

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

Roger Hall, et al.,)	
)	
Plaintiffs,)	Status Conference Scheduled for Aug. 3, 2007
)	
v.)	Civil Action 04-00814 (HHK)
Central Intelligence Agency,)	ECF
)	
Defendant.)	
)	

**DEFENDANT'S MOTION TO STRIKE,
IN PART, PLAINTIFF HALL'S DECLARATION**

The Defendant, Central Intelligence Agency (“CIA” or the “Agency”) by and through undersigned counsel, hereby moves, pursuant to Fed. R. Civ. P. 12(f) and 56(e), to strike, in part, the Plaintiff Hall’s declaration submitted with his Cross Motion for Partial Summary Judgment (Cross Motion). Doc. No. 73-2. Specifically, the Agency requests that paragraphs 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 28, 32, 33, 34, and 36 be struck, for the reasons set forth in the attached memorandum of points and authorities in support of this motion.

The Agency respectfully requests that its Reply in Support of its Motion for Summary Judgment and in Opposition (“Reply/Opposition”) to surviving portions of Plaintiffs’ Cross Motion, if any, be due for filing with the Court no later than 10 days from the date of this Order.

As required by LCvR 7(m), undersigned counsel conferred with counsel of record.

Messrs. Lesar and Clarke indicated that they do not consent to the Motion to Strike, but do not oppose the Agency's request to file its Reply/Opposition within 10 days of the Court's ruling.

Respectfully submitted,

/s/ _____
JEFFREY A. TAYLOR, D.C. Bar #498610
UNITED STATES ATTORNEY

/s/ _____
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO STRIKE, IN PART, PLAINTIFF HALL'S DECLARATION**

I. Legal Standards of Review

A. Motion to Strike

“Pursuant to Federal Rule of Civil Procedure 12(f), a court may strike a pleading, or portions thereof, for insufficiency, redundancy, immateriality, impertinence or scandalousness.” *Judicial Watch, Inc. v. United States Department of Commerce*, 224 F.R.D. 261, 263 (D.D.C. 2004) (citing Fed. R. Civ. P. 12(f)). “It is settled in this jurisdiction that the term ‘pleading’ for the purposes of Rule 12(f) includes affidavits and declarations filed in support of technical pleadings because Rule 12(f) is the only viable method for attacking materiality and pertinence defects in such documents.” *Judicial Watch, Inc. v. United States Department of Commerce*, 224 F.R.D. at 263 (citing *Larouche v. Dept. of the Treasury*, 2000 WL 805214, at 13-14 (D.D.C. 2000) (citing *Humane Soc'y of the United States v. Babbitt*, 46 F.3d 93, 97 n. 5 (D.C. Cir. 1995) (internal citation omitted)). “An affidavit, or portions thereof, may also be stricken for failing to satisfy the requirements of Federal Rule of Civil Procedure 56(e).” *Id.*

B. Federal Rule of Civil Procedure 56(e)

Rule 56(e) of the Federal Rules of Civil Procedure provides that:

Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as would be *admissible in evidence*, and shall show affirmatively that the affiant is *competent to testify* to the matters stated therein. Sworn and certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith.

(emphasis added). “As is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged. The objection must be timely or it will be deemed waived.” *Catrett v. Johns-Manville Sales Corporation, et al.*, 826 F.2d 33, 38 (D.C. Cir. 1987). Defects under Fed. R. Civ. P. 56(e) are waived if a motion to strike is not filed. *See Galvin v. Eil Lilly and Co.*, 2005 WL 3272142 (D.D.C. 2005) (citing *Humane Soc'y of the United States v. Babbitt*, 46 F.3d at 96 n. 5; *DeCintio v. Westchester County Med. Ctr.*, 821 F.2d 111, 114 (2d Cir. 1987)).

II. Plaintiff Hall’s Declaration Should Be Struck, In Part

Plaintiffs substantially rely on the declaration of Plaintiff Hall. *See e.g.*, the Hall/SSRI Cross Motion, pp. 7-12, Statement of Mat. Facts ¶¶ 2-42; and the AIM Cross Motion at 3-6, Statement of Mat. Facts ¶¶ 38-91. Preliminarily, Mr. Hall claims to “have developed an expertise in certain areas of this subject”. *See* Hall Decl. ¶ 1. Insofar as he may be suggesting that he is competent to testify as an expert, via his affidavit, he has not attempted to make an expert report disclosure, as required by Rule 26(a)(2) of the Federal Rules of Civil Procedure. Furthermore, he submits no curriculum vitae or other evidence to show that he is an expert in the relevant fields. Mr. Hall’s declaration is filled with claims and assertions about which Mr. Hall has no personal knowledge, and/or information which would not be deemed admissible

evidence. Accordingly, he is not competent to testify as to those assertions. Additionally, he fails to refer to any parts of the record and largely offers no documents that would support his assertions. Therefore, the portions of his 15-page declaration, outlined below, should be stricken and no Plaintiff may be permitted to rely on same in support of their respective Cross Motions for Summary Judgment.

A. Claims About Which Mr. Hall Has No Personal Knowledge Should be Struck.

An “affidavit based merely on information and belief is unacceptable.” *See Londigan v. Federal Bureau of Investigation*, 670 F.2d 1164, 1174 (D.C. Cir. 1981) (holding that Fed. R. Civ. P. 56(e)’s requirement that affidavits be based on the personal knowledge of the affiant is unequivocal) (citing C. Wright & A. Miller, *Federal Practice* § 2738 (1973); J. Moore & J. Wicker, *Federal Practice* ¶ 56.22(1) (1980)).

Here, it is clear on its face that Mr. Hall’s declaration, at least paragraphs 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 22, 25, 26, 27, 28, 32, fall within the category of assertions made without his personal knowledge. Indeed, Mr. Hall does not even attempt to hide his lack of personal knowledge when he states “While the identity of the agency which [sic] created these documents is not apparent, I believe they were either created by the CIA or based in substantial part on information provided by the CIA . . .”. Hall Decl. ¶ 32.

B. Assertions Made Based on Inadmissible Evidence Should be Struck.

It is required that “affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be *admissible in evidence*. . . .” Fed. R. Civ. P. 56(e)(emphasis added). Here, Plaintiff repeatedly asserts that the CIA is in possession of documents, based on hearsay, and in some instances not based on any identifiable source. *See* ¶ 10 (“Admiral Zumwalt

revealed to me in a conversation I had with him regarding *documents* on the CIA’s on-going POW/MIA tracking . . .”); ¶ 12 (“Admiral Moore stated that the CIA . . . had information on this operation and that I should check with the indigenous personnel *files* . . .”); ¶ 17 (“Harry Pugh . . . told me . . . that *all the documentation* was in the basement of the CIA . . .”); ¶ 20 (“John Syphrit . . . over-heard CIA Director William Casey inform President Ronald Regan” about offers by the Vietnamese and “confirming *documentation*”); ¶ 26 (“Billy Hendon . . . told me about several meetings . . . with CIA Directors . . . and remembered being shown *photographs* . . . of a prison in North Vietnam”); and ¶ 28 (“I have been told that NPIC . . . was responsible for aerial reconnaissance and photography during” relevant times. . . . It is likely that the *photographs* described by Congressmen Hendon and LeBoutillier would be found in NPIC *files*.)(emphasis added).

The foregoing claims, that the aforementioned documents and materials exist in CIA files, or that the files themselves exist, are based on hearsay – and in the case of paragraph 28 on an unidentified source – and would not be deemed admissible in evidence. *See Fed. R. Evid.* 802. Accordingly, paragraphs 12, 17, 20, 26 and 28 should be struck from Mr. Hall’s declaration and all Plaintiffs’ claims based on these paragraphs should be denied.

C. Claims Unsupported by Either the Record or Documentation Should be Struck.

Rule 56(e) requires “Sworn and certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith.” *Fed. R. Civ. P.* 56(e). Mr. Hall’s declaration contains 39 paragraphs, the majority of which refer to various sources, documentary and otherwise, including deposition transcripts (¶7 and 34), State Department records (¶8), Senate Committee reports (¶22), affidavits by congressmen (¶27), records gathered by Mr. Hall

from various government agencies (¶36), and the like. *See* Hall Decl. generally. However, he only provides documentation in an attempt to support ¶¶ 21, 24, 26, 29, 30, 31, 32, and 33. Even where Mr. Hall provides documentation, his conclusions are not necessarily supported by said documents. *See e.g.*, ¶ 26: References declaration by Congressman Hendon, but declaration is not provided in the supporting materials. Attachment 3 is referenced as providing support for Congressman Hendon's declaration, but it is unclear as to what the Attachment represents; ¶ 27: References affidavit by Congressman John LeBoutillier, but affidavit is not provided in materials; ¶ 32: Attachment 8 does not reference an unsuccessful attempt to rescue POWs; ¶33: The deposition of Martin Murphy makes no mention of documents or briefings concerning the location of POW camps. The deposition of Thomas Meurer mentions a meeting with Larry Devlin, who he believes to be the chief of station. The Meurer deposition never mentions the actual briefings they were given or maps referenced in the declaration; ¶ 34: Deposition of Terry Reed which is referenced is not included in the material.

In sum, Mr. Hall neither references any part of the record in this case, nor does he provide “copies of [any] papers”, as required by Rule 56(e) to support his assertions in paragraphs 5, 6, 7, 8, 9, 11, 13, 14, 15, 16, 18, 19, 22, 26, 27, 32, 33, 34, and 36. Those paragraphs should, therefore, be struck and Plaintiffs should not be permitted to rely on them to support their Cross Motions for Summary Judgment.

Conclusion

For the foregoing reasons, the Defendant respectfully moves to strike, in part, the Plaintiff's declaration.

Respectfully submitted,

/s/ _____
JEFFREY A. TAYLOR, D.C. Bar #498610
UNITED STATES ATTORNEY

/s/ _____
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Of Counsel:
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Central Intelligence Agency

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2007, I caused the foregoing *Motion to Strike* to be served on counsel of record via the Court's ECF system.

/s/

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