

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LARRY D. KERNS,

Plaintiff,

v.

MATHEW J. WENNER,

Defendant.

Case No.: 16cv2438-WQH-AGS

ORDER

HAYES, Judge:

The matters before the Court are the motion to reconsider partial summary judgment (ECF No. 149), the motion to dismiss (ECF No. 154), the motion for exclusion of GCIU Employer Retirement Fund’s contract with ERISA (ECF No. 156), the motion to allow Plaintiff to correct exhibits in motion to reconsider partial summary judgment (ECF No. 158), and the motion to remove document 165 from the docket (ECF No. 170).

I. BACKGROUND

On September 28, 2016, Plaintiff Larry D. Kerns initiated this action by filing the complaint against Defendants Mathew J. Wenner, Hugh Gaylord, Edward Treacy, Thomas

1 Sarnecki, George Tedeschi, Charles Kamen and John D. Bachler.¹ (ECF No. 1). Plaintiff
2 brings causes of action for mail fraud and violation of the Americans with Disabilities Act
3 (“ADA”) and seeks \$3,000,000 in punitive damages. Plaintiff allegations relate to
4 Plaintiff’s benefits under the GCIU-Employment Retirement Fund. *Id.*

5 **II. MOTION FOR RECONSIDERATION (ECF No. 149)**

6 On December 29, 2017, Plaintiff filed a motion to reconsider the Court’s ruling on
7 a prior motion for summary judgment filed by Plaintiff on the basis of new evidence. (ECF
8 No. 149). Plaintiff contends that new evidence proves that he was eligible for full
9 retirement benefits and that Defendant knew Plaintiff was eligible for full retirement
10 benefits as of July 8, 2010. Plaintiff contends that he has seen this evidence many times
11 but that he “simply did not or could not; comprehend; the evidence (information) on the
12 previous pages; until a few weeks; ago. One of my; Disability, Issues.” (ECF No. 149 at
13 8).

14 On January 29, 2018, Defendant filed a response in opposition. (ECF No. 165).
15 Defendant contends that Plaintiff fails to provide any new admissible evidence and fails to
16 establish that any new evidence was unavailable when the motion for partial summary
17 judgment was filed. Defendant contends that both the motion for summary judgment and
18 motion for reconsideration fail to address ERISA. Defendant contends that Plaintiff fails
19 to state grounds upon which summary judgment is warranted and fails to establish by
20 admissible evidence that the absence of any genuine dispute of material fact. Defendant
21 states that Plaintiff failed to file a separate statement of undisputed fact in support of his
22 motion for summary judgment and fails to remedy this deficiency in his motion for
23 reconsideration. Defendant files evidentiary objections to the evidence cited by Plaintiff
24 in his motion for reconsideration on the following grounds: lack of foundation; lack of
25

26
27 ¹ Defendant Mathew Wenner is the only defendant remaining in this action. Defendants
28 Gaylord, Treacy, Sarnecki, Tedeschi, Kamen, and Bachler were dismissed from this action
with prejudice. (ECF No. 39).

1 authentication; lack of personal knowledge; hearsay; irrelevance; and ambiguous,
2 confusing, and misleading evidence. (ECF No. 166).

3 Reconsideration is an “extraordinary remedy, to be used sparingly in the interests of
4 finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229
5 F.3d 887, 890 (9th Cir. 2000). “[A] motion for reconsideration should not be granted,
6 absent highly unusual circumstances, unless the district court is presented with newly
7 discovered evidence, committed clear error, or if there is an intervening change in the
8 controlling law.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d
9 873, 880 (9th Cir. 2009) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665
10 (9th Cir. 1999) (internal quotation marks omitted)). “A motion for reconsideration ‘may
11 *not* be used to raise arguments or present evidence for the first time when they could
12 reasonably have been raised earlier in the litigation.” *Id.* at 880 (quoting *Kona*, 229 F.3d
13 at 890). “Whether or not to grant reconsideration is committed to the sound discretion of
14 the court.” *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*,
15 331 F.3d 1041, 1046 (9th Cir. 2003). Civil Local Rule 7.1(i) provides that when a party
16 moves the Court for reconsideration of a prior order, the party must identify “what new or
17 different facts and circumstances are claimed to exist which did not exist, or were not
18 shown, upon such prior application.” CivLR 7.1(i).

19 On November 20, 2017, the Court denied Plaintiff’s motion for summary judgment
20 on the grounds that Plaintiff failed to satisfy his burden to demonstrate that summary
21 judgment was appropriate with respect to either the ADA claim or the mail fraud claim.
22 (ECF No. 145). In this motion for reconsideration, Plaintiff seeks reconsideration of this
23 Order based upon new evidence but concedes that he has seen this purported new evidence
24 “many times.” Accordingly, Plaintiff does not establish that the documents are newly-
25 discovered evidence and fails to establish adequate grounds for reconsideration.

26 Further, evidence provided by a party in support of a motion for summary judgment
27 must be admissible. *See Fed. R. Civ. P. 56; Soremekun v. Thrifty Payless, Inc.*, 509 F.3d
28 978, 984 (9th Cir. 2007) (“The evidence presented by the parties must be admissible.”).

1 The Ninth Circuit Court of Appeals “has repeatedly held that unauthenticated documents
2 cannot be considered on a motion for summary judgment.” *Orr v. Bank of Am., NT & SA*,
3 285 F.3d 764, 773 (9th Cir. 2002). In this case, Plaintiff has failed to properly authenticate
4 his purported new evidence. (ECF No. 149 at 3-6). Thus, the Court would be unable to
5 consider this evidence in support of any motion for summary judgment.

6 Plaintiff has failed to establish that any reconsideration of the Court’s prior order
7 denying his motion for partial summary judgment is warranted. The motion for
8 reconsideration is denied. (ECF No. 149).

9 **III. MOTION TO DISMISS (ECF No. 154)**

10 On January 10, 2018, Plaintiff filed a motion stating, “IF PLAINTIFF KERNS’:
11 MOTION FOR PARTIAL SUMMERY JUDGEMENT; IS GRANTED; WITH AN
12 AWARD OF AT LEAST 2 MILLION DOLLARS; BUT LESS THEN 3 MILLION
13 DOLLARS: PLAINTIFF; LARRY D. KERNS, HEREBY ENTERS A MOTION TO
14 DISMISS; ALL REMAINING ISSUES: **WITHOUT PREJUDICE: DUE TO**
15 **PLAINTIFF AND PLAINTIFF’S; WIFE’S; HEALTH ISSUES.**” (ECF No. 154).

16 The Court denied Plaintiff’s motion for partial summary judgment and Plaintiff’s
17 subsequent motion for reconsideration. The motion to dismiss is denied as moot. (ECF
18 No. 154).

19 **IV. MOTION FOR EXCLUSION OF GCIU EMPLOYER RETIREMENT** 20 **FUND’S CONTRACT WITH ERISA (ECF No. 156).**

21 On January 19, 2018, Plaintiff filed a motion for exclusion of the GCIU Employer
22 Retirement Fund’s Contract with ERISA as irrelevant. Plaintiff fails to provide an
23 adequate legal or factual basis to warrant the exclusion of this document at this stage in the
24 proceedings. The motion is denied without prejudice. (ECF No. 156).

25 **V. MOTION TO ALLOW PLAINTIFF TO CORRECT AND REPLACE** 26 **PAGES IN ITS MOTION TO RECONSIDER PARTIAL SUMMARY JUDGMENT** 27 **(ECF No. 158)**

1 On January 19, 2018, Plaintiff filed a motion requesting that the Court permit him
2 to file replacement pages in support of his motion to reconsider partial summary judgment
3 in the event that Defendant objects to the admissibility of the documents. (ECF No. 158).
4 Plaintiff contends that this should be permitted because otherwise Defendant would be
5 allowed to “Obstruct; plaintiff’s Justice.” *Id.* at 1.

6 Plaintiff fails to identify an adequate legal basis for this motion. Further, Plaintiff
7 fails to demonstrate that he could remedy the deficiencies of the evidence objected to by
8 Defendant. The motion is denied. (ECF No. 158).

9 **VI. MOTION TO REMOVE DOCKET NUMBER 165 FROM THE DOCKET**
10 **(ECF No. 170).**

11 On January 30, 2018, Plaintiff filed a motion stating, “PLAINTIFF, KERNS;
12 TOTALLY AGREES; WITH DEFENSE; REGARDING DOCKET NO. 166; [BELOW]
13 AND URGES, HONORABLE; JUDGE HAYS; TO GRANT; DEFENDANT’S;
14 REQUEST; BY REMOVING DOCUMENT NUMBER 165; FROM HONORABLE
15 COURT’S DOCKET.” (ECF No. 170 at 1).


16 Docket number 166 is “Defendant Mathew J. Wenner’s Evidentiary Objections in
17 Opposition to Plaintiff’s Motion for Reconsideration of Plaintiff’s Motion for Partial
18 Summary Judgment.” (ECF No. 166). Docket number 165 is “Defendant Mathew J.
19 Wenner’s Opposition to Plaintiff’s Motion for Reconsideration (ECF No. 149) of
20 Plaintiff’s Motion for Partial Summary Judgment (ECF No. 108).” (ECF No. 165).
21 Plaintiff fails to identify any statement by Defendant requesting that the Court remove
22 Document 165 from the docket. The motion is denied. (ECF No. 170).

23 **VII. CONCLUSION**

24 IT IS HEREBY ORDERED that the motion to reconsider partial summary judgment
25 (ECF No. 149), the motion to dismiss (ECF No. 154), the motion for exclusion of GCIU
26 Employer Retirement Fund’s contract with ERISA (ECF No. 156), the motion to allow
27 Plaintiff to correct exhibits in motion to reconsider partial summary judgment (ECF No.
28

1 158), and the motion to remove document 165 from the docket (ECF No. 170) filed by
2 Plaintiff Larry D. Kerns are DENIED.

3 Dated: May 7, 2018

4 
5 Hon. William Q. Hayes
6 United States District Court

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28