UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roger Hall, et al.,	)	
	)	
Plaintiff,	)	Status Conference Scheduled for Aug. 8, 2008
	)	
v.	)	Civil Action 04-0814 (HHK)
Central Intelligence Agency,	)	ECF
	)	
Defendant.	)	
	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION[1]

Defendant, Central Intelligence Agency ("CIA" or "the Agency"), by and through undersigned counsel, hereby submits its Opposition to Plaintiff's Motion for Reconsideration ("Pl. Mot." USDC Pacer Dk. No. 95).

Background

Plaintiff, Roger Hall, has not provided any bases, supported by law or facts, for this Court to set aside Magistrate Judge Facciola's ruling, granting in its entirety Defendant's Motion to Strike Plaintiff Hall's Declaration ("Mem. Op." USDC Pacer Dk. No. 88). Specifically, Plaintiff Hall has not demonstrated that Magistrate Judge Facciola's ruling was clearly erroneous or contrary to law when he ordered that 24 paragraphs of Mr. Hall's initial declaration ("Hall Decl. I"), and 21 Exhibits attached to Plaintiff Hall's Opposition to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment be stricken. *See* Mem. Op. at 17. In fact, Plaintiff Hall now offers the Court a revised declaration ("Hall Decl. II" USDC Pacer Dk. No. 96-2), in an ostensible attempt to correct the errors and shortcomings in his initial

[1] Pursuant to Local Civil Rules Plaintiff's Motion should have been titled "Objection to Magistrate Judge's Ruling" instead of "Reconsideration". *See* Comments to LCvR 72.2, revised in March 2008.

declaration, which led to Defendant's Motion to Strike. According to Mr. Hall, "a couple of paragraphs have been deleted and some new paragraphs or subparagraphs have been added" to his revised declaration. Pl. Mot. at 2. He also offers "some new exhibits . . . to shore up deficiencies in the original Hall Declaration cited by Magistrate Judge Facciola." *Id*. Mr. Hall further submits additional affidavits by Ms. Hrdlicka, and Messrs. O'Daniels and Hendon and Douglas. *Id*.

It is curious that while Mr. Hall could have made the foregoing adjustments to his declaration and offered the additional affidavits while the matter was pending before Magistrate Judge Facciola, he chose not to do so.[2] Moreover, in his instant motion, he does not state with specificity to which portions of Magistrate Judge Facciola's decision he objects that address the substance of the issues, let alone offer any basis for his objections, *i.e.*, whether the decision to strike the paragraphs was erroneous or somehow contrary to law. *See generally*, Pl. Mot.

As demonstrated below, Magistrate Judge Facciola's ruling is entitled to great deference and, more importantly, his ruling is in accordance with law. The Court, therefore, should deny Plaintiff's Motion for Reconsideration and grant Defendant's Motion for Partial Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure , because no genuine issue of material fact exists, at this point. In the alternative, should the Court wish to allow Mr. Hall to substitute his revised declaration, Plaintiff Hall still falls short of meeting the standards required by Rule 56(e). Hence, Plaintiff Hall's instant motion should be denied.

[2] Mr. Hall makes no indication that the newly provided information was previously unavailable to him. *See generally*, Pl. Mot.

Legal Standard

Local Civil Rule 72.2(b) provides "any party may file written objections to a magistrate judge's ruling . . ." within 10 days after being served with the order. This Rule further states that "[t]he objections shall *specifically designate* the order or part thereof to which objection is made and the basis for the objection." *Id*. (emphasis added). "[A] district judge may modify or set aside any portion of a magistrate judge's order . . . found to be clearly erroneous or contrary to law." LCVR 72.2(c).

Further, the D.C. Circuit has held that the magistrate judge's decision is entitled to deference unless the entire record gives the Court the definite and firm conviction that a mistake has been committed. *Page v. Pension Benefit Guaranty Corp.*, 498 F.Supp. 24 223 (D.D.C. 2007). On review by the district court, "a United States Magistrate Judge's decisions are entitled to great deference . . . ." *Evans v. Atwood*, 1999 WL 1032811, *1 (D.D.C. Sept. 29, 1999). A district court will uphold a magistrate judge's ruling unless found to be clearly erroneous or contrary to law. *Neuder v. Battle Pacific Northwest Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000). This standard of review requires a district court to affirm the magistrate judge's determination unless "on the entire evidence [the district court] is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Neuder*, 194 F.R.D. at 292. Here, the "entire evidence" shows that Magistrate Judge Facciola did not err in ruling on the disputed issues.

Argument

As a preliminary matter, Plaintiff Hall fails to identify any part of the Magistrate's order

that is "clearly erroneous or contrary to law".[3] In fact, much of his motion is devoted to attempting to correct the flaws identified by the magistrate. Pl. Mot. at 1-6. However, Mr. Hall's attempts to correct these problems fall short.

I. *The Court did not Err in Striking Claims About Which Mr. Hall has no Personal Knowledge.*

Magistrate Judge Facciola struck paragraphs 5-16, 18-20, 22, 25-28, 32, because they are claims about which the Plaintiff had no personal knowledge. An "affidavit based merely on information and belief is unacceptable." *See Londrigan 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)).

Plaintiff Hall, does not appear to challenge the legal basis for striking such claims and presumably acknowledges that his original declaration was flawed as he makes much of the fact that he has corrected those mistakes in the declaration. Pl. Mot. at 1-5. However, these paragraphs remain largely the same. In fact, paragraphs 5-7, 9, 10, 12, and 28 are not modified at all, and as such, the CIA incorporates relevant argument in its original Motion to Strike ("MTS" USDC Pacer Dk. No. 77). *See* MTS at 3. Of the remaining paragraphs that were stricken by the Court (that Mr. Hall does not otherwise omit in the new declaration), namely paragraphs 11, 16, 26, and 32, Mr. Hall only makes some minor alterations that do nothing to

[3] Although Mr. Hall seems to take exception to the portions of the Magistrate Judge's ruling regarding whether he should be designated an expert and the standard that should apply to his affidavit, the substantive question of the stricken paragraphs seem to remain uncontested.

address the problems identified by Magistrate Judge Facciola.

For example, paragraph 11 has been rewritten to include a reference in a Wikipedia entry[4] (Exhibit 34), presumably to support his argument that such documents exist. In other instances, he relies on affidavits of third parties or unidentified deposition transcripts to buttress his claims about what documents must be in Agency files. *See* Hall Decl. II, ¶¶ 16, 26. In Paragraph 32, he relies on an unidentified Defense Investigative Agency memorandum (and not attached to the declaration–missing is Attachment 8) to support his conclusion that certain documents were created by the CIA.

II. *The Court did not Err in striking Claims Made Based on Hearsay*.

Similarly, Plaintiff Hall does not seem to contest the Magistrate's decision to strike claims based on hearsay (*e.g.*, ¶¶ 12, 17, 20, 26, 28), but rather attempts to rectify his hearsay problem with his revised declaration. Pl. Mot. at 7. However, as in his original declaration, Mr. Hall continues to rely on information about what individuals such as former Congressman Herndon and others have told him or what they saw or overheard in order to prove what allegedly must be in Agency files. With respect to paragraphs 12 and 17, the Plaintiff does not change these paragraphs at all and the CIA continues to rely on its arguments in its Motion to Strike. MTS at 3-4.

Paragraphs 20, 26, and 28 are only modified by citing to the second Hendon affidavit. ("Cong. Hendon states that he believes the CIA still possesses this imagery." Hall Decl. II ¶ 26(A)). "Casey told him that only an imprisoned US filer could have made codes on the roof . . .

[4] By its own definition, Wikipedia is "the free [electronic] encyclopedia that *anyone* can edit." *See* www.wikipedia.com, last visited on June 24, 2008 (emphasis added). Accordingly, the accuracy or reliability of the information offered therefrom, is not easily verified.

." *Id*. In sum, the assertions by Plaintiff Hall that documents must exist in CIA files are based on conclusory allegations, hearsay or even double hearsay, and were properly striken. *See*, Mem. Op. at 5, *citing, Lujan v. Nat' Wildlife Fed'n.*, 497 U.S. 871, 888 (1990); *Wells v. Jeffrey*, 03-CV-228, 2006 WL 696057, at *3 n.7 (D.D.C. Mar. 20, 2006).

III. *Mr. Hall's Revised Declaration Still Falls Short of the Rule 56(e) Standard.*

A. *Plaintiff Misapprehends the Rule 56(e) Standard.*

Plaintiff Hall continues to protest that his declaration should be held to a less strict standard under Federal Rule 56(e) because he submitted it in support of an opposition to the Agency's motion for summary judgment. Pl. Mot. at 8. This is surprising given that (1) Plaintiff Hall titled his filing "Cross Motion . . . for Summary Judgment" (*see* USDC Pacer Dk. No. 73), and, (2) Mr. Hall has admitted previously that his declaration was submitted to the Court in support of *both* his Cross Motion and in opposition to the Agency's Motion for Summary Judgment. *See* USDC Pacer Dk. No. 83, Motion to Strike Opp. at 3. Yet he still insists that the Court should hold his sworn representations to a lower standard as a purported non-movant. Pl. Mot. at 7-8. As discussed in the Agency's reply to Plaintiff's opposition to the MTS, Mr. Hall's argument fails for two reasons.

> First, he has admitted that his affidavit is filed to support his Cross Motion. Simply put, his Cross Motion renders him a moving party. Second, if he is suggesting that because he is not the party to move first for disposal of certain issues, then he may make representations without a proper basis or documentation, he completely misapprehends Rule 56(e). The Rule, on its face, requires "[s]upporting *and* opposing affidavits [to] be made on personal knowledge, and set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify . . . ." Fed. R. Civ. P. 56(e) (emphasis added). Here, he failed to meet the Rule's standards and the Agency was left with no choice but to file its MTS. Plaintiff's suggestion that he should be held to

> a lower standard when making representations, under the penalty of perjury, to the Court, is simply untenable.

See USDC Pacer Dk. No. 86.[5] Magistrate Judge Facciola seems to have agreed with the Agency's position on this issue when he granted the Agency MTS in full, and the Court should not indulge Plaintiff Hall on this issue any further.

B. *Mr. Hall's "Revised" Declaration is not in Conformity with Rule 56(e).*

Despite his purported adjustments, the revised Hall declaration is replete with the same problems identified by the Magistrate in his Memorandum opinion. It is still a laundry list of historical events, and conversations with third parties. *See, e.g.*, Hall Decl. II, ¶¶ 10, 12, 14, 17, and 20. It contains descriptions of documents which Mr. Hall believes should exist, (*e.g.*, ¶¶ 11, 16, and 31, and conclusory statements of fact or opinion, contained in paragraphs 6, 7, 9, 10, 12, 14, 15, 16, 17, 19, 20, 23, 24, 26, 27, 32, 35, and 36. *See*, also Mem. Op. at 2. Therefore, much of the revised Hall declaration must similarly be stricken.

Moreover, while the Plaintiff's declaration now actually refers to exhibits attached to it, there remain fatal deficiencies to many of the exhibits. Most notably, the Plaintiff misrepresents what the exhibits actually state. For instance, contrary to Plaintiff Hall's declaration, Exhibit 23-B makes no mention of "Duck Soup" or "Air America", and Bates 174-175 make no mention of photos in connection with Americans held in Mahaxy, Laos. Hall Decl. II ¶ 7(c). There is no mention of the CIA in Exhibit 36-C, whatsoever. Hall Decl. II ¶ 37. Additionally, there are multiple instances of incorrect bate stamp or exhibit references, so it is difficult to determine to

[5] The CIA incorporates, by reference, the remainder of its arguments, made in its reply to Plaintiff's opposition to the MTS, including the issue of the irrelevance of Plaintiff's qualifications as an expert. *See* pp. 6-8.

which exhibit Mr. Hall may be referring. *E.g. id.*, ¶¶ 2, 4, 7, 11, 13, 40.

There is at least one exhibit that has not been bate stamped at all (*see* Exhibit 7),[6] and there are pages or information apparently missing from certain other exhibits (*e.g.*, the notes allegedly attached to the Affidavit of Ms. Hrdlicka are missing and at least one page from Exhibit 10). Some exhibits are not clearly marked or identified. For instance, Plaintiff Hall states that Attachment 2 and Exhibits 8 and 24 are CIA documents, but there is no basis for determining this. Unfortunately, Attachment 4 and Exhibit 11B are illegible and there is no way to verify Mr. Hall's representations about what they may demonstrate. Exhibit 6 and 19 are identified as deposition transcripts but there is no identification of the deponent on the transcripts, the date, a caption, or a case number. Hence, Plaintiff's revised declaration, in substantial part, does not conform to Rule 56(e).

[6] Plaintiff Hall indicates that some of the additional affidavits he has attached to his instant motion as a document without Bate stamp numbers. *See* Pl. Mot. at 3. This exhibits is not one of the foregoing affidavits.

CONCLUSION

WHEREFORE, Plaintiff Hall's Motion for Reconsideration should be denied and Defendant's Motion for Partial Summary Judgment should be granted as a matter of law.

Dated: June 25, 2008.

Respectfully submitted,

/s/ *Jeffrey A. Taylor*
JEFFREY A. TAYLOR
D.C. Bar #498610
United States Attorney

/s/ *Rudolph Contreras*
RUDOLPH CONTRERAS
D.C. BAR #434122
Assistant United States Attorney

/s/ *Mercedeh Momeni*
MERCEDEH MOMENI
Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 305-4851

Of Counsel:
Linda Ciprianni
Office of the General Counsel
Litigation Division
Central Intelligence Agency

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June 2008, I caused to be served, by the Court's Electronic Case Filing System, a true and correct copy of the above *Defendant's Opposition to Plaintiff's Request for Reconsideration* upon parties of record.

/s/ *Mercedeh Momeni*

MERCEDEH MOMENI
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
(202) 305-4851
(202) 514-8780 (facsimile)