**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 02-cv-01239-MSK-KLM

MARK JORDAN,

Plaintiff,

v.

MICHAEL PUGH, et al.,

Defendants.

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**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR FINDING PURSUANT TO 18 U.S.C. § 3626(a)(1) (Doc. 357)**

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Defendants, through undersigned counsel, hereby respond in opposition to Plaintiff's Motion for Finding Pursuant to 18 U.S.C. § 3626(a)(1) [hereinafter "Motion"] (Doc. 357). Plaintiff's motion for a finding pursuant to 18 U.S.C. § 3626(a)(1) should be denied because Plaintiff fails to show that a manifest error of law occurred, Plaintiff improperly requests that this Court make a new finding on an issue never before raised by Plaintiff throughout the history of this case, Plaintiff presents no evidence to support his Motion, and Plaintiff cannot show that manifest injustice will result if his Motion is denied.

Plaintiff asks that this Court insert the following language in its August 9, 2007 Memorandum Opinion and Order:

> Pursuant to and as required by 18 U.S.C. § 3626(a)(1), the Court specifically finds and concludes that the prospective relief granted herein is narrowly drawn, extends no further than necessary to correct the violations of the federal constitutional right asserted by Mr. Jordan, and is the least intrusive means

> necessary to correct the violation of the federal constitutional right. The Court has additionally given substantial weight to any adverse impact on public safety and the operation of the federal criminal justice system caused by the relief.

(Doc. 357-2 (Proposed Order).) Plaintiff does not, however, present any argument or evidence as to why the Court should grant his Rule 59(e) motion, but rather simply requests that the Court make additional findings and place those new findings in its Memorandum Opinion and Order. *See* Motion at 2. Because nothing in Rule 59(e) supports Plaintiff's requested relief, his motion should be denied.

"A Rule 59(e) motion to alter or amend the judgment should be granted only to correct manifest errors of law or to present newly discovered evidence." *Loughridge v. Chiles Power Supply Co.*, Inc., 431 F.3d 1268, 1274 -1275 (10th Cir. 2005). Although Plaintiff states that "this Court should grant this motion to correct manifest errors of law," Plaintiff never identifies any manifest error of law committed by the Court. *See* Doc. 357 at 2 (internal quotations omitted). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal quotations omitted); *cf. Benne v. Int'l Bus. Machs. Corp.*, 87 F.3d 419, 428 (10th Cir. 1996) (holding that no manifest error of law was committed where district court followed precedent and did not depart from established law). Plaintiff seeks to have the Court "make the § 3626(a)(1) findings and place those findings in its Memorandum Opinion and Order." Motion at 2. However, Plaintiff himself states that "[i]t is Plaintiff's position that … these determinations are implicit in the Court's opinion." *Id.* Thus, according to Plaintiff, the Court has already conducted the proper legal analysis, foreclosing any

argument that the Court has committed a manifest error of law that would justify a change in the Court's Memorandum Opinion and Order.

In addition, Plaintiff's attempt to have the Court make additional findings at this stage of the proceedings is improper. "Rule 59(e) provides a means to support reconsideration of matters properly encompassed in a decision on the merits. [It] cannot be used to expand a judgment to encompass new issues which could have been raised prior to issuance of the judgment." *Steele v. Young*, 11 F.3d 1518, 1520 n.1 (10th Cir. 1993) (internal quotations and citations omitted); *see also Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (A Rule 59(e) motion "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing."); *Mantle Ranches, Inc. v. U.S. Park Service*, 950 F.Supp. 299, 300 (D. Colo. 1997) ("[A] motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' and make legal arguments that could have been raised before.") (internal quotations omitted). In over five years of litigation, Plaintiff has never asked the Court to make findings pursuant to 18 U.S.C. § 3626(a)(1). Plaintiff cannot now seek to have the Court make § 3626(a)(1) findings when he neglected to raise the issue of such findings at any time before the judgment. Contrary to the purpose of Rule 59(e), Plaintiff's Rule 59(e) motion seeks for this Court to "expand a judgment to encompass new issues which could have been raised prior to issuance of the judgment."[1] *Steele*, 11 F.3d at 1520 n.1.

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[1] Plaintiff attempts to circumvent this argument by stating that the determinations are implicit in the Court's opinion, yet Plaintiff himself specifically asks the Court to "*make* the § 3626(a)(1) findings." Motion at 2 (emphasis added).

Moreover, Plaintiff presents no argument that new evidence is available to support the new findings he seeks. In fact, Plaintiff presents no evidentiary support for his Motion at all. Nevertheless, without evidentiary support, Plaintiff asks the Court to make new findings and place those findings in its Memorandum Opinion and Order. In addition, contrary to Plaintiff's unsupported assertion that "Defendants will not be unduly prejudiced" by Plaintiff's request, Plaintiff seeks an additional factual finding that Plaintiff did not raise during the trial. Plaintiff presents no evidence in his motion – either from earlier proceedings or newly discovered – to support findings pursuant to § 3626(a)(1); therefore this Court should not now make such findings.

Finally, manifest injustice will not result if the Plaintiff's motion is denied. On the contrary, manifest injustice would result if the Court accepted Plaintiff's request and now made unsupported factual findings post-trial. Plaintiff did not raise this issue at trial and consequently Defendants did not address it or present evidence on it. Plaintiff now asks that the Court simply make an additional factual finding on a new issue previously unaddressed. At a minimum, this Court should conduct a post-trial evidentiary hearing regarding the issue if the Court is inclined to entertain the motion, and thereby provide both parties the opportunity to present evidence on the matter to the Court.

In sum, Plaintiff has not shown a manifest error of law, seeks additional findings that he should have sought at an earlier stage of the litigation, presents no evidence in support of the new findings he proposes, and cannot show manifest injustice is caused by the Court's existing decision. Plaintiff's 59(e) motion should be denied.

For these reasons, Plaintiff's Motion for Finding Pursuant to 18 U.S.C. § 3626(a)(1) should be denied.

Respectfully submitted this 12th day of September, 2007.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of September, 2007, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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Counsel for Plaintiff

I also hereby certify that on this 12th day of September, 2007, I mailed or served the foregoing document to the following non-CM/ECF participant(s) in the manner (mail, E-mail, etc.) indicated by the nonparticipant's name:

None

s/ Marcy E. Cook
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