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Issue Date: 28 February 2018

Case No.: 2016-SOX-00042
OSHA No.: 7-4120-16-058

In the Matter of:

JACK JORDAN,
Complainant,

v.

DYNCORP INTERNATIONAL LLC, JASON BRANCIFORTE, ETHAN BALSAM, AND MICHAEL CANNON,
Respondents.

DECISION AND ORDER OF DISMISSAL AND ORDER SANCTIONING COMPLAINANT

This matter arises under the Sarbanes-Oxley Act of 2002, as amended ("SOX" or "the Act"), and the implementing regulations at 29 C.F.R. § 1980, *et seq*.

Table of Contents

PROCEDURAL HISTORY 2
ISSUES 8
PRELIMINARY MATTERS 8
I. Disqualification 8
II. October 19 Motion 8
DISCUSSION 8
I. The Motions to Dismiss Are Granted 8
A. Applicable Law 8

B. Respondent's Assertions 10
C. Information in the Record Regarding Complainant's Complaint 13
D. Fair Notice 21
E. This Case Must Be Dismissed 26
II. Complainant's Renewed Disqualification Motion Does Not Establish Grounds on Which to Disqualify Me 27
A. Legal Standard for Disqualification 30
B. Complainant's Argument that ALJ Merck's Rulings Are Mere Contentions 31
C. Complainant's Allegations of Specific Misconduct 42
D. Allegation of Knowledge of Facts in Dispute 80
E. Complainant's Renewed Disqualification Motion Fails to Establish That I Should Be Disqualified. 81
III. Complainant Is Sanctioned 82

PROCEDURAL HISTORY

This matter has a crowded procedural history, with interlocking filing dates. Unless otherwise noted, all documents are dated the day they were received by the Office of Administrative Law Judges ("OALJ").

The Parties

Complainant is a licensed attorney in the state of New York.[1] He represents a claimant in a case brought under the Defense Base Act, 42 U.S.C. § 1651, *et seq.*, an extension of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (collectively the "LHWCA"). That Defense Base Act case, *Jordan v. DynCorp International, LLC*, 2015-LDA-00030 ("the DBA Case"),[2] was heard by Administrative Law Judge ("ALJ") Larry S. Merck ("ALJ Merck"). That case was brought against DynCorp International, LLC ("Employer"), a respondent in this matter.[3] Complainant was formerly employed by Employer.

Michael Cannon is an employee of Employer. Jason Branciforte and Ethan Balsam are two attorneys of the firm Littler Mendelssohn[4] who represent Employer in the DBA Case. Littler Mendelssohn represents Employer and Cannon in this SOX matter, though with different counsel. The firm Vorys, Sater, Seymour, and Pease LLP[5] represents Branciforte and Balsam in this matter.

[1] Respondents often refer to Complainant as "Mr. Jordan."
[2] The claimant in the DBA Case also has the last name "Jordan," but is not Complainant.
[3] The parties often refer to Employer as "DI" in their filings.
[4] Complainant often refers to this firm in his filings as "LM"
[5] Complainant often refers to this firm in his filings as "VSSP"

Initial Matters

Complainant initially filed a complaint with OSHA on January 8, 2016. Complainant amended this complaint to include additional parties on February 29, 2016. On July 7, 2016, OSHA completed its investigation of Complainant's complaint and found that there was no reasonable cause to believe that Respondents had retaliated against Complainant in violation of SOX. Complainant objected and requested a hearing on July 24, 2016.

This matter was assigned to me on October 5, 2016. On November 16, 2016, I issued a Notice of Assignment, Notice of Hearing, and Initial Prehearing Order ("Prehearing Order"). On November 22, 2016, I issued errata for the Prehearing Order.

On December 16, 2016, I received two Motions to Dismiss: one filed by Employer and Cannon ("First Motion to Dismiss"),[6] and one filed by Branciforte and Balsam ("Second Motion to Dismiss"). The parties joined each other's motions. *See* Second Motion to Dismiss Memo at 6; First Motion to Dismiss at 3. In the First Motion to Dismiss, Employer and Cannon sought "dismissal of the case for failure to state a claim." Motion to Dismiss at 2. Branciforte and Balsam similarly alleged that Complainant's case "should be dismissed for failure to state a claim upon which relief can be granted," while also asserting that they were protected from the SOX claim via the judicial proceedings privilege. Second Motion to Dismiss Memo at 6.

On December 20, 2016, I received Complainant's Motion Re: Discovery Plan, Answer, and Privilege ("Discovery Motion").[7] This was followed on December 22, 2016, by Complainant's Opposition to the First Motion to Dismiss ("First Dismissal Opposition") and Complainant's Request for an Extension of Time to Respond to the Second Motion to Dismiss.[8] I granted the Request for Extension by email on December 23, 2016.

On December 30, 2016, Employer and Cannon filed their Response to the Discovery Motion ("Discovery Response"), which was joined by Branciforte and Balsam that same day. On January 13, 2017, I received Complainant's Motion for Leave to File a Reply to the Discovery Response, including a proposed reply.[9]

On January 17, 2017, I received Employer and Cannon's Motion for Leave to File a Reply to the First Dismissal Opposition.[10] That same day, I received Complainant's Opposition to the Second Motion to Dismiss ("Second Dismissal Opposition.") Believing Employer's Motion for Leave to File a Reply in the First Dismissal Opposition to be unopposed, I instructed my law clerk to inform the parties telephonically that I was granting that motion. Upon learning that the Complainant intended to oppose that motion, I rescinded the telephonic order and the parties were informed of this rescission shortly thereafter (within five minutes of the first call).

[6] Dated December 15, 2016.
[7] Dated December 13, 2016.
[8] Both filings dated December 17, 2016.
[9] Dated January 9, 2017.
[10] Dated January 13, 2017.

Sanction and Injunction Motions, and the Order Granting Leave

On January 23, 2017, I received Employer and Cannon's Response to Complainant's Motion for Sanctions,[11] as well as Branciforte and Balsam's Response to Complainant's Motion for Sanctions. On January 31, 2017, Branciforte and Balsam filed a Motion for Preliminary and Permanent Injunction or, in the Alternative, a Protective Order ("First Communications Motion"). On February 6, 2017, I received Employer and Cannon's Motion for Preliminary and Permanent Injunction or, in the Alternative, a Protective Order ("Second Communications Motion").

Also on February 6, 2017, I received Complainant's Motion for Sanctions for False Statements Regarding the Emails ("First Sanctions Motion"), Complainant's Motion for Leave to File a Reply to the Sanction Responses ("Sanctions Reply Motion") (including a proposed reply), and Complainant's Motion Requesting Official Notice ("Official Notice Motion").[12] The next day, on February 7, 2017, I received Branciforte and Balsam's Motion for Leave to File a Reply in Further Support of the Second Motion to Dismiss.

On February 8, 2017, I issued a Notice Regarding Christopher Bellomy. In that Notice, I explained that I belonged to the same U.S. Army Reserve unit as a "Captain Christopher Bellomy" in approximately 2002-2005. Notice Regarding Christopher Bellomy at 1. Though I did not recall working with him on any legal matter, I did recall seeing him a couple of times a year at events such as unit physical fitness tests, trips to the firing range, and mandatory annual training. *Id.* Though I did not recall seeing Mr. Bellomy at any time after approximately 2005, I granted the parties the opportunity to *voir dire* me concerning my knowledge of Mr. Bellomy if they wished. *Id.*

On February 9, 2017, I issued an Order Granting Employer's Reply Motion, Holding in Abeyance the Motions to Dismiss, and Granting Complainant Leave to File an Amended Complaint ("Order Granting Leave"). In that Order, *inter alia*, I held Respondents' Motions to Dismiss in abeyance until Complainant provided an amended complaint, which was due on February 24, 2017. Order Granting Leave at 9-10. The parties were then given additional time in which to file additional briefs on the matter of dismissal after Complainant filed an amended complaint. *Id.* at 10.

Official Notice, Multiple Motions, and Order to Show Cause

In addition to my Order Granting Leave, I issued a Supplemental Prehearing Order on February 9, 2017. In that Order, having noticed the parties' multiple and continued citations to orders issued by ALJ Merck in the DBA Case, I took official notice of the text of ALJ Merck's Orders, and I explained that I would not rule on the outstanding discovery plan until the Motions

[11] Dated January 20, 2017. Respondents routinely file responses to Complainant's sanctions motions prior to Complainant's actual filing of those motions. It appears that Respondents file such responses prior to the expiration of the 21-day safe harbor outlined in 29 C.F.R. § 18.35(c), which is substantively identical to Federal Rule of Civil Procedure 11(c) (though § 18.35(c) lacks any provisions for monetary sanctions). *Compare* 29 C.F.R. § 18.35(c) *with* Fed. R. Civ. P. 11(c).

[12] All documents dated February 1, 2017.

to Dismiss were resolved. On February 13, 2017, I denied Branciforte and Balsam's Motion for Leave to File a Reply in Further Support of the Second Motion to Dismiss as moot.

On February 14, 2017, I issued an Order Denying Complainant's Motion for Sanctions, Denying Complainant's Sanctions Reply Motion, and Ordering the Complainant to Show Cause Why He Should Not Be Sanctioned ("Order to Show Cause"). That same day, I received Complainant's Opposition to the Communications Motions.[13] On February 16, 2017, I received Complainant's moot Opposition to Branciforte and Balsam's Request for Leave to File a Reply.[14]

Branciforte and Balsam submitted their Opposition to Complainant's Official Notice Motion ("Official Notice Opposition") on February 21, 2017. On February 22, 2017, I received four filings from Complainant: a Notice of Noncompliance; a Motion for Notice Regarding LTC Merck and LTC Henley ("Notice Motion"), a Motion Requesting Equal Access to the Court ("Equal Access Motion"), and a Motion to Reconsider the Order Granting Leave ("Motion to Reconsider").[15] Among the multiple arguments raised in those motions, Complainant informed me that he would not comply with my request to amend his complaint. *See* Notice of Noncompliance.

On February 24, 2017, I received Complainant's Motion to Vacate the Order to Show Cause and Disqualify Judge Almanza ("Motion to Vacate and Disqualify"). Complainant sought to vacate my Order to Show Cause, and he alleged that I should be disqualified for numerous reasons.

On March 3, 2017, I issued an Order Vacating Part of the Supplemental Prehearing Order, Reinstating Section X of the Supplemental Prehearing Order, and Denying Complainant's Motion for Official Notice ("Official Notice Order"). Also on March 3, 2017, I issued a Notice Scheduling Conference Call, which scheduled a conference call to address outstanding motions on March 20, 2017. Additionally, I received Complainant's Motion to Compel Discovery Responses ("Motion to Compel") later that same day.[16]

The March 20, 2017 Conference Call and Subsequent Order

On March 6, 2017, I received Employer and Cannon's Oppositions to: the Motion to Reconsider; the Equal Access Motion; and Notice Motion. These oppositions were joined that same day by Branciforte and Balsam. On March 9, 2017, Branciforte and Balsam filed an Opposition to the Motion to Vacate and Disqualify, which was similarly joined by Employer and Cannon. On March 17, 2017, I received Employer and Cannon's Opposition to Complainant's Motion to Compel,[17] as well as Branciforte and Balsam's Opposition to Complainant's Second Motion for Sanctions Regarding the Emails ("Second Sanctions Response").

[13] Dated February 9, 2017.
[14] Dated February 11, 2017.
[15] All dated February 17, 2017.
[16] Dated February 27, 2017.
[17] The document was received after 5:00 p.m. on the evening of March 16, 2017.

On March 20, 2017, I held a conference call granting the parties the opportunity to provide oral argument on the outstanding motions, as well as allowing the parties the opportunity to *voir dire* me regarding Christopher Bellomy. A court reporter was present on the call (and I received a transcript of the conference on April 19, 2017). During argument, Complainant disavowed the two complaint summaries provided by OSHA. Conference Call Transcript ("Tr.") at 25. After lengthy argument by the parties, I adjourned the call to begin working on an Order addressing the outstanding motions. *See* Tr. at 5 (noting I did not anticipate making substantive rulings on the call).

Eight days later, on March 28, 2017, I received Complainant's Supplemental Memorandum Supporting the Motion to Disqualify and Regarding Evidence of Retaliation by ALJ Almanza ("Supplemental Disqualification Motion") and Complainant's Second Motion for Sanctions ("Second Sanctions Motion").[18] On April 10, 2017, I received Employer and Cannon's Opposition to the Supplemental Motion to Disqualify, and Branciforte and Balsam's Opposition to the Supplemental Motion to Disqualify.

On May 15, 2017, I issued an Order Denying Complainant's Motions to Disqualify, to Reconsider, to Compel, for Sanctions, for Equal Access, and for Notice Regarding LTC Merck and LTC Henley; Denying Respondents' Motion for Preliminary Injunction or Protective Order; Granting Complainant Leave to File a Statement of the Complaint; Addressing Complainant's Request; Sanctioning Complainant; Ordering Complainant to Show Cause; and Cancelling Hearing ("May 15 Order"). As part of that Order, I ordered Complainant to provide a statement of his complaint within fifteen days. May 15 Order at 79. I granted Respondents fifteen days thereafter to file supplemental briefs in support of the Motions to Dismiss, and I then granted Complainant a subsequent fifteen days in which to file a brief in response to the supplemental briefs. *Id*.

Additionally, the May 15 Order contained an order to show cause ("Second Show Cause Order") why Complainant should not be sanctioned for making statements without evidentiary support and arguments for an improper purpose. May 15 Order at 77-78. The Second Show Cause Order gave Complainant fifteen days in which to file a response.[19]

On May 23, 2017, I received Complainant's Motion for Continuance,[20] which I subsequently denied as moot on May 24, 2017.

Subsequent Motions and Orders

On May 30, 2017, I received an email from Complainant containing a Request for Prompt Disclosure of the Emails under 5 U.S.C. § 556(e), 29 C.F.R. § 18.201(e), and 29 C.F.R. § 1980.107(d) ("Email Request"). The next day, on May 31, 2017, I received Complainant's Motion to Reconsider Denial of the Motion to Compel ("Motion to Reconsider Denial"). On June 6, 2017, I received Complainant's Response to the May 15 Show Cause Order ("May 15

[18] Both dated March 24, 2017.
[19] In the May 15 Order, I also increased the additional time to respond to documents submitted by mail under 29 C.F.R. § 18.32(c) to 6 days. *See* May 15 Order at 38, 79.
[20] Dated May 17, 2017.

Show Cause Response"), as well as Complainant's Motion for the OALJ to Release the Emails ("Motion to Release").[21]

On June 14, 2017, I issued an Order Concerning Filing Procedures. In that Order, I reminded Complainant that I had previously denied his request to accept filings by email. Order Concerning Filing Procedures at 1. I informed Complainant that his Email Request was not properly filed, and that he should properly file the Email Request by a means specified in 29 C.F.R. § 18.30(b)(3). *Id.* at 2. I have yet to receive any such filing.

On June 19, 2017, I received Employer and Cannon's Opposition to the Motion to Release and the Motion to Reconsider the Motion to Compel. On June 20, 2017, I received Branciforte and Balsam's Opposition to Complainant's Motion to Release. On June 30, 2017, I issued an Order Denying Complainant's Motion to Release ("Order Denying Release").

On July 21, 2017, I received Complainant's Second Motion to Declare the Emails Not Privileged ("Second Privilege Motion").[22] On July 25, 2017, I received Complainant's Motion for Declarations, Clarifications, and Production and Notice of the Emails ("Production Motion").[23] On August 7, 2017 I received Branciforte and Balsam's Opposition to Complainant's Second Privilege Motion and Employer and Cannon's Opposition to Complainant's Second Privilege Motion. On August 9, 2017, I received Branciforte and Balsam's Opposition to the Production Motion and Employer and Cannon's Opposition to the Production Motion.

On August 11, 2017, I issued an Order Holding Further Motions in Abeyance. In that Order, I informed the parties that I would hold all future-filed motions in abeyance until I was able to resolve the outstanding motions, specifically including the two Motions to Dismiss. On October 19, 2017, I received Complainant's Motion Requiring Email Service of Decisions; Notice of Noncompliance with Any Order Hindering Certain Types of Filing; Motion of Official Notice Re: Huber Email; and Motion to Vacate Orders ("October 19 Motion").[24] On November 6, 2017, I received Branciforte and Balsam's Opposition to the October 19 Motion. On that same day, I received Employer and Cannon's Opposition to the October 19 Motion.

On January 17, 2018, I issued an Order Sanctioning Complainant, Denying Complainant's Motions to Reconsider the Motion to Compel; to Declare the Emails Not Privileged; and for Declarations, Clarifications, and Production and Notice; and Ordering Complainant to Show Cause ("January 17 Order"). In that Order, I denied Complainant's outstanding discovery motions. *See* January 17 Order at 38-87, 91-92. I also sanctioned Complainant for failing to show cause why he should not be sanctioned on the grounds outlined in my May 15 Order. *Id.* at 7-38, 92. Finally, as part of the January 17 Order, I ordered Complainant to show cause ("Third Show Cause Order") why he should not be sanctioned for statements made within his May 15 Show Cause Response.

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[21] Both dated June 2, 2017.
[22] Dated July 17, 2017.
[23] Dated July 20, 2017.
[24] Dated October 16, 2017.

On February 8, 2018,[25] Complainant filed his Renewed Motion to Disqualify ALJ Almanza and Response to January 17 Show Cause Order and Notice of Noncompliance ("Renewed Disqualification Motion"). On February 26, 2018, I received Branciforte and Balsam's Response to the Renewed Disqualification Motion. That same day I received Employer and Cannon's Response to the Renewed Disqualification Motion.

ISSUES

There are two outstanding issues I must address:

1. Whether the Motions to Dismiss should be granted; and

2. Whether Complainant has shown cause why he should not be sanctioned.

PRELIMINARY MATTERS

I. Disqualification

Before addressing the two outstanding issues, I must first address Complainant's renewed argument that I should be disqualified. *See* Renewed Disqualification Motion. Complainant provides no additional evidence in support of this assertion, beyond my rulings in the January 17 Order. *See id.* Complainant's argument that my January 17 Order, as well as my other orders, were improper is discussed and rejected, below. *See* Discussion Part II, *infra*. Accordingly, Complainant has failed to establish that I should be disqualified.

II. October 19 Motion

In my Order Holding Further Motions in Abeyance, I explained that I would hold any further motions filed by the parties in abeyance pending my ruling on the Motions to Dismiss. Order Holding Further Motions in Abeyance at 1. In accordance with that Order, I held Complainant's October 19 Motion in abeyance after receiving it. As I grant Respondents' Motions to Dismiss, *see* Discussion Part I, Complainant's October 19 Motion has been rendered moot. Accordingly, Complainant's October 19 Motion is **TAKEN OUT OF ABEYANCE** and is **DENIED AS MOOT.**

DISCUSSION

I. The Motions to Dismiss Are Granted

A. Applicable Law

Under 29 C.F.R. § 18.70(c), a party "may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness." The regulations at 29 C.F.R.

[25] Dated February 6, 2018. Complainant further filed on February 12, 2018, a table of authorities, dated February 6, 2018, which were inadvertently excluded from the Renewed Disqualification Motion.

§ 1980.101, *et seq.*, and the statute at 18 U.S.C. § 1514A do not clarify the procedure for addressing a motion to dismiss in a SOX matter. However, the Administrative Review Board ("ARB"), the Circuit courts, and the Federal Rules of Civil Procedure[26] provide insight into this issue.

Rule 12(b) of the Federal Rules of Civil Procedure addresses motions to dismiss. Specifically, Rule 12(b) covers, *inter alia*, motions to dismiss for lack of subject-matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1-2, 6). Of these grounds, failure to state a claim upon which relief can be granted is relevant to this matter (Rule 12(b)(6)).

Supreme Court precedent states that, to survive a 12(b)(6) motion, a complaint must contain enough factual matter so as to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, the ARB specifically rejected this standard, concluding that it "should not be applied to SOX whistleblower claims." *Sylvester v. Parexel Int'l LLC*, No. 07-123, 2011 WL 2165864 at *10 (ARB May 25, 2011).

The ARB, instead, holds complaints to the "fair notice standard." *Evans v. United States Envtl. Prot. Agency*, No. 08-059, 2012 WL 3164358 at *6 (ARB July 31, 2012) ("fair notice is the proper legal standard for any complaint filed by the complainant or required by the ALJ in administrative whistleblower proceedings before the DOL.") The fair notice standard recognizes that "once a whistleblower case goes to the OALJ for an evidentiary hearing before an ALJ, just as in federal court, an opposing party has a right to 'fair notice' of the charges against it." *Id.* at 2012 WL 3164358 at *6. Accordingly, should the issue of fair notice be raised, an adjudicator must determine whether the complaint gives "fair notice of the protected activity and adverse action." *Id.* (internal quotation marks omitted). This standard is equivalent to the standard of review for claims in the federal system prior to *Twombly* and *Iqbal*. *Id.*

To survive a motion to dismiss under the fair notice standard, a complaint must contain: "(1) some facts about the protected activity and alleging that the facts relate to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) an assertion of causation[,] and (4) a description of the relief that is sought." *Evans*, 2012 WL 3164358 at *7. Should a complaint forwarded by OSHA "fail[] to provide sufficient factual allegations to give the respondent fair notice of the nature of the complaint, the ALJ is obligated to permit the complainant an opportunity to provide those sufficient facts either in writing or orally prior to ruling on the motion to dismiss the complaint."[27] *Id.*

A motion to dismiss is a facial challenge, focusing "*solely* on the allegations in the complaint, its amendments, and the legal arguments the parties raised – not whether evidence

[26] "The Federal Rules of Civil Procedure . . . apply in any situation not provided for or controlled by [the 29 C.F.R. Part 18] rules, or a governing statute, regulation, or executive order." 29 C.F.R. § 18.10(a).

[27] This obligation arises from the lack of regulatory requirements governing the complaint forwarded from OSHA to the OALJ, which need not include any "additional, supplementary, information collected during the administrative investigation." *Evans*, 2012 WL 3164358 at *5. Accordingly, the file forwarded to the OALJ "may not necessarily contain the full articulation of the complainant's claim [and c]onsequently an ALJ should not act on a Rule 12 facial challenge until [the complaint] is clear." *Id.*

exists to support such allegations." *Id.* at *6 (*citing Neuer v. Bessellieu*, No. 07-036, ALJ No. 2006-SOX-00132, slip op. at 4 (ARB Aug. 31, 2009)). In fact, the consideration of evidence marks the material difference between a motion to dismiss a complaint based on a "facial challenge at the initial stages of litigation and a motion for summary decision." *See id.*; *compare also* 29 C.F.R. § 18.70(c) *with* 29 C.F.R. § 18.72(a, c).

B. Respondent's Assertions

The Motions to Dismiss in this matter raise similar arguments. In their motion, Respondents Employer and Cannon argued, in relevant part:

> Respondents now move, pursuant to 29 C.F.R. § 18.70(c), for dismissal of the case for failure to state a claim. Jordan has not pleaded a *prima facie* case: specifically, he has not pleaded an adverse employment action, and he has not pleaded that he was an employee entitled to whistleblower protection at the time of the events of which he complains. . . .
>
> . . .
>
> Jordan's fraud allegation and retaliation claims relate to factual and legal positions DI has taken in its defense in the *Maria Jordan* matter. Jordan contends that DI, Cannon, Branciforte, and Balsam violated SOX because, after he asserted that the respondents in the DBA case were making false statements in their submissions to ALJ Merck, the Respondents said negative things about him in subsequent legal filings. SOX does not protect Jordan against legal documents filed in the DOL Office of Administrative Law Judges when he is functioning as the lawyer for his wife. *Jordan v. Sprint Nextel Corp.*, 3 F. Supp. 3d 917, 931-932 (D. Kan. 2014) (holding that statements made by corporate counsel to the SEC about Jordan could not form the basis of a SOX complaint).
>
> . . .
>
> DI recognizes that SOX, like most federal retaliation statutes, protects an employee post-termination of employment for protected acts that occurred during employment. *Tides v. The Boeing Co.*, 644 F.3d 809, 811 (9th Cir. 2011); *Sylvester v. Parexel In'l LLC*, ARB Case No. 07-123 (May 25, 2011). However, no case under SOX or any other anti-retaliation statute has found protection for an ex-employee who learns of something unrelated to his or her former employment, then complains about it in the course of litigation also arising after the employment relationship is over. Indeed, the decisions under SOX have held uniformly that SOX protects employees who engage in protected activities only while they are employed by the alleged retaliator. [Footnote 2: There are certain exceptions for blacklisting and other interference with subsequent employment that are not relevant here.] *See Jordan*, 3 F. Supp. 3d at 931-932; *Hunter v. Anheuser-Busch Cos., Inc.*, Case No. 2008-SOX-21 (April 29, 2008); *Pittman v.*

> *Siemens AG et al.*, Case No. 2007-SOX-15 (July 26, 2007); *Harvey v. Home Depot, Inc.*, Case No. 2004-SOX-36 (May 28, 2004).
>
> The activities Jordan alleges are protected in this case are his communications with DI's lawyers and ALJ Merck, during the course of his wife's DBA retaliation case, in which he contended that DI's lawyers and witnesses who disagreed with him were lying. The "adverse personnel action" of which he complains is DI's briefing in support of a motion to prevent his threatening communications with witnesses. These complaints are wholly unrelated to his former employment with DI or information he would have learned while employed by DI. Essentially, Jordan claims that any facts that DI presented in his wife's case that do not support his wife's allegations are fraudulent. Jordan was not covered by SOX at the time he complained about DI's litigation position because he was functioning as his wife's lawyer and not as an employee of DI. . . .
>
> The ALJ need not construe 18 U.S.C. § 1514A in order to dismiss this case, because Jordan has not suffered an adverse employment action. It is clear from his complaints[28] and supplemental submissions to the DOL that the "retaliation" Jordan claims was part of DI's opposition to his wife's lawsuit. . . .The filings opposing Jordan's wife's claim, including the efforts to curtail Jordan's improper contact with witnesses, are not adverse personnel actions. Without an adverse personnel action, Jordan cannot establish a *prima facie* case.
>
> . . .
>
> Jack Jordan was not an employee at any relevant time, and has suffered no cognizable adverse personnel action. DI Respondents respectfully request that, pursuant to 29 C.F.R. § 18.70 (2015), this Court dismiss Jack Jordan's Complaint with prejudice for failure to state a *prima facie* claim.

First Motion to Dismiss at 2-3, 8-11 (footnote reproduced in text in brackets; bracketed footnote added).

Respondents Branciforte and Balsam adopted similar reasoning. They stated their grounds for dismissal in the Second Motion to Dismiss as: "1) Mr. Branciforte and Mr. Balsam's actions are absolutely protected by the judicial proceedings privilege[;] 2) Mr. Jordan's Complaint fails to set forth a *prima facie* case of retaliation, pursuant to 18 U.S.C. § 1514A[;] 3) Mr. Jordan was not a covered employee at the time of the alleged retaliation[;] 4) Mr. Jordan did not suffer an adverse personnel action[; and] 5) Mr. Jordan has failed to sufficiently allege that he engaged in protected activity." Motion to Dismiss at 1. Respondents Branciforte and Balsam explained further:

[28] *See* Discussion Part I.C, *infra*, explaining that Complainant later disavowed the complaints on which Respondents relied.

Mr. Jordan's allegations against Mr. Branciforte and Mr. Balsam should be dismissed because Mr. Branciforte and Mr. Balsam's alleged conduct is absolutely protected by the judicial proceedings privilege. Mr. Jordan alleges that certain statements made during the course of the [DBA Case] amount to retaliation under SOX. *See* Mr. Jordan's July 24, 2016 Objections and Request for Hearing at 4 ("Respondents violated SOX when they communicated their false allegations to ALJ Merck and to me.") . . .

. . .

. . . Mr. Branciforte and Mr. Balsam's actions were protected by the judicial proceedings privilege. Therefore this Court should dismiss Mr. Jordan's claims against Branciforte and Balsam with prejudice.

. . .

Even if this Court determines that the judicial proceedings privilege somehow does not protect Mr. Branciforte and Mr. Balsam from Mr. Jordan's SOX allegations, Mr. Jordan's claims should be dismissed for failure to state a claim upon which relief can be granted. Mr. Jordan's allegations are insufficient to establish a *prima facie* case of retaliation and therefore fail to state a claim upon which relief can be granted. . . . Mr. Jordan cannot establish such a *prima facie* case because Mr. Jordan: (1) did not engage in a protected activity; (2) was not an employee of a covered entity (nor an applicant for employment) at the time of the alleged retaliation; and, (3) did not suffer an adverse employment action.

Mr. Jordan has failed to allege that he engaged in a protected activity. Mr. Jordan alleges that he "reported to DI multiple instances of fraud" and "*everything* Branciforte and Balsam do is part of a determined, prolonged effort to commit fraud and to use DOL proceedings to do it." Mr. Jordan's July 24, 2016 Objections and Request for Hearing at 4. "Branciforte and Balsam could not perpetrate or perpetuate their fraud without securing the assistance and acquiescence of ALJ Merck." *Id.* at 4-5. Such allegations are insufficient to establish that Mr. Jordan engaged in a protected activity. . . .

Even if Mr. Jordan subjectively believed that Mr. Branciforte and Mr. Balsam's conduct in the [DBA Case] constituted a violation of one of the laws listed in § 1514A, such a belief is not objectively reasonable. . . . [N]o reasonable factfinder could conclude that Mr. Branciforte and Mr. Balsam's legal filings in the [DBA Case], as part of their clients' defense of the DBA proceeding, constituted fraud covered by § 1514A. It is also objectively unreasonable to conclude that ALJ Merck "assist[ed] and acquiesc[ed]" in any alleged fraud. . . . Thus Mr. Jordan cannot establish that he engaged in a protected activity and, therefore, cannot make the required *prima facie* showing.

> Mr. Jordan was also not an employee of a covered entity at the time of the alleged retaliation and [he] did not suffer an adverse employment action. Mr. Jordan was previously employed by Respondent DI, but Mr. Jordan's employment with DI ended nearly two (2) years before the alleged wrongful conduct, and Mr. Jordan's allegations do not relate to his status as a former employee of DI. [Footnote 1: Even if this Court were to determine that Mr. Jordan was an employee of DI for purposes of SOX, Mr. Jordan was never an employee of either Mr. Branciforte or Mr. Balsam]. Mr. Jordan further contends that he suffered an adverse action as a result of briefing that occurred in the [DBA Case]. Statements made in legal filings to ALJ Merck and ALJ Merck's rulings in the [DBA Case] do not constitute an adverse employment action. *See e.g. Jordan v. Sprint Nextel Corp.*, 3 F. Supp. 3d 917, 931 (D. Kan. 2014) ("There are no factual allegations that Defendants' communications with the SEC interfered with Plaintiff's actual or potential employment of the terms and conditions of employment.") Accordingly, Mr. Jordan's retaliation claim should be dismissed, with prejudice.
>
> . . .
>
> Mr. Jordan's allegations against Mr. Branciforte and Mr. Balsam should be dismissed for failure to state a claim upon which relief can be granted.

Second Motion to Dismiss Memo at 3-6.

C. Information in the Record Regarding Complainant's Complaint

No complaint, statement of complaint, or amended complaint has been filed in this matter. There is, however, information in the record that refers to Complainant's complaint, and I reproduce it below.

1. Complaint Summaries from OSHA

Respondents provided, as exhibits with their Motions to Dismiss, copies of the documents they received from OSHA summarizing Complainant's complaint. *See* First Motion to Dismiss at Exhibit ("Ex.") 1 at 4 and Ex. 2 at 4. Respondents further stated at the March 20, 2017 conference call that they had not received any other documents "from the Department of Labor setting forth what Mr. Jordan's Complaint is." Tr. at 22. The complaints in these exhibits are identical to those forwarded to the OALJ by OSHA as attachments to the Secretary's findings. *See* Tr. at 22-23.

The summary provided by OSHA of the amended complaint reads:

> This case was initiated on January 8, 2016 by receipt of an allegation from Jack Jordan. Mr. Jordan alleges that Respondents discriminated against him by making false statements about him in a public forum in order to harm his prospects of future employment. Specifically, Complainant alleges that from on or about July 10, 2015 to December 2015, Respondents' representatives made

> false statements about him in a public forum; the statements were highly inflammatory and impugned his professional integrity, competence, and performance. Respondents' Representatives also allegedly accused Complainant of illegal conduct even though they knew their allegations were false. Complainant claims this is in violation of Section 806 of the Corporate criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley act of 2002 (SOX), 18 U.S.C. § 1514A, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, P.L. 111-203.

First Motion to Dismiss Ex. 2 at 4; *see also* Secretary's Findings Attachment 2. However, Complainant has "disavowed those documents entirely, as far as fulfilling any kind of requirement that [he's] required to fulfill." Tr. at 25.[29] Complainant further explained that the documents "do not in any way reflect what [he has] provided to [Respondents] by means of fair notice of the gravamen of [his] complaint." *Id.* at 26. Complainant has gone further:

> Judge Almanza: So you've just conceded that the documents I outlined, which were the Secretary's findings and the two paragraphs long complaints, didn't give [Respondents] fair notice. Did I mishear you?
>
> Mr. Jordan: I would not argue that they do.

Tr. at 30-31. Complainant has also admitted that he has not filed a complaint in this matter with the OALJ. He specifically stated that he "would file a complaint if [Judge Almanza] ordered [Respondents] to file an answer. [Judge Almanza] refuses to order them to file an answer[;] [Complainant] will not be subjected to a pleading requirement that [Judge Almanza] won't impose on the other parties." *Id.* at 28. As Complainant has disavowed the paragraph-long complaints that OSHA forwarded to the OALJ and that Respondents attached as exhibits to the Motions to Dismiss, I cannot rely on those documents when attempting to elucidate Complainant's complaint.

Complainant also asserted that he gave Respondents "notice of the facts and issues that are asserted . . . long ago." Tr. at 30. Complainant stated that "[l]ong before these proceedings even started, [he] provided them letters explaining the issues and subsequently [he] provided them letters and evidence explaining exactly what [he] was talking about." *Id.* Complainant argued that he "provided [Respondents] copious evidence and information far beyond what they submitted [with their Motions to Dismiss]." *Id.* at 25. Moreover, Complainant asserted that Respondents have "not even alleged that they don't have fair notice. They merely argued that those documents that they submitted to your honor don't give them fair notice. . . . [B]ut that still would not justify dismissing a case." *Id.*

2. Objections and Request for Hearing

In his objections to the Secretary's Findings, Complainant made various assertions of fact and law. Complainant stated in relevant part:

[29] Complainant clarified that "those documents" referred to the complaint summaries forwarded by OSHA and included by Respondents as exhibits. *See* Tr. at 26-27.

Respondents' false allegations have been profoundly harassing, intimidating and detrimental for more than a year. Respondents have rained down upon me a torrent of false allegations. Even more harassing and intimidating, Respondents caused ALJ Merck—who was the initial recipient of Respondents' false allegations—to take clearly unlawful actions to perpetuate those false statements. First, he repeated them (without establishing any basis in evidence or the law for doing so). Second, for more than a year he has regularly refrained from applying (or even complying with) the law, himself, in his interaction with me. *See, e.g.*, Section 5, below.

Respondents' false allegations were intended to have at least the foregoing consequences. Respondents have used ALJ Merck as the "cat's paw." Respondents' and ALJ Merck's actions have been profoundly distressing and intimidating, and they are potentially devastating professionally. They are far from trivial. I have worked day and night for the vast majority of the past year to counter the effects of Respondents' false allegations on ALJ Merck and others, but to very limited effect. An entire year's worth of time and effort is not a trivial loss.

[. . .]

Protected activity includes in any way "assist[ing] in a proceeding *filed* or *about to be filed* (with any knowledge of [DI]) *relating to an alleged violation* of section 1341 [mail fraud] or 133 [wire fraud]." 18 U.S.C. § 1514A(a)(2) (emphasis added).

Protected activity also includes "provid[ing] information [or] caus[ing] information to be provided . . . regarding *any conduct* which [I] reasonably believe[d] constitute[d] a violation of section 1341 [mail fraud] . . . when the information or assistance is provided to . . . a person working for the employer who has the authority to investigate, discover, or terminate misconduct." 18 U.S.C. § 1514A(a)(1)(C) (emphasis added).

I repeatedly provided information about mail fraud and wire fraud to people working for DI who had the authority to investigate, discover, or terminate misconduct. In addition, the DBA proceedings very much relate to alleged mail fraud and wire fraud in multiple respects. Thanks to blatantly false statements by Branciforte and Balsam, personally, as well as their decisions to write false sworn statements for Cannon (and another former DI employee) to sign, mail fraud and wire fraud are central to the DBA case. The fact that the Respondents violated SOX in connection with such proceedings directly brings them under SOX.

[. . .]

Respondents violated SOX when they communicated their false allegations to ALJ Merck and to me.

[. . .]

I reported to DI multiple instances of fraud, and I will refrain from elaborating much here. However, it might be appropriate to clarify that Banciforte's and Balsam's attempts to use DOL proceedings to defraud my client and me in the DBA case go far beyond what some people seem inclined to consider acceptable run-of-the-mill lying in litigation. DI's *entire* defense and *everything* Branciforte and Balsam do is part of a determined, prolonged effort to commit fraud and to use DOL proceedings to do it. Branciforte and Balsam could not perpetrate or perpetuate their fraud without securing the assistance and acquiescence of ALJ Merck, and they could not have done that without their false allegations.

On July 7, 2015, Branciforte and Balsam submitted to ALJ Merck a brief and two declarations that Branciforte and Balsam had written for Cannon and another former DI employee to sign. The brief and the declarations included statements that were outright false and other statements that were profoundly misleading regarding the most fundamental and important aspects of DI's purported defense in the DBA case. These facts were established by copious evidence that DI has produced. I amicably explained this to Branciforte and Balsam, and I asked them to correct their statements. Instead, Branciforte and Balsam reacted by immediately waging a campaign to vilify me. Consequently, I filed two briefs in July 2015 explaining to ALJ Merck (and Branciforte and Balsam) precisely how the evidence substantiated my assertions. Branciforte and Balsam refrained entirely from refuting any of my analysis. Instead, they focused on vilifying me. ALJ Merck simply refrained from addressing any evidence or analysis.

On October 15, 2015, Branciforte and Balsam filed another brief supported by the same two declarations. *Every* false statement (except for one) that had been included in the July 7 filing was repeated verbatim in the October 15 filing. I filed a motion for sanctions because it was impossible for Branciforte and Balsam to show that their statements were supported by the evidence. *See* 29 C.F.R. § 18.35(b)(3) (every time Branciforte and Balsam present a document to ALJ Merck, they are certifying "that to the best of [his] knowledge" after "a reasonable inquiry," each of his "factual contentions have evidentiary support"). *Again*, Branciforte and Balsam refrained entirely from refuting any of my analysis or submitting *any* evidence. Again, they focused, instead, on vilifying me. Again, ALJ Merck simply refrained from addressing any evidence or analysis.

On March 16, 2016, Branciforte and Balsam filed *another* brief supported by the same two declarations. *Every* false statement (except for one) that was included in the July 7 filing has been repeated verbatim in the March 1 filing. On about April 13, 2016, I again filed a motion for sanctions because it was impossible for Branciforte and Balsam to show that their statements were supported by the

> evidence. *Again*, Branciforte and Balsam refrained entirely from refuting any of my analysis or submitting *any* evidence. Again, they focused, instead, on vilifying me. [. . .]
>
> On April 4, 2016, Branciforte and Balsam filed *another* brief supported by the same two declarations. *Every* false statement (except for one) that was included in the July 7 filing had been repeated verbatim in the April 4 filing.
>
> There is nothing inadvertent or even occasional about the false statements at issue here. There also is no question about their falsity or their materiality to the DBA proceedings. The Respondents are trying to use DOL proceedings to commit fraud. The Respondents could not do what they are doing without Judge Merck. I submit that Judge Merck would not be doing what he is doing without Respondents.

Objections at 2-5 (internal brackets, emphasis, and ellipses in original; footnotes omitted; bracketed ellipses added).

3. Oppositions to the Motion to Dismiss

In Complainant's First Opposition, he stated in relevant part:

> Complainant's formal Complaint will plead the fraud at issue with particularity.
>
> The fraud at issue here is closely related to Complainant's former employment. The fraud involved Cox and Cannon—two members of DI management who were above Complainant when Complainant was employed by DI in Iraq. *See, e.g.*, LM Motion at 3 ("Cannon was a DI manager on the WPS Program in Iraq. At one point, [Cannon] supervised [Complainant].").
>
> One instance of wire fraud involves the successful efforts of Cox (and apparently Cannon) to use statements that Cox and Cannon knew to be false to cause the U.S. Department of State to pay DI more than $40,000 to which DI was not entitled. A second instance of mail fraud and wire fraud involved Cox's and Cannon's (and Branciforte's and Balsam's) attempts to defraud the DBA Complainant of more than $70,000. The two instances are closely related to the WPS Program on which DI employed Complainant, Cox and Cannon. *See* LM Motion at 3 (describing WPS Program). *See also* page 7, fn. 2, below.
>
> [. . .]
>
> For more than 18 months, DI, Cannon, Branciforte and Balsam have delayed the resolution of the DBA case by relying on numerous patently false statements, including vicious accusations against Complainant. During that time, Complainant has worked without compensation. In contrast, the Supreme Court recognized that "[m]any reasonable employees would find a month without a

> paycheck to be a serious hardship." *Burlington Northern & Santa Fe Ry. Co. v.White*, 548 U.S. 53, 75 (2006).
>
> The litigation tactics of Branciforte and Balsam (and by extension DI and Cannon) were deliberately designed to impose serious financial loss and considerable hardship. They have effectively entirely precluded Complainant from seeking work for which he would be compensated 18 months. That necessarily will continue for as long as required to resolve the DBA proceedings. Complainant respectfully submits that there is no basis in fact or law to contend that such actions cannot constitute adverse actions under SOX.

First Opposition at 3-4. Complainant then explained in a footnote:

> In fact, as LM knows and as Complainant will allege in his Complaint (1) he was employed by DI until about September 6, 2013 and he continued to interact with Cox and Cannon as a former DI employee into early 2014.
>
> As a result of a conversation between Cannon and Complainant in June 2013, Complainant learned on September 6, 2013 that Cannon was behind the plan to defraud the DBA Claimant. This is corroborated by DI's own evidence and DI's admissions in the DBA proceedings. As LM knows, Complainant acted as a DI employee in September 2013 to assist the DBA Claimant in attempting to address her concerns within DI on September 6, 2013. In the DBA proceedings, LM (on behalf of DI) admitted the following:
>
>> On September 6, 2013 [Maria] Jordan met with Cox in Cox's office in Falls Church, Virginia. . . . On September 6, 2013, after [Maria] Jordan's meeting with Cox, [Maria] Jordan sent an email to Joe Kale ("Kale"), who was then a DI Senior Vice President and DI's Chief Compliance Officer, asking to speak with him. Kale did not respond to [Maria] Jordan's email by sending any email or any other written document. Kale did not speak with [Maria] Jordan in response to her email.
>
> Instead, on about September 6, 2013, DI terminated the employment of both Complainant and the DBA Claimant.
>
> About a month later, DI shipped back to the U.S. the personal belongings of some 40 employees. Cannon was overseeing that activity, and he was personally involved in the handling of more than $3,000 worth of personal belongings of Complainant and the DBA Claimant. Somehow, under Canon's oversight, the personal belongings of Complainant and the DBA Claimant were left in Iraq while everyone else's belongings were shipped back to the U.S. Complainant learned of those facts in 2014 when, while acting as a former DI employee, he exchanged emails with Cannon regarding his personal belongings.

First Opposition at 7 fn. 2 (internal brackets, ellipsis, and emphasis in original). Complainant made similar statements in his Second Opposition:

> For more than 19 months, DI, Branciforte and Balsam have delayed the resolution of the DBA Case by relying on numerous patently false statements, including vicious accusations against Complainant. During that time, Complainant has worked without compensation. In contrast, the Supreme Court recognized that "[m]any reasonable employees would find a month without a paycheck to be a serious hardship." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006).
>
> The litigation tactics of Branciforte and Balsam were deliberately designed to impose serious financial loss and considerable hardship. They were designed to cause Complainant to forego all compensation for all work performed on the DBA Case for more than 19 months. They have effectively entirely precluded Complainant from seeking work for which he would be compensated for 19 months. That state of affairs necessarily will continue for as long as required to resolve the DBA Case and this case. Complainant respectfully submits there is no basis in fact or law to contend that such actions cannot constitute adverse actions under SOX.
>
> [. . .]
>
> [. . .] The evidence will establish that Branciforte and Balsam asserted many blatantly false contentions, and they tricked ALJ Merck into doing and saying things that he would not have done or said but for the statements of Branciforte and Balsam.
>
> [. . .]
>
> [. . .] "[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *United States v. Ratcliff*, 488 F.3d 639, 644-45 (5th Cir. 2007) quoting *McNally v. United States*, 483 U.S. 350, 359 (1987).
>
> The statements made by Branciforte and Balsam to cause the DBA Claimant's claim to be denied certainly were well within the foregoing parameters. Again and again, Branciforte and Balsam asserted factual contentions that they knew were blatantly false. They knew DI's own evidence proved their contentions were blatantly false. They knew DI's own evidence proved their contentions were false. It is not even possible for Branciforte and Balsam, VSSP or LM to create *any* doubt about this fact.

Second Opposition at 10, 17-19 (internal brackets and emphasis in original; footnotes omitted; bracketed ellipses added). Complainant also outlined, by footnote:

> In fact, as Complainant will allege in his Complaint (1) he was employed by DI until about September 6, 2013, (2) he was physically in DI's offices in Virginia (as a DI employee) in September 2013 and he continued to interact with Cox and Cannon as a former DI employee into early 2014. In about April 2014, Complainant learned that Cox and DI were attempting to defraud the U.S. State Department of at least about $40,000. Complainant reported that issue to DI's General Counsel shortly thereafter. In June 2015, Complainant learned that DI and Cox had accomplished their fraud in about May 2014.
>
> In addition, as a result of a conversation between Cannon and Complainant in June 2013, Complainant learned on September 6, 2013 that Cannon was behind the plan to defraud the DBA Claimant. This is corroborated by DI's own evidence and DI's admissions in the DBA proceedings. Complainant acted as a DI employee in September 2013 to assist the DBA Claimant in attempting to address her concerns within DI on September 6, 2013. In the DBA proceedings, LM (on behalf of DI) admitted the following:
>
>> On September 6, 2013 [Maria] Jordan met with Cox in Cox's office in Falls Church, Virginia. . . . On September 6, 2013, after [Maria] Jordan's meeting with Cox, [Maria] Jordan sent an email to Joe Kale ("Kale"), who was then a DI Senior Vice President and DI's Chief Compliance Officer, asking to speak with him. Kale did not respond to [Maria] Jordan's email by sending any email or any other written document. Kale did not speak with [Maria] Jordan in response to her email.
>
> Instead, on about September 6, 2013, DI terminated the employment of both Complainant and the DBA Claimant.
>
> About a month later, DI shipped back to the U.S. the personal belongings of some 40 employees. Cannon was overseeing that activity, and he was personally involved in the handling of more than $3,000 worth of personal belongings of Complainant and the DBA Claimant. Somehow, under Cannon's oversight, the personal belongings of Complainant and the DBA Claimant were left in Iraq while everyone else's belongings were shipped back to the U.S. Complainant learned of those facts in 2014 when, while acting as a former DI employee, he exchanged emails with Cannon regarding his personal belongings.

Second Opposition at 7 fn. 2 (internal brackets, ellipses, and emphasis in original). After mentioning these alleged frauds by footnote, Complainant provided more information in his response to Respondents' arguments on objective reasonableness:

> VSSP summarily contend that Complainant cannot establish the objective reasonableness of his belief that Branciforte's and Balsam's "legal filings" in the DBA Case "constituted fraud."

> . . .
>
> VSSP actually knows their contention (regarding fraud by Branciforte and Balsam) is false as a matter of fact. Complainant has repeatedly submitted to VSSP copious evidence conclusively proving that Branciforte and Balsam asserted many factual contentions that they knew were false for the purpose of defrauding the DBA Claimant. That evidence will be addressed specifically in Complainant's Complaint.
>
> . . .
>
> The statements made by Branciforte and Balsam to cause the DBA Claimant's claim to be denied certainly were well within the [parameters for fraud]. Again and again, Branciforte and Balsam asserted factual contentions they knew were blatantly false. They knew DI's own evidence proved their contentions false. It is not even possible for Branciforte and Balsam, VSSP or LM to create *any* doubt as to this fact.

Second Opposition at 18-19 (emphasis in original).

4. Other Assertions

Complainant also mentioned additional facts in his Production Motion that potentially may be related to his complaint. Complainant stated:

> Complainant will prove that Respondents committed mail fraud—especially with respect to facts establish by the Emails—and that contributed to their discrimination against Complainant. To cause this case to be dismissed, VSSP contended that "no reasonable [ALJ] could conclude that Mr. Branciforte and Mr. Balsam's legal filings [in the DBA Case] constituted fraud covered by § 1514A." VSSP Memo re: Motion to Dismiss (Dec. 16, 2016) at 5. SOX covers, *inter alia*, mail fraud and wire fraud. *See* 18 U.S.C. § 1514(a)(10 citing U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud).

Production Motion at 25 (internal brackets and emphasis in original) (footnote omitted).

D. Fair Notice

Respondents' Motions to Dismiss allege that Complainant has not stated a claim on which relief can be granted. *See, e.g.*, Second Motion to Dismiss at 4 ("Mr. Jordan's claims should be dismissed for failure to state a claim upon which relief can be granted"). In so doing, Respondents assert that Complainant's complaint fails to provide fair notice of the allegations made against them.

Complainant has yet to file a complaint in this matter, and he has refused to file a statement of his complaint. Complainant instead argues that the documents he provided to Respondents were sufficient to give them fair notice. Complainant further asserts that, under the APA, the burden of proof is on the Respondents to establish by substantial evidence that this matter should be dismissed. *See* Motion to Reconsider at 21.

1. The Burden of Proof

Under the fair notice standard, an opposing party "has a right" to receive fair notice of the charges against it. *Evans*, 2012 WL 3164358 at *6. The ARB does not explain how the burdens of proof lie in determining fair notice. The ARB merely states that "to survive a motion to dismiss, [a] complaint must be reviewed to determine whether it provides fair notice of [the] claim." *Id.* Moreover, an ALJ should "review a response to a motion to dismiss a complaint to determine whether the opportunity to amend was sought by the nonmoving party." *Id.* at 8.

However, the ARB does provide a clue to the burdens of fair notice. Specifically, the ARB in *Evans* acknowledges that fair notice "was the standard for many years in federal court (for rule 8 pleadings) before the Supreme Court decided *Twombly* and *Iqbal*." *Id.* Under this regime, the moving party bears the burden to show a failure of the claim. *See Finch v. Hercules, Inc.*, 809 F. Supp. 309, 310 (D. Del. 1992) (*citing Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980)).

2. Fair Notice Under the Pre-*Twombly* Standard

Before *Twombly*, the issue of fair notice turned on the ability of a party to prepare for trial. *See Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) ("[the] principal function of pleadings under the Federal Rules is to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial"); *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995) (*citing* 2A *Moore's Federal Practice*, ¶ 8.13, at 5-58 (2d ed. 1994)) ("fair notice is that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the proper form of trial.") A complainant is only required to provide "a short and plain statement of the claim that will give the defendant fair notice of what the . . . claim is and *the grounds upon which it rests*." *Kyle v. Morton High School*, 144 F.3d 448, 454-55 (7th Cir. 1998) (*quoting Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit*, 507 U.S. 163, 168 (1993)) (internal quotation marks omitted) (emphasis added).

When determining whether a complaint provides fair notice, an adjudicator must "accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir. 1994). Moreover, it is improper to dismiss a complaint on account of "mere technicalities[.]" *Kyle*, 144 F.3d at 457. Rather, dismissal is reserved for when a complainant has "omitted the gravamen of his complaint."

A complainant "need not plead facts; he can plead conclusions." *Kyle*, 144 F.3d at 455 (*citing Jackson v. Marion County*, 66 F.3d 151, 153-54 (7th Cir. 1995)). However, such

conclusions must provide the defendant fair notice of the claim, and provide sufficient information "to allow the [adjudicator] to understand the gravamen of the . . . complaint." *Doherty v. City of Chicago*, 75 F.3d 318, 326 (7th Cir. 1996). Where the complaint is "so confused, ambiguous, or otherwise unintelligible that its true substance, if any, is well disguised," dismissal for failure to state a Complaint is warranted. *Salahuddin*, 861 F.2d at 42.

3. Respondents Have Properly Filed a Motion to Dismiss

As the ARB recognized in *Evans*, the regulations are largely silent as to how much of the complaint must be forwarded from OSHA to the OALJ, or what form the complaint must take at the OSHA level. *Evans*, 2012 WL 3164358 at *5. Given this uncertainty, the ARB determined that the complainant in *Evans* had to be given the opportunity to amend the information provided from OSHA before an ALJ could dismiss a complaint. *Id.*

This case, however, presents a novel situation. Complainant was twice given the opportunity to amend (or provide a statement of) his complaint, yet he refused to do so each time. *See* May 15 Order at 29-33, 79; Order Granting Leave at 8, 9-10; *see also* Notice of Noncompliance; Tr. at 31 ("I don't intend to [file an amended complaint] and you don't need to give me extra time, Your Honor. Just please go ahead and issue your decision."); Cover Letter to the Motion to Release ("Please also note that Complainant will not be filing any complaint or "statement of complaint."). In between these opportunities, Complainant disavowed the complaint statements provided by OSHA. Tr. at 25. In essence, Complainant, although he was given the opportunity to provide more information regarding his complaint, instead made the subject of his complaint even more difficult to ascertain by disavowing the OSHA documents.

Given the foregoing, I find that Respondents have provided enough evidence to meet the initial burden required of them when filing a motion to dismiss. No document filed before the Motions to Dismiss, beyond the disavowed OSHA documents, provides any definite information regarding Complainant's complaint (and even the OSHA documents lack specificity).[30]

Accordingly, I must now determine whether Complainant has given Respondents fair notice.

4. Form of the Alleged Fair Notice

There remains an open question as to whether I can even consider information outside of a complaint-like document in determining whether Complainant has actually stated a cognizable claim. However, wide latitude is given to *pro se* litigants in federal pleading. *See Cook v. Whiteside*, 505 F.2d 32, 34 (5th Cir. 1974) ("[w]e are also cognizant that the pleadings of pro se litigants should not be held to standards as stringent as the formal pleadings of attorneys); *Hanes v. Kerner*, 404 U.S. 519, 521 (1972) (allegations by *pro se* complainants "[are held] to less stringent standards than formal pleadings drafted by lawyers."). Moreover, the ARB has noted that the means by which a complaint arrives in front of an ALJ after a decision is made by OSHA deviates greatly from the federal system. *See Evans*, 2012 WL 3164358 at *5. Although

[30] *See* Order Granting Leave at 3-8 (explaining why the complaint as it then stood failed to provide fair notice to Respondents).

I am aware that Complainant is a member of the bar, I find it most prudent to give him the wide latitude given to *pro se* litigants and thus do not limit my consideration of information only to a complaint-like document or statement of the complaint.

Complainant also argues that documents provided to Respondents, *which are not in the record*, can establish fair notice. Despite the latitude granted to a *pro se* party such as Complainant, I do not agree that such documents can provide fair notice of a complaint. As the pre *Twombly* and *Iqbal* precedent states, a complainant must provide sufficient information so as "to allow the [*adjudicator*] to understand the gravamen of the . . . complaint." *Doherty*, 75 F.3d at 326. I cannot consider documents outside of the record. Thus, such documents cannot serve to help me understand the gravamen of the complaint. Moreover, Complainant's unsupported assertions that he has provided notice to Respondents via documents not in the record are insufficient to establish that such documents were actually provided.[31]

Given the foregoing, in order to determine whether Complainant has managed to give the Respondents fair notice, I must look to the record to determine what, if any, information has been provided to Respondents regarding the complaint in this matter.

a. Facts About the Protected Activity

Evans requires that Complainant provide fair notice regarding his alleged protected activity. *Evans*, 2012 WL 3164358 at *7. Complainant does not identify what actions constituted his protected activity. Complainant lists a number of alleged frauds (see Discussion Part I.C, *supra*), but it is unclear which frauds, if any, are actually at issue in this case. For example, Complainant seems to assert in the Second Dismissal Opposition that the frauds at issue in this case are related to alleged fraud in Respondents' legal filings, while the First Dismissal Opposition states that the "fraud at issue" involves Complainant's former employment with Employer. *Compare* Second Dismissal Opposition at 18-19 *with* First Dismissal Opposition at 3-4. As such, it is unclear which (some, none, or all) of the alleged frauds listed by Complainant are related to his protected activity.

Even the forgiving *Evans* standard requires Complainant to provide *some* facts about the protected activity. *Evans*, 2012 WL 3164358 at *7; *Pik v. Credit Suisse AG*, No. 11-034, 2012 WL 1999860 (ARB May 31, 2012) ("Understandably, [when a complainant] appears *pro se* [she] is entitled to some leeway; however, even if done inartfully, a complainant must *at least* point to some facts that fairly identify the [protected] activity . . . .") (emphasis added). Whether an activity was actually protected or not is a keystone determination in a SOX case. Fair notice of a claim requires, at the very least, a statement of the alleged protected activity sufficiently definite enough to allow a respondent to prepare its defense. Such a statement must necessarily include a statement identifying what activity is actually at issue. Complainant's assertions are insufficient to meet this requirement.

"Fair notice is that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the

[31] I note that Complainant has repeatedly been sanctioned for making statements without evidentiary support. May 15 Order at 46-55; Second Order Sanctioning Complainant.

proper form of trial." *Simmons*, 49 F.3d at 86 (*citing* 2A *Moore's Federal Practice*, ¶ 8.13, at 5-58 (2d ed. 1994)). Complainant's failure to explain the alleged protected activity renders such actions impossible. Respondent lacks sufficient information to determine what actually constitutes the protected activity, or which (if any) of the alleged wrongs the protected activity concerns. Complainant may not merely allege a list of wrongdoings without identifying which of the wrongdoings are applicable to this matter.

Accordingly, Complainant has not provided "some facts about the protected activity" sufficient to meet fair notice under *Evans*. I simply am unable to determine what protected activity is at issue in this matter.

b. Facts About the Adverse Action

Even were I to find that Complainant had given fair notice of the protected activity, Complainant has failed to provide fair notice of the adverse action. Complainant states that "[t]he evidence will establish that Branciforte and Balsam asserted many blatantly false contentions, and they tricked ALJ Merck into doing and saying things that he would not have done or said but for the statements of Branciforte and Balsam." Second Dismissal Opposition at 2. But as I have explained, "Complainant has failed to identify . . . what impugning statements or filings were made by Respondents." Order Granting Leave at 7.

As I noted, over the five month period identified in the now disavowed OSHA documents, Complainant and Respondents filed over 100 documents in the DBA Case. *Id.* As those OSHA documents have been disavowed, Complainant's allegation of retaliation appears to refer to the entire DBA Case record. This amounts to nearly 300 filings and almost 50 orders.

Identifying more than 300 filings and orders and stating that false statements have been made in "many"[32] of them is not sufficient to provide fair notice. "[A party's] failure to allege anything more than that the [defending party] lied . . ., *without even stating what those lies are*, is simply not enough . . . ." *Lucien v. Preiner*, 967 F.2d 1166, 1168 (7th Cir. 1992) (emphasis added); *Albiero v. City of Kankakee*, 122 F.3d 417 (7th Cir. 1997) (merely asserting that defendants engaged in a conspiracy against plaintiff, without any information regarding how such conspiracy was at all related to the matter of law at issue, "flunked even the lax standards of notice pleading under the federal rules.") Fair notice does not require a party to search through thousands of pages of documents to isolate text that Complainant could believe to be false. Nor does fair notice require a party to put itself in Complainant's shoes and attempt to figure out which of the multitude of statements made in the DBA Case constituted an adverse action. Accordingly, Complainant has failed to give fair notice of the adverse action.

[32] The word "many" establishes that at least some of the filings in this matter do not have false statements. It is utterly unclear which filings are not at issue in this matter. If Complainant means, instead, that *all* filings in the DBA Case are retaliatory, he was twice given the opportunity to so state. Despite my instructions on this matter, Complainant has refused to identify which filings are at issue. Order Granting Leave at 7 fn. 5.

c. Assertion of General Causation

Complainant has not provided an assertion of general causation. Simply put, Complainant does not describe the protected activity with enough specificity to allow Respondents to causally connect that activity to the alleged adverse action. Complainant has failed to clarify, in any meaningful degree, the protected activity in which he allegedly engaged. He has merely provided a plethora of alleged frauds, spanning a significant period of time, without identifying which, if any, are related to his protected activity. *See* Discussion Part I.C, *supra*. Though Complainant states that he repeatedly provided information "about mail and wire fraud," Complainant does not explain if these actions are the protected activity at issue in this matter, or if the protected activity is related to any of the frauds he listed months later in his oppositions.

Moreover, Complainant has failed to identify the alleged adverse action with sufficient specificity. Thus, even were Complainant to establish a cause, Respondents have insufficient notice of the related effect.

Given this lack of information, I find that Complainant has not provided an assertion of causation that is sufficient to give fair notice to Respondents. It is unclear what protected activity Complainant engaged in, what action was taken by Respondents in retaliation, and how that protected activity influenced the actions of the Respondents.

5. Complainant's Filings Have Not Provided Fair Notice

Simply put, the case at this point is so nebulous and ambiguous that "its true substance, if any, is well disguised." *Salahuddin*, 861 F.2d at 42. I cannot see how the information provided by Complainant at this point provides fair notice to Respondents (and I, too, am unable to determine what Complainant's complaint is at this time). Complainant has not sufficiently described the protected activity at issue in this matter: he has pointed to over three hundred filings that allegedly contain false statements, without clarifying which statements are at issue; and he has failed to clarify, in any meaningful degree, the causal link between his alleged protected activity and the alleged adverse action. *See* Discussion Part I.D.4.a-c.

Accordingly, Complainant has failed to provide fair notice to the Respondents.

E. This Case Must Be Dismissed

Complainant has failed to provide fair notice to Respondents. Complainant has been given *two* opportunities to provide a statement of his complaint in this matter. *See* May 15 Order at 29-33, 79; Order Granting Leave at 8, 9-10. Despite these opportunities, Complainant has refused to offer any clarification of his complaint. *See* Notice of Noncompliance; Tr. at 31; Cover Letter to the Motion to Release. In fact, throughout these proceedings, Complainant has only made his complaint *more* nebulous.

I find that giving Complainant an additional opportunity to state his complaint would be a futile act. Despite being informed on at least two occasions that he had not provided fair notice,

and despite being given opportunities to state his complaint in this matter, Complainant has definitively stated he does not believe he needs to provide further information regarding his complaint. Moreover, Complainant has made it clear that he does not intend to file any statement of the complaint. Accordingly, it is time to rule on the Motions to Dismiss.

I find that Complainant has failed to provide fair notice to Respondents. A claim that fails to provide fair notice, even after an opportunity to amend the claim has been granted, should be dismissed. *See Evans* 2012 WL 3164358 at *7. Accordingly, the Motions to Dismiss are **GRANTED.**[33]

II. Complainant's Renewed Disqualification Motion Does Not Establish Grounds on Which to Disqualify Me

In response to my Order to Show Cause, Complainant filed his Renewed Disqualification Motion. In that motion, Complainant asserts that I have constantly chosen to misrepresent and distort the truth, and that my conduct proves that I cannot provide fair judgment of this matter. Renewed Disqualification Motion at 2. Complainant argues that my actions are part of an "illegal (even criminal) campaign to conceal the emails and the material facts they prove." *Id.* (internal bold and capitalization omitted). Complainant states:

> For more than a year, ALJ Almanza has willfully failed (and often expressly refused) to determine whether the Emails are privileged. *See* Mot., Section I.A., below. Instead, he has chosen to re-litigate and re-re-litigate ALJ Merck's misrepresentations about the Emails. Each time ALJ Almanza does so, the illegality of his misconduct becomes increasingly obvious.
>
> To cause ALJ Almanza to finally determine, himself, that the Emails are *not* privileged, Complainant correctly contended that (1) no "evidence (or legal authority) in the record even tends to establish that ALJ Merck actually determined that the Emails were privileged consistent with" "the APA, the OALJ Rules, and Fifth Circuit precedent" and that (2) ALJ Almanza misrepresented that ALJ Merck "definitively found" the Emails were privileged and "excluded" them from the record. Jan. 17 Order at 88.
>
> With his third Show Cause Order, ALJ Almanza contended that *no* evidence supported Complainant's contentions. ALJ Almanza's contentions were not even rational. Neither was his Show Cause Order. He essentially ordered Complainant to prove that ALJ Almanza asserted criminally false statements and used tricks and devices to conceal material facts to defraud Complainant of (at least) the Emails. *Cf.* 18 U.S.C. §§ 1001(a), 1341 and 1343.
>
> ALJ Almanza has insisted that ALJ Merck determined or found that the Emails were privileged because ALJ Merck merely summarily *stated* that he found or determined that the Emails were privileged. *See* Mot. Section I.F., below. ALJ

[33] As I am granting Respondents' Motions to Dismiss on account of Complainant's failure to provide fair notice, I find it unnecessary at this time to rule on their other arguments for dismissal.

Almanza knew that no *evidence* showed that ALJ Merck actually performed any *action* necessary to find *any* relevant fact, so he could not possibly have actually determined that the Emails were privileged.

Dozens of times, ALJ Almanza knowingly falsely insisted that ALJ Merck "excluded" the Emails from the record merely because ALJ Merck purportedly took *other* actions that clearly did not constitute a ruling excluding the Emails. *See* Reasons, Section II, below. *Cf.* Jan. 17 Order at 7 (discussing what "rulings" are). ALJ Almanza contended that unsupported (and false) contentions were "rulings" because they were merely *stated* by an ALJ. *See id.*[34]
ALJ Almanza also now contends that the Emails were "Placed under seal" merely because ALJ Merck arbitrarily asserted that conclusory contention. ALJ Almanza knew that no *evidence* showed that ALJ Merck performed *any* of the several *actions* that were necessary to actually place the Emails under seal. *See* Reasons II.F, below.

ALJ Almanza repeatedly (for a year) merely assumed that heavily disputed actions occurred so that he could help Respondents conceal evidence and prevail. By issuing his Show Cause Orders for the purpose of imposing sanctions, ALJ Almanza chose to substitute himself for respondents. In effect, he has chosen to become a litigant. So he must bear the burden of proving that each act occurred, and he must do so with evidence. *See* pages 18-21, below. There is no evidence in the record proving that *any* ALJ *ever* found or determined that the Emails were privileged or excluded them from any record or placed them under seal. That absence of evidence, alone, proves that all the Show Cause Orders have been illegal and irrational.

ALJ Almanza literally based all his Show Cause Orders on the truth of mere contentions. *See* Mot., Section I.F., below. But then (proving that he knew his actions were illegal) he repeatedly deceitfully denied relying on the veracity of those statements. *See* Mot., Section I.G., below. More than 14 months into this case, ALJ Almanza continues to refuse to determine that even one such statement is true. *See id.* For a full year, ALJ Almanza has done his best to avoid applying the law to the most probative evidence.

To support the foregoing caprice, ALJ Almanza arbitrarily dictated what was or was not evidence and he treated evidence in a manner that is impossible to reconcile with the relevant legal standards. He arbitrarily acknowledged evidence (or the absence thereof) only when he wanted to do so. The so-called evidence that he contended supported his Show Cause Orders was a complete fabrication of false "evidence." All three orders relied on such fabrications.

Much of ALJ Almanza's argument was so obviously false that he did not state it

[34] Complainant misconstrues the text of that Order. The order explains that ALJ Merck's statements were "conclusions made in issued orders. . . . ALJ Merck's orders served as rulings on whether or not material was privileged (he ordered the material to be excluded from the record due to privilege)." *See* January 17 Order at 7.

> directly or explicitly. To conceal the flaws and holes in his arguments, he repeatedly resorted to circumlocution and merely implying crucial contentions. ALJ Almanza has relied on outright false or misleading contentions that amount to criminal tricks and devices to conceal material facts. *Cf.* 18 U.S.C. § 1001(a)(1). ALJ Almanza repeatedly and deliberately violated his oath of office. *See* 5 U.S.C. § 3331. He routinely deliberately disregarded and undermined the Constitution, the APA, SOX, the SOX regulations, and the OALJ Rules.
>
> . . .
>
> ALJ Almanza knew that he could not *find* or *determine* that the Emails were privileged consistent with any applicable law.[35] *See* Mot., Section I.A. Consequently, ALJ Almanza has waged a multi-pronged campaign to help Respondents conceal the Emails.
>
> His first prong consists of blocking *all* Complainant's discovery—for more than a year. *See* Mot., Section I.P.
>
> The second prong consists of refusing to acknowledge that the Emails are not privileged. *See* Mot., Section I.A.[36] ALJ Almanza is responsible for ruling on issues in this case. Yet, for more than a year he has refused to rule on Complainant's brief, simple Privileges Motion. Instead, he has devoted an extreme quantity and type of orders (and compelled or caused copious briefing) to needlessly re-hash what ALJ Merck purportedly did (and actually failed to do) with the Emails in the DBA Case.
>
> As the third prong, ALJ Almanza has devoted a *full year* to attempting to justify sanctioning Complainant for refusing to acquiesce to Respondents' or ALJ Almanza's false contentions that ALJ Merck *found* or *determined* the emails to be privileged or that he *excluded* the Emails from the record in the DBA Case.

Renewed Disqualification Motion at 2-5 (emphasis in original; footnotes added). Complainant's motion alleges severe misconduct. Though most of the arguments he has raised have been addressed in prior orders, given the severity of his accusations, I address them each in turn.

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[35] I have never seen the emails at issue, and thus have no idea as to whether or not the Emails are privileged in this matter.

[36] As this case is currently at the motion to dismiss stage, factual allegations in Complainant's Complaint are taken as true. *See* Discussion Part I.D.2, *supra*. The privileged status of the factual contents of the Emails is irrelevant to the resolution of the motions to dismiss. Moreover, were the motions to dismiss granted, any discovery rulings would be irrelevant. Accordingly, I found that the administrative economy was best served by delaying any ruling on any discovery issues until the motions to dismiss had been resolved. *See* January 17 Order at 62; May 15 Order at 15; Official Notice Order at 7-8. Complainant, yet again, fails to explain why the factual contents of the Emails bears any relevance to the issue of whether his complaint provides fair notice.

A. Legal Standard for Disqualification

Under 29 C.F.R. § 18.16(b), parties may move to disqualify a judge. Such motions "must allege grounds for disqualification, and include any appropriate supporting affidavits, declarations, or other documents." 29 C.F.R. § 18.16(b). There is a strong presumption, for the purposes of disqualification, that ALJs are unbiased. *Partree v. Astrue*, 638 F.3d 860, 865 (8th Cir. 2011) (*quoting Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) ("[t]here is a 'presumption of honesty and integrity in those serving as adjudicators'"); *Perkins v. Astrue*, 648 F.3d 892, 902 (8th Cir. 2011) (*quoting Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001)) ("ALJs and other similar quasi-judicial administrative officers are presumed to be unbiased"); *see also Matthews v. Ametek, Inc.*, No. 11-036 2012 WL 1999681 at *3 (ARB May 31, 2012) (*quoting In the Matter of the Disqualification of Edward A. Slavin* ("*Matter of Slavin*"), No. 04-088, 2003 WL 21499867 at *18 (ARB June 30, 2003)).

"[J]udicial rulings alone *almost never* constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (*quoting Fed. Trade Comm'n v. Cement Institute*, 333 U.S. 683, 702 (1948)). Opinions formed on "the basis of facts introduced or events occurring in the course [of the proceeding] . . . , do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. In fact, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.*; *accord Wang v. Holder*, 569 F.3d 531, 540 (5th Cir. 2009).

The Supreme Court has explained that, to be disqualifying, "[t]he alleged bias and prejudice . . . must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (*citing Berger v. United States*, 255 U.S. 22, 31 (1921)); *see also First Nat'l Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1337 (6th Cir. 1987). "[B]ias generally cannot be shown without proof of an extra-judicial source of bias." *Matthews*, 2012 WL 1999681at *3 (internal citations omitted). "[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable . . . . [including] those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." *Withrow*, 421 U.S. at 47 (1975) (internal footnotes omitted).

Unlike Article III judges, ALJs are judged by the standards of the Administrative Procedure Act ("APA"). *See Greenberg v. Bd. of Governors of Fed. Reserve Sys.*, 968 F.2d 164, 166-67 (2d. Cir. 1992); *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir. 1998); *Bunnell v. Barnhardt*, 336 F.3d 1112, 1114 (9th Cir. 2004). Section 556(b) of the APA specifically states, in relevant part: "On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the

agency shall determine the matter as a part of the record and decision in the case." 5 U.S.C. § 556(b).[37]

Decisionmakers "violate the Due Process clause and must be disqualified . . . when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments." *Mississippi Comm'n on Envtl. Quality v. E.P.A.* [*"MCEQ"*], 790 F.3d 138, 183 (D.C. Cir. 2015) (*quoting Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 633 F.3d 476, 487 (D.C. Cir. 2011) (internal citations omitted)). Mere "unfounded allegations of collusion" or "unsupported allegations based on the ALJ's decision itself" are insufficient to support disqualification. *Partree*, 638 F.3d at 865; *Matter of Slavin*, 2003 WL 21499867 at *18. Should a party fail to provide "proof that the ALJ acted on bias stemming from an extrajudicial source . . . or that the proceedings were pervaded by bias demonstrating deep-seated antagonism that precludes the exercise of fair judgment by the ALJ," a motion to disqualify will be denied. *Matter of Slavin*, 2003 WL 21499867 at *18 (*citing Reddy v. Commodity Futures Trading Comm.*, 191 F.3d 109, 119-20 (2d Cir. 1999)).

It is important, further, to note that "[d]isqualification is never taken lightly. In the wrong hands, a disqualification motion is a procedural weapon to harass opponents and delay proceedings. If supported only by rumor, speculation, or innuendo, it is also a means to tarnish the reputation of a . . . judge." *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

B. Complainant's Argument that ALJ Merck's Rulings Are Mere Contentions

Much of Complainant's argument is based on his repeated assertion that ALJ Merck's Orders were mere contentions, not rulings. Complainant focuses specifically on two orders issued by ALJ Merck: (1) ALJ Merck's February 9, 2016 Order Denying Claimant's Motion to Compel Production of Emails Over Which Employer Has Asserted Attorney-Client Privilege and Order Denying Claimant's Motion for Sanctions ("ALJ Merck's Feb. 9 Order"); and (2) ALJ Merck's September 30, 2016 Order Denying Claimant's Counsel's Letter Request for an Order Releasing Privileged Documents and Second Order Apprising Claimant's Counsel of Appropriate Conduct in Administrative Proceedings ("ALJ Merck's Sept. 30 Order). Complainant argues:

> All ALJ Findings of fact, conclusions and rulings must be stated explicitly and explicitly supported by relevant and legal authorities. *See* page 20, below, discussing 5 U.S.C. § 557(c)(3). No finding of fact, conclusion, or ruling may be fabricated using *post hoc* rationalizations. *See* pages 17, below, citing *MVMA*. ALJ Almanza failed to provide evidence that he did not know the foregoing before he falsely contended that ALJ Merck (1) "definitively found" the Emails were privileged or (2) excluded the Emails from the record.
>
> Copious evidence in the record shows that ALJ Almanza knew that no evidence in the record established that ALJ Merck issued any order even purporting to exclude the Emails. ALJ Almanza's *post hoc* rationalizations, themselves, are

[37] To the extent that the APA requires an "affidavit of personal bias or other disqualification," 5 U.S.C. § 556(b), I find that Complainant has provided no such affidavit to support his claims.

evidence of his knowledge. Thus all evidence in the record (and the absence of contrary evidence from the record) supports Complainant's contention that ALJ Almanza knew that ALJ Merck had not excluded the Emails.

Copious evidence in the record shows that ALJ Almanza *knew* that no evidence in the record shows that ALJ Merck actually performed any action necessary to determine that the Emails were privileged or exclude the Emails. The evidence shows that ALJ Almanza knew that ALJ Merck failed to make any finding of fact based on any evidence that would permit him to find that DI proved even a single element of the privilege. *See* page 66, below.

It is a legal impossibility to determine that the Emails are privileged without finding that DI proved every relevant fact with evidence. ALJ Merck's so-called findings that the Emails were privileged were a fabrication. Regardless of whether it was asserted by ALJ Almanza, ALJ Merck, or Respondents, it was knowing and willful falsehood designed to conceal the Emails and the facts they prove.[38] *Cf.* 18 U.S.C. § 1001(a).

No evidence in the record proves that ALJ Merck actually applied the APA, the OALJ Rules, or any Fifth Circuit law to any evidence in the manner required to actually determine that the Emails were privileged. ALJ Almanza did not even attempt to show that there was any such evidence.[39] No evidence in the record would permit a determination by ALJ Almanza that the Emails are privileged. Copious evidence in the record supports Complainant's contentions that (1) ALJ Merck failed to actually find or determine that the Emails were privileged consistent with any applicable law and (2) ALJ Almanza *knew* ALJ Merck had failed to do so.

Purportedly to prove the absence of all the foregoing evidence, ALJ Almanza relied on falsehoods and trickery. He contended that ALJ Merck's statements (in his DBA case decisions) constitute evidence that prove the *truth* of Respondent's contentions (of ALJ Almanza's contentions). ALJ Almanza thereby implied—but he refrained from stating—that such statements *prove* that (1) the Emails actually contain the requests that ALJ Merck said they did and (2) ALJ Merck actually did what he said he did, *i.e.*, at least perform each of the acts necessary to determine that the Emails were privileged under Fifth Circuit law. Based on the foregoing implication, ALJ Almanza went even further to contend that *no* evidence existed that ALJ Merck *failed* to perform any act necessary to determine that the Emails

[38] I have not seen the Emails at issue, and, to the best of my knowledge, Complainant has never seen the contents of the Emails. Despite this, Complainant continues to make statements regarding the Emails' contents. These assertions are unsupported speculation by Complainant.

[39] *See* Order to Show Cause at 3-4 (*quoting* ALJ Merck's Feb. 9 and Sept. 30 Orders); May 15 Order at 46-51 (heavily citing and quoting ALJ Merck's Feb. 9 and Sept. 30 Orders); January 17 Order at 89-90 (*quoting* ALJ Merck's Feb. 9 and Sept. 30 Orders).

were privileged consistent with the law.[40]

For Respondents' benefit, ALJ Almanza *sua sponte* repeatedly presented argument about the nature of ALJ Merck's statements in the DBA Case. He argued that "ALJ Merck's rulings are specific judicial determinations of fact and law with adjudicative impact." June 30 Order at 4. He argued that such rulings were entitled to highly beneficial presumptions.[41] *See* May 15 Order at 6; Jan. 17 Order at 9, fn. 25. Twice, ALJ Almanza purported to provide a fulsome discussion of ALJ "rulings" under the caption "ALJ Merck's Rulings Are Not Contentions." June 30 Order at 2; Jan. 17 Order at 6.

. . .

Every decision must actually "show the ruling on each finding [or] conclusion." 5 U.S.C. § 557(c)(3) (emphasis added). Yet, more than 60 pages after his purported discussion of the issue, ALJ Almanza hid his reason for including the foregoing section in his orders. His reason was to set the stage for egregiously misrepresenting the law regarding the legal effect in this case of ALJ Merck's purported determination that the Emails were privileged: "The determination, regardless of its veracity, has been made. It *remains a ruling until changed by a body empowered to change it*. The observance of this basic concept does not amount to a violation of the APA or any other applicable legal regime." Jan. 17 Order at 69 (emphasis added). It certainly did. . . .

. . .

ALJ Almanza is the Associate Chief ALJ for LHWCA cases. The LHWCA is the statute under which ALJ Merck's decisions were issued. The LHWCA directly established that nothing ALJ Merck has done is "final" or "effective," even in the DBA Case. 33 U.S.C. § 921(a).[42] . . .

. . .

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[40] I am unaware of any text in any order I have issued that states whether or not ALJ Merck's privilege ruling was correct. Rather, I have routinely explained that the veracity of ALJ Merck's ruling is irrelevant. *See, e.g.*, January 17 Order at 59; May 15 Order at 17-18 (explaining this issue in great detail); Official Notice at 11, 13; Order Denying Release at 16, 23-24. Moreover, I have repeatedly explained to Complainant that I have not made a determination regarding the veracity of ALJ Merck's Orders. *See* January 17 Order at 27 ("I have never determined the veracity of ALJ Merck's rulings in this matter"); Order Denying Release (explaining throughout that I have never taken notice of the veracity of ALJ Merck's rulings, whether implicitly or explicitly, and citing to Complainant's own admissions that I have never explicitly taken such notice); May 15 Order (stating throughout that I have not taken notice of the veracity of ALJ Merck's rulings).

[41] Complainant cites to my analysis regarding *disqualification*, which correctly stated that there is a "strong presumption that ALJs are unbiased." May 15 Order at 6 (internal citations omitted). I have not stated, or applied, this presumption to ALJ Merck's rulings. I cannot disqualify ALJ Merck. If Complainant alleges that ALJ Merck should have been disqualified, his proper recourse is to raise that matter on appeal. *See* 20 C.F.R. § 702.392; 33 U.S.C. § 921(b). If Complainant is attempting to argue that ALJ Merck's rulings were not actually rulings, that matter is addressed below.

[42] Complainant conflates the finality of a ruling with its existence.

In addition, Complainant has repeatedly briefed (and ALJ Almanza necessarily knew) that no purported finding, conclusion or ruling by ALJ Merck can be presumed to have any legal effect that was not explicitly stated and explicitly supported by a rational explanation. *See* 5 U.S.C. § 557(c)(3). ALJ never explicitly contended otherwise. . . . he merely evasively asserted his argument, above, about rulings and presumptions, and then more than 60 pages later hid his point. He is not permitted to avoid directly addressing the issues that actually have been presented. *See id.*

. . .

ALJ Almanza knew that, at most, ALJ Merck's contentions could be considered rulings *only* in the DBA Case: "ALJ Merck's rulings are specific determinations of fact and law with adjudicative impact *in the case then before him*." Jan. 17 Order at 7 (emphasis added). Very clearly, for purposes of this case, ALJ Merck's contentions do not have the effect of judicial rulings, determinations or findings. ALJ Merck's orders are evidence only that he asserted certain contentions and issued certain rulings or orders on certain dates. That is all.

ALJ Almanza repeatedly acknowledged particular rulings by ALJ Merck. "ALJ Merck made his determination regarding the contents of the Emails by *actually reviewing* the Emails *in camera*." May 15 Order at 73 (emphasis added). "ALJ Merck made a ruling on the record, regarding the privileged status of Emails that he reviewed *in camera*." *Id.* ALJ Merck found that the Emails were privileged." June 30 Order at 4. "ALJ Merck's Orders served as rulings on whether or not material was privileged." June 30 Order at 3; Jan. 17 Order at 7. ALJ Almanza repeatedly admitted that he knew he was prohibited from relying on the veracity of ALJ Merck's contentions about either the content of the Emails or ALJ Merck's actions pertaining to the Emails. . . .

. . .

[Footnote 13: Such quotes illustrate one of ALJ Almanza's tricks/devices to help conceal material facts. He routinely distorts issues by using misleading terminology. To conceal the fact that ALJ Merck's contentions are false (and ALJ Almanza *knew* they are false)[43], he misinterpreted that the issue is whether ALJ Merck's contentions were "findings" or "rulings" and whether they were "correct." The issue was plainly and simply whether ALJ Merck's contentions were *reliable* and *probative evidence* that his or Respondent's contentions were true.[44] *See* Subsection G, below. Since they have not been determined to be

[43] *See* fn. 38, *supra* (noting Complainant has never seen the contents of the Emails, and thus it is unclear how he can know that certain statements by ALJ Merck regarding the contents of the Emails are false).

[44] Complainant continues to misunderstand the issue. Complainant is focused on an issue that is utterly outside the scope of the case at this moment. The issue at hand was whether the rulings *were made*, not whether the rulings were correct.

true, Respondents and ALJ Almanza may not rely on them as "evidentiary support" of the truth of Respondents' contentions[45] (or to sanction Complainant).]

. . .

Specifically regarding the content of the Emails, ALJ Almanza stated that an ALJ "cannot take official notice of the text of the Emails." May 15 Order at 23. An ALJ "cannot take official notice of the Emails." *Id.* at 53, fn. 81. "Accordingly, I find, yet again, that the contents of the Emails are not an appropriate subject for official notice. Jan. 17 Order at 84. ALJ Almanza also showed that he knew why this was true.

ALJ Almanza *knew* and acknowledged that determinations are actions, not mere statements. "A ruling 'is a term ordinarily used to signify the outcome of *applying* a legal test . . . [and t]he immediate effect is to *decide* an issue." June 30 Order at 3; Jan. 17 Order at 7 (emphasis added). A "ruling refers specifically to a judicial *determination*." *Id.* (both cites) (emphasis added).

ALJ Almanza knew that he could not officially notice that ALJ Merck actually *applied* any test, *decided* any issue, or *determined* anything. He knew that he could not officially notice that ALJ Merck even *read* the Emails. ALJ Almanza *knew* that he could not officially notice that ALJ Merck performed *any* act beyond causing certain words to be committed to paper *because* ALJ Merck's decisions did not constitute a source whose accuracy cannot be questioned.[46] ALJ Almanza knew that before ALJ Merck's contentions could be accepted as true, the accuracy of ALJ Merck's decisions was *required* to be questioned. *See* Subsection G, below.

Additional evidence that ALJ Almanza knew that ALJ Merck's statements could not constitute evidence that ALJ Merck's statements were true is the fact that ALJ Almanza repeatedly (1) contended that the truth of ALJ Merck's contentions was irrelevant and (2) refused to determine whether ALJ Merck's contentions were true. *See id.*

. . .

Dozens of times, ALJ Almanza has insisted that on February 9, 2016 ALJ Merck excluded the Emails from the record of the DBA Case. *See* Reasons, Section II, below. Yet many times ALJ Almanza also insisted that ALJ Merck determined

[45] Complainant applies the wrong standard, as is addressed in Discussion Part II.D, *infra*.
[46] Complainant's argument is unclear. If Complainant is arguing that ALJ Merck did not issue orders which were served to the parties in the DBA Case, Complainant should so state. The service sheets attached to ALJ Merck's orders show that they were served upon the parties on the date of issuance, however.

that the Emails contained an express request for legal advice.[47] Next, ALJ Almanza insisted, ALJ Merck determined that the Emails were privileged *because* they contained an express request for legal advice.[48]

ALJ Almanza knew, however, that evidence that is not in the record cannot support any decision or ruling—by ALJ Merck or ALJ Almanza. That is even more true of evidence Respondents and ALJ Merck actively concealed from the DBA Claimant and Complainant. *See* Subsection L, below. . . .

. . .

ALJ Almanza knew that the "*exclusive* record for decision" must consist of the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. § 556(e) (emphasis added). He knew that "[w]hen an agency decision rests on official notice of a material fact not appearing *in the evidence in the record*, a party is entitled, on timely request, to an opportunity to show the contrary. *Id.* (emphasis added). . . .

Judicial decisions *must not* be based on facts that are not in evidence. In fact, a judge *must* be disqualified when he has personal knowledge of disputed evidentiary facts concerning the case. *See* Mot., Section III, below. ALJ Merck was required to be disqualified because he obtained personal knowledge of heavily disputed facts and then concealed (and helped DI conceal) the evidence that would have disproved Respondents' and ALJ Merck's misrepresentations of such facts. ALJ Almanza *must* not rely on ALJ Merck's contentions—based on his personal knowledge of disputed facts—as "evidentiary support" for Respondents' contentions or for ALJ Almanza's orders or sanctions.

ALJ Almanza willfully misrepresented that three cursory contentions by ALJ Merck "conclusively dispelled" *any* doubt that ALJ Merck actually determined that the Emails were privileged: "If there were any shadow of a doubt that in ALJ Merck's February 9, 2016 Order he found [the Emails] covered by attorney-client privilege, ALJ Merck conclusively dispelled any such doubt in his September 30, 2106 Order." *Id.*[49]

Significantly, ALJ Merck had merely asserted the following three conclusory contentions. "To determine whether the two emails were privileged, I conducted

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[47] *See* ALJ Merck's Feb. 9 Order at 8 ("[i]n this case, Employer's management-level employees expressly sought legal advice from Employer's in-house counsel, and the statements themselves were confidential between the employees and the attorney at the time they were made.")

[48] Complainant misconstrues the text of my Orders. I have not determined *why* ALJ Merck made his privilege determination; I have only explained that ALJ Merck had determined the Emails were privileged. *See, e.g.*, Order to Show Cause at 3-4; May 15 Order at 12-13, 46-51; January 17 Order at 89-90.

[49] *See, e.g.*, Order to Show Cause at 3 (*quoting* ALJ Merck's Feb. 30 Order at 4 fn. 2) (noting that "ALJ Merck conclusively dispelled any such doubt in his [Sept. 30 Order]" in which ALJ Merck stated "to avoid Claimant's counsel's further confusion, I will reiterate here that, for the reasons stated in the [Feb. 9 Order], I find that [the Emails] are subject to attorney-client privilege.")

an *in camera* review of the emails." Feb. 14 Order at 4 quoting ALJ Merck (9/30/16) at 2. So ALJ Merck merely admitted that, by February 9, he had read the Emails. Then he contended that "for the reasons stated in that Order, I find that these two emails are subject to attorney-client privilege." *Id.* at 3 quoting ALJ Merck (9/30/16) at 4, fn. 2. He further contended that "[i]t is abundantly clear from the original February 9, 2016 Order that I did find [the Emails] subject to attorney client privilege." *Id.* Based on *nothing* more than the foregoing three contentions, ALJ Almanza contended that ALJ Merck "conclusively dispelled any [ ] doubt." *Id.* at 3. *Very* far from dispelling all doubt, ALJ Merck's September 30 contentions *created* copious doubt.

. . .

As a consequence of the foregoing (and because it was convenient to ALJ Almanza), ALJ Almanza merely *assumed* that ALJ Merck was referring to *all* the language in the particular paragraph that ALJ Almanza *selected* to justify his Show Cause Orders and sanctions. ALJ Almanza essentially *post hoc* rationalized and *assumed* that ALJ Merck *must* have been referring to *all* such language.[50] Nothing about ALJ Almanza's assuming or rationalizing was rational or legal. . . .

As significant as all the foregoing, even in his February 9 Order, ALJ Merck did *not* find or determine that DI *proved* any element of privilege. He never even *contended* that any evidence supported DI's contention that the Emails were privileged.[51] He did not even *contend* that he found or determined that the Emails were privileged. Not only is ALJ Almanza not permitted to *reverse* any of ALJ Merck's rulings, he also is not permitted to *fabricate* any rulings for ALJ Merck. Yet, fabricate is what ALJ Almanza did.[52]

Another trick/device ALJ Almanza routinely uses to mislead is failing to acknowledge the great difference between a fact and a conclusion. ALJ Almanza knew that ALJ Merck simply failed to find *any* specific fact regarding the Emails.[53] ALJ Merck merely asserted conclusory contentions, and ALJ Almanza, himself, insisted that such contentions were not necessarily accurate. *See* Page 43, above. Thus, ALJ Almanza knew that, at best, ALJ Merck asserted contentions. At worse, he asserted knowing falsehoods.

. . .

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[50] *See* ALJ Merck's Sept. 30 Order at 4 fn. 2 ("I will reiterate here that, *for the reasons stated in [the Feb. 9 Order]*, I find that these two emails are subject to attorney-client privileged.") (emphasis added).

[51] *See, e.g.*, Order to Show Cause at 3 (explaining that, after analyzing the text of ALJ Merck's Feb. 9 Order, the "only reasonable reading of ALJ Merck's language . . . [was] that the [E]mails were covered by attorney-client privilege.")

[52] *See* fn. 51, *supra*; *see also* fn. 49, *supra*.

[53] *See* ALJ Merck's Sept. 30 Order at 4 fn. 2 (stating that ALJ Merck did find the Emails privileged in the Feb. 9 Order and finding that the Emails were privileged).

> ALJ Almanza cannot establish that ALJ Merck actually performed *any* action (much less *all* actions) necessary to any determination merely by pointing to a conclusory contention by ALJ Merck that he "found" the Emails were privileged. ALJ Merck's vague contention that unidentified "employees" "expressly sought legal advice" in the Emails cannot establish that *either* Huber or Powers actually included any *particular* language in either email. Yet ALJ Almanza has very deliberately and deceitfully purported to use ALJ Merck's contentions in exactly such illegal manner. . . .
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> . . .
>
> Regarding sealing the Emails, ALJ Almanza knew that ALJ Merck's decisions did nothing more than merely "stating" that he "had placed the Emails under seal." Jan. 17 Order at 27. . . .
>
> . . .
>
> Subsequently, ALJ Almanza contended that ALJ Merck could make a "determination" that the Emails are privileged if ALJ Merck merely "resolves a *disagreement* by considering both sides' *contentions*, applying the relevant law, and issuing a ruling." Jan. 17 Order at 7 (emphasis added). . . .
>
> . . .
>
> Despite this indisputable fact, ALJ Almanza knowingly falsely contended that "ALJ Merck determined that the Emails were privileged consistent with his analysis of the applicable law." Jan. 17 Order at 20. "No other evidence in this matter [even] *suggests* that ALJ Merck did not make those rulings." Jan. 17 Order at 90 (emphasis added).[54] ALJ Almanza's contentions in this regard are deliberately deceitful. No evidence even suggests that ALJ Merck actually performed *any* action necessary to determine that the Emails were privileged.
>
> ALJ Almanza *knew* that ALJ Merck did not "definitively find" that the Emails were privileged. It is simple math. No evidence equals no findings of fact equals no determination of privilege. One hundred or even one billion times zero is still zero. No sophistry or trickery (not even completely reversing the burden of

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[54] The original quote reads:

> As I explained previously when sanctioning Complainant for making the same assertions regarding ALJ Merck's rulings, there is no support in the record for Complainant's contention that ALJ Merck did not determine that the Emails were privileged. May 15 Order at 46-54. The text of ALJ Merck's orders, which are in the record in this matter, *plainly states ALJ Merck's rulings*. No other evidence in this matter suggests that ALJ Merck did not make those rulings. The only items in the record that state that ALJ Merck did not make such determinations are Complainant's own unsupported assertions to the contrary (for which he was sanctioned).

January 17 Order at 90 (emphasis in original).

> proof) can change the math. ALJ Almanza *knew* that ALJ Merck did not "definitively find" that the Emails were privileged.
>
> ALJ Almanza outright (and knowingly) falsely contended that ALJ Merck "definitively found" the Emails were privileged. ALJ Almanza, himself, provided copious additional evidence that he knew his contention was false. *Every* refusal by ALJ Almanza to determine, himself, that the Emails are privileged is evidence. *Every* effort by ALJ Almanza to block or delay Complainant's discovery (and access to the Emails) is evidence. ALJ Almanza cannot rationally or honestly conclude *no* evidence supports Complainant's contention.
> ALJ Almanza's arrogant defiance of the law is evidence that he *knew* that ALJ Merck did not "definitively find" that the Emails were privileged. *See Dryer*, above.
>
> After all the foregoing, ALJ Almanza *sua sponte* insists that ALJ Merck excluded the Emails from the record without even saying he did so. Dozens of times, ALJ Almanza knowingly falsely contended that ALJ Merck "excluded" the Emails from the record in the DBA Case. Overwhelming evidence shows that ALJ Almanza knew his contentions were false.
>
> . . .
>
> The APA provided copious evidence of the steps that ALJ Almanza *knew* were required before a statement by ALJ Merck could constitute a ruling. A ruling must be explicit: decisions must actually "show the ruling on each finding, conclusion, or exception." 5 U.S.C. § 557(c)(3). A ruling must be supported by an explicit rational explanation. Every decision must "include a statement" not only of the "findings and conclusions," but also of "the reasons or basis therefor, on all the material issues of fact, law, or discretion." *Id*. Findings of fact must be supported by evidence that is relevant (reliable and probative) and already in the record. *See* Mot., Sections I.C and H, above.
>
> . . .
>
> The evidence shows that ALJ Almanza knew that ALJ Merck did not issue any protective order. ALJ Almanza created additional evidence that he knew that ALJ Merck did *not* apply any legal test necessary to exclude the Emails. Many times, ALJ Almanza insisted that he did not, could not and would not apply any legal test to any of ALJ Merck's contentions or actions. *See* Mot., Section I.G. Such "defiance" is evidence of fabrication. *Dyer*, above.
>
> When an intelligent competent judge (like ALJ Almanza) refuses to apply the law to the evidence, that is evidence that he knows his contentions are false.

Renewed Disqualification Motion at 5-7, 38-42, 42 fn. 13, 43-45, 55-57, 59-66, 109-111, 113-115 (brackets and emphasis in original; footnote 13 repeated in text in brackets; bracketed

footnotes added). Complainant's arguments, which have been addressed repeatedly prior to this Order, remain unpersuasive.

Complainant refers to ALJ Merck's rulings as contentions. I have explained in detail that ALJ Merck's orders served as "rulings." *See, e.g.*, January 17 Order at 6-7; Order Denying Release at 2-4. A ruling is "[t]he outcome of a court's decision either on some point of law or on the case as a whole." *See* BLACK'S LAW DICTIONARY, *Ruling* (10th ed. 2014). A ruling "is a term ordinarily used to signify the outcome of applying a legal test when that outcome is of relatively narrow impact. The immediate effect is to decide an issue in a single case." *Id.* (*citing* ROBERT E. KEETON, JUDGING 67-68 (1990)).

A contention is "[a] strong opinion that someone expresses; esp., a legal or factual position openly stated by counsel . . . [or a]rgument or disagreement between people; controversy, strife, or dispute . . . ." BLACK'S LAW DICTIONARY, *Contention* (10th ed. (2014)). An adjudicator typically resolves a disagreement by considering both sides' contentions, applying the relevant law, and issuing a ruling. Thus unlike a contention, a ruling refers specifically to a judicial determination on an issue, not mere strong opinion.

In this matter, ALJ Merck issued two orders specifically regarding the privileged status of the Emails. *See* ALJ Merck's Feb. 9 Order; ALJ Merck's Sept. 30 Order. In his Feb. 9 Order, after reviewing the Emails *in camera*, ALJ Merck concluded:

> In this case, Employer's management-level employees expressly sought legal advice from Employer's in-house counsel, and the statements themselves were confidential between the employees and the attorney at the time they were made. . . . These emails were received by the in-house counsel and a select group of upper-level employees, and there has been no evidence submitted to this Court that these communications were not kept confidential.

ALJ Merck's February 9 Order at 8 (citations and footnote omitted). Based on this determination, ALJ Merck denied Complainant's motion seeking production of the Emails in the DBA Case. *Id.* at 10 (denying "Complainant's Motion to Compel production of the emails over which the Employer/Carrier's counsel has asserted attorney-client privilege.") ALJ Merck clarified this ruling in his Sept. 30 Order. ALJ Merck explained:

> In [the February 9 Order], I[, ALJ Merck,] found that two emails that Claimant sought from Employer were protected by attorney-client privilege, and denied Claimant's request to compel the emails. To determine whether the two emails were privileged, I conducted an *in camera* review of the emails. Because I determined the emails were privileged, I placed them under seal to be opened only by the appropriate appellate authority.
>
> . . .
>
> Claimant appears to doubt whether the Court found that these emails were subject to attorney client privilege. It is abundantly clear from the original February 9,

> 2016 order that I did find these emails subject to attorney client privilege. *See Order Denying Claimant's Motion to Compel Production of Emails Over Which Employer has Asserted Attorney-Client Privilege and Order Denying Motion for Sanctions* (Feb. 9, 2016). However, to avoid Claimant's counsel's further confusion, I will reiterate here that, for the reasons stated in that Order, I find that these two emails are subject to attorney-client privilege.

ALJ Merck's September 30 Order at 2, 4 fn. 2.

It is plain from the text of ALJ Merck's orders that he issued rulings regarding the privileged status of the Emails. ALJ Merck's determinations could be wrong or right; they could have relied on flawed analysis or correct analysis. Either way, by issuing determinations regarding the contested privileged status of the Emails, ALJ Merck issued rulings.

Despite ALJ Merck's plain language, Complainant continues to argue that ALJ Merck could not have made a privilege determination. Complainant fails to understand the difference between stating that an event did not happen and stating that an event that did happen was wrong. I provided, to no avail, multiple hypotheticals in an attempt to explain this issue to Complainant. *See, e.g.*, January 17 Order at 68-69 (listing some prior hypotheticals).

Simply put, whether an ALJ's analysis is correct or incorrect is irrelevant to determining whether an ALJ made a ruling. No matter how vehement the dispute, a ruling is not rendered non-existent simply due to a party's disagreement. Rather, only an appellate authority may vacate an adjudicator's ruling. For the purposes of ALJ Merck's rulings, the initial appellate authority lies with the Benefits Review Board ("BRB"). *See* 20 C.F.R. §§ 702.391, 702.392; 33 U.S.C. § 921(b). As far as I am aware, the BRB has not overturned or vacated ALJ Merck's privilege determination as of the time of this Order's issuance. Thus, even if Complainant was correct and ALJ Merck's ruling did not abide by the strictures of the APA, LHWCA, and other laws, the ruling still exists until it is overturned or vacated.

I have informed Complainant that I do not have the authority to overturn, vacate, modify, or determine the veracity of another ALJ's ruling. *See, e.g.*, January 17 Order at 46; Order Denying Release at 16; May 15 Order at 17; Official Notice Order at 11. Complainant's assertion that ALJ Merck could not have made certain findings, because he did not follow the proper legal standards, does not modify my authority. Nor do such assertions support Complainant's arguments.[55] A ruling is deprived of its status when a body with the power to overturn or vacate it does so. Complainant's allegations of error, be they right or wrong, do not change ALJ Merck's ruling.

Complainant continues to disagree with this basic tenet. Complainant's disagreement, however, does not serve as grounds to disqualify me. My actions have not demonstrated that I have an "unalterably closed mind" or that I am "unwilling or unable to rationally consider arguments." *MCEQ*, 790 F.3d at 183 (citation omitted). Nor have my actions demonstrated a

[55] On the contrary, by acknowledging that ALJ Merck's determination was incorrect, Complainant has admitted that ALJ Merck made a ruling on the matter. Simply put, Complainant's argument admits that ALJ Merck made a ruling that Complainant believes was illegal.

"deep-seated antagonism that precludes the exercise of fair judgment." *Matter of Slavin*, 2003 WL 21499867 at *18 (citation omitted). An adjudicator does not demonstrate an unalterably closed mind by rejecting legal argument that had already been addressed and rejected in prior orders.

Accordingly, I reiterate that ALJ Merck's determinations regarding the privileged status of the Emails are *rulings*, not contentions. Complainant's arguments to the contrary are without merit, and they are, again, rejected. Complainant's assertions that I have engaged in wrongdoing that warrants disqualification by finding that ALJ Merck's privilege determinations are rulings are similarly without merit.

C. Complainant's Allegations of Specific Misconduct

Complainant specifically alleges numerous instances of severe misconduct. Many of Complainant's assertions overlap, and he repeats arguments throughout his Renewed Disqualification Motion. I have attempted to organize Complainant's grounds for disqualification into the following list of allegations. Complainant alleges that: 1) I abused my discretion regarding discovery; 2) I wrongfully found evidentiary support for Respondents; 3) I wrongfully stated that ALJ Merck excluded the Emails from the record; 4) I have wrongfully handled the Motions to Dismiss; 5) I am acting as a "superadvocate" for Respondents; 6) I am partial; 7) I engage in deceitful tricks; and 8) I wrongfully published material. I address each allegation in turn.

1. Allegation that I Have Abused My Discretion Regarding Discovery

Complainant argues that I, by tolling discovery in this matter, have abused my discretion and position. Complainant states:

> It is a fact that with very little effort (*i.e.*, great economy), ALJ Almanza could have much better served the interests of justice by ruling on the Privilege Motion a year ago. He could very easily (and he must) determine that the Emails are not privileged. He already has. He knows that he cannot deny the Privilege Motion. That is *why* he refuses to rule on it. DI was required to present evidence proving that it satisfied *each* element of its assertion of the privilege. But DI fialed to present *any* evidence proving even *one* element.
>
> To deliberately undermine Justice and economy, ALJ Almanza has used an obvious criminal trick. He disregarded the actual issues and the legal standards. Instead, he distorted the issue by pretending that Complainant must prove that Respondents' contentions are false. He deliberately and deceitfully reversed the burden of proof: "to the extent Complainant argues that Respondents falsely contended that the Emails were privileged, I reject that argument. Complainant provides no evidence to support this assertion." Jan. 17 Order at 31. . . .
>
> . . .

It is common knowledge and common sense that in discrimination cases, employers typically possess virtually all the most probative evidence. Consequently, ALJ Almanza *must* apply all "rules *or* principles" that "assure production of the most probative evidence." 29 C.F.R. § 1980.107(d) (emphasis added).[56]

Initially, ALJ Almanza tried to thwart this rule by grossly misrepresenting its text and meaning. He completely omitted the foregoing crucial command when he purported to quote this rule and state its meaning. . . .

Recently, ALJ Almanza tried to thwart this rule by misrepresenting that he "may" choose *not* to "rely on the OALJ rules," *i.e.* the ones that actually do state "the rules or principles designed to assure production of the most probative evidence." *Id.* at 42, fn. 67. ALJ Almanza repeatedly contended that the language quoted above "means that I *may* rely on the rules of evidence for the principles and insight they shed on the law, but I *cannot* apply them rote." *Id.* at 83 (emphasis added).

. . .

For a full year, ALJ Almanza expressly refused to apply (or he refrained from applying) any rule or principle that would cause DI to produce the Emails. . . . Such rules would have (a full year ago) started to ensure the production of the most probative evidence. *See, e.g.*, Jan. 17 Order at 10, fn. 33; at 25, fn. 55; at 26; and at 46 (euphemistically contending that he "tolled" discovery). He is illegally helping DI illegally conceal *all* evidence *because* the Emails are among the most highly relevant and probative evidence in this case. All the while he is doing so, he is expressly and repeatedly relying on ALJ Merck's contentions about what Huber or Powers requested in the Emails. . . .

A statement made by ALJ Merck, Huber or Powers cannot become evidence until it is offered into evidence. . . .

. . .

ALJ Almanza and Respondents have used two pretexts to block *all* Complainant's[57] discovery—for more than a year. ALJ Almanza euphemistically refers to his misconduct as "tolling" discovery. *See, e.g.*, Jan 17

[56] Complainant misstates the regulation. As I have previously noted, 29 C.F.R. § 1980.107(d) states: "[f]ormal rules of evidence will not apply, but the rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious." *See, e.g.*, May 15 Order at 21. I explained to Complainant that, accordingly, I may rely on the OALJ rules "for the insight they shed on the law and the principles they embod[y]," but I may not apply them rote. *Id.* at 21-22.

[57] Complainant misrepresents the situation. I delayed ruling on the parties' contested discovery plans until after the Motions to Dismiss were addressed. *See* Supplemental Prehearing Order § II. I have also tolled the deadline to make initial disclosures until such time as I resolve the disputes on the discovery plans. *Id.* § III. Complainant's insinuation that only *his* discovery has been delayed misrepresents the status of discovery in this matter.

> Order at 10, fn. 33; at 25, fn. 55; at 26; and at 46. However, his justifications for "tolling" discovery are complete and deliberate shams.
>
> . . .
>
> There is no reason to block Complainant's discovery merely because Respondents fail to sign the Discovery Plan. Rules of Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ.P. 1. Instead, ALJ Almanza is facilitating and encouraging patently dilatory tactics intended to conceal probative evidence, thwart justice and cause unnecessary delay and expense. ALJ Almanza must apply *all* "rules or principles" that "assure production of the most probative evidence." 29 C.F.R. § 1980.107(d).
>
> Complainant repeatedly filed motions asking ALJ Almanza to order DI to respond to discovery because there is no dispute over the Discovery Plan. ALJ Almanza denied all such motions even though he repeatedly acknowledged that he cannot identify—and Respondents have not identified—any dispute over the Discovery Plan. . . .

Renewed Disqualification Motion at 29-32, 79-82 (brackets and emphasis in original; bracketed footnotes added). Complainant's argument is without merit.

Complainant reiterates argument that was addressed in detail by my prior orders. The foundation of Complainant's argument is a misunderstanding of the plain language of the regulations. Complainant asserts, wrongly, that I illegally tolled discovery in this matter, and that I have failed to properly apply 29 C.F.R. § 18.201.

As I explained previously, I have tolled discovery in this case due to the parties' disputed discovery plans. Complainant argues, yet again, that there is no dispute over his discovery plan in this case. I have addressed this issue numerous times, most recently in the January 17 Order. *See* January 17 Order at 20-21, 32-37, 38-40. There has been no intervening change of the record since that Order. I advise Complainant to review Discussion Parts I.C.4, I.G and II of the January 17 Order, as they explain, in detail, that the record plainly establishes that Complainant's discovery plan is disputed by the parties.

The regulation at 29 C.F.R. § 18.50 states that when a judge has ordered the parties to meet and confer regarding discovery, "[t]he time to respond to any pending discovery requests is extended until the time *agreed* in the discovery plan, or that *the judge* sets in resolving disputes about the discovery plan[.]" 29 C.F.R. § 18.50(a)(1)(i) (emphasis added). Moreover, § 18.50(c) provides that "[a] party must make the initial disclosures required . . . *unless a different time is set by stipulation or a judge's order*, or a party objects during the conference that initial disclosures are not appropriate in the proceeding and states the objection in the proposed discovery plan." *Id.* § 18.50(c)(1)(i), 18.50(c)(1)(iv) (emphasis added).

Given the two outstanding Motions to Dismiss, I extended the time for discovery in this matter until after the Motions to Dismiss were resolved. Supplemental Prehearing Order § III. Because the factual statements in a complaint (or similar document) are presumed true when addressing a motion to dismiss, I determined that discovery was irrelevant to the resolution of Respondents' outstanding dismissal motions. I found that it was in the interest of administrative economy to delay discovery pending the resolutions of the Motions to Dismiss. My tolling of discovery was plainly warranted by the circumstances of the case and the regulations.

Complainant's assertion regarding 29 C.F.R. § 18.201 has also been addressed numerous times. Complainant's position, which overlooks the text of 29 C.F.R. 1980.107(d) and the rule against superfluities, has been addressed multiple times. *See* January 17 Order at 83; May 15 Order at 21-22, Official Notice Order at 9. As Complainant has provided no new argument on this matter, I advise him to review my prior orders on this subject.

Overall, Complainant's arguments for disqualification on this point are predicated on his disagreement with my interpretations of the regulations. Complainant's disagreement with my orders is not grounds for disqualification. Complainant has failed to establish that my decision shows "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. An adjudicator does not demonstrate deep-seated antagonism merely by adopting analysis that is contrary to the analysis of a party. I have not engaged in illegal conduct by disagreeing with Complainant.

2. Allegations that I Have Wrongfully Found Evidentiary Support for Respondents

Complainant asserts that I have wrongfully found that ALJ Merck's rulings served as evidentiary support for some of Respondent's filings. Complainant states:

> To help Respondents conceal the Emails, ALJ Almanza has used three Show Cause Orders, and twice he imposed sanctions. All such actions have been patently illegal. To attempt to make them appear legal, ALJ Almanza egregiously misrepresented what he may, must or must not consider "evidentiary support." ALJ Almanza's decisions are the epitome of decisionmaking that motivated Congress to enact the APA."
>
> [. . .]
>
> The words *evidentiary support* do not mean what ALJ Almanza contended or implied they meant. *Cf.* Subsection F, below. At least in agency proceedings, the APA, itself, establishes what those words mean. Every order must be "*supported* by and *in accordance* with the *reliable*, *probative*, and substantial evidence." 5 U.S.C. § 556(d) (emphasis added). *Only* reliable and probative evidence can constitute evidentiary support for any finding of fact. ALJs *must* exclude any evidence that is "irrelevant" or "immaterial." 5 U.S.C. § 556(d). "To be admissible, evidence must be relevant to this matter." Jan. 17 Order at 31. "Relevant evidence" is limited to evidence that actually has a "tendency to [prove

that a material fact is] more probable or less probable." *Wainscott v. Pavco Trucking, Inc.*, No. 05-089, ALJ Case No. 2004-STA-054, 2007 WL 3286332 at *8 (ARB Oct. 31, 2007) quoting 29 C.F.R. § 18.401.

Evidence that is not reliable or probative has no tendency to *prove* a fact. False evidence cannot prove that the Emails were privileged or that ALJ Merck determined that they were. Such evidence is irrelevant and it must be excluded. Moreover, it is a crime to fabricate evidence or provide false statements about any material fact in any agency proceeding. *See* 18 U.S.C. § 1001(a). It is a crime to use any trick or device to conceal a material fact. *See id.* It would be irrational to contend (as ALJ Almanza implies) that such criminal conduct may be used to fabricate evidence. ALJ Almanza *must* determine whether evidence is reliable or probative before he relies on it to establish the truth of a contention.[58]

One trick/device that ALJ Almanza routinely uses to conceal material facts is to falsely contend that he "cannot determine the veracity of ALJ Merck's findings." *See, e.g.*, Jan. 17 Order at 31. *See also id.* at 45, 46, 51, 67.[59] He was required to do so a *year* ago, but he admitted that he *still* has not done so: "I have not determined the veracity of the evidence on which Respondents rely" "i.e., ALJ Merck's ruling." *Id.* at 31, fn. 60. *See also id.* at 59.

Another trick/device that ALJ Almanza routinely uses to conceal material facts is disregarding the evidence that is actually in the record. ALJ Almanza routinely treats actual evidence as mere argument: "Complainant's *argument* that ALJ Merck could not have found the Emails privileged is simply irrelevant." Jan. 17 Order at 59 (emphasis added). *See also id.* at 46 and 69 quoting June 30 Order. He willfully disregards the fact that Complainant applied the law to the evidence to show that ALJ Merck's contentions were false.[60] ALJ Almanza was required to do the same before he relied on ALJ Merck's contentions of evidence of any fact.[61]

After an out-of-court statement is offered into evidence, it becomes hearsay.[62] The contentions by ALJ Merck that ALJ Merck actually performed certain acts or that Huber or Powers actually included certain requests in their Emails become

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[58] I have not relied on the veracity of ALJ Merck's orders for the purposes of sanctioning Complainant. *See* Discussion Part II.B, *supra*.

[59] *See* Discussion Part II.B, *supra* (explaining that I do not have the authority to determine the veracity of ALJ Merck's orders).

[60] Complainant wrongfully equates the veracity of ALJ Merck's ruling with the *existence* of ALJ Merck's ruling. *See* Discussion Part II.B, *supra*.

[61] Complainant alleges that I am relying on ALJ Merck's rulings to make substantive rulings regarding privilege. I have not done so; I have made no privilege rulings in this matter. *See, e.g.*, January 17 Order at 27-28 ("I have not taken notice of the veracity of ALJ Merck's orders); May 15 Order (stating throughout I have not made a determination of privilege in this matter); Order Denying Release at 24 (". . . by acknowledging that [ALJ Merck made rulings regarding privilege] . . . , I have not implicitly noticed those rulings' veracity.")

[62] ALJ Merck's order was admitted into the record via official notice. I have not taken official notice of the veracity of anything ALJ Merck stated in his orders. *See* Official Notice Order at 17. The orders were not offered to prove the truth of the matters asserted in the orders.

hearsay when Respondents offer them into evidence. [. . .]

To ascertain whether evidence is reliable and probative, Complainant is "entitled" use such "documentary evidence" and to "conduct such cross-examination as may be required for a *full* and *true* disclosure of the *facts*." 5 U.S.C. § 556(d) (emphasis added). [. . .]

[. . .]

ALJ Almanza also may not base any order on ALJ Merck's statements about any fact at issue in this case. ALJ Almanza may not "consult [*any*] person" on any "fact in issue," unless "all parties" have been given "notice and opportunity" to participate in such consultation.[63] 5 U.S.C. 554(d)(1). ALJ Almanza may not (in any way whatsoever) consult ALJ Merck regarding or rely on his contentions about any fact in dispute in this case, including whatever Huber and Powers said in their email. *See also* Mot. Section III, below.

For a year, ALJ Almanza has illegally assumed to be true (and actually relied on the truth of) the contentions by ALJ Merck about (1) what Huber and Powers *wrote* in the Emails or (2) what ALJ Merck *did* with the Emails. Neither Respondents nor ALJ Almanza may rely on any evidence regarding any disputed fact before Complainant has had (1) the opportunity for discovery to ascertain whether such evidence is reliable and probative and (2) the opportunity to present relevant facts and arguments to ALJ Almanza.

[. . .]

ALJ Almanza may not rely on ALJ Merck's out-of-court statements about Huber's and Powers' out-of-court statements as *evidence* that Huber and Powers actually *wrote* anything in the Emails. ALJ Almanza may not rely on ALJ Merck's out-of-court statements as *evidence* that ALJ Merck actually *did* anything with either the Powers email or Huber email. ALJ Merck's orders are nothing more than evidence[64] that ALJ Merck falsely contended that (1) Huber and Powers made certain statements in their emails and (2) ALJ Merck took certain actions.

[. . .]

Additional evidence that ALJ Almanza knew that ALJ Merck's statements could not constitute evidence that ALJ Merck's statements were true is the fact that ALJ Almanza *never* directly contended that they could. He always accomplished such

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[63] To the extent Complainant is arguing that even discussing this matter with another DOL employee is *ex parte* communication, I *again* reject Complainant's meritless argument. I refer Complainant to my January 17 Order explaining, in detail, why Complainant's argument is without merit. *See* January 17 Order at 50-51.

[64] ALJ Merck's orders are, in fact, rulings. *See* Discussion Part II.B, *supra*; *see also* January 17 Order at 6-7; Order Denying Release at 2-4.

result via circumlocution. First, ALJ Almanza [. . .] asserted a statement that was "consistent" with ALJ Merck's statements. Then, ALJ Almanza contended that ALJ Merck's statements constituted evidentiary support for Respondents' statements. ALJ Almanza implied (but he did not state) that ALJ Merck's statements constituted evidence of the *truth* of Respondents' statements. With the foregoing, ALJ Almanza provided evidence that he *knew* ALJ Merck could not officially notice the content of the Emails. ALJ Almanza also provided copious evidence that he *believed* that the Emails were excluded from the evidence in the record of the DBA Case. *See* Reasons, Section II, below.[65] After all the foregoing, ALJ Almanza knowingly falsely contended that ALJ Merck's contentions constituted *evidence* of the *content* of the Emails. *See* Subsection F, below. Then he irrationally contended that such *evidence* supporting Respondents' contentions about the contents of the Emails. *See id.*

When it suited ALJ Almanza to (somewhat) acknowledge the law (*i.e.*, to use it against Complainant) he acknowledged that he knew that his contentions to benefit Respondents, were false. First ALJ Almanza acknowledged that "[t]o be admissible, evidence must be relevant to this matter." Jan. 17 Order at 31. [. . .] Yet ALJ Almanza repeatedly admitted he never bothered to find that any so-called evidence used by Respondents, below, was reliable or probative. *See* Subsection G, below.

[. . .]

[. . .] It is not even rational for ALJ Almanza to pretend that he and Respondents may rely on ALJ Merck's *contentions* about the Emails as evidence of what actually is in the Emails while (1) ALJ Almanza and Respondents conceal the actual emails and (2) ALJ Almanza contends that ALJ Merck excluded the Emails from the record in the DBA Case. Such actions would be and are farcical. They were also deliberately illegal.

[. . .]

To understand how ALJ Almanza used knowingly false and misleading contentions to protect DI and attack Complainant (with his Show Cause Orders), it is necessary to consider how egregiously ALJ Almanza abused his discretion regarding certain evidence (*i.e.*, the mere contentions by ALJ Merck on February 9 and September 30, 2016) to ultimately contend that ALJ Merck's contentions provided "evidentiary support" for Respondents' contentions.

[. . .] Clearly, "there is nothing to support" Respondents' contentions "except" ALJ Merck's contentions, and equally clearly, there is "nothing to support" ALJ Merck's contentions "except" his own contentions. That is not "evidentiary

[65] *See* Discussion Part II.E, *infra* (explaining that the record shows that ALJ Merck excluded the Emails from the record in the DBA Case).

support." *See also* page 15-16, above, regarding how the meaning of words must be ascertained.

[. . .]

Ultimately, ALJ Almanza fabricated evidence by pure fiat. ALJ Almanza purported to *fabricate* evidence by merely declaring that it was evidence. ALJ Almanza's fabrication of evidence was as irrational as it could possibly be. ALJ Almanza knew that ALJ Merck's contentions were not evidence that his contentions were true. He knew that was the reason he could not officially notice the veracity of ALJ Merck's contentions about (1) the contents of the Emails or (2) that ALJ Merck actually performed *any* action other than committing words to paper. *See, e.g.*, Subsection E, above.

The following statements illustrate ALJ Almanza's criminal tricks to conceal material facts. To conceal the content of the Emails, ALJ Almanza personally fabricated the false contention that ALJ Merck excluded the Emails from the record of the DBA Case on February 9, 2016.[66] *See* Reasons, Section II, below. For that same reason, as well as to conceal the fact that neither ALJ Merck's nor Respondents' contentions had any evidentiary support, ALJ Almanza knowingly falsely declared that ALJ Merck's contentions were *evidence* that (1) the Emails actually contained requests for legal advice and (2) ALJ Merck actually performed *each one* of several specific actions necessary to determine the Emails were privileged.

Initially ALJ Almanza presented his argument that Respondents' contentions were supported by mere conclusory contentions by ALJ Merck. The truth of such contentions never were provided by *any* evidence in the public record:

> [DI's] management-level employees [Powers and Huber] expressly sought legal advice from [DI's] in-house counsel, and the statements themselves were confidential between the employees [Powers and Huber] and the attorney at the time they were made. . . . These emails were received by the in-house counsel and a select group of upper-level employees.

Feb. 14 Order at 3 quoting ALJ Merck (2/9/16) at 8. ALJ Merck did not even *contend* that the foregoing established that the Emails were privileged.[67] In his whole decision he did not even *contend* that DI proved—or that he found—that the Emails were privileged.

Yet ALJ Almanza deliberately abused his discretion regarding the foregoing

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[66] *See* Discussion Part II.E, *infra* (explaining how I have not wrongfully asserted that ALJ Merck excluded the Emails from the record in the DBA Case).

[67] As I explained above, the record plainly shows that ALJ Merck did make a ruling regarding privilege. *See* Discussion Part II.B, *supra*; *see also* May 15 Order at 46-50; January 17 Order at 89-90.

conclusory contentions in the following manner: "Especially in the light of the fact that [ ] ALJ Merck *explained* that the emails were submitted to him for *in camera* review [ ] there is *only one way* to read this paragraph – that each of the elements *necessary* to establish the privilege *existed*." *Id.*; June 30 Order at 8, fn. 5 (emphasis added). Thus, ALJ Almanza outright fabricated evidence that DI proved (or that ALJ Merck found that DI proved) *each* essential element of the privilege.[68] *Cf.* page 66, below, identifying each such element.

ALJ Almanza next deliberately abused his discretion by outright assuming the existence of additional facts without evidence. More than seven months after ALJ Merck asserted the contentions, above, ALJ Merck contended "for the reasons stated in that Order [2/9/16] I find that these two emails are subject to attorney-client privilege." Feb. 14 Order at 3 quoting ALJ Merck (9/30/16) at 4, fn. 2 Significantly, ALJ Merck did not bother to identify any such "reasons."[69] He merely contended, "[i]t is abundantly clear form the original February 9, 2016 Order that I did find these emails subject to attorney client privilege." *Id.*

[. . .]

ALJ Almanza observed that 'ALJ Merck plainly stated that the Emails were privileged," and then ALJ Almanza contended that by merely asserting such a "statement" "the record shows that ALJ Merck made the determination." Jan. 17 Order at 69 quoting May 15 Order at 51. "Respondents' assertion that ALJ Merck found the Emails privileged is accurate because ALJ Merck *did, in fact, make* such a finding. . . . [T]he record clearly establishes that such a finding was *made*." Jan. 17 Order at 31 (emphasis added). "[I]t is obvious that he *did* far more than merely *determine* the Emails were privileged." *Id.* at 67 (emphasis added).

[. . .]

With the foregoing contentions, ALJ Almanza directly contended that ALJ Merck's contentions constituted evidence of the *truth* of Respondents' contentions. He necessarily implied that ALJ Merck's contentions constituted evidence of the truth of his own contentions. For very good reason, ALJ Almanza refrained from explicitly stating what he was doing. For very good reason, ALJ Almanza also failed to even *allude* to (much less actually identify) any basis in

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[68] I found that the record plainly established that ALJ Merck had made a privilege ruling regarding the contents of the emails. *See* Order Denying Release at 6-7. As I have reiterated above, the language of ALJ Merck's orders clearly establishes that he made a privilege determination in the DBA Case regarding the Emails. *See* Discussion Part II.B., *supra*. Whether the privilege determination employed the proper test is irrelevant to the issue of whether the ruling *was made*.

[69] ALJ Merck wrote: "for the reasons stated in that Order, I find that these two emails are subject to attorney-client privilege." Sept. 30, 2016 Order at 4 fn. 2.

> law for his explicit contentions or his implicit arguments to benefit Respondents. *Cf.* 5 U.S.C. 557(c)(3).[70]
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> ALJ Almanza never determined that ALJ Merck's contentions were *either* reliable or probative. Consequently, he could not legally treat them as "evidentiary support." He certainly could not actually rely on them as evidentiary support for Respondents' contentions or for any order or sanction. *See* Subsections C and H. Yet, that is exactly what ALJ Almanza has done.
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> [. . .]
>
> Additional OALJ Rules further establish that Respondents and ALJ Almanza were not allowed to use evidence or information that Respondents failed to provide to Complainant before they use it as "evidentiary support." Respondents and ALJ Almanza have engineered a situation that precludes them from using any information, evidence or any witness that was covered by Complainant's discovery requests.
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> [. . .]
>
> Only "for good cause" was ALJ Almanza authorized to "issue an order to protect" DI from "undue burden or expense related to discovery.[71] [. . .]
>
> [. . .]
>
> [. . .] Respondents never properly identified Messrs. Merck, Powers or Huber as witnesses and DI never produced the Emails, so Respondents and ALJ Almanza are not allowed to use Messrs. Merck, Powers, or Huber or their (actual or purported) statements as evidence to prove anything. They may not use ALJ Merck's contentions[72] as evidence that Huber or Powers included any request in the Emails.

Renewed Motion to Disqualify at 33-37, 45-52, 70-72 (brackets, ellipses, and emphasis in original; bracketed ellipses and footnotes added). Complainant misrepresents the record and my Orders, and his argument is without merit.

Complainant asserts that I have wrongfully allowed Respondents to rely on ALJ Merck's rulings as evidentiary support for the purposes of satisfying the requirements of 29 C.F.R. § 18.35(b). This is not the first time Complainant has made this argument. *See, e.g.*, Production Motion at 18-23.

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[70] *See* January 17 Order at 14-15, 78-79 (explaining the standard for sanctions under 29 C.F.R. § 18.35(b) and why Respondent's assertion was not sanctionable).

[71] *See* Discussion Part II.D, *supra* (explaining that this matter has not yet reached the discovery phase and that discovery was rightfully tolled in this matter).

[72] *See* Discussion Part II.B, *supra* (explaining that ALJ Merck's rulings are not contentions); January 17 Order at 6-7 (explaining same); Order Denying Release at 2-4 (explaining same).

Complainant's argument is based on a misunderstanding of 29 C.F.R. § 18.35(b). As I have explained, a party may be subject to sanctions under 29 C.F.R. § 18.35(b)(3) if that party's factual contentions neither have "evidentiary support [n]or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Though the regulations do not define "evidentiary support," the term has been interpreted significantly in the context of the Federal Rules of Civil Procedure.[73]

Under Federal law, there is consensus that sanctions are warranted where the actions taken are objectively frivolous and where a reasonable party under the same circumstances would have been aware of the frivolousness. *See Rowe et al. v. Gary, et al.*, No. 16-12124, 2017 WL 3082022 at *2 (5th Cir. July 20, 2017) (unpub.) (*citing In re Mroz*, 65 F.3d 1567, 1573 (11th Cir. 1995); *Salmon v. Nutra Phrama Corp.*, 2017 WL 1522115 at *4 (*quoting Dodd Ins. Serv., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1155 (10th Cir. 1991)) ("[i]n deciding whether to impose Rule 11 sanctions, a district court must apply an objective standard; it must determine whether a reasonable and competent attorney" would engage in the behavior); *see also Hourani v. Mirtchev*, 796 F.3d 1, 17 (D.C. Cir. 2015) (*citing Business Guides, Inc. v. Chromatic Enterprises, Inc.*, 498 U.S. 533, 554 (D.C. Cir. 1991)) ("courts must apply an objective standard of reasonableness in determining whether there has been a violation of the rule").

Factual allegations fail to meet this objective standard when: 1) "they are unsupported by any information obtained prior to filing[,]" *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006); 2) they contain "allegations based on information which minimal factual inquiry would disprove," *Chaudry v. Gallerizzo*, 174 F.3d 394, 410-11 (4th Cir. 1999) (internal quotations and citations omitted); or 3) "an attorney knows that a position is unsupported by fact," *W. Maryland Wireless Connection v. Zini*, 601 F. Supp. 2d 634, 647 (D. Md. 2009) (*citing Blue v. U.S. Dep't of Army*, 914 F.2d 525, 542-43 (4th Cir. 1990)). In order to prevent such failings, the language of Rule 11(b) places an affirmative duty on parties "to conduct a reasonable inquiry into the viability of a pleading before it is signed." *Hutter v. Countrywide Bank, N.A.*, 41 F. Supp. 3d 363, 387 (S.D.N.Y. 2014) (*quoting Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985)); *accord Bus. Guides, Inc.*, 498 U.S. at 551. Crucially, the requirement of "evidentiary support" does not equate to a determination that "the party will prevail with respect to its contention." *See O'Brien v. Alexander*, 36 F.3d 1479, 1489 (2d Cir. 1996) (*quoting* Fed. R. Civ. P. 11 Advisory Committee's Notes to the 1993 Amendments).

The determination of evidentiary support under 29 C.F.R. § 18.35(b)(3) thus concerns itself with the *objective reasonableness* of a party's reliance on certain information. *Salmon*, 2017 WL 1522115 at *4 (internal citations omitted); *W. Maryland Wireless Connection*, 601 F. Supp. 2d at 647 (internal citations omitted) (providing examples of statements that would be objectively unreasonable to rely on for evidentiary support). In making that determination, the *veracity* of the item serving as evidentiary support is, in most cases, irrelevant. Whatever the item states, the issue is whether it is *reasonable* to rely on that source.

[73] The regulation at 29 C.F.R. § 18.35 is almost identical to Rule 11, but for the substitution of the term "judge" for "court," the elimination of the option to impose monetary sanctions, and other minor and non-substantive deviations. *Compare* Fed. R. Civ. P. 11 *with* 29 C.F.R. § 18.35.

In this case, I found that a reasonable competent attorney would believe that an adjudicator's ruling could serve as evidentiary support. Moreover, I rejected, and continue to find meritless, Complainant's assumption that, because an adjudicator's ruling is used to support a statement or filing for purposes of 29 C.F.R. § 18.35(b)(3), that adjudicator has somehow been coopted as a witness. The veracity of the adjudicator's ruling is not at issue – the only issue is whether it was reasonable for the party to rely on the adjudicator's ruling.

Accordingly, by finding that it was reasonable for Respondents to rely on ALJ Merck's ruling as support, I did not make any determination regarding the ruling's veracity. The accuracy of the rulings was unrelated to the issue at hand. Complainant's assertion that I surreptitiously determined the veracity of ALJ Merck's ruling overlooks the plain language of my prior orders.

Complainant clearly disagrees with my determination that it was reasonable for Respondents to rely on ALJ Merck's orders for the purposes of meeting the strictures of 29 C.F.R. § 18.35(b)(3). His disagreement with my ruling does not warrant my disqualification in this matter, however. Moreover, my determination does not show a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

3. Allegations that I Have Wrongfully Stated that ALJ Merck Excluded the Emails from the Record in the DBA Case

Complainant asserts that I have wrongfully determined that ALJ Merck excluded the Emails from the record in the DBA Case. Complainant States:

> *Dozens* of times, ALJ Almanza has insisted that on February 9, 2016 ALJ Merck excluded the Emails from the record of the DBA Case. *See* Reasons, Section II, below. Yet many times ALJ Almanza also insisted that ALJ Merck determined that the Emails contained an express for legal advice.[74] Next, ALJ Almanza insisted, ALJ Merck determined that the Emails were privileged *because* they contained an express request for legal advice.[75]
>
> ALJ Almanza knew, however, that evidence that is not in the record cannot support any decision or ruling—by ALJ Merck or ALJ Almanza. That is even more true of evidence Respondents and ALJ Merck actively concealed from the DBA Claimant and Complainant.[76] *See* Subsection L, below. . . .
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> . . .

[74] *See* ALJ Merck's Feb. 9 Order at 8 ("[i]n this case, Employer's management-level employees expressly sought legal advice from Employer's in-house counsel, and the statements themselves were confidential between the employees and the attorney at the time they were made.")

[75] *See* Discussion Part II.B, *supra*, (explaining why I determined the record demonstrates that ALJ Merck did find the Emails privileged).

[76] Complainant does not explain why information regarding another case is relevant to this matter. As explained above, I do not know what might or might not be relevant in this case due to Complainant's failure to provide fair notice of his claim. *See* Discussion Part I.D, *supra*.

ALJ Almanza knew that the "*exclusive* record for decision" must consist of the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding." 5 U.S.C. § 556(e) (emphasis added). He knew that "[w]hen an agency decision rests on official notice of a material fact not appearing *in the evidence in the record*, a party is entitled, on timely request, to an opportunity to show the contrary. *Id.* (emphasis added).[77] . . .

Judicial decisions *must not* be based on facts that are not in evidence. In fact, a judge *must* be disqualified when he has personal knowledge of disputed evidentiary facts concerning the case. *See* Mot., Section III, below. ALJ Merck was required to be disqualified because he obtained personal knowledge of heavily disputed facts and then concealed (and helped DI conceal) the evidence that would have disproved Respondents' and ALJ Merck's misrepresentations of such facts.[78] ALJ Almanza *must* not rely on ALJ Merck's contentions—based on his personal knowledge of disputed facts—as "evidentiary support" for Respondents' contentions or for ALJ Almanza's orders or sanctions.[79]

. . .

ALJ Almanza insists that four events occurred on February 9, 2016. First, ALJ Merck determined that the Emails contained an express request for legal advice. Second, he determined that the Emails were privileged *because* they contained an express request for legal advice. Third, because of the foregoing, he placed them under seal. Fourth, after all the foregoing, ALJ Merck excluded the Emails from the record.

. . .

ALJ Almanza's story is irrational on multiple levels. On October 28, 2015, ALJ Merck received the Emails, so they already were in the record.[80] On February 9, 2016, ALJ Merck (1) contended that the Emails contain an express request for legal advice, and (2) based on that contention he purportedly found the Emails were privileged, and (3) based on all the foregoing contentions he purportedly placed the Emails under seal.

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[77] ALJ Merck's orders were officially noticed and included in the record. *See* Official Notice Order at 17-18.

[78] Complainant's argument that ALJ Merck should have disqualified himself should be taken to the BRB, the proper appellate authority for the DBA Case. *See* 20 C.F.R. §§ 702.391, 702.392; 33 U.S.C. § 921(b). I lack the authority to determine whether ALJ Merck should or should not have disqualified himself.

[79] *See* Discussion Part II.C.2, *supra* (explaining in detail why the factual veracity of ALJ Merck's ruling was irrelevant to the determination of evidentiary support under 29 C.F.R. § 18.35(b)(3)).

[80] Complainant's argument is based on his erroneous contention that *in camera* review functions as *ex parte* communication. That argument has been addressed and rejected numerous times, and I see no benefit in addressing the matter, yet again, here. I refer Complainant to my analysis of this issue in my prior Orders. *See* January 17 Order at 49-50; Order Denying Release at 19-20; May 15 Order at 16-17; Official Notice Order at 11.

After all the foregoing, ALJ Almanza *sua sponte* insists that ALJ Merck excluded the Emails from the record without even saying he did so. Dozens of times, ALJ Almanza knowingly falsely contended that ALJ Merck "excluded" the Emails from the record in the DBA Case. Overwhelming evidence shows that ALJ Almanza knew his contentions were false.

. . .

Complainant repeatedly analyzed the fact that APA Sections 556(d) and (e) and 557(d) established that ALJ Merck *could not* have excluded the Emails from the record of the DBA Case. *See, e.g.*, Complainant Supplement (3/24/17) at 17, 20 and 22-25. Many APA provisions govern this issue. The law is clear and categorical, and it has been briefed many times. The evidence established that ALJ Almanza knew that exclusion of the Emails from the record of the DBA Case by ALJ Merck was a legal impossibility because DI failed to produce evidence to prove each element of the privilege. *See* Mot., Section I.A, above.

. . .

The APA provided copious evidence of the steps that ALJ Almanza *knew* were required before a statement by ALJ Merck could constitute a ruling. A ruling must be explicit: decisions must actually "show the ruling on each finding, conclusion, or exception." 5 U.S.C. § 557(c)(3). A ruling must be supported by an explicit rational explanation. Every decision must "include a statement" not only of the "findings and conclusions," but also of "the reasons or basis therefor, on all the material issues of fact, law, or discretion." *Id*. Findings of fact must be supported by evidence that is relevant (reliable and probative) and already in the record. *See* Mot., Sections I.C and H, above.

. . .

ALJ Merck's decisions (which ALJ Almanza quoted) showed that ALJ Almanza knew that ALJ Merck did not even use the word *exclude*, much less refer to Section 18.85 or purport to apply it or comply with it. To dispense with that inconvenient fact, ALJ Almanza misrepresented that "whether or not the exact word 'exclude' was used in ALJ Merck's orders is irrelevant." Jan. 17 Order at 53.

In fact, such failure is not irrelevant. It is probative evidence that ALJ Merck did not exclude the Emails. This fact is established by the APA. *See* Subsection B, above. It is even acknowledged in a rule of evidence. The absence of a statement that an event occurred where it normally would be stated is, itself, evidence that the event did not occur. *See* 29 C.F.R. § 18.803(a)(7).[81] The evidence in the

[81] This regulation is irrelevant to the matter at hand, given that ALJ Merck's orders are not being offered as evidence to support excluding the Emails from the record in this case. This case has yet to reach (and now, due to dismissal,

record established that ALJ Almanza knew that ALJ Merck failed to perform *any* act (including using the word *exclude*) necessary to exclude the Emails.

. . .

To purport to support his false contentions that ALJ Merck excluded the Emails from the record, ALJ Almanza has attempted to rely on the following contentions which were either (or both) (1) outright false and (2) precisely the type of *post hoc* rationalizations that ALJ Almanza knew were prohibited by the APA.

. . .

No decision by ALJ Merck showed or stated any ruling excluding the Emails. *Cf. id*. That fact is dispositive. *See id*.

. . .

The issue is not merely that ALJ Merck failed to use the word "exclude." *Nothing* ALJ Merck did amounted to exclusion. ALJ Almanza never has stated any rational reason or factual or legal basis for his contention that ALJ Merck excluded the Emails. *Cf*. 5. U.S.C. § 557(c). ALJ Almanza's contentions are not rational or consistent with governing law.

. . .

ALJ Almanza knew that sealing the evidence *in* the record could not possible contribute to excluding evidence *from* the record. At best, ALJ Almanza knew that his two contentions were a *non sequitur*. At worst, ALJ Almanza knew that they directly contradicted each other. He was necessarily fabricating one event, if not both. The regulations provide copious evidence that ALJ Almanza knew that he was fabricating both.

. . .

ALJ Merck's contention that he placed the Emails under seal (and *every* assertion by ALJ Almanza of that contention) is evidence that ALJ Almanza very deliberately and entirely *sua sponte* fabricated and asserted *dozens* of times over the past year the knowingly false contention that ALJ Merck excluded the Emails from the record. ALJ Almanza knew that sealing the Emails precluded excluding them. An ALJ may seal *only* "material that is in the record" to prevent "public access." 29 C.F.R. § 18.85(b).

. . .

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will not reach) the discovery phase. Moreover, the formal rules of evidence do not apply rote in this matter. *See* fn. 56, *supra*.

> By at least February 2017, ALJ Almanza knew that ALJ Merck contended that he "placed [the Emails] under seal." Feb. 14 Order at 4 quoting ALJ Merck. In June 2017, ALJ Almanza began to contend, "I lack the authority to enter another ALJ's office and retrieve material put under seal," *i.e.*, the Emails. June 30 Order at 4. He refused to "officially notice sealed material," *i.e.*, the Emails. *Id*. at 25, fn. 16. However, it was not until January 2018 that ALJ Almanza started contending that by sealing the Emails ALJ Merck somehow excluded the Emails. Copious evidence shows that ALJ Almanza knew that placing the Emails under seal would be evidence that ALJ Merck did *not* exclude the Emails from the record.
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> . . .
>
> ALJ Almanza contended that the Emails were excluded from the record on February 9, 2016. Yet, ALJ Almanza necessarily knew that an ALJ may seal *only* "material that is in the record" to prevent "public access." 29 C.F.R. § 18.85(b). It is not possible (or even rational to contend) that ALJ Merck *excluded* the Emails from the record *and* simultaneously (or subsequently) *included* the Emails in the record and placed them under seal.
>
> Neither ALJ Merck nor ALJ Almanza ever even *cited* any relevant legal authority to support the contentions that ALJ Merck placed the Emails under seal. *Not once* did ALJ Almanza or ALJ Merck ever even *cite* 29 C.F.R. § 18.85(b). This fact is evidence that, as usual, ALJ Almanza attempted to conceal (or he pretended to be unaware of) relevant law that proved the falsity of his contentions. He had very good reason to conceal or disregard the law.

Renewed Disqualification Motion at 55-57, 110-11, 113, 115-16, 118-20 (brackets and emphasis in original; footnotes omitted; bracketed footnotes added.) Complainant's arguments are without merit.

Much of Complainant's argument has been addressed previously. As I explained in my January 17 Order, the record clearly demonstrates that ALJ Merck excluded the Emails from the record. January 17 Order at 53. Specifically, I noted that ALJ Merck had continually denied each of Complainant's motions seeking production of the Emails in the DBA Case. *Id.* (listing ALJ Merck's denials of Complainant's requests). ALJ Merck, himself, noted in his Feb. 16 Order[82] that he had ruled "many times" on the request for "emails which have been found privileged[.]" Feb. 16 Order at 3. It is obvious from the text of ALJ Merck's orders that he deliberately excluded the Emails from the record. Though Complainant states that ALJ Merck did not specifically use the phrase "I exclude the Emails from the record," the record plainly establishes that the Emails were excluded.

Complainant also attempts to argue that by sealing the Emails, ALJ Merck admitted that the Emails were in the record. Complainant misstates ALJ Merck's order. ALJ Merck explained

[82] ALJ Merck's February 16, 2016 Order Denying Claimant's Request to Release to her Attorney Documents that this Court Has Determined are Covered by the Attorney Client Privilege and Order Denying Claimant's Motion to Disqualify the Administrative Law Judge ("Feb. 16 Order")

in his Sept. 30 Order that he had "found that [the Emails] that Claimant sought from Employer were protected by attorney-client privilege . . . [and he] placed them under seal to be opened *only* by the appropriate appellate authority." ALJ Merck's Sept. 30 Order at 2. Complainant argues that this is an admission that ALJ Merck sealed the Emails as part of the record in accordance with 29 C.F.R. § 18.85(b).

This interpretation is not supported by the text of ALJ Merck's ruling. The regulation at 29 C.F.R. § 18.85(b)(2) allows an ALJ to seal material in the record from public access. If a document is so sealed, an accompanying order must be issued explaining the reasons for sealing the records, and why they outweigh public access to the record. 29 C.F.R. § 18.85(b)(2). However, ALJ Merck did not engage in such action.

ALJ Merck plainly stated: "[b]ecause I determined the emails were privileged, I placed them under seal to be opened *only* by the appropriate appellate authority." ALJ Merck's Sept. 30 Order at 2 (emphasis added). It is obvious from the text of ALJ Merck's Order that the Emails were kept so that an appellate authority, and *only* an appellate authority, would be able to review them. The records were plainly excluded from the record, and were retained only for this limited purpose. Holding documents in such a manner is not akin to sealing documents already in the record, and ALJ Merck's actions provide no indication that he engaged in the process listed in 29 C.F.R. § 18.85(b)(2).

Complainant's argument is also based in part on his flawed analysis of what constitutes the record in the DBA Case. I have addressed and found meritless Complainant's allegations regarding *ex parte* communication numerous times. *See, e.g.*, January 17 Order at 49-50; Order Denying Release at 19-20; May 15 Order at 16-17; Official Notice Order at 11, 14-15. Complainant's arguments regarding *in camera* review and *ex parte* communication, which are unchanged since those past orders, remain incorrect and unpersuasive. For the reasons explained in those orders, I again reject Complainant's argument on this issue.

Considering the above, I find, again, that ALJ Merck's orders show that the Emails were excluded from the record in the DBA Case. Clearly Complainant disagrees with my legal analysis and conclusions on this issue. This disagreement does not warrant my disqualification from this case, however, nor does it show "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

4. Allegation of Misconduct Regarding My Handling of the Motions to Dismiss

Complainant argues that my handling of Respondents' Motions to Dismiss was illicit and deliberately designed to favor Respondents. Complainant states:

> One thing that ALJ Almanza has established conclusively over the past year is that if he thinks he can benefit Respondents by justifying something—even with obviously false and even irrational arguments—he will do so. Yet, for more than a year, he has refrained from ruling on Respondents' first motions in this case.

Respondents filed their Motions to Dismiss almost 14 months ago (on December 16). *See* Jan. 17 Order at 3. Yet, ALJ Almanza still refrains from ruling on those motions. He is stalling because he knows he cannot plausibly grant those motions, and he wishes to delay denying them. . . .

For more than a year, ALJ Almanza has known the APA and ARB standards requiring denial of Respondents' Motion to Dismiss. Complainant briefed this issue in January 2017.[83] . . .

. . .

In addition, the appropriate application of the phrase "fair notice" must be very similar to the application of the phrase "reasonable belief" as an element of Complainant's SOX claim.[84] Each word has meaning and the meaning must be considered. Under *Evans*, the questions to be addressed are whether Respondents received *notice* and whether such notice was *fair* to Respondents under all relevant circumstances.[85]

. . .

ALJ Almanza has done far worse than merely *delay* applying the *Evans* standard.[86] More than eight months ago, ALJ Almanza announced his intention to award judgment to Respondents by *sua sponte* invoking *Evans*. Respondents simply did not invoke *Evans* or try to prove that this case could be dismissed under *Evans*.

ALJ Almanza essentially admitted that he knew that Respondents did "not expound a correct standard [in *Evans*] for adjudging whether a complaint can survive a motion to dismiss" under SOX. May 15 Order at 31. In the next sentence, however, he admitted that he simply disregarded the foregoing dispositive fact: "Regardless, Respondents filed motions to dismiss" and they characterized their motions as being "for failure to state a claim." *Id.*

As a result of Respondents' mere cursory *characterization* of their Motions to Dismiss,[87] ALJ Almanza, *sua sponte*, attempted to help Respondents by (1) asserting an entirely new issue and (2) his own argument regarding that issue. ALJ Almanza, entirely *sua sponte*, informed the parties that "I find that Complainant has failed to" satisfy the standard established in *Evans*. *Id.* at 32. He further insisted, "I have provided Complainant a detailed description of what [Complainant must do to satisfy the *Evans* standard]. Should Complainant [fail to

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[83] *See* Order Granting Leave (addressing Complainant's initial briefs on these issues).
[84] See Discussion Part I.A, *supra* (explaining, in detail, the proper application of the fair notice standard). Complainant's assertion that fair notice is akin to SOX's reasonable belief standard is incorrect.
[85] *See* fn. 84, *supra*.
[86] See Order Granting Leave (explaining and applying the *Evans* standard, in February 2017).
[87] *See* Discussion Part I.B, *supra* (quoting Respondents assertions and their specific requests to dismiss this matter for Complainant's failure to state a claim on which relief can be granted).

satisfy the *Evans* standard], I shall take the Motions to Dismiss out of abeyance and I shall rule on their merits."[88] *Id.* at 33.

ALJ Almanza should have ruled on the *actual* merits of the motions months before May 15. The merits of the motions had nothing to do with *Evans*. They did not even acknowledge *Evans*. That is all ALJ Almanza should have considered to *impartially* adjudicate the merits of the motions, and that is all he legally could have done.

. . .

Three times over the course of the past year, ALJ Almanza has *sua sponte* (purportedly) applied "reasonable inquiry" and "reasonable belief" standards to hound Complainant. . . .

ALJ Almanza knows that LM's Motion to Dismiss was founded on the frivolous argument that Complainant was required to "establish by a preponderance of the evidence" each element of a *prima facie* case of discrimination. . . .

. . .

For an additional reason, ALJ Almanza has long known that Respondents' Motions to Dismiss were not "warranted by existing law or by nonfrivolous argument."[89] 29 C.F.R. § 183.5(b)(2). At the outset, Complainant offered to file a Complaint and he requested that ALJ Almanza order Respondents to file an Answer to the Complaint.[90] *See* Feb. 9 Order at 9-10 *citing* 5 U.S.C. § 554(d).

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[88] The text of the Order reads:

> This is Complainant's second opportunity to provide fair notice of his complaint. On February 22, Complainant asserted that would [sic] not comply with my Order Granting Leave. *See* Notice of Noncompliance. He maintained that position at the March 20 conference call. Tr. at 31 ("I don't intend to file [an amended complaint] and you don't need to give me extra time, Your Honor.") However, as Complainant is proceeding *pro se*, I find it appropriate to give him one last opportunity to provide fair notice of his complaint. I have provided Complainant with a detailed description of what his statement of the complaint should contain. Should Complainant again refuse to provide this statement, I shall take the Motions to Dismiss out of abeyance and I shall rule on their merits.

May 15 Order at 33 (brackets in original; sic added).

[89] To the extent Complainant asserts that the filing of a motion to dismiss is unwarranted by existing law, I reject that argument. *See* Discussion Part I.A, *supra*. To the extent Complainant argues that the standards to which Respondents asserted his complaint should be judged are incorrect, I have already addressed this issue. *See* Order Granting Leave at 3-8; May 15 Order at 27-33.

[90] In regards to this issue, Complainant stated:

> Mr. Jordan: Your Honor, I offer to make this simple for everybody. I would file a complaint if you ordered them to file an answer. If you refuse to order them to file an answer, I will not be subjected to a pleading requirement you won't impose on other parties.

ALJ Almanza refused to order Respondents to file an answer. *See id.* On May 15, ALJ Almanza reiterated his refusal. *See* May 15 Order at 33-36.

ALJ Almanza's reasons for doing so are relevant to Respondents' Motion to Dismiss. "I explained that 5 U.S.C. § 554(b) allows, but does not require" the filing of pleadings. *Id.* at 33.[91] . . . Yet, ALJ Almanza failed to apply that same standard to Respondent's Motion to Dismiss. ALJ Almanza (and Respondents) knew that Respondents failed to provide any evidence that Section 554 required Complainant to file a Complaint.[92]

Despite all the foregoing, to benefit Respondents in many respects, ALJ Almanza disregarded 29 C.F.R. § 18.35(b) and his own copious analysis of Section 18.35. Most obviously, instead of holding Respondents accountable for failing to address any applicable standard in their Motions to Dismiss, ALJ Almanza attempted to give Respondents every possible benefit that he, personally, could derive from invoking *Evans*, *sua sponte*, for Respondents. After he realized that would be ineffective, he delayed ruling on their motions for a full year so that he could use that as a pretext to block all Complainant's discovery.

. . .

It is very likely ALJ Almanza purported to impose such a "sanction" on Complainant precisely because he knew that his failure to rule on (and deny) Respondents' Motions to Dismiss (for more than a year) is becoming especially conspicuous. He must deny those motions, and he is attempting to protect Respondents from sanctions for (1) failing to withdraw for more than a year and (2) using their Motions to Dismiss (and ALJ Almanza's failure to rule on those motions) as pretext to block all Complainant's discovery for the past year. *See* Subsection P, below.[93]

Tr. at 27.

[91] The text of the Order reads:

> As I explained in my Order Granting Leave, Complainant is not entitled to an answer-like document under the APA. *See* Order Granting Leave at 8-9. In that analysis, I explained that 5 U.S.C. § 554(b) allows, but does not require, an agency to enact a requirement of responsive pleadings. . . . Thus that portion of the APA would be rendered superfluous if the APA automatically required an answer from Respondents. . . . Further, I noted that 5 U.S.C. § 554(c)(1) allows an agency to "give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and public interest permit." . . . Thus answers could not be required per se, as an agency can require the submission of arguments and facts when the time, nature of the proceeding, and public interest permit. . . .

May 14 Order at 33 (internal citations omitted).

[92] At no time was Complainant ordered to file a complaint. He was ordered to provide fair notice of his complaint in accordance with the *Evans* standard. *See* Order Granting Leave at 8; May 15 Order at 33.

[93] *See* Discussion Part II.C.1, *supra* (finding I have not engaged in any wrongful conduct by tolling discovery in this matter).

. . .

> Now, ALJ Almanza falsely contends that he did order Complainant to file a statement of complaint.[94] He is clearly doing so because he hopes to use the mere failure to file a Complaint to justify dismissing this case. ALJ Almanza specifically stated that the "standard for reviewing a *complaint* filed in a SOX case is the 'fair notice standard.'" *Id.* at 29 (emphasis added). *See also id.* at 28, fn. 51 ("fair notice standard for complaint"). In doing so, however, ALJ Almanza has grossly misrepresented the law. . . . ALJ Almanza knows that he must apply the "fair notice" standard to the *motions to dismiss*, not to a *complaint*. *See* Subsection M, above.

Renewed Disqualification Motion at 72-78, 84 (brackets and emphasis in original; bracketed footnotes added). Complainant's arguments misconstrue the law and lack merit.

As an initial matter, Complainant's argument that I have engaged in partial behavior by delaying the resolution of the Motions to Dismiss is contradicted by the record. The record establishes that, after I found the complaint summary did not give fair notice, I granted Complainant the opportunity to provide fair notice of his complaint to Respondents. *See* Order Granting Leave at 4-8, 10. Since that initial determination, Complainant has filed numerous motions for sanctions, motions for production (which were premature given the matter had not yet reached the discovery phase), and motions of noncompliance and reconsideration. *See* Procedural History, *supra*. As Complainant is proceeding *pro se* and lacks legal counsel, Complainant was given numerous opportunities to provide fair notice of his Complaint. *See id.* In so doing, I was not helping Respondents; rather, I was providing Complainant, a *pro se* party, additional time to meet the filing requirements of a SOX complaint. This action was beneficial to Complainant. It was not partial against him.

As to Complainant's allegation that I have misapplied the *Evans* standard, Complainant's argument is incorrect. Complainant asserts that *Evans* must be applied *against* a motion to dismiss. Rather, *Evans* does the opposite; the doctrine outlines what information a SOX complaint must contain to provide fair notice. *See* Discussion Part I.A, *supra*.

Complainant's arguments that Respondents' Motions to Dismiss had to be dismissed are similarly meritless. Respondents plainly filed Motions to Dismiss that directly requested that Complainant's complaint be dismissed for failure to state a claim upon which relief can be granted. *See*, Discussion Part I.B, *supra*. Though I disagreed with Respondents' interpretation of what law should be applied to determine whether a SOX complaint referred to the OALJ can survive a motion to dismiss, my disagreement did not mean that the motions were meritless. As I found after my first review of the summary of Complainant's complaint, Respondents had not received fair notice. Order Granting Leave at 4-8.

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[94] See May 15 Order at 33, 79 (ordering Complainant to file a statement of his complaint); *see also* Order Granting Leave at 8, 10 (ordering Complainant to file an amended complaint at that time, as Complainant had not yet disavowed the complaint summary filed by OSHA).

Respondents' request for dismissal appeared warranted by law and the record. Respondents' assertions that Complainant's complaint be held to the higher *Twombly* and *Iqbal* standards, though incorrect, do not change the fact that Complainant's complaint did not provide fair notice (and that, despite the opportunities granted him, Complainant refused to provide further notice of his complaint). Complainant's argument that I should deny a motion that is warranted by law and the record, merely because Respondents' analysis was based on an incorrect legal standard, is rejected.

Accordingly, I did not engage in misconduct by giving Complainant more time to provide fair notice of his complaint or by holding Respondents' Motions to Dismiss in abeyance. Regardless, Complainant has failed to show how my actions regarding the Motions to Dismiss show "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Complainant's disagreement with my rulings does not establish such antagonism or favoritism. Complainant's allegations of bias and partiality are unsupported by the record.

5. Allegation that I Am a Superadvocate for Respondents

Complainant asserts that, through my actions, I have demonstrated that I am a "superadvocate" for Respondents. Complainant states:

> The point of ALJ Almanza's Show Cause Orders is very much to help Respondents avoid sanctions motions for presenting misrepresentations of fact and law and frivolous arguments. As the first "sanction" ALJ Almanza imposed, "Respondents are no longer required to respond to any future motion for sanctions that Complainant may file, unless and until I specifically order them to do so." May 15 Order at 79 (No. 7). As the second "sanction" ALJ Almanza imposed, "Complainant is forbidden from filing further motions for sanctions in this matter." Jan. 17 Order at 92 (No. 2).
>
> ALJ Almanza has gone considerably further than imposing sanctions on Complainant to help Respondents avoid sanctions. ALJ Almanza is using his Show Cause Orders to, himself, present misrepresentations of fact and law and frivolous arguments that, if presented by Respondents, would subject them to sanctions motions. To attempt to justify sanctions, ALJ Almanza abused the poser of his position, and he failed to conduct himself as a judge. He did not act impartially, and he did not apply the law to the evidence. Instead, he acted very much as Respondents' actual advocates act. *See* Section LT, above. If ALJ Almanza actually were Respondents' counsel appearing before an impartial judge and he filed a motion for sanctions, his argument would be recognized as frivolous.
>
> ALJ Almanza is using his profoundly flawed argument for profoundly improper purposes. Two things that ALJ Almanza knows he cannot do in any legal manner are (1) determine that the Emails are privileged or (2) dismiss this case.

Renewed Disqualification Motion at 95 (emphasis in original). Complainant points to a number of methods by which I allegedly have demonstrated my "superadvocacy" for Respondents. I address each below.

a. Allegation that I Have Prepared Orders to Be Prejudicial to Complainant

Complainant asserts that I have issued and prepared my orders to be prejudicial against him. Complainant states:

> ALJ Almanza also designed his order to be significantly more prejudicial to Complainant than any motion by Respondents could have been. ALJ Almanza is well aware that by using a show cause order (instead of Respondents filing a motion) he was precluding Complainant from withdrawing or modifying any contention. "The regulation [allows] 21 days [after service of a motion for sanctions] to withdraw or correct the alleged misconduct. However, there is no such [grace period] for orders to show cause issued by a judge."[95] May 15 Order at 24.
>
> Merely because of Complainant's use of the words *exclude*, *find* and *determine*, ALJ Almanza is "considering imposing the full range of sanctions available under 29 C.F.R. § 18.35(c)(4)."[96] Jan. 17 Order at 91.
>
> . . .

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[95] The text of the Order reads:

> The regulations plainly states that attorneys may not file a motion for sanctions until giving 21 days or a time the judge sets for opposing counsel to withdraw or correct the alleged misconduct. However, there is no such time requirement for orders to show cause.
>
> [. . .]
>
> Complainant alleges that I am acting partially by refusing to correct or withdraw my Order to Show Cause. Supplemental Motion to Disqualify at 29; *see also* Tr. at 35-36. Complainant misunderstands the purpose of an order to show cause. The Order to Show Cause merely put Complainant on notice that, based on my reading of Complainant's motion, Complainant appeared to have engaged in sanctionable misconduct. At no time did I conclude that the activity *was* sanctionable; rather, I wanted to hear Complainant's explanation before making any determination. An Order to Show Cause is a means through which I can ask for Complainant's explanation of his behavior. As I explained: "[t]he reason I gave you an opportunity to show cause was to show . . . why my notices to the appearance of this or the appearance of that are incorrect.

May 15 Order at 24-25 (brackets, emphasis, and ellipsis in original; bracketed ellipsis added).

[96] Complainant misrepresents the reasons for why he was sanctioned and ordered to show cause. *See* Order to Show Cause at 2-5 (explaining why Complainant's behavior appeared sanctionable); May 15 Order at 46-55 (sanctioning Complainant and explaining why his behavior was sanctionable); January 17 Order at 88-90 (explaining why Complainant's behavior appeared sanctionable).

> ALJ Almanza is attempting to engineer judgment for Respondents by "considering imposing the full range of sanctions available" because he knows that dismissing this case for the reasons that he already had written up in May 2017 would be too obviously illegal. Yet, all three of ALJ Almanza's Show Cause Orders were just as illegal. They were founded on ALJ Almanza's use of ALJ Merck's contentions to purport to prove that no evidence supports Complainant's contentions.
>
> . . .
>
> In a nutshell, ALJ Almanza's sanctions and threats of sanctions are a scheme based on outright and obvious falsehoods to conceal evidence that (1) the Powers email or the Huber email (or both) do not contain an express request for legal advice, (2) they are not privileged and (3) ALJ Merck and DI's counsel conspired and colluded for years to conceal those materials facts and others and (4) ALJ Almanza and Respondents' counsel conspired and colluded for the past year to conceal those material facts and others.
>
> ALJ Almanza's sanctions and threats of sanctions are a scheme to distract from (and avoid remedying) the now very obvious fact that ALJ Almanza has devoted the past year to helping Respondents illegally conceal the Emails. ALJ Almanza's sanctions and threats of sanctions are a scheme to perpetuate and cover up at least (1) Respondents' and ALJ Merck's knowing and willful falsehoods regarding the Emails and (2) ALJ Almanza's own knowledge that the Emails were not and could not have been excluded from the record of the DBA Case.
>
> ALJ Almanza can refer to his, ALJ Merck's or Respondents' falsehoods as "statements," "rulings," "determinations," or "findings," but no name can change their nature. They are what the *evidence* proves they are, not what ALJ Almanza *says* they are.[97] That is what the Rule of Law means. A lie is a lie no matter who said it or what he called it. A lie by any other name is still a lie. The purpose and function are the same regardless of the name.

Renewed Disqualification Motion at 97-100 (brackets and emphasis in original). Complainant's arguments misstate the record and fail to establish any disqualifiable misconduct.

Complainant's assertions that I have engaged in a scheme to issue prejudicial orders against him is contradicted by the record. Complainant is well aware of why he has been sanctioned and why I have ordered him to show cause. *See e.g.*, Order to Show Cause at 2-5; May 15 Order at 46-55; Jan. 17 Order at 38, 88-90.

Complainant alleges that I have sanctioned him and ordered him to show cause to delay ruling on matters of discovery in this matter. This core assumption is plainly disproven by the record. I refer Complainant to Discussion Part II.C.1, above, explaining why Complainant's assertions regarding discovery in this matter are incorrect.

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[97] *See* Discussion Part II.B, *supra* (providing in-depth explanation as to the nature of ALJ Merck's rulings).

Moreover, Complainant's assertions that I am trying to use sanctions to benefit Respondent are meritless. Complainant essentially argues that, because he continues to engage in sanctionable conduct, I have engaged in wrongdoing for sanctioning him for that behavior. Complainant's sanctions are due to his own sanctionable behavior.

Complainant also asserts that I have sanctioned Complainant in an effort to deprive him of the 21-day "grace period" listed under 29 C.F.R. § 18.35(c)(2). Complainant's argument is based on his misunderstanding of an order to show cause. As I have explained previously, an order to show cause grants a party the additional opportunity to explain why their activity was not sanctionable, or why they should not be sanctioned regardless of the activity. *See* May 15 Order at 24-25. An order to show cause does not been deprive a party of the opportunity to explain herself or offer to resolve the issue in a manner that would alleviate the need for sanctions. Moreover, the regulations plainly do not apply the grace period to orders to show cause. Complainant thus appears to argue I should be disqualified for abiding by the regulations.

Regardless, I did not abuse my discretion by ordering Complainant to explain why he should not be sanctioned for engaging in apparently sanctionable conduct. I further did not deprive Complainant of the opportunity to offer to withdraw an apparently sanctionable filing; Complainant could have offered that solution in his response as justification for why he should not be sanctioned.

Additionally, Complainant asserts that he was arbitrarily sanctioned, but this is not the case. The record plainly shows otherwise; multiple orders outline, in detail, the reasons for Complainant's sanctions. *See, e.g.*, Order to Show Cause at 2-5; May 15 Order 23-25, 46-55; Tr. at 36-41. Despite clear explanation of why he was sanctioned, Complainant continued to engage in sanctionable activity. Ordering him to show cause why he should not be sanctioned for such actions is not arbitrary or an abuse of discretion.

I find I have not prepared orders to be prejudicial to Complainant. When it appeared that Complainant engaged in misconduct, I issued an order to show cause. When I found that the response to the order to show cause had not shown cause why Complainant should not be sanctioned, I sanctioned him. Complainant's disagreement with my orders does not establish that I should be disqualified. Nor does his disagreement establish such "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

b. Allegation that I Am Harassing and Intimidating Complainant to Help Respondents

Complainant asserts that I am harassing and intimidating him for the benefit of the Respondents. Complainant states:

> The fact that for the past year ALJ Almanza has (1) determinedly helped DI conceal the Emails and (2) repeatedly threatened Complainant with sanctions in connection with Complainant's analysis of ALJ Merck's criminal treatment of the Emails is evidence that ALJ Almanza is using his Show Cause Orders to help

> Respondents conceal the Emails. ALJ Almanza has used his Show Cause Orders in criminal intimidation to hinder, delay, prevent, and dissuade Complainant from obtaining evidence of crimes by Respondents and ALJ Merck to present to federal judges and law enforcement officers. *Cf.* 18 U.S.C. § 1512(d)(2).
>
> . . .
>
> Three times in the past year he has done so based on thoroughly premeditated pretext. He has issued show cause orders containing extremely serious accusations, compelling voluminous responses. He imposed and threatened to impose sanctions. He has done so, specifically, to help Respondents conceal evidence that would support Complainant's positions and actions. As ALJ Almanza's publication of the Jan. 17 Order shows, he also has the ability to publish defamatory material that will linger long after the case is over. Solely by virtue of his position and power, ALJ Almanza is able (and quite willing) to publish accusations that he knows are false to defame an attorney.[98]

Renewed Disqualification Motion at 99-101 (emphasis in original; footnote omitted; bracketed footnote added).

Complainant's assertion that I have helped Respondents conceal the Emails in this matter remains without merit. As I have explained, the Emails have not been concealed; rather, they have not been addressed at this time due to the outstanding Motions to Dismiss. *See* Discussion Part II.C.1, *supra*. Complainant's assertions that my orders to show cause served a nefarious scheme to prevent his access to the Emails lack any support in the record. The reason this matter has not progressed to discovery is because Complainant has refused to provide fair notice of his complaint to Respondents. *See* Discussion Part I, *supra* (dismissing this matter for Complainant's failure to provide fair notice of his complaint, despite being granted multiple opportunities to do so).

Complainant further bases his argument on the assertion that my orders to show cause and orders sanctioning Complainant were pretext. This allegation appears to be based solely on Complainant's disagreement with my rulings—specifically, Complainant's contention that I erred in finding that ALJ Merck did make a privilege determination regarding the Emails. I have rejected this argument before, and I do so again now. *See, e.g.*, Order Denying Release at 6; Discussion Part II.B, *supra*.

Complainant's flawed argument, and continued disagreement with my orders, does not establish that I am harassing or intimidating him, or that I have engaged in misconduct that warrants disqualification. Nor does it establish that I am some form of "superadvocate."

[98] *See* Discussion Part II.8, *infra* (addressing this issue of wrongful publication).

c. Allegation that I Am Wrongfully Using Evidence to Benefit Respondent

Complainant asserts that I arbitrarily use evidence in whichever way most benefits Respondents. Renewed Disqualification Motion at 84. Complainant states:

> Regarding ALJ Almanza's discriminatory treatment of evidence in this case, ALJ Almanza specifically refused to accept Complainant's statements (made directly to ALJ Almanza in this case) as evidence, and he disregarded the exhibits Complainant submitted in his Motion to Compel. In marked contrast, many times ALJ Almanza contended that mere contentions by ALJ Merck (in the DBA Case) *do* constitute evidence that Respondents' similar contentions are true. *See* Subsection F, above.[99]
>
> . . .
>
> To justify issuing his Jan. 17 Order ALJ Almanza has done far worse. First, he contended that the truth or falsity of the ALJ Merck's statements was irrelevant. *See* Subsection G, above. In that manner, ALJ Almanza simply dispensed with all *actual* evidence. Second, ALJ Almanza contended that ALJ Merck's contentions were evidence that Respondents contentions were true.[100] *See* Subsection F, above. Then, he *implied* that they were evidence that ALJ Merck actually performed the acts necessary to determine that the Emails were privileged under APA and Fifth Circuit law. *See* Subsection D, above. In that manner, ALJ Almanza literally repeatedly *fabricated* evidence. . . .
>
> ALJ Almanza's methods are not legal or rational. Evidence that ALJ Merck failed to perform *even one act* necessary to determine that the Emails were privileged is evidence that supports Complainant's contentions. ALJ Merck's contentions cannot prove the absence of evidence that supports Complainant's contentions.[101] ALJ Merck's conclusory contentions about what he did with the Emails cannot eliminate any of the evidence that proves what he did not do.
>
> The foregoing facts and truths establish that ALJ Almanza's arguments are frivolous and the remainder of this response should be unnecessary. Yet, it is precisely because ALJ Almanza's arguments are so obviously frivolous that the remainder of this document is necessary. When an ALJ tries to do what ALJ Almanza has repeatedly tried to do with his show cause orders, his determination to abuse his position and power should not be underestimated.

Renewed Disqualification Motion at 84-86 (emphasis in original; bracketed footnotes added).

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[99] *See* Discussion Part II.B, *supra* (explaining that ALJ Merck's orders are rulings, not contentions).
[100] *See* Discussion Part II.C.2, *supra* (explaining how I did not make such a determination regarding the veracity of Respondents' arguments).
[101] *See* fn.99, *supra*.

Complainant's arguments on these issues have been addressed in detail above. For sake of brevity, Complainant is advised to review Discussion Parts II.B and II.C.2, *supra*. Complainant's assertion that his legal argument as to the veracity of ALJ Merck's rulings serves as evidence is unpersuasive. Complainant's legal argument is just that – argument. It does not serve as factual evidence of whether ALJ Merck's ruling was a ruling or not. The record plainly establishes that ALJ Merck issued a ruling – be it correct or not. *See* Discussion Part II.B, *supra*. Moreover, as I have explained to Complainant, I cannot determine the veracity of ALJ Merck's ruling. *See, e.g.*, May 15 Order at 17-18, 70-71; Official Notice Order at 11, 13, 17. Complainant's continued attempt to argue an issue outside my authority remains perplexing.

Regardless, Complainant's argument on this point again boils down to his disagreement with my determination that the record plainly establishes that ALJ Merck made a privilege ruling. Yet again, Complainant's disagreement with my legal analysis does not display "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Moreover, Complainant's disagreement with my analysis does not show that I am a superadvocate for Respondents.

d. Alleged Misstatements of Prejudice

Complainant argues that I have repeatedly misstated the prejudice that my actions have caused Complainant and Respondents. Renewed Disqualification Motion at 86. Complainant states:

> For a year, ALJ Almanza has denied Complainant access to the Emails. The entire time, ALJ Almanza has ensured that Respondents' Motions to Dismiss have hung over Complainant's head. The Emails are highly relevant to establishing whether Respondents received fair notice of Complainant's claim.[102] *See* Subsection M, above. In addition, ALJ Almanza has subjected Complainant to three Show Cause Orders and sanctions based virtually entirely on ALJ Merck's and Respondent's contentions *about* the Emails.[103]
>
> Despite these facts, ALJ Almanza knowingly falsely contended that Complainant has failed to explain how the denial of access to Emails caused Complainant any prejudice. *See, e.g.*, Jan 17 Order at 10, fn. 33. ALJ Almanza even contended that "[u]pon review of the record, I am unconvinced that the delay has caused *any* prejudice in this case." *Id.* at 61-62 (emphasis added). Yet, ALJ Almanza, himself, expressly identified multiple relevant types of prejudice . . . .

Id. (brackets and emphasis in original; bracketed footnotes added). Complainant's argument misstates the record and lacks merit.

As I stated in my January 17 Order:

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[102] *See* Discussion Part II.C.1, *supra* (explaining why access to the Emails is irrelevant to the resolution of the Motions to Dismiss).
[103] *See* fn. 99, *supra*.

> I may only review the Emails on the matter of privilege if a party seeks to introduce them into the record. At that time I may, should the circumstances so warrant, be required to review the contents of the Emails. *See* May 15 Order at 41. In this case two motions to dismiss were filed at the same time as Complainant's December 13 motion. Given the motions to dismiss, I found it most prudent to delay my ruling on the parties' discovery plan dispute, and toll evidentiary deadlines, until such time as the motions to dismiss were resolved (as evidence is unnecessary at that point in the proceeding). *See* May 15 Order at 43-44 (internal citations omitted). Complainant has failed, multiple times, to explain how he is prejudiced by these actions. *See id.* at 15-16 (noting that if Complainant is trying to assert that his DBA Case is prejudiced, such argument is unpersuasive).

January 17 Order at 10 fn. 33. Complainant asserts that he has been prejudiced by having the Motions to Dismiss hang over his head. As I explained in that order, Complainant is not prejudiced by the delay of discovery. *See* January 17 Order at 61; *see also* Discussion Part II.C, *supra* (noting that discovery is irrelevant for the purposes of resolving the Motions to Dismiss).

I find that Complainant's assertion that my delayed ruling on the Motions to Dismiss has prejudiced him is without merit. Much of the delay has been caused by granting Complainant the opportunity to provide fair notice of his complaint to Respondents. Additionally, there have been many voluminous filings in this matter, the resolution of which has led to additional delay. *See* Procedural History, *supra* (outlining the many filings in this matter).

To the extent Complainant asserts that my show cause orders are based on ALJ Merck's "contentions," I refer Complainant to Discussion Part II.B, above, soundly rejecting this argument.

Complainant's assertions regarding my statements of prejudice are meritless. Moreover, Complainant's argument for disqualification is based solely on his disagreement with my analysis. A party's mere disagreement with an adjudicator's determination does not warrant disqualification. Further, my orders do not show a "deep-seated favoritism or antagonism" that would preclude fair judgment. *Liteky*, 510 U.S. at 555.

e. Allegation that I Am Using Sanctions and Orders as If I Were Respondents' Counsel

Complainant asserts that I am using and threatening sanctions in the same manner as if I were Respondents' counsel. Complainant alleges:

> ALJ Almanza also acknowledged that all the foregoing apply *much* more to an ALJ's order that included accusations. *See, e.g.*, Jan. 17 Order at 6-7 discussing effect of ALJ rulings and at 9, fn. 25 discussing presumptions regarding ALJ actions.[104] Even threatening to impose the most severe sanctions possible

[104] The footnote to which Complainant cites reads:

implies extreme misconduct.[105] ALJ Almanza made his accusations and threats public[106] while he is helping DI conceal all the evidence that would have rendered his order superfluous and even absurd. *Cf.* Section IV.C, below.

ALJ Almanza is essentially working for DI, and his great partiality is revealed by his deliberate misconduct, including but not limited to the following. Instead of relying on motions by Respondents, ALJ Almanza repeatedly used his own Show Cause Orders very much as if he were one of DI's counsel filing motions. To support his efforts, he repeatedly presented his own argument. He routinely misrepresented and disregarded the law (just like DI's counsel). He repeatedly asserted outright falsehoods (just like DI's counsel). He repeatedly relied on his own massive assumptions and rationalizations to fill huge holes in *his* evidence (just like DI's counsel). He literally pretended (and knowingly falsely contended) that DI's contentions were supported by evidence (just like DI's counsel).

ALJ Almanza even imposed deadlines to his show cause orders that were essentially the same as if DI, itself has filed the motions. *See* Feb. 14 Order at 5 ("Complainant is given **15 days** from the date of this Order to show cause"); May 15 Order at 79 (No. 11 Ordering Complainant to show cause without stating the deadline) (but in No. 2 stating "Complainant has 15 days from the issuance of this Order to file a statement of his complaint"); Jan. 17 Order at 92 ("within 15 days of the issuance of this Order"). *Cf.* 29 C.F.R. § 18.33(d) (14 days to respond to a motion).

ALJ Almanza repeatedly focused on supporting and defending DI's false contentions (just like DI's counsel). ALJ Almanza pursued sanctions to protect DI (just like DI's counsel). ALJ Almanza's desperation and determination to use sanctions and threats of sanctions to help DI conceal the Emails is illustrated by his blatant pretexts (just like DI's counsel). *See* Subsection F, above.

He also previously fabricated evidence to support his false accusation of perjury.[107] . . .

> Complainant cites to my analysis which states that, for the *purposes of disqualification*, there is a "strong presumptions that ALJs are unbiased." May 15 Order at 6 (internal citations omitted); *see also Partree v. Astrue*, 638 F.3d 860, 865 (8th Cir. 2011) (*quoting Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) ("[t]here is a 'presumption of honesty and integrity in those serving as adjudicators'"); *Perkins v. Astrue*, 648 F.3d 892, 902 (8th Cir. 2011) (*quoting Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001)) ("ALJs and other similar quasi-judicial administrative officers are presumed to be unbiased"); *see also Matthews v. Ametek, Inc.*, No. 11-036, 2012 WL 1999681 at *3 (ARB May 31, 2012) (*quoting In the Matter of the Disqualification of Edward A. Slavin*, No. 04-088, 2003 WL 21499867 at *18 (ARB June 30, 2003)).

January 17 Order at 9 fn. 25. Complainant continues to allege that I am applying this presumption to other issues beyond disqualification, despite my orders specifically stating the opposite.

[105] Complainant apparently engaged in the same sanctionable conduct for which he was previously sanctioned. *See* January 17 Order at 91-92.

[106] See Discussion Part II.8, *infra* (addressing this argument).

. . .

> ALJ Almanza has essentially picked up where ALJ Merck left off in the DBA Case. In the DBA Case, DI was desperate to prevent the DBA Claimant from obtaining the Powers email and the Huber email. However, DI could not establish that either email was privileged. Consequently, DI repeatedly sought to submit the Emails to ALJ Merck in an *ex parte* communication[108] so that he could simply falsely declare that the Emails were privileged.

Renewed Disqualification at 88-90 (emphasis in original; bracketed footnotes added). Complainant's arguments, many of which have been addressed countless times in this matter, are meritless.

Complainant asserts that, by using a 15 day period to respond to my orders to show cause, I have demonstrated that I am functioning as though I am Respondents' counsel. However, the time to respond to an order to show cause is up to the Judge's discretion. *See* 29 C.F.R. § 18.35(c)(3) (listing no period during which a party must respond to an order to show cause). I have used 15 day deadlines as I believe that is a reasonable time in which a party could respond. I have given more time where I believe more time is warranted. Additionally, 15 days is beyond the 14 days of 29 C.F.R. § 18.33, the normal period in which to respond to a motion by an opposing party. I do not understand how providing a reasonable time for the parties to respond to an order is a ground for disqualification, or evidence that I am somehow acting as counsel for Respondents.

Complainant also asserts that my sanctions protect Respondents. On the contrary, my sanctions protect neither side. When a party engages in conduct that appears sanctionable, I issue an order to show cause to that party, giving them the opportunity to respond. Where that party fails to establish that my understanding of the situation was incorrect, or that the party should not be sanctioned despite the misconduct, I take appropriate action.

Finally, Complainant asserts that I have shown myself to be a superadvocate because I am allegedly misrepresenting the record, and because I have denied him access to the Emails. Complainant appears to assert that, because I disagree with his legal analysis, I am acting on Respondents' behalf. Complainant's argument is meritless. An adjudicator does not become an advocate for a party merely because he disagrees with the opposing party's analysis. Nor does an adjudicator become an advocate for a party merely because that adjudicator agrees, in whole or in part, with that party's analysis.

Nevertheless, Complainant's arguments, again, boil down to an assertion that I am prejudiced and partial because I disagree with him. Disagreement with a party does not establish partiality, particularly when that party's arguments have been addressed and found incorrect

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[107] *See* May 15 Order at 44-46 (explaining why it appeared Complainant had committed perjury, eventually accepting Complainant's argument that he had not committed perjury).

[108] Complainant continues to believe that *in camera* review is *ex parte* communication, despite copious analysis and rulings to the contrary. I refer Complainant to my copious analysis of this issue in my prior Orders. *See* January 17 Order at 49-50; Order Denying Release at 19-20; May 15 Order at 16-17; Official Notice Order at 11.

copious times. Nor does such disagreement show the sort of "deep-seated favoritism and antagonism" that warrants disqualification. *Liteky*, 510 U.S. at 555.

f. Complainant Fails to Establish I Am Acting as a Superadvocate

Upon review of Complainant's arguments on this issue, I find they are all without merit. I have not used my orders to prejudice complainant, to harass and intimidate him, or as if I was Respondents' counsel. Nor have I misstated the prejudice he suffered, and I have not wrongfully used evidence to benefit Respondent over Claimant. Simply put, Complainant's assertions of superadvocacy and misconduct therewith are unsupported by the record, lack merit, and are based on misunderstandings of the law. Complainant's meritless assertions on this issue do not establish that I should be disqualified.

6. Allegation of Partial Actions

Complainant asserts that I have engaged in openly partial actions in this matter, and that I have wrongfully denied his requests to disqualify me. Complainant states:

> ALJ Almanza has so knowingly and willfully violated so many commands and prohibitions of so many legal authorities for so long that the issue has long been not only that ALJ Almanza lacks the independence and impartiality to preside over this case, but also that he lacks integrity. ALJ Almanza's misrepresentations of law and fact and his efforts at retaliation and intimidation are thoroughly premeditated. The misconduct and crimes that ALJ Almanza is committing have been briefed repeatedly, so his actions are not merely criminal as a matter of law, they are criminal as a matter of conscious and considered choice. *See, e.g.*, 33 U.S.C. §§ 931(c) and 938(b); 18 U.S.C. §§ 1001(a), 1512(c)(1), 1341 and 1343.
>
> . . .
>
> The U.S. Constitution clearly establishes a hierarchy of legal authorities and limitations of ALJ and judicial power. All "powers" that are relevant to this case and that are "not delegated to" ALJs Merck or Almanza (or the DOL) "are reserved" "to the people," including Complainant.[109] U.S. Const. Amend. X. ALJs have only the powers delegated to them by the Secretary of Labor consistent with the APA. *See, e.g.*, 5 U.S.C. § 556(c).
>
> Neither ALJ Merck nor ALJ Almanza (nor any tribunal) is the supreme law of the land—not even in their own proceedings.
>
> . . .

[109] The text of the Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". U.S. Const. Amend. X. Complainant's assertion that all powers not reserved to the DOL in this case are reserved to himself, and, necessarily, Respondents, misconstrues the Amendment.

> Despite all the evidence (and ALJ Almanza's personal knowledge) of his scheming, trickery and deceit to illegally conceal evidence and favor Respondents (which is *not* limited to the issues above), ALJ Almanza refused to disqualify himself because Complainant did not provide an "affidavit to support his claims." Jan. 17 Order at 6. *See also* May 15 Order at 27. . . . He implied—but failed to directly contend or support with any legal authority—that an affidavit was *always* required to disqualify an ALJ.
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> . . .
>
> Every fact stated in the affidavit must be assumed to be true.[110] Disqualification must be based on a determination that the affidavit, itself, sufficiently states grounds for disqualification. If it does, "it is the [the judge's] duty to 'proceed no further' in this case." *Id.* Section 144[111] "directs an immediate cessation of action by the judge whose bias or prejudice is averred." *Id.* at 33.
>
> . . .
>
> This Renewed Motion to Disqualify is supported by all the analysis in this entire document. ALJ Almanza's rulings, alone—and even more so in the context of his accompanying statements—reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. ALJ Almanza's conduct has been *far* outside the bounds of even reasonable errors under the APA, the OALJ Rules, the SOX regulations and Model Code. He is willfully failed to uphold, apply and comply with many provisions of law in many respects. He has willfully failed to act impartially through the duration of this case. Some of ALJ Almanza's actions were criminal. *See, e.g.*, 18 U.S.C. §§ 1001(a) and 1521(c)(1).
>
> Perhaps the best example of all the foregoing is ALJ Almanza's insistence on repeating and relying on an obvious falsehood that he personally fabricated. *See* Reasons, Section II, below.[112] Another excellent example is ALJ Almanza's, personal efforts to essentially fabricate evidence. *See* Section I.F, above. He has engaged in the foregoing (1) to help Respondents conceal the Emails, (2) to justify the most severe sanctions that he has the power to impose (in a [95] further effort to help conceal the Emails), and (3) ultimately to justify judgment for Respondents. ALJ Almanza conclusively proved that fair judgment by him is impossible.

Renewed Disqualification Motion at 9-10, 91-95 (brackets and emphasis in original; bracketed footnotes added). Complainant's argument misstates the record and is without merit.

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[110] Complainant provides no citation to support the notion that an affidavit must be assumed true and automatically trigger disqualification, and I can find no law to support that contention.

[111] Complainant refers to 28 U.S.C. § 144 regarding filings in District Court.

[112] Complainant appears to refer to my determination that the record plainly establishes that ALJ Merck made a privilege determination. *See* Discussion Part II.B, *supra* (addressing this issue in detail).

Complainant misstates my Orders, stating that I refused to disqualify myself because Complainant did not include an affidavit of bias. My Orders, however, have not been so limited in their reasoning.

In my May 15 Order, for example, I explained:

> No argument provided by Complainant establishes deep-seated favoritism or antagonism that would make fair judgment impossible. I do not show impermissible partiality when I deny motions that ask me to perform acts contrary to the law or beyond my authority. Nor do I show favoritism by providing an analysis of law and facts to support my decisions (be they good or bad for Complainant). [Footnote: Complainant does not attack the validity of decisions (or parts therein) that have ruled in his favor, such as the partial vacation of my Supplemental Prehearing Order. *See, e.g.*, Official Notice Order]. Each of Complainant's arguments concerning my disqualification continues to boil down to mere disagreement with my ruling. When I do not rule in Complainant's favor, he alleges I act partially. *See generally* Supplemental Motion to Disqualify; *see also* Motion to Vacate and Disqualify. Upon review of my rulings, my determinations were based solely upon the law as I understood it, and I typically provided detailed accompanying explanations to support my determination.
>
> . . .
>
> . . . Complainant is not entitled to disqualify merely because he disagrees with my rulings. *See, e.g.*, *Locascio v. United States*, 372 F. Supp. 2d 304 (E.D.N.Y. 2005). Complainant must show bias or a deep-seated favoritism or antagonism that makes fair judgment impossible. Complainant fails to provide any evidence that does so.
>
> Moreover, Complainant's motion is clearly procedurally lacking, as it does not contain an affidavit of bias or other disqualification as required under 5 U.S.C. § 556(b). . . .

May 15 Order at 27 (emphasis in original; footnote repeated in bracketed text; footnote omitted). Further, the January 17 Order states:

> The final sentence of Complainant's Response states: "[t]he Show Cause Order again shows why ALJ Almanza must be disqualified." Response at 20. Complainant provides no additional evidence in support of this assertion, beyond pointing to the Show Cause Order portion of my May 15 Order. *See id.* Under 5 U.S.C. § 556(b), a party seeking disqualification must provide an "affidavit of personal bias or other disqualification." Complainant has provided no such affidavit to support his claims. Moreover, any assertions that my Show Cause Order was improper are addressed, and rejected, below. *See* Discussion Part I,

> *infra*. Accordingly, I find that Complainant has failed to establish that I should be disqualified.

January 17 Order at 6. As is evident from both Orders, I did not disqualify Complainant for merely failing to file an affidavit of bias. Though his failure to file such an affidavit did make his request for disqualification procedurally deficient under 5 U.S.C. § 556(b), I denied his requests for disqualification because the grounds on which they were based were faulty. His assertions of misconduct were countered by my determinations that no misconduct occurred, and that Complainant had failed to establish any deep-seated favoritism or antagonism that would preclude fair judgment. Simply put, Complainant's disqualification motions were both procedurally and substantively deficient.

Beyond this, Complainant again asserts that I have violated the APA, SOX, and various other statutes. Complainant's arguments are based entirely on his disagreement with my rulings. He asserts that my rulings are furthering alleged misconduct, specifically regarding Complainant's access to the Emails. As I have explained numerous times above, Complainant's disagreement with my legal analysis does not warrant my disqualification. Nor does my determination that Complainant's analysis misinterprets the law establish a deep-seated favoritism or antagonism that precludes fair judgment. Accordingly, I find, yet again, that I have not engaged in partial actions via my legal analysis.

7. Complainant Alleges I Engage in Deceitful Tricks

Complainant alleges that I have used various tricks in my effort to conceal evidence in this matter. Complainant states:

> . . . ALJs Merck and Almanza routinely used certain tricks or devices to purport to justify helping DI conceal evidence, including the Emails. *Cf.* 18 U.S.C. § 1001(a). One trick/device consists of falsely contending that the law is "silent." Jan 17 Order at 62; ALJ Merck (1/27/16) at 13. A variation on that trick/device consists of disregarding (or misrepresenting the absence) of particular language prohibiting or requiring actions. *See, e.g.*, Reasons, Section II, below. Two other tricks/devices consist of (1) citing a regulation for a purpose that clearly conflicts with a statute and (2) citing a court or agency decision for a proposition that clearly conflicts with the Constitution or statute, rule or regulation.
>
> . . .
>
> ALJ Almanza refrained from explicitly stating the following in his Show Cause Orders, but he implied it in each one. He implied that crucial words (*e.g.*, *evidence*, *exclude*, *seal*, *ruling*, *finding* and *determination*) mean what he wants them to mean, and he may change their meanings or arbitrarily apply varying meanings to help him sanction and defraud Complainant. *See, e.g.*, Mot., Sections I.F and J and Reasons, Sections I and II, below.

The words *evidence*, *exclude*, *seal*, *ruling*, *finding* and *determination* have real meaning. No such word is a mere word. It is a concept. Each word is used in one or more of SOX, the APA, the SOX regulations and the OALJ Rules, and the meaning of the words (*i.e.*, the concepts) must be ascertained by considering how they are used in the relevant statutory scheme. Each word stands for a discrete set of actions. The requisite actions (and, therefore, the meaning of the words) are established by real standards governing ALJs. . . .

. . .

The rules and principles that apply to evidence in this case determine what constitutes "evidentiary support." ALJ Merck's status as an ALJ in the DBA Case cannot alter the fact that no person—ALJ, counsel for DI or witness for DI—is empowered to fabricate false evidence for DI. ALJ Merck's statements must be treated like any other evidence—evidence *only* of what one person stated on a certain date. The actual content of the Emails must be determined in accordance with the evidence in the record that is reliable and probative of such facts. . . . ALJ Almanza may not—as he has frequently—use any contention by ALJ Merck as evidence that such contention or any similar contention by Respondents is true

. . .

ALJ Almanza knew that the law required him to determine whether ALJ Merck's contentions were true. . . .

ALJ Almanza has failed to ever explain how the falsity of ALJ Merck's contentions can be irrelevant to ALJ Almanza's show cause orders or his orders imposing sanctions. Moreover, ALJ Almanza knew that the falsity of particular contentions by ALJ Merck was highly relevant. That is *why* for more than a year ALJ Almanza has (1) refused to rule on Complainant's Privilege Motion seeking a determination that the Emails are not privileged and (2) blocked Complainant's discovery.[113] Yet, for many months ALJ Almanza has threatened and imposed sanctions while frequently falsely contending that the veracity or truth of ALJ Merck's contentions was irrelevant.[114]

. . .

If an ALJ wishes to rely on any court or board decision after Complainant has shown that it conflicts with a statute, rule or regulation, the ALJ *must* actually *show* how it does not conflict. *See* 5 U.S.C. § 557(c)(3). Unless the ALJ has stated rational reasons for concluding that such a decision does not conflict with a statute, rule or regulation, he may not rely on such decision to justify any ruling.

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[113] *See* Discussion Part II.C.1, *supra* (explaining why discovery has been tolled in this matter).

[114] *See* Discussion Part II.B, *supra* (explaining that ALJ Merck's determinations are rulings, and explaining why their veracity is irrelevant).

> *See id.* . . .
>
> . . .
>
> ALJ Almanza *knew* that the APA and the OALJ Rules precluded *ex parte* communications, together with the common law, also clearly prescribed actions that DI, ALJ Merck and ALJ Almanza were required to take or prohibited from taking in connection with a determination that the Emails are or were privileged. ALJ Almanza willfully failed and refused to apply and comply with the law.[115]
>
> ALJ Almanza entirely disregarded plain statutory and regulatory text and studiously avoided applying any canon of statutory construction. Instead, ALJ Almanza attempted to deceitfully confuse the issue with arguments that were patently irrational and plainly contrary to the statutes and regulations. ALJ Almanza's arguments only provided additional evidence that (1) ALJ Almanza knew and understood the law and (2) that he knowingly falsely contended that ALJ Merck determined that the Emails were privileged or excluded from the record.
>
> . . .
>
> As a result of the foregoing, ALJ Almanza *knew* that ALJ Merck lacked the authority to receive the Emails, he lacked the authority to consult the Emails regarding any fact in issue in the DBA Case, and he lacked the authority to conceal the Emails from the DBA Claimant. To pretend to show to the contrary, ALJ Almanza relied solely on court decisions that failed to analyze or apply *any* of the foregoing binding legal authorities. Mar. 3 Order at 11; June 30 Order at 19-20; Jan. 17 Order at 49-50. ALJ Almanza knew that his conduct was not legal or even rational. *See* Limitations on ALJ Power, above. It was deliberately unconstitutional and criminal. *Cf.* 18 U.S.C § 1001(a).
>
> Despite all the foregoing—and despite the fact that these issues have been briefed many times over many months—ALJ Almanza repeatedly knowingly falsely insisted that ALJs *must* be able to review documents *in camera* to determine that they are privileged. . . .

Renewed Disqualification Motion at 12-16, 53, 67-69 (emphasis in original; bracketed footnotes added). Complainant fails to establish that I engage in deceitful tricks.

Complainant focuses yet again on arguments that he admits he has briefed "many times" before. Renewed Disqualification Motion at 69. He fails to acknowledge that I have addressed these addressed and analyzed these arguments an equal amount, and that I have *consistently*

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[115] Complainant's argument on *ex parte* communications has been addressed multiple times, in great length, in my prior orders. I suggest that Complainant review the copious analysis on this issue. *See, e.g.*, January 17 Order at 49-50; Order Denying Release at 19-20; May 15 Order at 16-17; Official Notice Order at 11, 14-15. Complainant's unchanged argument that *in camera* review is *ex parte* communication remains meritless.

rejected them as inaccurate and misinterpretations of the law. *See, e.g.*, January 17 Order at 49-50 (addressing the issue of *in camera* review); Order Denying Release at 19-20 (same); May 15 Order at 16-17 (Same); Official Notice Order at 11, 14-15 (same). I do not understand why Complainant, upon raising the same argument that was already addressed and rejected as incorrect, expects a different outcome.

Simply put, reasoned legal analysis issued by an adjudicator is not a "trick," even if it disagrees with Complainant's argument. Nor do I engage in "deceitful tricks" when I do not change my analysis, despite Complainant's reiterations of the same, incorrect arguments. Regardless, Complainant, again, bases his argument entirely upon his disagreement with my analysis and orders. Such disagreement does not warrant disqualification; it does not establish "deep-seated favoritism or antagonism that would render fair judgment impossible." *See Liteky*, 510 U.S. at 555.

Additionally, Complainant's arguments regarding ALJ Merck's rulings and discovery have been previously addressed and I refer Complainant to Discussion Parts II.B and II.C.1, above, which address those issues.

8. Alleged Wrongful Publication of Allegedly False Accusations

Complainant asserts that I "egregiously abused [my] position and power by publicizing and flaunting [my] misconduct, [my] false accusations, and [my] personal interest in ensuring Respondents prevail." Renewed Disqualification Motion at 101 (internal bold and capitalization omitted). Complainant states:

> In addition to all the misconduct addressed in the remainder of this document, ALJ Almanza chose to publicly highlight his misconduct, his partiality, and his personal interest in this case. He chose to abuse his position and his power to cause the OALJ to make these issues considerably more public than they were required to be. He chose to issue a single document so that he could accomplish at least three goals with one publication. First, on the on-line docket for this case he announced that he issued an "Order Sanctioning Complainant." Second, he filled the Jan. 17 Order with misrepresentations and false accusations. Third, he made all the foregoing available to the public via multiple OALJ websites, *e.g.*, https://www.oalj.dol.gov/ and https://www.oalj.dol.gov/OALJ_Case_Status.htm.

Id. (emphasis in original). Complainant's argument is meritless.

Effective October 31, 2017, OALJ expanded its online functionality. *See* OALJ, *Enhanced Access to ALJ Orders*, https://www.oalj.gov/. OALJ's website was updated to include "all ALJ final decisions, interim decisions, orders, and notices made in the adjudication of cases, with limited exceptions for documents that are FOIA exempt." *Id.* The change was made only for prospective orders. *Id.*

My January 17 Order was published after this new OALJ policy was instituted. The policy is displayed on the oalj.dol.gov website homepage. It does not appear that my orders in this case are FOIA exempt.

Complainant asserts that I have wrongfully published the January 17 Order. My January 17 Order was published according to OALJ policy, much in the same manner that this Order shall be published. The publication of the January 17 Order was done in accordance with the enhanced access policy, and Complainant provides no evidence to support his assertion that the Order was published with any ill intent.

Moreover, Complainant asserts that the title of the Order, including the phrase "Order Sanctioning Complainant" somehow serves as a retaliatory act against him. Complainant's persistent insistence on engaging in sanctionable behavior, coupled with his inability to show cause why he should not be sanctioned, resulted in the issuance of an order sanctioning complainant and order to show cause. This is clearly explained in the January 17 Order. The order sanctioning complainant was not a form of retaliation.

Complainant also asserts I made false accusations and misrepresentations of fact. Complainant does not identify which statements are allegedly false. To the extent Complainant argues that my determination that the record establishes that ALJ Merck made a privilege ruling is false, the copious evidence and argument in the record plainly disproves Complainant's assertion. I refer Complainant to Discussion Part II.B, above, for a more detailed analysis of that issue.

Regardless, I reject Complainant's assertion that I should be disqualified because my January 17 Order was published as required by OALJ policy. Such publication clearly does not establish bias or any sort of deep-seated favoritism or antagonism.

D. Allegation of Knowledge of Facts in Dispute

Complainant provided a statement reminding me that I am prohibited from obtaining or relying upon information in this matter that was obtained from any source outside the record. Complainant states:

> ALJ Almanza has long known that he is prohibited from obtaining personal knowledge of disputed facts from any source other than the parties. . . .
>
> ALJ Almanza may not (in any way whatsoever) consult ALJ Merck, ALJ Henley or any other person regarding any fact in dispute in this case, including whatever Huber and Powers might have said in their Emails. The Model Code contains a related prohibition: ALJ Almanza "may consult with court staff and court officials whose functions are to aid" ALJ Almanza "in carrying out [his] adjudicative responsibilities, or with other judges," only if ALJ Almanza "makes reasonable efforts to *avoid receiving factual information that is not part of the record*." Rule 2.9(A)(3).

> Judicial decisions *must not* be based on facts that are not in evidence. . . .
>
> . . .
>
> If ALJ Almanza has personal knowledge of any disputed fact in this case, he must disqualify himself. ALJ Almanza has ensured that he does have personal knowledge of facts in this case. He issued his third Show Cause Order to compel Complainant to prove what ALJ Almanza, personally, knew and misrepresented. *See* Jan. 17 Order at 88.

Renewed Disqualification Motion at 95-96 (brackets and emphasis in original). Complainant's argument is moot: I have no such personal knowledge.

As I have reiterated throughout this proceeding, I have not seen the Emails or their contents. *See, e.g.*, May 15 Order at 22 ("[n]either I nor, as far as I know, Complainant have ever seen the contents of the Emails."); Tr. at 49-50 (informing Complainant that I had never seen the contents of the emails); January 17 Order at 63 ("I have never seen the Emails at issue in this matter, and I have not reviewed any portion of the Emails (redacted or otherwise), in this case.") I have no personal knowledge of the facts at issue in this matter, beyond what the parties have already asserted.

Complainant provides no evidence to support any assertion that I have seen such evidence. Complainant states that my third show cause order shows that I personally "knew and misrepresented" evidence regarding the Emails. Complainant cites to the portion of my January 17 Order noting Complainant's apparently sanctionable conduct.[116] I do not understand how that establishes that I have any information in regards to this matter, beyond that which is already in the record.

Regardless, as I have no such personal knowledge of any disputed fact in this case, I need not disqualify myself on account of this issue.

E. Complainant's Renewed Disqualification Motion Fails to Establish That I Should Be Disqualified.

Upon review of Complainant's Renewed Disqualification Motion, I find it lacks any substantive merit. The Renewed Disqualification Motion reiterates argument that has been addressed, and rejected, many times before. In toto, Complainant's assertions reduce to a simple, repeated argument. Complainant alleges that any disagreement with his legal analysis is irrational, illegal, and grounds for disqualification. This argument is based ultimately on two flawed assumptions: 1) that complainant's legal analysis is correct (it is not); and 2) that I know his analysis is correct (I do not).

[116] Specifically, Complainant's repeated assertions that ALJ Merck did not make a privilege determination. *See* January 17 Order at 88.

Complainant is entitled to disagree with me, and he may appeal my rulings to the Administrative Review Board if he deems it appropriate. However, Complainant is not entitled to disqualify me merely because he disagrees with my rulings; he *must* establish "that the proceedings were pervaded by bias demonstrating deep-seated antagonism that precludes the exercise of fair judgment[.]" *Matter of Slavin*, 2003 WL 21499867 at *18 (*citing Reddy*, 191 F.3d at 119-20); *see also Liteky*, 510 U.S. at 555 (noting an adjudicator's decisions warrant disqualification only where they show a "deep-seated favoritism or antagonism that would make fair judgment impossible.") Complainant fails to do so.

Complainant asserts that my analysis, which disagrees with Complainant's interpretations of law, establishes such antagonism. As I have shown above, however, Complainant's analysis misinterprets the law, misstates my Orders, and ignores the record. Upon review, I find that my rulings remain well-reasoned, and I continue to believe that my analysis correctly and accurately applies the law to this matter. I further find that Complainant has failed to establish that I have deep-seated favoritism or antagonism that precludes fair judgment.

Additionally, Complainant failed, yet again, to provide an "affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case." 5 U.S.C. § 556(b). Complainant's arguments for disqualification fail even if the requirements of 5 U.S.C. § 556(b) do not apply. However, as the 5 U.S.C. § 556(b) requirements are also necessary, Complainant's argument is both substantively and procedurally flawed.

Accordingly, Complainant's Renewed Disqualification Motion is **DENIED.**

III. Complainant Is Sanctioned

In my January 17 Order, I issued an Order to Show Cause Why Complainant Should Not Be Sanctioned ("Third Show Cause Order"). The evidence suggested that Complainant had made a factual contention without evidentiary support, as forbidden by 29 C.F.R. § 18.35(b)(3). Second Sanctions Order at 35. Complainant specifically asserted three contentions that appeared false:

> [1] There is absolutely no evidence (or legal authority) in the record that even tends to establish that ALJ Merck actually determined that the Emails were privileged consistent with *any* applicable law (*i.e.*, the APA, the OALJ Rules, or Fifth Circuit Precedent).
>
> . . .
>
> [2] ALJ Almanza also misrepresented that "ALJ Merck definitively found that the Emails were privileged." May 15 Order at 68. That contention is plainly false. ALJ Merck's contentions cannot even create the *possibility* that the Emails were privileged.

> [3] ALJ Almanza also continues to misrepresent that ALJ Merck "excluded [the Emails] from the record in the DBA Case." *Id. See also id.* at 17 and 18. That contention is patently false as a matter of fact and as a matter of law.

Second Sanctions Order at 36 (*citing* Complainant's Response to the May 15 Show Cause Order at 12, 14 (emphasis in original). I found these statements particularly disturbing because I had already sanctioned Complaint for making a statement without evidentiary support in his Motion for Sanctions for False Statements Regarding the Emails. Specifically, Complainant reiterated the statement "ALJ Merck did not make a 'privilege determination' based on his review of the Emails." January 17 Order at 37-38; May 15 Order at 46-51, 55.

I explained in great detail why Complainant's assertion was without evidentiary support. January 17 Order at 36-38. Specifically, I explained that the three contentions made above are "contradicted by ALJ Merck's February 9 Order and ALJ Merck's September 30 Order." *Id.* at 37. As ALJ Merck summarized and reiterated in his September 30 Order:

> In [the February 9 Order], I[, ALJ Merck,] found that two emails that Claimant sought from Employer were protected by attorney-client privilege, and denied Claimant's request to compel the emails. To determine whether the two emails were privileged, I conducted an *in camera* review of the emails. Because I determined the emails were privileged, I placed them under seal to be opened only by the appropriate appellate authority.
>
> . . .
>
> Claimant appears to doubt whether the Court found that these emails were subject to attorney client privilege. It is abundantly clear from the original February 9, 2016 order that I did find these emails subject to attorney client privilege. *See Order Denying Claimant's Motion to Compel Production of Emails Over Which Employer has Asserted Attorney-Client Privilege and Order Denying Motion for Sanctions* (Feb. 9, 2016). However, to avoid Claimant's counsel's further confusion, I will reiterate here that, for the reasons stated in that Order, I find that these two emails are subject to attorney-client privilege.

ALJ Merck's Sept. 30 Order at 2, 4 fn. 2.

I explained to Complainant that "[t]he most minimal factual inquiry, *simply reading ALJ Merck's orders*, seems to disprove Complainant's factual statement." January 17 Order at 89 (emphasis in original). Moreover, I explained that Complainant was clearly aware that the statements made were without evidentiary support, as they had been analyzed and found to have been made without evidentiary support in my May 15 Order. *Id.* Finally, I stated that the evidence in the record clearly failed to support Complainant's assertions, which were entirely based on "Complainant's own unsupported assertions to the contrary (for which he was previously sanctioned)." *Id.* at 89-90.

Complainant's response to the January 17 Order's order to show cause has been addressed, and found meritless. *See* Discussion Part II, *supra*. Despite my repeated efforts, Complainant fails to understand the difference between stating that a ruling was incorrect, and stating that the ruling was never made. *See* Discussion Part II.B, *supra*. The record plainly establishes that ALJ Merck made a privilege determination, and Complainant has provided no evidentiary support, beyond his own bald assertions, for his contrary contention. Complainant has assumed, incorrectly, that his rejected legal arguments are sufficient to undermine the plain record. They are not.

I find that Complainant has engaged in sanctionable activity, and he has failed to show cause why he should not be sanctioned. Accordingly, Complainant is **SANCTIONED**.

Additionally, I find that Complainant engaged in the same sanctionable conduct for which he was previously sanctioned. *Compare* January 17 Order at 36-38 *with* May 15 Order at 46-51, 55. This plainly demonstrates that the initial sanctions were insufficient. Complainant's continued failure to understand the basic logical difference between stating that a ruling was wrong, and that it was never made, casts doubt on his ability to ever modify this behavior.

I gave Complainant notice that, given the severity of his conduct, I was considering significant sanctions. January 17 Order at 91 ("I am considering imposing the full range of sanctions available under 29 C.F.R. § 18.35(c)(4)"). Complainant's continued pattern of making statements without evidentiary support will clearly not abate, even after suffering sanctions. Under these circumstances, I find it appropriate to sanction Complainant by forbidding him from filing any further documents in this matter.

ORDER

Based on the foregoing:

1. Complainant's Renewed Disqualification Motion is **DENIED**;

2. Respondents' Motions to Dismiss are **TAKEN OUT OF ABEYANCE** and **GRANTED --** Complainant's claim is therefore **DISMISSED**;

3. Complainant's October 19 Motion is **TAKEN OUT OF ABEYANCE** and **DENIED AS MOOT**; and

4. Complainant is **SANCTIONED –** Complainant is forbidden from filing any further documents in this matter.

SO ORDERED.

PAUL R. ALMANZA
Associate Chief Administrative Law Judge