IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96CV01285 (Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

INTERIOR DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' "MOTION TO STRIKE OR DISREGARD" SECTION III OF INTERIOR DEFENDANTS' REPLY BRIEF IN SUPPORT OF INFORMATION TECHNOLOGY PROTECTIVE ORDER

I. Introduction

In their "Motion to Strike or Disregard Section III of Interior Defendants' Reply Brief in Support of Motion for a Protective Order With Regard to Information Technology Security Materials to be Submitted Pursuant to July 28, 2003 Preliminary Injunction" ("Motion to Strike or Disregard" or "Pl. Mot."), plaintiffs continue their resource-wasting practice of filing motions devoid of merit and legal authority for their requested relief. In seeking their requested relief, plaintiffs wholly ignore the standards set forth in Rule 12(f) of the Federal Rules of Civil Procedure, governing motions to strike. Moreover, they cite no authority for their motion "to disregard." Finally, in arguing that Interior Defendants' reply brief "improperly exceeds the limited scope of a reply memorandum and seeks unfair advantage," Pl. Mot. at 1, plaintiffs ignore the arguments advanced in both parties' principal briefs – particularly their own brief opposing the Information Technology ("IT") protective order – because such arguments squarely placed at

issue the matters properly addressed in the IT protective order reply brief.

II. Plaintiffs' Motion to Strike or Disregard Fails to Establish Any Legal Authority for the Relief Sought in Their Pleading

Motions to strike are governed by Rule 12(f) of the Federal Rules of Civil Procedure, which explicitly states the grounds upon which such relief may be granted: "the court may order stricken any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Plaintiffs' motion to strike or disregard does not even cite Rule 12(f), let alone discuss any of the grounds set forth in Rule 12(f), perhaps because nothing contained within Section III of the IT protective order reply brief could be considered an "insufficient defense" or "redundant, immaterial, impertinent, or scandalous matter." Id. Similarly, plaintiffs fail to cite any authority for their motion asking the Court to "disregard" Section III of the IT protective order reply brief; indeed, the law does not recognize anything resembling a "motion to disregard." Given the disfavored nature of motions to strike, see, e.g., Metrokane, Inc. v. The Wine Enthusiast, 160 F. Supp. 2d 633, 641-42 (S.D.N.Y. 2001), and the absence of any authority for a "motion to disregard," plaintiffs' filing is facially deficient.

Plaintiffs argue that the IT protective order reply brief raises new arguments and that Interior Defendants filed the reply brief "knowing that plaintiffs would have no opportunity to respond to them." Pl. Mot. at 1. As we explain in the following section, however, plaintiffs could not be more wrong or misleading. Nevertheless, even if new arguments were raised by the IT protective order reply brief – and they clearly were not – that would not have provided a basis to strike the argument. At most, plaintiffs' remedy would be to seek leave of court to file a

surreply brief.[1]

III. The IT Protective Order Reply Brief Does Not Present "New" Arguments and Properly Addresses Arguments Raised In Both Parties' Principal Briefs Regarding Interior Defendants' Motion for an IT Protective Order

In their earlier opposition to Interior Defendants' IT protective order motion, plaintiffs repeatedly argued that the motion improperly sought a blanket protective order. Plaintiffs' motion to strike or disregard is fatally flawed, at the outset, because the undeniable fact is that Interior Defendants did raise the issue of blanket protective orders in the opening brief supporting the IT protective order motion, thereby putting plaintiffs on notice that Interior Defendants contended the proposed protective order was proper in light of the law regarding blanket protective orders.[2] In fact, plaintiffs obviously were aware of this issue because they referred to blanket protective orders on ten of the eleven pages of their brief opposing the protective order!

In any event, plaintiffs recognize, initially, that reply briefs may respond to matters raised in an opposing memorandum. See Pl. Mot. at 1 (citing W. Schwarzer, A. Tashima & J.

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[1] Despite their complaint that they have no ability to be heard on "new arguments," plaintiffs do recognize the potential for seeking leave to file a surreply brief. Pl. Mot. at 4 (final clause of Conclusion). During the meet-and-confer exchange referenced in footnote 1 of the motion to strike or disregard, plaintiffs' counsel stated nothing about seeking leave to file a surreply brief, however, and because Interior Defendants vigorously deny Section III presented new arguments, Interior Defendants oppose that request for relief.

[2] Plaintiffs seem to complain that Interior Defendants' brief in support of an IT protective order was too short. E.g., Pl. Mot. at 1 ("skeletal initial memorandum"), 2 ("flimsy 3-page motion"). The simple fact is that, in virtually any other case, there would be no serious doubt whether IT security materials properly should be the subject of a protective order. As was noted in the IT protective order reply brief, the Special Master's Revised Order confirmed that good cause existed for such an order, IT Reply Br. at 7-8, and it was only because of plaintiffs' intransigence that Interior Defendants were required to file an opposed motion for a protective order. Under such circumstances, Interior Defendants did not believe – and still do not believe – that this Court required an extensive briefing on the need for the requested protective order.

Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial § 12.107 (2003)).[3] Plaintiffs then proceed to misconstrue the holdings of three cases to argue, in substance, that their opposing brief is legally entitled to provide both the first and final words about blanket protective orders.[4]

Plaintiffs initially cite Marie O. v. Edgar, 131 F.3d 610 (7th Cir. 1997), as a "see also" citation following their reference to the California Practice Guide. Pl. Mot. at 2. Although plaintiffs fail to provide a specific page citation, the language quoted in plaintiffs' citation can be found in a footnote which simply stated that the trial court would only address arguments related to those raised in the principal briefs and not "a new and independent argument." 131 F.2d at 614 n.7. As noted earlier, the propriety of blanket protective orders was an issue raised in the principal briefs filed by both Interior Defendants and plaintiffs; it was not a new and independent argument first raised in the reply brief.

Plaintiffs similarly misapply an unreported decision, Murphy v. Hoffman Estates, No. 95-C-5192, 1999 WL 160305, at *2 (N.D. Ill. Mar. 17, 1999), aff'd, 234 F.3d 1273 (7th Cir. 2000)(table). Pl. Mot. 2-3. Murphy simply addressed the legal obligation of parties in summary judgment practice, noting that the plaintiff failed to cite specific support in his opening brief for

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[3] Plaintiffs' citation omitted "California Practice Guide" from the title of this treatise, but the treatise does discuss federal practice and accurately states that reply briefs may address matters raised in an opposing brief.

[4] As Interior Defendants explained in Section III of the IT protective order reply brief, plaintiffs are simply wrong in asserting that blanket or umbrella protective orders are per se invalid. In fact, such orders are frequently desirable in complex litigation, such as this case, because they relieve the Court of having to rule upon every single document as to which protection is sought and to focus only on those documents in dispute. See IT Protective Order Reply Br., § III.

his claim that his job performance was adequate and that defendants had terminated him for pretextual reasons. 1999 WL 160305, at *2. Baugh v. Milwaukee, 823 F. Supp. 1452, 1457 (E.D. Wis. 1993), aff'd, 41 F.3d 1510 (7th Cir. 1994)(table), relied upon by plaintiffs, Pl. Mot. at 3, similarly addresses the burden of coming forward with specific evidence in the context of summary judgment practice. Plaintiffs' reliance upon Baugh is particularly puzzling because the language quoted in their motion expressly recognizes, in summary judgment practice, that reply briefs and affidavits may respond to "matters placed in issue by the opposition brief." 823 F. Supp. at 1457, quoted in Pl. Mot. at 3.

Thus, plaintiffs' motion to strike or disregard is wholly devoid of merit. Contrary to plaintiffs' assertion, Interior Defendants' arguments about blanket protective orders did not originate in Section III of the reply brief. In fact, the propriety of the proposed protective order and the law regarding blanket protective orders was discussed, initially, in Interior Defendants' protective order motion. As a result, plaintiffs were not "sand-bagged" – as they repeatedly complain – but were put on notice that Interior Defendants contended the proposed protective order was proper, in light of the law on blanket protective orders, and plaintiffs were afforded their opportunity to argue about this in their opposition brief. Moreover, having discussed blanket protective orders in their opposition brief, the law plainly permitted Interior Defendants to respond to plaintiffs' arguments in the reply brief.

Conclusion

Plaintiffs' motion to strike or disregard continues plaintiffs' pattern of filing motions not

authorized by the Court's rules and unsupported by fact or law. For the foregoing reasons, Interior Defendants respectfully request that this Court deny plaintiffs' motion to strike or disregard.

Respectfully submitted,

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September 15, 2003

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FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
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GALE NORTON, Secretary of the Interior, et al.,	
Defendants.	

ORDER

This matter comes before the Court on Plaintiffs' *Motion to Strike or Disregard Section III of Interior Defendants' Reply Brief in Support of Motion for a Protective Order with Regard to Information Technology Security Materials to Be Submitted Pursuant to July 28, 2003 Preliminary Injunction.* Upon consideration of the Plaintiffs' Motion, Interior Defendants' Opposition, and any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion to Strike or Disregard is, DENIED.

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 15, 2003 I served the foregoing *Interior Defendants' Memorandum in Opposition to Plaintiffs' "Motion to Strike or Disregard" Section III of Interior Defendants' Reply Brief in Support of Information Technology Protective Order* by facsimile in accordance with their written request of October 31, 2001 upon:

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