UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C. A. No. 04-0814 HHK
	:	
CENTRAL INTELLIGENCE AGENCY,	:	
	:	
Defendant		

REPLY TO DEFENDANT'S OPPOSITION TO MOTION
OF ROGER HALL AND STUDIES SOLUTIONS RESULTS, INC.
FOR RECONSIDERATION OF MAGISTRATE JUDGE FACCIOLA'S
ORDER PARTIALLY STRIKING DECLARATION OF ROGER HALL

PRELIMINARY STATEMENT

When plaintiffs Roger Hall and Studies Solutions Results, Inc. (hereafter collectively referred to as "Hall") filed their cross-motion for summary judgment and opposition to the motion of defendant Central Intelligence Agency ('CIA') for summary judgment, the CIA responded by moving to strike the Declaration of Roger Hall which Hall had filed in support of his motion and in opposition to the CIA's. This motion was referred to Magistrate Judge Facciola, who ultimately issued a decision granting the CIA's motion. Thereafter, Hall filed a motion for reconsideration of Judge Facciola's ruling, to which the CIA has now responded.

The CIA opposes Hall's motion for reconsideration on various grounds and urges this Court to deny plaintiff's motion for reconsideration and grant its motion for partial

summary judgment "because no genuine issue of material fact exists at this point." Defendant's Opposition to Plaintiff's Motion for Reconsideration ("Opp.") at 2.

In arguing this, the CIA tries to push its hand way beyond what the record before the Court permits. This is an extreme and wholly unwarranted claim. Even if the Magistrate's ruling were to be entirely upheld and plaintiff's attempt to utilize a Revised Hall Declaration thwarted, the fact would still remain that not all paragraphs of the original Hall Declaration nor all exhibits submitted in support of his cross-motion for summary judgment have been stricken. In responding to the motion, the CIA must address those that have not been stricken, and this Court must then determine whether or not there is a genuine issue of material fact in dispute. Summary judgment in the CIA's favor at this point is simply not sustainable..

If Hall is permitted to file his revised declaration, then the CIA will have to address a number of additional evidentiary issues in responding to Hall's cross-motion. For example, the CIA notes that 21 paragraphs of Hall's original declaration were stricken for lack of personal knowledge (paragraphs 5-16, 18-20, 22, 25-28, 32). Opp; at 4. It states that of these 21 paragraphs, seven (paragraphs 9-10, 12, 28) were not modified at all, and that four paragraphs (paragraphs 11, 16, 26, and 32) contained only minor alterations. Id. This leaves ten paragraphs which have been substantially modified to correct the lack of personal knowledge deficiencies in the prior versions. Thus, if Hall is permitted to file file his revised affidavit, the CIA will then have to respond to a substantial additional amount of information calling into account the adequacy of its search.

The overarching issue presented by plaintiffs' motion for reconsideration is whether plaintiffs should be permitted to file the Revised Hall Declaration. Even if this Court were to sustain Magistrate Judge Facciola's ruling on the original Hall Declaration, it should still permit plaintiffs to file the Revised Hall Declaration. This will permit the merits of the important issues raised by this case to reached at long last.

While plaintiffs' motion for reconsideration did object to portions of Magistrate Judge Facciola's ruling, its major thrust, as the CIA points out, was to try to bring the Hall Declaration into compliance with his ruling to the extent possible. Thus, the primary issue presently before the Court is not whether to sustain the Magistrate's ruling that certain paragraphs of the Hall Declaration should be stricken, but whether Hall should be allowed to support his cross-motion for summary judgment and opposition to the CIA's motion for summary judgment with the Revised Hall Declaration (even if some portions of it, too, are stricken).

Plaintiffs in this case are FOIA requesters who are, in effect, acting as private attorney generals seeking information on behalf of the public. With scant resources they are seeking to compel disclosure of records from an agency with enormous resources whose activities are generally cloaked in secrecy. Some of the problems confronted by FOIA plaintiffs in this regard were noted by the Court of Appeals in Vaughn v. Rosen, 484 F.2d 620 (D.C.Cir.1973). Here, the problems are compounded by the fact that the records sought relate to significant historical events that have been kept deeply shrouded by an agency which is dedicated, allegedly in the interest of national security, to keeping those events away from public scrutiny. The fact that these events occurred long ago and that many of the key participants died during the pendency of this lawsuit and its

predecessor (Admiral Mooer and Zumwalt, for example), makes it difficult to comply with technical legal standards. Nonetheless, plaintiffs have made a substantial effort to do so, and to the extent that they have succeeded, they should not be penalized for having made that effort.

For the reasons set forth below, the Court should permit plaintiffs to file the Revised Hall Declaration, subject to particular parts of it being stricken if the Court finds they should be.

ARGUMENT

I. PLAINTIFFS SHOULD BE ALLOWED TO SUBMIT THE REVISED DECLARATION IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT IN OPPOSITION TO THE CIA'S MOTION

The CIA is not so much interested in getting the case before the Court on its merits as it is in just getting rid of it, or at least in reducing its scope to the bare minimum. It complains that plaintiffs should have earlier made the corrections they have now made. Since they did not do so, the CIA argues, Magistrate Facciola's ruling should be the final word on the subject and plaintiffs' efforts to bring themselves into compliance with that ruling should go for naught.

But it is quite clear that Rule 56 intends that motions made under it should be resolved on their merits, even if delays and the provision of new affidavits and other evidentiary materials are needed to accomplish that. Rule 56(e) expressly states that: "The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." F.R.Civ.Pro. 56(e)(emphasis added). In light of

this, this Court may permit Hall to file a revised declaration, even if it upholds the Magistrate Judge's striking of portions of his original declaration, or even if it determines that portions of the Revised Declaration should also be stricken.

Rule 56(f) further enhances the Court's power in this regard, stating that:

> (f) Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

By its terms, then, Rule 56 provides for a wide degree of flexibility in the treatment of oppositions to motions for summary judgment, to the end that they may be resolved on their merits. A district court judge may even order a continuance to enable a party opposing summary judgment to obtain additional evidence.[1]

Like all rules, Rule 56 must be interpreted in accordance with the overriding purpose of the Federal Rules of Civil Procedure, which is to ensure that legal matters are resolved on their merits. This goal is made clear by the very first rule, "Rule 1. Scope and Purpose of Rules," which provides:

> These rules govern the procedure in the United States district Courts in all suits of a civil nature. . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 1 is "one of the least frequently cited, but most important, of all the rules. . . ." United States v. State of Tex., 523 F. Supp. 703, 723 (E.D.Tex.1981). Prof. David A. Sonenschein has stated in a commentary on this rule that:

---

[1] Plaintiffs have not so far submitted a Rule 56(f) affidavit. To the extent that portions of the Hall Declaration or Revised Hall Declaration are stricken, a Rule 56(f) affidavit would seem appropriate and may be submitted with his re-filed opposition to defendant's cross-motion for summary judgment.

> The most significant language in Rule 1 is the prescription that the procedural rules are to be applied "to secure the just, speedy and inexpensive determination of every action" This phrase embodies the fundamental policy of the Rules. Actions are to be dealt with in the most efficient way possible—which, in reality, translates into a broad grant of discretionary power to the judge. Essentially, federal judges have the power to regulate proceedings as long as that regulation is consistent with principles of equity, fairness to both parties, and of course, the Rules. The policies underlying Rule 1 are the promotion of uniform federal rules with minimal deviations, the minimization of technical defaults, the promotion of decisions based on the merits of the claims, and the elimination of unfair maneuvering.

Commentary by Prof. David A. Sonenschein, United States Code Service, Court Rules, Federal Rules of Civil Procedure, Rule 1 at 1-2.

The courts have repeatedly enforced the policies set forth by Prof. Sonenschein. Thus, in line with this, Walsh v. Connecticut Mut. Life Ins. Co., 26 F. Supp. 566, 573, stated that the Federal Rules of Civil Procedure "are intended to promote and not to obstruct the administration of justice and thus enable the Court to do substantial justice rather than to decide cases upon technicalities which have no relationship whatever to the rights of the parties to the litigation. Thus, the court in Walsh ruled that while defendant was entitled to summary judgment, plaintiff would be given the opportunity to move for further time to comply with defendant's request for admissions and, if granted, an opportunity would be afforded plaintiff to submit affidavits under Rule 56 opposing defendant's motion for summary judgment.

The intention of the Rules is "principally and primarily to reach justice by obtaining a full disclosure of the truth in connection with any controversy. This does away with the idea that existed in certain quarters that the administration of the law was a game whereby an artful pleader might secure an unwarranted advantage over his less

skilled opponent." Boysell Co. v. Colonial Coverlet Co., 29 F. Supp. 122, 124 (D.Tenn.1939). "[T]he spirit of all the Federal Rules of Civil Procedure is to settle controversies upon their merits rather than to dismiss actions upon technical grounds, to permit amendments liberally and to avoid if possible depriving a litigant of a chance to bring his case to trial." Fierstein v. Piper Aircraft Corporation, 79 F. Supp. 217, 218 (M.D.Pa.1948)(citations omitted). "The rules are designed to discourage battles over form and to sweep away needless controversies that serve either to delay a trial on the merits or deny a party his day in court because of technical defects in the pleadings." McCormack v. Wood, 156 F. Supp. 483, 484 (S.D.N.Y.1957)(citations omitted).

Even where a motion for summary judgment is sought to be filed after the time for doing so has expired, a district court has discretion to allow it. Gomez v. Trustees of Harvard University, 676 F. Supp. 13, 14 (D.D.C.1987).

Of course, a district court's power is not limited to its power under the Rules. A district court has inherent power to control the cases before it so long as it exercises that power in a manner that is in harmony with the Federal Rules of Civil Procedure. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604 (3d Cir.1995); City of L.A. v. Santa Monica BayKeeper, 254 F.3d 882 (9th Cir.2001)(district court's power to rescind, reconsider or modify interlocutory order over which it has jurisdiction).

Whatever the procedural flaws in plaintiffs' filings, this Court should exercise its discretion to permit plaintiffs to file the Revised Hall Declaration to the extent it is consistent with Rule 56 as construed by the D.C. Circuit. The CIA's insistence that plaintiffs should be limited to the original Hall Declaration as largely expunged by the Magistrate Judge should be disregarded.

If there is one distinctive characteristic of FOIA litigation, it is that government agencies, even though they shoulder the burden of proof, routinely are accorded multiple bites at the apple. When they fail initially to meet their burden of proof they are given additional shots at it. See, e.g., Hall v. U.S. Dept. of Justice, 26 F. Supp. 2d 78 (D.D.C.1998)(parties' cross-motions for summary judgment denied) and Hall v. U.S. Dept. of Justice, 63 F. Supp. 2d 14 (D.D.C.1999)(where FBI's subsequent attempt to meet the Exemption 7 threshold test was as insufficient as its first at meeting its burden of proof, just like its first, plaintiff was granted summary judgment). No less consideration to getting FOIA matters resolved on their merits should be accorded to FOIA plaintiffs.

Here, the circumstances favor allowing plaintiffs to file the Revised Hall Declaration (and other materials accompanying their motion for reconsideration). Plaintiffs made multiple errors in filing the original Hall Declaration. It was based very largely on an earlier version that had been filed in the predecessor to this lawsuit by the attorney who then represented plaintiff Roger Hall. In part because the CIA had not challenged it in that lawsuit, the undersigned did not give it the degree of scrutiny it deserved. Both in connection with the original filing and the Revised Hall Declaration, errors in labeling and lack of specificity are attributable to a variety of reasons, including the poor eyesight of both plaintiff Hall and the undersigned counsel, the age and complexity of the materials, the loss of materials during multiple home and office moves Hall and his counsel have made during the litigation.

While acknowledging these errors, plaintiffs have attempted to correct them where possible. This, it is hoped, will enable the Court to address the serious issues pending before the Court on the merits as the rules intend.

II. PLAINTIFFS' MOTION FOR RECONSIDERATION CLEARLY OBJECTED TO SPECIFIC PORTIONS OF THE MAGISTRATE'S RULING SET FOR THE BASES FOR THE OBJECTIONS

A. Rule 72.2

The CIA faults Hall for having captioned his pleading as a "Motion for Reconsideration" of the Magistrate's ruling, rather than as Objections to" it, as well as having failed to state objections with specificity. Opp. at 2. The CIA is correct that Local Civil Rule 72.2(b), as recently amended, does provide that this is the method for filing objections to a Magistrate's decision. Plaintiffs' counsel relied on his past experience, unaware of the rule change. Local Rule 72.2(b) had previously provided that "[a]ny party may request the judge to reconsider a magistrate judge's ruling under paragraph (a) by filing a motion for reconsideration. . . ." Local Rule 72.2(b)(as of March 2004)

A comment to the change in Local Rule 72.2 made in March 2008 states that: "The Rule is intended to make clear that objections to the magistrate judge's proposed findings and recommendations should not be called motions for reconsideration and are to be directed to the district judge." Insofar as it was intended to object to certain of the Magistrate Judge's rulings, plaintiffs did not correctly title their pleading, although they clearly intended it to be submitted to the district judge, not the magistrate.

As part of their obligation to decide cases on the merits rather than deciding them on the basis of technical deficiencies courts will, for example, disregard erroneous captions and motions brought under one rule when they should have been brought pursuant to another. Thus, motions which are untimely under Rule 59(e) will be

considered under Rule 60(b). Ward v. Kennedy, 200 F.R.D. 137, 138 (D.D.C.2001); Computer Professionals for Social Responsibility v. United States Secret Service, Civil Action No. 93-0231, 1994 U.S. Dist. LEXIS 14372 at *2 (D.D.C. Oct. 7, 1994).

In this case, plaintiffs' intended their motion for reconsideration to have a dual function. Most importantly, it would seek approval to file a Revised Hall Declaration which attempted to comply with many of the faults the Magistrate Judge had found in the original declaration. Secondly, it aimed to object to certain limited aspects of the Magistrate Judge's rulings. In light of the authorities cited above, this Court should address the issues raised in the motion and deal with them on the merits.

B. In Their Motion, Plaintiffs Clearly Identified the Portions of the Magistrate Judge's Ruling They Object to and the Basis Therefore

The CIA repeatedly states that plaintiffs do not state "with specificity" the portions of the Magistrate's rulings they object to. See, e.g., Opp. at 2, 3. On occasion, however, it acknowledges that he did. Thus, in a footnote it states that "Hall seems to take exception to the portions of the Magistrate Judge's ruling regarding whether he should be designated as an expert and the standard that should apply to his affidavit." Id. at 4 n.3. Plaintiffs' response to the CIA's opposition to the specific objections raised by plaintiffs follows.

1. Rule 56(e) Standard

The CIA separately addresses plaintiffs' claim that the Magistrate Judge disregarded D.C. Circuit Court precedent when he ruled that standard for determining whether a statement in a declaration should be treated exactly the same whether it is viewed as having been submitted in support of a motion for summary judgment or in opposition to such a motion. While the CIA argues the Magistrate Judge was correct on

this point, it fails to even mention, much less address, the two Court of Appeals cases cited by plaintiffs, Corley v. Life & Cas. Ins. Co., 296 F.2d 449, 450 (D.C.Cir.1961) and Underwater Storage, Inc. v. United States Rubber Co., 371 F.2d 950, 953 (D.C.Cir.1966), which give a contrary holding. Instead, it simply quotes at length the two reasons given by the Magistrate Judge. First, that Hall is the moving party because he submitted a cross-motion for summary judgment; second, that he is contending that he is entitled to a different evaluation because he is not the party who first moved for summary judgment, then he misapprehends Rule 56(e). See Opp. at 6-7, citing Memorandum Opinion of Magistrate Judge Facciola.

With respect to the Magistrate's first point, plaintiffs both cross-moved for summary judgment and opposed the CIA's motion for summary judgment. This is why parties filing cross-motions for summary judgment customarily style their memorandum of points and authorities as being in support of their motion for summary judgment and in opposition to the adversary party's motion for summary judgment. Under the D.C. Circuit cases cited by plaintiffs, a different standard applies when the material submitted is viewed as supporting the opposition rather than the motion. The Magistrate Judge's second reason also missed this point. It is not the priority of filing which calls for a more liberal treatment of the evidentiary submission but whether it is viewed as being in support of the motion or in opposition to the adversary's motion.

The CIA fails in its opposition to mention the Court of Appeals cases cited by plaintiffs. What is clear from all this is that the Magistrate Judge disregarded the D.C. Circuit's precedent on this issue, thus making his ruling clearly erroneous.

It should also be noted that a couple of D.C. Circuit cases suggest that informed speculation may not necessarily be disregarded when offered by a party opposing summary judgment. Thus, in Campbell v. U.S. Dept. of Justice, 164 F.3d 20 (D.C.Cir.1998), the court responded to the FBI's argument that the FOIA plaintiff's assertion regarding the existence of certain records was "speculative" because they were not generally preserved by stating that "in any FOIA request the existence of responsive documents is somewhat `speculative' until the agency has finished looking for them." In then continued, "[a]s the relevancy of some records may be more speculative than others, the proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular type of record." Id. at 28, citing Meeropol v. Meese, 790 F.2d 942, 957 (D.C.Cir.1986).

And in Allen v. Central Intelligence Agency, 636 F.2d 1287, 1293 n.34 (D.C.Cir. 1980), the D.C. Circuit noted that the plaintiff "speculates as to the contents of the document, contending they have all been previously released in other documents." However, because it held that the agency's affidavits failed to support summary judgment, it stated that it "need not address these additional arguments."[2] Nonetheless, it is worthy of note that the Court did not reject the plaintiff's detailed "speculation" out of hand.

2. Hall's Status as an Expert

Hall specifically objected to the Magistrate Judge's ruling that Hall did not qualify as an expert witness. See Motion for Reconsideration at 8-10, As those arguments were set forth at some length in that motion and the CIA does not respond

[2] Subsequently, when the document was ultimately revealed, plaintiff-Appellant Allen's "speculation" proved oorrect. See Lesar Decl., ¶ 3.

plaintiffs' attack on the Magistrate's ruling, there is no need to repeat them here, except to note that the Magistrate Judge ignored the evidence regarding Hall's qualifications as an expert that was in the record before him in the form of witnesses who were qualified to make that assessment. Thus, his determination on this issue was clearly erroneous.

3. Personal Knowledge

In discussing certain paragraphs previously stricken for lack of personal knowledge and says that some of them make no changes or only minor alterations that do not address the problems identified by the Magistrate. With respect to Paragraph 32, it notes that it refers to Attachment 8 which Hall says supports the conclusion that certain records were created by the CIA. Attachment 8 was inadvertently omitted from the Revised Hall Declaration. It is attached hereto.

II. THE REVISED HALL DECLARATION REQUIRES SOME CORRECTIONS, BUT NOT ALL OF THE CIA'S CLAIMS IN THIS REGARD ARE WELL-FOUNDED

The CIA criticizes Hall for certain references in his Revised Declaration to Bates Stamp page numbers that are incorrect. Not all of the CIA's claims are correct, but there are several such errors. Generally, the correct Bates stamp number is different by a matter of two pages from the incorrect one. This apparently resulted when the pages were renumbered to include additional pages but the corresponding references in the Revised Hall Declaration were not corrected.

The correct numbers for the errors in particular paragraphs pointed out by the CIA on page 7 of the Opposition are as follows:

Paragraph 2: should be Bates stamp 00248, not 00250.

Paragraph 4: should be Bates stamp 00270, not 00272.

Paragraph 7(B): should be Bates stamp 00176, not 00178; should be Bates 00177-00178, not Bates 00179-00180.

Paragraph 7(C): should be Bates 00170, not 00172.

Paragraph 11: Moorer Deposition p. should be Bates 00101 not 00182; Exh. 34 at 3 should be Bates 00230, not Bates 00240.

Paragraph 13: Exh. 24 at p. 19 should be Bates 00180, not 00182; Exh. 24 at p. 65 should be Bates 00187, not Bates 00189; Exh. 40 should be Bates 00271-273, not Bates 00273.

These errors will be corrected in any future filing of the Revised Hall Declaration.

The CIA's laundry list of complaints includes a claim that Attachment 4 and Exhibit 11 B are illegible. These are both the same document, which consists of two handwritten pages. Perhaps the CIA has particular difficulty in reading handwritten materials. The undersigned counsel has very poor vision, approximately 20/50 in both eyes, complicated by extensive scarring due to approximately 10 laser surgery operations on each eye to prevent the further destruction of his vision due to diabetic retinapathy. This destroyed about 60% of his light receptive cells and left him seeing all objects through a permanent fog. Notwithstanding this, he is generally able to read the document as it appears on his computer. At the top it bears the date of Feb. 1981 and indicates that it took place in the Roosevelt Room with 15 people present. If the CIA cannot read the

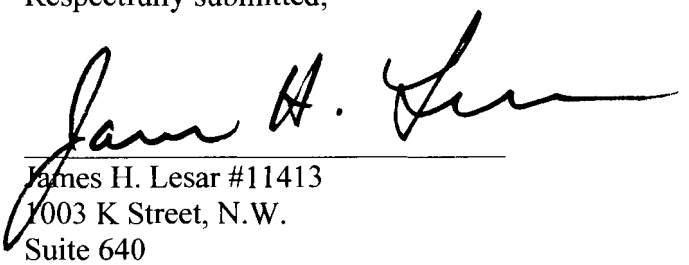
digital copy furnished it through Pacer, plaintiffs will be happy to provide a hard copy for its review.

With respect to Exhibit 19, the CIA says that although it is identified as a deposition transcript there is no identification of the deponent, the date, a caption, or a case number. The deponent was Terry Reed. The deposition was taken in the case of John Cummings v. Department of Defense, Civil Action No. 91-1736 (D.D.C.). The undersigned counsel has personal knowledge of these facts, having represented the plaintiff, John Cummings, and having taken the deposition of Terry Reed during the course of that lawsuit. Exhibit 19 is an authentic copy of Reed's deposition. See attached Declaration of James H. Lesar.

CONCLUSION

For the reasons set forth above, this Court should grant plaintifffs' motion for reconsideration.

Respectfully submitted,



James H. Lesar #11413
1003 K Street, N.W.
Suite 640
Washington, D.C. 20001
Phone: (202) 393-1921

Counsel for Plaintiffs Roger Hall
and SSRI, Inc.

August 11, 2008