UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S RESPONSE TO DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

On July 9, 1980, plaintiff filed a Motion for Partial Summary Judgment With Resepct to FBI Field Office Records Withheld As "Previously Processed." On July 17, 1980, defendant filed a "Memorandum in Opposition to Plaintiff's Motions for Partial Summary Judgment." Defendant's Memorandum dealt only tangentially with plaintiff's July 9 motion. To the extent that it did so at all, it misrepresented the facts.

For example, it characterized plaintiff's motion as requesting an order "requiring the release of documents in FBI field offices which are duplicates of documents already released from FBI Headquarter (sic) files." (Memorandum, p. 1) But the very basis for plaintiff's motion is that there has been no showing that the documents were in fact actually released from FBI Headquarters files and that there is substantial reason to believe that documents withheld as "previously processed" were not actually released from Headquarters files.

In addition, defendant asserts that plaintiff's July 9 motion "seeks to reopen the question of the FBI's search for documents, an issue that was decided by this court's order of February 26, 1980." (Memorandum, p. 1) The silliness of this assertion is obvious. Surely the FBI did not make a claim of "previously pro-

cessed for records it had not even located. And if the records have been located, then there can be no question of seeking "to reopen the question of the FBI's search for documents.

Rather than responding directly to plaintiff's July 9 motion, defendant seeks to have it and five prior motions for partial summary judgment made by plaintiff denied on the grounds that such motions are improper under Rule 56 of the Federal Rules of Civil Procedure. In making its argument, defendant now concedes that is earlier motion to strike plaintiff's motions for partial summary judgment under Rule 12(f) of the Federal Rules of Civil Procedure was invalid.

Defendant's latest pretext for refusing to address the substance of plaintiff's motions has no more merit than its first. In arguing that it is improper for plaintiff to seek to have this Court rule on a portion of his "Freedom of Information Act claim" under Rule 56, defendant argues against a procedure that both parties have employed on a number of occasions. Until now this procedure has not been challenged by either side. In this regard, it may be noted that defendant's argument that a motion for partial summary judgment is improper where it does not dispose of the whole of plaintiff's FOIA claim (Memorandum, p. 2) undercuts its own pending motion for partial summary judgment. Even if defendant's motion for partial summary judgment were granted, a number of other issues pertaining to plaintiff's "FOIA claim" would remain, e.g., attorneys fees and costs, consultancy fee, sanctions, etc.

The interpretation of Rule 56 which defendant urges upon the Court is preposterous. Rule 56(a) provides that a party seeking to recover upon a claim may move "for a summary judgment in his favor upon all or any part thereof." (Emphasis added) The meaning of this provision is inescapable. As a leading authority states:

> Subdivisions (a) and (b) of Rule 56 clearly contemplate that a motion for summary judgment in his favor may be made by either a claimant or a defendant upon all or a part of a claim; and subdivision (c) provides that a "summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." And since an action may involve multiple claims a summary adjudication of one claim, either partially or completely, may be proper, although the other claim or claims must be fully tried.

Moore's Federal Practice, § 56.20. (Citations omitted)(Emphasis added)

It is apparent from defendant's reliance on Biggins v. Oltmer Iron Works, 154 F.2d 214 (1946) and cases which follow it, that defendant has confused the question of whether a motion for partial summary judgment may be made with the question of whether an order or "judgment" entered pursuant to such a motion is an interlocutory order or a final judgment for purposes of appeal. This was the issue in Biggins, whether an award of partial summary judgment as to less than the whole case is an appealable final order or "judgment". Normally it is not, but under the unique circumstances of the case in front of it, the Biggins court held that the one at issue was.

Thus, Biggins does not stand for the proposition that defendant, in its desperation, tries to create. Citing a leading authority on the subject once again:

> It is clear that Rule 56 authorizes summary adjudication that will often fall far short of a final adjudication, even of a single claim; and that the term "partial summary judgment" as applied to interlocutory summary adjudication is often a misnomer.

Moore's Federal Practice, § 52.20[3.-2]. (Citations omitted)(Emphasis added)

At page two of its Memorandum, Defendant quoted Biggins as follows:

> We observe in the beginning and will attempt to show that this rule [56], in our opinion, does not contemplate a summary judgment for a portion of a single claim in suit. Neither does any other rule of the Rules of Civil Procedure so contemplate, as far as we are aware.

Essential to an understanding of what the Seventh Circuit meant by "summary judgment" as employed in the quoted passage is the very next sentence in its opinion, the one omitted by defendant:

> A partial summary judgment, as the instant one is termed, under the circumstances before us is a misnomer.

Biggins, supra, 154 F.2d at 216.

Defendant's attempt to sow semantical confusion by pretending that Biggins is authority for the proposition that plaintiff cannot properly move for an interlocutory order disposing of legal issues where there are no material facts in dispute is entirely uncalled for. Plaintiff has asked the Court to issue "orders" not "judgments," as is shown by the proposed "orders" which accompanied his motions. If there are material facts in dispute, then of course this Court cannot properly grant summary judgment. But defendant has not so far made any showing whatsoever that there is any dispute as to the facts alleged in support of the motions.

Plaintiff's pending summary judgment motions were made in an effort to force some action in this case by bring certain separate legal issues to a head. Defendant, on the other hand, has resorted once again to spurious motions as part of its continuing campaign to obstruct and delay this lawsuit and to drive up the costs to plaintiff and his counsel. The Court must at some point take cognizance of these tactics if this case is to be brought to a proper and speedier conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of August, 1980, mailed a copy of the foregoing Plaintiff's Response to Defendant's Memorandum in Opposition to Plaintiff's Motions for Partial Summary Judgment to Mr. William G. Cole, Attorney, Civil Division, Room 3137, U.S. Department of Justice, Washington, D.C. 20530.

James H. Lesar

JAMES H. LESAR