UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

March 23, 2023

RAVI SHARMA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2022B00023
NVIDIA CORP., Respondent.	)	

Appearances: Ravi Sharma, pro se Complainant
Patrick Shen, Esq., K. Edward Raleigh, Esq., and Samantha Caesar, Esq., for Respondent

ORDER DENYING COMPLAINANT'S MOTION FOR ADVISORY OPINION AND GRANTING IN PART COMPLAINANT'S MOTION FOR CLARIFICATION OF THE CONTENTS OF THE RECORD AND RECONSIDERATION

I. BACKGROUND

On March 9, 2023, the Court received a written submission from Complainant (dated February 27, 2023).[1] In this submission, Complainant discusses the "Declaration of Delphine Ni" and the "Declaration of Karla Harris." Mot. Advisory Opinion ¶ 1. Complainant moves the Court to "reject" these declarations, because he did not receive them in the mail until after close of discovery. *Id*. Complainant then moves the Court to opine on whether it would "accept" these declarations if Respondent submits them at a later date. *Id.* ¶ 2. On March 14, 2023, the Court received Respondent's opposition to the written submission (dated February 27, 2023).

On March 15, 2023, the Court received a second written submission from Complainant (dated March 8, 2023).[2] In this submission, Complainant seeks clarification on "what documents are

[1] The Court will refer to this submission as "Motion Seeking Advisory Opinion."

[2] The Court will refer to this submission as "Motion For Clarification of the Contents of the Record and Reconsideration."

considered part of the evidentiary record."[3] *See* Mot. Clarif. & Recons. 1–2. The submission also informs the Court that the Complainant "disagrees" with the Court's holdings on redaction in the Order Denying Motions to Compel. *See id.* at 2 (stating that the Court should have required the filing of a protective order, citing to OCAHO Case No. 19B00048); *see Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450d, 4, 6–10 (2023).[4] On March 17, 2023, the Court received Respondent's opposition to Complainant's written submission (dated March 8, 2023).

II. LAW & DISCUSSION

While he does not expressly caption his submission accordingly, Complainant moves the Court to consider three separate matters through these two written submissions. *See Zajradhara v. GIG Partners*, 14 OCAHO no. 1363c, 3 (2020) (pro se filings "may be construed liberally") (citing *M.S. v. Dave S.B. Hoon – John Wayne Cancer Inst.*, 12 OCAHO no. 1305b, 5 (2018), citing to *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

First, Complainant moves the Court to provide an advisory opinion about what would transpire should Respondent submit a specific document for consideration into the record. Second, Complainant moves the Court to reconsider its decision in its January 18, 2023 Order. Finally, Complainant moves the Court to provide clarity on what is or is not in the record. Each motion will be discussed further below.

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[3] As phrased by Complainant, "[m]y question is: Are 'Respondent's Responses & Objections to Complainant's First Set of Written Interrogatories," dated October 31, 2022, and 'Respondent's Responses & Objections to Complainant's First Request for Production of Documents and Electronically Stored Information,' dated November 2, 2022, part of the evidentiary record or not?" Mot. Clarif. & Recons. 2.

Complainant observes that Respondent attached interrogatory responses to its December 6, 2022 opposition. *Id.* at 1; *see Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450d, 5–6 (2023).

Complainant argues his "Supplemental Rebuttal to Declaration of Leon Lixingyu" should be considered part of the record. Mot. Clarif. & Recons. at 1–2; *see Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450e, 1 (2023); *see also NVIDIA Corp.*, 17 OCAHO no. 1450d, at 5.

[4] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

1. Motion for Advisory Opinion

An advisory opinion is a "nonbinding statement by a court of its interpretation of the law[.]" *Advisory Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Advisory Opinion*, ENCYCLOPEDIA BRITANNICA (2009) ("Advisory opinions adjudicate nothing[.]"). OCAHO precedent discourages the issuance of advisory opinions that speculate on applicability and scope of the forum's regulations. *See, e.g.*, *United States v. Harris Ranch Beef Co.*, 2 OCAHO no. 333, 292, 292 (1991).

In this case, Complainant asks the Court to opine on a hypothetical wherein declarations could be submitted by Respondent and the Court could subsequently "reject" or "accept" the declarations. Such an opinion would adjudicate nothing. Complainant, the moving party, provides no rationale which compels the Court to deviate from precedent on this issue. Accordingly, the Court DENIES the Motion for Advisory Opinion.

2. Motion for Reconsideration

Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 540 F. Supp. 2d 1176, 1179 (D. Or. 2008) (quoting *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).[5]

Because "OCAHO's Rules of Practice and Procedure do not contemplate motions for reconsideration of interlocutory orders[,]" the Court turns to the Federal Rules of Civil Procedure as permissive guidance. *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381b, 2 (2021) (citations omitted); *see* 28 C.F.R. § 68.1. The "power to modify an interlocutory order is authorized by . . . Federal Rule 54(b)." *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285a, 1 n.1 (2018) (citations omitted); *e.g.*, *Griffin v. All Desert Appliances*, 14 OCAHO no. 1370b, 10–12 (2021).

The decision to grant or deny a motion for reconsideration pursuant to Federal Rule 54(b) is a discretionary one. *See Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 585–86 (D. Ariz. 2003) (citations omitted) (surveying district court approaches for reconsideration of interlocutory orders); *e.g.*, *Allergan, Inc. v. Athena Cosmetics, Inc.*, No. SACV 07–1316 JVS (RNBx), 2012 WL 12903072, *1 (C.D. Cal. Oct. 11, 2012).

"Motions for reconsideration are disfavored [and] are not the place for parties make new arguments not raised in their original briefs." *Motorola, Inc.*, 215 F.R.D. at 582 (citation omitted). Further, a successful motion for reconsideration does not repeat argument contained in the original motion or opposition. *Id.* at 586.

[5] As this case arises in California, the Court consults caselaw from the United States Court of Appeals for the Ninth Circuit. *See* 28 C.F.R. § 68.57.

Grounds for reconsideration may include:

(1) material differences in fact or law from that presented to the Court and, at the time of the Court's decision, the party moving for reconsideration could not have known of the factual or legal differences through reasonable diligence;
(2) new material facts that happened after the Court's decision;
(3) a change in the law that was decided or enacted after the Court's decision; or
(4) The movant makes a convincing showing that the Court failed to consider material facts that were presented to the Court before the Court's decision.

Id.

Here, Complainant informs the Court that he "disagrees" with the Court's holdings on redaction in the Order Denying Motion to Compel, concluding that, in his estimation, the Court should have required the filing of a protective order. [6] Complainant did not identify newly discovered facts or a change in law following issuance of the Order Denying Motion to Compel. Moreover, Complainant did not make a convincing showing that the Court failed to consider material facts.

Complainant did not meet his burden on reconsideration, and the Motion for Reconsideration is DENIED.

3. Motion for Clarification of the Contents of the Record

OCAHO precedent allows the Court to consider motions for clarification, and if granted, provide the movant with explanation on the sought information. *See, e.g.*, *Villalobos v. Roumiguiere Vineyards*, 4 OCAHO no. 630, 381, 382–83 (1994) (interpreting letter from a pro se respondent as a grantable motion for clarification, and providing guidance).

Following that precedent, the Court provides the following clarification:

Specific to motions on discovery, parties may attach matters for the Court to consider, for the limited purpose of moving the Court to take or refrain from taking a particular action. 28 C.F.R. §§ 68.18, 68.23(b); *see, e.g.*, *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381j, 5–8 (2021) (noting that an email, in which the complainant objected to the discovery request, satisfied the procedural requirement that a motion to compel provide "[t]he response or objections of the party upon whom the request was served"). The documents attached to a discovery motion are only considered for the limited purpose outlined in the motion; they are not evaluated by the

[6] With respect to protective orders, the Court observes: Parties make seek protective orders, *see* 28 C.F.R. § 68.18(c), and other tools to facilitate resolution of the case or in preparation for hearing or filing a dispositive motion. However, absent a party moving the Court to utilize a particular tool, it is disinclined to insert itself into the discovery process. *Cf. Hseih v. PMC–Sierra, Inc.*, 9 OCAHO no. 1084, 4 (2002) (noting that OCAHO's rules "require a conscientious effort to resolve [a] discovery dispute without court intervention") (internal citations omitted).

Administrative Law Judge for reliability[7] and probative value.[8] In other words, those documents are not considered for impact, if any, on substantive issues alleged in the Complaint.

Before the dispositive motion stage, the Complaint and the Answer form the basis for the record as to the substantive issues before the Court. The Complaint outlines the allegations made,[9] and the Answer contains admissions or statements upon which parties can rely. Typically, the first instance in which documentary evidence addressing the actual allegations enter the record occurs at either summary decision or at hearing. *See* 28 C.F.R. § 68.38 (summary decision); § 68.39 (formal hearings).

In this particular case, Respondent filed a Motion for Summary Decision on March 13, 2023.[10] When a party files a dispositive motion (such as for summary decision), the party is asking the

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[7] "The proponent of documentary evidence must 'authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be[.]'" *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 24 (2022) (citing *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (internal citations omitted)). As to the reliability of documentary evidence, *id.*:

> Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021); *United States v. Bhattacharya*, 14 OCAHO no. 1380a, at 4–5 (2021) . . . Affidavits are reliable if "they are sworn and signed by the affiants . . . contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein." *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 14 (2004).

[8] "Probative value is determined by how likely the evidence is to prove some fact[.]" *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 9 n.5 (2023) (citations omitted). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." *Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, at 8 (quoting Fed. R. Evid. 401).

[9] The Court previously found the Complaint gave Respondent adequate notice of the allegations. *See Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 6–7 (2022) (citations omitted) (affirming the propriety of OCAHO's notice pleading standard, and concluding the Complaint met this standard).

While statements made in the Complaint provide notice of the allegations, they do not serve as evidence that the allegations are true. *See Sanchez Molina v. Securitas Sec. Servs. USA, Inc.*, 11 OCAHO no. 1261, 7 (2015) ("Conclusory and unsupported allegations do not provide an adequate basis for summary decision[.]"). Complainant still has the burden to prove a prima facie case through evidence. *Id.* (citing *Curata v. N. Harris Montgomery Cmty. Coll. Dist.*, 9 OCAHO no. 1099, 12 (2003) ("An individual's subjective perception of discrimination, however strongly held, does not substitute for evidence[.]").

[10] Complainant did not file a Motion for Summary Decision.

Court to evaluate the substance of the attached evidence. *See* 28 C.F.R. § 68.38. The dispositive motions phase is the appropriate time for a party to highlight concerns about how much weight, if any, should be given, or whether a document should be excluded from consideration because of some other defect or procedural issue (i.e., a theory related to a party's failure in discovery). *See* 28 C.F.R. § 68.40.

III. CONCLUSION

Complainant's Motion for an Advisory Opinion is DENIED.

Complainant's Motion for Clarification of the Contents of the Record and Reconsideration is GRANTED IN PART and DENIED IN PART.

The Court notes that responses to dispositive motions are due on April 7, 2023, and that parties must seek leave of the Court in advance of filing a reply to a response. *See* 28 C.F.R. § 68.11(b).

SO ORDERED.

Dated and entered on March 23, 2023.

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Honorable Andrea R. Carroll-Tipton
Administrative Law Judge