F.2d 700 (1991). In Kregos, the court explained that blank forms do not convey information if the headings are so obvious that their selection cannot be said to satisfy even minimal creativity, not only because it contains blanks, but because its selection of headings is totally uninformative. Utopia, at 1321-22; citing, Kregos, at 708-09. As opposed to a scorecard or diary that contains a group of headings whose selection (or possibly arrangement) displays cognizable creativity,

then, the author's choice of those headings would convey to users the information that this group of categories was something out of the ordinary. Id.³

In employing guidance from the court in Kregos, the Eleventh Circuit considered whether the selection of information requested by the ED Maximus form or its arrangement was informative or out of the ordinary, and found that the forms called for the same information that any responsible physician would ask a patient with the given ailment. Utopia, at 1322. The first section on the forms were the same regardless of the ailment, calling for personal information such as the patient's name, date of birth, sex, and chief complaint. Id. The court also considered whether the ED Maximus form conveyed information, and found that the form did not prompt the physician to adequately care for the patient, but rather prompts the physician to capture the information that derives from providing the care, therefore the forms did not convey information before filled out nor tell an emergency physician how to do his job. Id., at 1324. Tellingly, while being deposed, McHale (one of the plaintiffs in the case) agreed that the form was a "means for capturing and retaining information." Id. After an independent review of the forms

³ For example, the court in Kregos found that a baseball scorecard with columns headed "innings" and lines headed "players" and a travel diary with headings for "cities," "hotels," and "restaurants" would be considered examples of works with obvious headings, conversely, works with headings that convey information, depending on the suggestions of items to record and their arrangement, would be books intended to record the events of a baby's first year or a European trip. Utopia, 596 F.3d at 1322.

and uncontradicted evidence gleaned through depositions, the court concluded that the selection or arrangement of terms in the forms were not original and did not convey information. Id.

Here, the Guest Sheet asks for personal information such as name, address, telephone number, and place of work. (Doc. 19-1). It then incorporates headings requesting additional information such as, How did you hear about us; Vehicle Considered; trade Info.; and Drive Home Today Budget. (Id).

In his response to BHA's motion, Ragan claims that in *Ragan v. Vinsolutions, Inc.*, 2:20-cv-2225-TC-JPO (D.Kan. May 1, 2020), Judge Crouse deferred to the administrative expertise of the Copyright office, and rejected BHA's blank form argument. (Doc. 101, Opp. p 10). A more accurate reading of Judge Crouse's statements expressed during a status conference indicates that while the blank form doctrine may indeed defeat Ragan's claim, in light of the *prima facie* presumption of validity for a registered copyright, the better course on a 12(b)(6) motion would be to permit further discovery (Doc. 102-2, pp. 5-6).

This tracks with my prior reluctance to rule against Ragan at the early stage of the case. (Doc. 35). I noted however that under Baker a document containing space for answering questions (referred to as "headings"), would not be copyrightable due to an underlying rationale seemed to be that simply stated

questions are not “expressive,” at least in circumstances where spaces for answering are created, thus making the answers (by persons other than the creator of the document) the “expressive” aspect of the paper. (Doc. 35, p. 13).

Documents thus might also occasionally become expressive in the questions asked, but the routine presentation, as in Baker and probably in this case, would lose copyrightability because they are not expressive.⁴ (Id, p. 14). On this rationale, defendant may ultimately prevail on the “Blank Form” issue it raises. But it would be premature to dismiss the amended complaint on the ground suggested, without more briefing. Thus, the parties were invited to seriously brief the pertinent Blank Form issues on summary judgment or on a motion for judgment on the pleadings. (Id).

Ragan argues that issuance of copyright registration of the Guest Sheet means that the Copyright Office did not consider it barred under the Blank Forms noted in § 202.1(c), and is therefore sufficient to defeat dismissal of his claim. (Doc. 101, Opp. pp. 11-13).⁵ While a certificate of registration from the United States Copyright Office is *prima facie* evidence of the copyrightability of a work, where

⁴ In the words of Circular 33, simple questions would seem to qualify for Blank Form use as “short phrases that identify the content that should be recorded in each field or space. Blank forms that are designed for recording information and do not themselves convey information are uncopyrightable.

⁵ The Blank forms listed include time cards, graph paper, account books, diaries, bank checks, scorecards, address books, report forms, order forms and the like, which are designed for recording information and do not in themselves convey information. § 202.1(c).

other evidence in the record casts doubt on the question, validity is not to be assumed. Utopia, 596 F.3d, at 1319.

Ragan also argues that the Guest Sheet is not excluded from legitimate copyrightability because it “conveys information” as part of a sales-training process. (*Id.* p. 8). While the Guest Sheet may have been used “as a sales tool to assist automobile salespersons” (Doc. 19: First Amended Complaint ¶¶ 11-12), there is no evidence that, prior to being filled out, it conveyed any information to the salesperson about the customer; and could very well constitute a “process, system or method of operation” in an automobile dealership which would then not enjoy copyright protection. Utopia, at 1320; citing, 37 C.F.R. § 202.1(c)(the forms are designed for recording information, and before they are filled out, do not convey any information about a patient). In considering whether the ED Maximus form conveyed information, and the court found that the form did not prompt the physician to adequately care for the patient, but rather prompts the physician to capture the information that derives from providing the care, therefore the forms did not convey information before filled out nor tell an emergency physician how to do his job. *Id.* at 1324.

Although plaintiff claims the Guest Sheet is an “original” work, the questions asked are not unique, and seem to be routine information an automobile

salesperson would seek to elicit from a customer visiting a showroom or car lot. See Utopia, where the court found that the selection and arrangement of the terms used in the templates did not convey information and was not sufficiently original. Id. at 1322. The Utopia court reasoned that if the correct way to perform an action is well established in a profession, it is unlikely that a description of how to perform that action can be original. Id. The court further reasoned that the arrangement of the terms used was not informative or out of the ordinary, and found that the forms called for the same information that any responsible physician would ask a patient with the given ailment. Utopia, at 1322.

The first section on the forms were the same regardless of the ailment, calling for personal information such as the patient's name, date of birth, sex, and chief complaint. Id; see also, Clean Crawl, Inc. v. Crawl Space cleaning Pros, Inc., where the court held that a blank form that merely contains words, short phrases, or a *de minimis* amount of text does not satisfy the requirement of authorship because it does not qualify as a literary work, a pictorial work, a graphic work, or any of the other categories of works listed in 17 U.S.C. § 102(a). 364 F.Supp.3d 1194, 1215 (W.D.Wa.), 11 Nimmer on copyright 313 (2018); citing, Registration of Claims to Copyright, 77 Fed. Reg. 37,605, 37,607 (June 22, 2012). In acknowledgment of the Ninth Circuit's interpretation of the rule, the court held

that a blank form's inclusion of some categories of information and not others does not make it copyrightable, nor does the fact that, as alleged here by Ragan, considerable effort and creativity went into designing it necessarily make it copyrightable. Clean Crawl, 364 F.Supp.3d at 1215; citing, Bibbero, 893 F.2d at 1107, 1108 n.1.

The arguments posited by Ragan here are unpersuasive and do not sufficiently address the issue of the copyrightability of the Guest Sheet. Notwithstanding plaintiff's argument to the contrary, the Guest Sheet in and of itself does nothing more than request basic information which, at most, may simply assist a salesperson tailor his or her sales pitch. Thus, it is not copyrightable because it is a blank form designed for recording information that does not convey information and/or inseparable instructions. Moore, at *5. In sum, there is no genuine issue of material fact as to the Guest Sheet's copyrightability, and BHA is entitled to judgment as a matter of law.

Finally, Ragan has filed a motion seeking confirmation that he can file declarations as a matter of right, or alternatively, an order deeming the declarations attached to the motion as filed. Ragan claims there is a right under Rule 6(c)(2) to submit declarations "in opposition" to a dispositive motion (Doc.

106, p. 13); however, Ragan did not file the declarations with his opposition brief, instead, he waited until well over two months later.

Ragan also argues that he requested oral argument in his opposition brief, thereby permitting submission of the declarations at any time prior to 7 days before the hearing. relying on, Costal States Gas Corp. v. Dept. of Energy, 644 F.2d 969 (3rd Cir. 1981).

On appeal, the Third Circuit Costal found that the district court erred in declining to consider the 400-page Vaughn index⁶ and the accompanying affidavit submitted by the Dept. of Energy one day before the scheduled hearing. The court reached this conclusion because the Vaughn index, which requires factually grounded and specifically-indexed justifications for withheld documents, was developed as a preferred device for creating a more balanced and effective relationship between the parties and the court. Costal, 644 F.2d at 984.

The facts in Costal are distinguishable, and thus unhelpful to Ragan's argument. Here, though requested, oral argument has not been scheduled, and it is within the court's discretion to grant oral argument. Tokio Marine Am. Ins. Co. v. Professional Svcs. Ind. Inc., 2020 WL 7647555 (W.D.Mo.); Local Rule 7.0(b) (the court

⁶ A Vaughn index is a procedural tool developed in Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C.Cir. 1973), to enable a district court to evaluate allegations of exemption advanced by a governmental agency, and to assure that claimed exemptions are justified under 5 U.S.C. § 552(a)(6)(A) "the Act." Costal, at 972.

may, but need not order and consider oral argument). Consequently, Ragan's purported right to file declarations at least 7 days before a hearing is without merit.

If not as a matter of right, Ragan requests that this court liberally construe Local Rule 15.1(a) and seeks an order that the declarations as attached to his motion be deemed filed. The blank form rule as an exception to copyrightability was first raised by BHA in its initial dismissal motion (Doc. 21) and has been pending in this matter for well over two years, and the scheduling order has been amended several times extending the period for discovery. Consideration of these procedural events, as well as Ragan's arguments noted above fail to support a finding of good cause or excusable neglect. Thus, Ragan's motion will be denied.

Accordingly, defendant's motion for judgment on the pleadings (Doc. 92) is GRANTED. It is further

ORDERED that plaintiff's motion for leave to file declarations (Doc. 105) is DENIED.

/s/ Howard F. Sachs
Honorable Howard F. Sachs
UNITED STATES DISTRICT JUDGE

Dated: March 10, 2022
Kansas City, Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

RONALD RAGAN, JR.,)
Plaintiff,)
v.)
BERKSHIRE HATHAWAY)
AUTOMOTIVE, INC.,)
Defendant.)

Case No. 4:18-cv-01010-HFS

ORDER

Presently pending before the court is plaintiff's motion for clarification and reconsideration (Doc. 112), and motion for leave to file a document under seal (Doc. 120). Defendant has filed a motion for an order entering final judgment (Doc. 115). Plaintiff seeks relief pursuant to Federal Rules of Civil Procedure 54(b), 59(e), and/or 60(b). (Doc. 113, p. 5).

Without reciting the facts in this case, suffice it to say that plaintiff continues to seek a ruling that his Guest Sheet is copyrightable. The issue has been repeatedly considered, and after careful review of the many briefings submitted in this inordinately lengthy proceeding, I found that the questions solicited on plaintiff's Guest Sheet were not unique, but, rather, appeared to be routine information an automobile salesperson would seek to elicit from a customer visiting a showroom or car lot. Citing, Utopia (Doc. 111, Order dated Mar. 10, 2022). Consequently, defendant's motion for judgment on the pleadings was granted. (Id).

Plaintiff seeks clarification of that Order, claiming that a ruling was not made as to whether copyrightability can be decided as a matter of law as argued by defendant, or is a mixed question of fact and law to be decided by a jury. In the event the ruling was decided as a matter of law,

plaintiff claims that it would be determinative of an appeal to the U.S. Court of Appeals. And, if the ruling was decided as a mixed question, plaintiff seeks reconsideration of the ruling by granting him leave to amend to present new evidence.

As noted above, plaintiff seeks relief in the form of “clarification and reconsideration” under Federal Rules of Civil Procedure 54(b), 59 (e), and/or 60(b).¹ The Federal Rules do not allow for motions to clarify, and, the court must construe the motion according to the type of relief sought. Schoenbaum v. E.I. DuPont de Nemours and Co., 2007 WL 3331291 *1 (E.D.Mo.). Thus, the question of reconsideration pursuant to Fed.R.Civ.P. 60(b) will be addressed below.

Whatever the precise authority, courts do sometimes entertain motions identified as motions for clarification. G2 Database Marketing, Inc. v. Stein, 2020 WL 6484788 * 3 (S.D.Iowa). However, the Eighth Circuit Court of Appeals takes a dim view of motions for clarification that simply attempt to relitigate already decided issues, concluding that they may warrant sanctions for unreasonably and vexatiously multiplying the proceedings and wasting everyone’s time. G2, citing, Vallejo v. Amgen, Inc., 903 F.3d 733, 749 (8th Cir. 2018).

There is sound reasoning for the Eighth Circuit’s unflattering opinion of clarification motions. Here, plaintiff has not cited any relevant authority, and his reliance on Burton v. Johnson,

¹ Rule 54(b) provides that any order or other decision, however, designated, that adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities. Avery v. E&M Services, LLC, 2022 WL 4395480 *4 (D.N.D.). The exact standard applicable to granting such a motion is not clear, though it is typically held to be less exacting than a motion under Rule 59(e), which is in turn less exacting than the standards enunciated in Rule 60(b). Id.

Fed.R.Civ.P. 59(e) was adopted to clarify a district court’s power to correct its own mistakes in the time period immediately following entry of judgment, Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998)(such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment); and, it must be filed within ten days of the entry of judgment. Schoenbaum v. E.I. DuPont de Nemours and Co., 2007 WL 3331291 *2 (E.D. Mo.).

975 F.2d 690 (10th Cir. 1992), is unpersuasive and does not support his argument for clarification.²

Contrary to plaintiff's contention, the ruling in this case is not ambiguous. The ruling states, quite clearly, that the Guest Sheet was not copyrightable because it was designed for recording information that does not convey information and/or inseparable instructions. (Doc. 111, Order dated March 10, 2022, p. 14). Finding no genuine issue of material fact as to its copyrightability, I held that defendant was entitled to judgment as a matter of law. (Id). Plaintiff's argument to the contrary is therefore disingenuous.

Reconsideration

There is no doubt that the crux of plaintiff's motion revolves around the purported copyrightability of the Guest Sheet, and he seeks reconsideration so that he can amend his pleadings to include the deposition of Peter DeDecker, an automotive sales manager who began his 40-year career in the automotive business with BHA. The record indicates that in a case pending before the District Court for the District of Kansas, *Ragan v. VinSolutions, Inc.*, 20-cv-02222-DDC-JPO, on July 8, 2021, DeDecker was noticed as a witness for defendant. (Doc. 114-2, p. 2). Through the declaration of his counsel, Andrew Grimm, plaintiff claims that much of DeDecker's deposition testimony (taken the day after the ruling in this case) in the Kansas case is "highly important to this case;" primarily due to his long career in automotive sales and training and prior employment with Van Tuyl – which was later acquired by defendant (Doc. 112-1, p. 2). According to plaintiff,

² Plaintiff cites *Burton v. Johnson*, 975 F.2d 690 (10th Cir. 1992), a habeas action, in which the petitioner challenged her state court conviction for first-degree murder. *Id.* at 691. In an Order dated December 27, 1989, the district court granted the petition, and ordered that the petitioner be released unless a new trial is commenced within 90 days; both parties appealed the court's determination, and litigation continued in the matter. *Id.* 691-93. The Eighth Circuit ultimately found that the district court's Order was "ambiguous" as to the intended effect of the expiration of the 90-day period, and it was unclear what type of "release" the district court intended in ordering that the petitioner "be released unless a new trial is commenced within 90 days." *Id.* at 694. Thus, the matter was remanded to the district court for interpretation and clarification of the Order, pursuant to Fed.R.Civ.P. 60(a). *Id.*

DeDecker acknowledged, among other things, that the Guest Sheet “was a novel, and original, expression of a general idea for a customer-interview sheet.” (Id). Contrary to plaintiff’s contentions, DeDecker’s opinion is not dispositive on the issue of copyrightability of the Guest Sheet; rather, it is just that, the opinion of another employee in the automotive sales venue. Plaintiff also claims that upon learning of the DeDecker testimony in the Kansas case, for months he attempted to schedule DeDecker’s deposition, but defendant employed delaying tactics until a day after the ruling was issued in this case. (Doc. 122, p. 13).

Giving plaintiff the benefit of the doubt that the ruling granting defendant’s motion for judgment on the pleadings was not a final judgment, plaintiff’s motion for reconsideration will not be held untimely. Williams v. Employers Mutual Casualty Company, 845 F.3d 891, 898 (8th Cir. 2017)(a district court decision is not final, and thus not appealable, unless there is some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as the court is concerned, is the end of the case). And, the motion will be considered as a motion seeking relief under Rule 60(b).

Motions for reconsideration are nothing more than Rule 60(b) motions when directed at non-final orders. Elder-Keep v. Aksamit, 460 F.3d 979, 984 (8th Cir.2006). Rule 60(b) provides that a court may reconsider a prior ruling for one of the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Rule 60(b) relief is an “extraordinary remedy” that is justified only in “exceptional circumstances,” Prudential Ins. Co. of America v. Nat'l Park Med. Ctr., Inc., 413 F.3d 897, 903 (8th Cir.2005), and “[e]xceptional circumstances are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at.” Atkinson v. Prudential Prop. Co., 43 F.3d 367, 373 (8th Cir.1994) (in the context of a motion under Rule 60(b)(6) relief will only be granted where the “exceptional circumstances have denied the moving party a full and fair opportunity to litigate his claim and have prevented the moving party from receiving adequate redress.” Harley v. Zoesch, 413 F.3d 866, 871 (8th Cir.2005). As such, a Rule 60(b)(6) motion that does nothing more than attempt to reargue issues already decided should be denied. Broadway v. Norris, 193 F.3d 987, 989–90 (8th Cir.1999) (in their motion for reconsideration, defendants did nothing more than reargue, somewhat more fully, the merits of their claim of qualified immunity. This is not the purpose of Rule 60(b)(6).... It is not a vehicle for simple reargument on the merits.).

That is precisely what plaintiff attempts to do here; present cumulative argument – by way of the DeDecker deposition - on an issue that has been repeatedly reviewed by this court, and found to be lacking support for plaintiff’s argument that his Guest Sheet does not fall within the “blank form” exception to copyrightability.

Accordingly, plaintiff’s motions for reconsideration (Doc. 112) and to seal document (Doc. 120) are DENIED. It is further

ORDERED that defendant’s motion to enter final judgment (Doc. 115) is GRANTED. The copyright infringement claim is DISMISSED, and the Clerk of the Court is directed to enter final judgment in this case.

/s/ Howard F. Sachs
Honorable Howard F. Sachs
UNITED STATES DISTRICT JUDGE

Dated: October 11, 2022
Kansas City, Missouri