UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	:	Civil Action No. 75-1996

PLAINTIFF'S OPPOSITION TO MOTION TO STRIKE

Defendant has moved to strike motions for partial summary judgment made by plaintiff on April 9, 1980; May 23, 1980; June 4, 1980; June 5, 1980; and June 6, 1980. Defendant purports to make this motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure on the grounds that these motions are "impertinent, redundant, and inconsistent with this court's orders of February 26, 1980."

At the outset it must be noted that Rule 12(f) is not the proper vehicle for a motion such as that attempted by defendant. Rule 12(f) reads as follows:

> (f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. (Emphasis added)

By its terms, then, Rule 12(f) is limited to "pleadings." Pleadings do not include motions. Rule 7 distinguishes between pleadings and motions and carefully defines the former as follows:

> (a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-

> party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer. (Emphasis added)

From this it is obvious that defendant's motion has no legal basis whatsoever.

Defendant's motion is spurious in other respects as well. Although defendant makes a conclusory allegation that plaintiff's motions are inconsistent with this Court's orders of February 26, 1980, such is not the case. One of the Court's orders is styled "Finding as to Scope of Search." The Court's finding is limited to a single fact: ". . . the Court finds that proper and good faith search has been made for all items responsive to plaintiff's request in the FBI headquarters' Murkin files and in all files of the FBI field offices, with the exception of the Frederick residency." (See Exhibit 1) Since none of plaintiff's motions involves a search for records in FBI Headquarters MURKIN files, they cannot be inconsistent with this order. The second order merely directed defendant to prepare a Vaughn v. Rosen index within 60 days "justifying the deletions on every 200th document released or to be released to the plaintiff." (See Exhibit 2) As is shown below, none of plaintiff's motions is inconsistent with this second order, either.

Plaintiff's April 9, 1980, motion for partial summary judgment sought disclosure of ten CIA documents located in the FBI Headquarters MURKIN file. These documents have been withheld in their entirety without any claim of exemption having been made. None of these documents was involved in the Vaughn sampling and none of the exemptions likely to be claimed for any allegedly nondisclosable portions of them figured in the Vaughn sampling in any way. (The

CIA customarily invokes Exemptions 1, 3, and 6 for excisions it makes in records. Defendant's Vaughn sampling contains not a single example of any of these exemption claims.) The spuriousness of defendant's motion to strike is shown by the fact that defendant admits that it responded to plaintiff's April 9 motion without claiming that it violated the February 26 orders. Now defendant claims--inconsistently--that it did.

Plaintiff's May 23, 1980, motion for partial summary judgment with respect to Civil Rights Division records does not conflict in any way with this Court's order for a Vaughn sampling justifying deletions. Rather, plaintiff's motion focuses upon the withholding in their entirety of thousands of pages of Civil Rights Division records which should have been provided in the course of this lawsuit. To the extent that this motion has any implication as regards this Court's order directing a Vaughn sampling, it is that defendant, by refusing to produce these records, has violated the Court's directive requiring a Vaughn showing to be made for every 200th document "released or to be released" to plaintiff. Until defendant has produced these withheld records, its Vaughn sampling is at best incomplete and in violation of the Court's February 26th order because it did not include within the sample these records which must be released to plaintiff.

Plaintiff's June 4, 1980, motion sought partial summary judgment for records of the Office of the Attorney General and the Office of the Deputy Attorney General which remain withheld in their entirety. Again, this motion addresses the withholding of records in toto, not excisions made in documents already produced, which is the focus of the Court's order of February 26. Again, too, defendant has failed to make any Vaughn showing with respect to any records of these offices, despite the undeniable fact that such records do exist and should have been provided to Weisberg.

Having failed to produce these records and to subject every 200th document to a Vaughn sampling, defendant stands in violation of this Court's February 26, 1980, Vaughn order.

Plaintiff's June 5, 1980, motion for partial summary judgment involves six records that have been withheld in their entirety under Exemption 5. Defendant's Vaughn sampling did not contain a single example of the use of Exemption 5. Again, this motion deals with records withheld in toto, not with deletions. It is unlikely that there are any MURKIN records that properly can be withheld in their entirety under Exemption 5. Moreover, this motion is not inconsistent with the Court's Vaughn order but instead helps further its objective by providing the Court with examples of the use of an exemption which was not touched upon at all by defendant's Vaughn sampling.

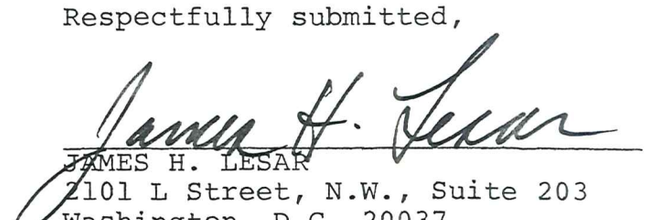
Plaintiff's June 6, 1980, motion to require reprocessing of the FBI's MURKIN Headquarters records does deal with the subject of deletions made in those documents. However, it is not in the least bit inconsistent with the Court's Vaughn order. Rather it affords the Court with the only viable alternative means of dealing in an orderly, efficient, and legally permissible manner with a problem made intractable by the FBI's refusal to correct obvious errors in its processing of MURKIN Headquarters records at the time that those errors were called to its attention and by its refusal to honor its promise to address Weisberg's complaints about such excisions once it had completed processing of the Headquarters MURKIN records. It offers the only realistic hope of resolving a governmental snafu whose true dimensions are only hinted at in defendant's misbegotten Vaughn sampling. In fact, at the January 12, 1979, hearing in this case, this Court specifically authorized plaintiff to file a motion for reprocessing of the MURKIN Headquarters records, stating that she would rule on it when it was filed.

It has now been filed and it is time for defendant to respond to the motion, if it can.

Indeed, defendant's time for responding to this motion and the motions which plaintiff filed on May 23, June 4, and June 5, 1980, has expired. Local Rule 1-9(d) provides that "[w]ithin ten days of the date of service of a motion or such other time as the court may direct, an opposing party shall serve and file a statement of points and authorities in opposition to the motion. If such opposing statement is not filed within the prescribed time, the court may treat the motion as conceded."

This Court should treat plaintiff's motions as conceded. It is obvious that defendant has chosen not to try to answer them because it knows it cannot in fact prevail. There is no way that defendant can justify not providing plaintiff with the records of the Office of the Attorney General or the Office of the Deputy Attorney General, or the multitudinous records of the Civil Rights Division that were concealed from plaintiff and the Court until Mr. Shea informed him of their existence and its extent. Rather than face up to these unpleasant facts, defendant has resorted to the intellectually dishonest and legally unethical tactic of attacking plaintiff's motions on the basis of a Federal Rule that does not even authorize such action. It is time for the Court to take firm action to put a stop to this form of harrassment. Treating plaintiff's motions as conceded is one way in which the Court may do so. Alternatively, the Court should give defendant ten days in which to answer the motions on the express condition that if response is not made within that time, the motions will then be treated as conceded.

Respectfully submitted,



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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of June, 1980, mailed a copy of the foregoing Opposition to Motion to Strike to Mr. William G. Cole, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant	:	Civil Action No. 75-1996

O R D E R

Upon consideration of defendant's motion to strike plaintiff's motions filed on April 9, May 23, June 4, June 5, and June 6, 1980, plaintiff's opposition thereto, and the entire record herein, it is by the Court this _____ day of _____, 1980,

ORDERED, that defendant's motion to strike be, and hereby is, DENIED; and it is further

ORDERED, that defendant shall file its response to plaintiff's motions of May 23, June 4, June 5, and June 6, 1980, within ten days of the date of this order.

_____
UNITED STATES DISTRICT COURT

Exhibit 1

Civil Action No. 75-1996

FILED

FEB 26 1980

JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG	:	
Plaintiff	:	
v.	:	Civil Action No. 75-1996
U.S. DEPARTMENT OF JUSTICE	:	
Defendant	:	

FINDING AS TO SCOPE OF SEARCH

Upon consideration of defendant's motion for partial summary judgment, plaintiff's reply and motion for order directing that defendant provide plaintiff with field office records offered to him by letter of former FBI Director Clarence M. Kelley, the affidavits submitted by both parties, plaintiff's motion for Vaughn v. Rosen index and defendant's opposition thereto, together with supporting affidavits submitted by both parties, the entire record herein, and after extensive oral argument on January 3, 1980, February 8, 1980 and February 26, 1980, the Court finds that proper and good faith search has been made for all items responsive to plaintiff's request in the FBI headquarters' Murkin files and in all files of the FBI field offices, with the exception of the Frederick residency.

JUNE L. GREEN
U.S. District Judge

Dated: February 26 1980

Exhibit 2 Civil Action No. 75-1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG :

Plaintiff :

v. : Civil Action No. 75-1996

U.S. DEPARTMENT OF JUSTICE : FILED

Defendant : FEB 26 1980

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of defendant's motion for partial summary judgment, plaintiff's reply and motion for order directing that defendant provide plaintiff with field office records offered to him by letter of former FBI Director Clarence M. Kelley, the affidavits submitted by both parties, plaintiff's motion for Vaughn v. Rosen index and defendant's opposition thereto, together with supporting affidavits submitted by both parties, the entire record herein, and after extensive oral argument on January 3, 1980, February 8, 1980 and February 26, 1980, it is by the Court this 26th day of February 1980,

ORDERED that a Vaughn v. Rosen index be prepared within 60 days of this order justifying the deletions on every 200th document released or to be released to the plaintiff.

JUNE L. GREEN
U.S. District Judge