UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. KUSUMA NIO, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	)	Civil Action No. 1:17-00998-ESH-RMM

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

The Court should deny Plaintiffs' Motion to Strike Portions of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Defendants' Cross Motion for Summary Judgment. *See* ECF No. 226 ("Plaintiffs' Motion" or "Motion to Strike"); *see also* ECF No. 219 ("Defendants' Cross Motion"). While labeled as a "motion to strike," Plaintiffs' Motion effectively serves as an improper 10-page supplement to the response brief Plaintiffs filed on the same day, and the Court should recognize it as such. *See* ECF No. 227 ("Plaintiffs' Response," also filed on December 21, 2018).

The Court has already clarified the documents that Defendants may refer to in their summary judgment briefing, and Defendants Cross Motion is consistent with that Order. *See* ECF Nos. 215, 217. To the extent Plaintiffs believe Defendants' Cross Motion inaccurately describes the administrative record, Plaintiffs had ample opportunity to raise those points within their Response, and within the page-limitations set by the Court for summary judgment briefing. *See* ECF Nos. 159 (setting a page-limitation of 45 pages for Plaintiffs' response in opposition and reply). Defendants' therefore oppose Plaintiffs' Motion and urge the Court to deny it. Moreover, to the extent Plaintiffs

raise arguments in their Motion to Strike that are not presented in their Response, the Court should regard these arguments as waived for summary judgment purposes.

I. Plaintiffs' Motion to Strike makes no showing of prejudice

"Motions to strike, as a general rule, are disfavored." *Capitol Sprinkler Inspection, Inc. v. Guest Services, Inc*. 630 F.3d 217, 226 (D.C. Cir. 2011) (quoting *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrib*., 647 F.2d 200, 201 (D.C. Cir. 1981)). Moreover, Courts routinely deny motions to strike where there was no showing of prejudice to the moving party. *See Phillips et al. v. Mabus, et al.*, 319 F.R.D. 36, 38-39 (D.D.C. 2016); *Malyutin v. Rice*, 854 F. Supp. 2d 38, 45 (D.D.C. 2012); *see also Villas at Parkside Partners v. City of Farmers Branch*, 2007 WL 4322147, at *2 (N.D. Tex. Dec. 11, 2017).

Plaintiffs have made no effort in their Motion to demonstrate how they were prejudiced by the allegations they raise about Defendants' Cross Motion.[1] *See generally* ECF No. 226. Nor is any claim of prejudice remotely plausible in this instance because Plaintiffs already had a perfectly adequate means for expressing their qualms with Defendants Cross Motion: their response brief. *Rivera v. United States*, No. 3:12-CV-1339, 2013 WL 1826396, at *1 (N.D. Ill. Apr. 30, 2013) ("Recognizing that briefs are, by their nature, argumentative and sometimes contentious filings, it is generally held that a brief – as opposed to other forms of pleadings – typically will not be considered a 'pleading' which is properly the subject of a motion to strike [under Fed. R. Civ. Proc. 12(f)]," and therefore treating plaintiff's motion to strike as a sur-reply, where briefing was otherwise complete). Indeed, as discussed below, Plaintiffs' allegations that Defendants "rel[ied] on" on extra-record material to justify the July 7 Guidance does not withstand minimal scrutiny. Rather, the purpose of

[1] While Plaintiffs cite *Oceana, Inc. v. Locke* in support of their motion to strike, *see* ECF 226, at 1, that case involved the separate question of the circumstances under which a party challenging an agency action could seek consideration of extra-record evidence of its own creation. 674 F. Supp. 2d 39, 44-45 (D.D.C. 2009).

these assertions is to supplement the arguments on which Plaintiffs rely in their summary judgment briefing as to whether the July 7 Guidance is in fact supported by the administrative record. Because Plaintiffs could have, and in some cases did, raise these same arguments in their Response brief, they have not showed they were prejudiced by Defendants' Cross Motion. *See Phillips et al.*, 319 F.R.D. at 38-39 (D.D.C. 2016).

II. Plaintiffs have not shown that Defendants' Cross Motion is not in accord with the Court's Orders on Plaintiffs previous motion strike.

Even assuming they did establish the requisite prejudice, the grounds Plaintiffs offer for "striking" certain portions from Defendants brief are baseless. Plaintiffs identify four instances where, according to them, Defendants' citation to extra-record materials runs afoul of the Court's instructions. ECF No. 226, at 4-5.

First, Plaintiffs complain that Defendants' Cross Motion includes a "Background" section, with citations to materials from the Department of Defense ("DoD") administrative record, and to the July 7, 2017 Miller Declaration. ECF No. 226, at 4 (referencing the Miller Declaration at ECF No. 19-7. In so doing, Plaintiffs ignore that their own Motion for Partial Summary Judgment includes *over seven pages* of "Background" and "Preliminary Statement" information separate and apart from their Statement of the Facts. *See* ECF No. 177, at 1-8. While most of this narrative is entirely *uncited*, Plaintiffs' do cite to the same Miller Declaration to which they now object in their Motion to Strike. *See* ECF No. 177, at 2 (citing ECF No. 19-7). Given Plaintiffs use of an extensive "Background" and "Preliminary Statement" in their Motion for Partial Summary Judgment (with a citation to same Declaration about which Plaintiffs complain in their Motion to Strike), Defendants deemed it reasonable and consistent with the Court's order that they be afforded the same opportunity to provide the Court with an overview of the case. ECF No. 217, at 1 (noting Defendants may cite any portion of the July 7, 2017 Miller Declaration, or the DoD administrative record if necessary to rebut plaintiffs' arguments). It was in this spirit that Defendants Cross Motion sets forth a "Background,"

with references to materials that are not part of the United States Citizenship and Immigration Services ("USCIS") administrative record.

Second, Plaintiffs again protest that Defendants "abuse their license" by referencing the same July 7, 2017 Miller Declaration in the context of one particular argument. ECF No. 226, at 5. In the argument to which Plaintiffs refer, Defendants noted that it "is also reasonable for USCIS to await the results of an MSSD because an adverse military suitability determination may result in the recruit being discharged under other than honorable conditions." ECF No. 219, at 29. As explained in Defendants' Reply, however, it is *not* Defendants' position that the potential for discharge "under other than honorable conditions" was an "alternate rationale" for the July 7 Guidance, as Plaintiffs claim. *See* ECF No. 237, at 14. Rather, Defendants simply raised this point to highlight an advantage of the current policy as compared to the alternative Plaintiffs seem to propose. *Id*. Insofar as Defendants referenced the Miller Declaration in order to rebut Plaintiffs' implicit assertion that an alternative policy would work better, there is no merit to the claim that this reference should be stricken.[2]

Third, Plaintiffs again argue that USCIS did not consider the DoD "time-out policy" and – for purposes of shoehorning this oft-repeated argument into their "Motion to Strike" – they fault Defendants for citing post July 7 Guidance documents. ECF No. 226, at 5 (citing ECF No. 219, at 33-34, and ECF No. 157). But the documents that Defendants cited simply explained that DoD has "facilitate[d] retention of . . . soldier[s] until the enhanced security protocols are completed," notwithstanding the ordinary "time-out" limit. ECF No. 157. In other words, the documents explained that the "time-out policy" has had no meaningful effect on class members. As Plaintiffs themselves

[2] Plaintiffs' argument on this particular point perfectly exemplifies why these contentions belong in a Response rather than a "Motion to Strike." Because Defendants are not asserting that the statement in question in the Miller Declaration was a "rationale" for July 7 Guidance, and have clarified as such in their Reply, there is no actual dispute about the manner in which the Court should consider the statement.

acknowledge in their Motion, this is precisely the type of situation in which the Court stated it was appropriate for Defendants to cite materials outside of the administrative record. *See* ECF No. 226, at 6 (noting that the Court authorized Defendants to cite materials outside of the administrative record "'to rebut the plaintiff's arguments whenever the plaintiff goes beyond July 7,' *such as by showing that factors not considered did not occur and were thus truly not at issue*.") (emphasis added).

Finally, Plaintiffs take issue with Defendants reference to a recent criminal complaint in the Northern District of Illinois alleging that MAVNI recruit acted in the United States as an agent of a foreign government. ECF No. 226, at 4 (citing ECF No. 219, at 22 n.12). Defendants referenced this case for the Court's awareness alone, and clearly acknowledged in their Cross Motion that it is not part of the administrative record. ECF No. 219, at 22 n. 12. To the extent it needs clarification, it is not Defendants position that this particular case in any way motivated the July 7 Guidance. Defendants leave it to the discretion of the Court as to whether this information is useful in rendering a decision on the parties' cross motions for summary judgment.

III. Plaintiffs assertions regarding "material misstatements" of "underlying document[s]

Plaintiffs' Motion to Strike also lists a series of instances in which they allege that Defendants Cross Motion does not accurately describe a document being cited. ECF No. 226, at 8-9. Plaintiffs offer no authority for the view that alleged inaccuracies in a brief warrant "striking" the statements from that brief. To the contrary, courts have routinely held that "there is no occasion for a party to move to strike portions of an opponent's brief (unless they be scandalous or defamatory) merely because he thinks they contain material that is incorrect, inappropriate, or not part of the record." *Fla. Tomato Exch. v. United States*, 973 F. Supp. 2d 1334, 1338 (Ct. Intl. Trade 2014) (citing *Acciai Speciali Terni, S.p.A. v. United States*, 120 F. Supp. 2d 1101, 1106 (Ct. Intl. Trade 2000)). "The proper method of raising those issues is by so arguing, either in a brief or in a supplemental memorandum, but not by filing a motion to strike." *Id*.

In any event, it appears that many of the alleged "misstatements" Plaintiffs identify reflect minor disagreements with Defendants' characterizations. *See e.g.*, ECF No. 226, at 8 (arguing that it is inaccurate to claim that "certain MAVNI recruits were involved in international money laundering and suspicious wire transfers, . . . were not loyal to the United States and were dishonest, . . . [or] had violent behavior and court-imposed protective orders issued against *them*," (*see* ECF No. 219, at 19), because "the administrative record only refers to *one* recruit with *one* protective order against her); *see id*. (arguing that it is inaccurate to claim that "certain MAVNI recruits were involved in international money laundering" or "were engaged in visa fraud" (*see* ECF No. 219, at 19), because the administrative record does not reflect that these recruits were actually *convicted*).[3] Suffice it to say, the Court is capable of reading these materials, and if it disagrees with Defendants' characterizations, it can make that determination without "striking" Defendants' statements.[4]

For these reasons, Defendants ask that the Court deny Plaintiffs' Motion to Strike Portions of Defendants' Cross Motion.

DATED: February 15, 2019

Respectfully submitted,

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[3] Plaintiffs' claim that "perhaps most egregious is Defendants' assertion that the administrative record shows that '[u]nder the July 7 Guidance, USCIS deems the MSSD to be the conclusion of the DoD background check." ECF 226, at 9. But as Defendants' explained in their Cross Motion, ECF No. 219, at 26, and again in their Reply, ECF No. 237, at 6-8, the administrative record does reference the September 30, 2016 Memo (which the Court has ruled shall be considered as part of the administrative record), and that Memo in turn describes the military suitability determination as the final phase of the DoD screening process.

[4] As for Plaintiffs claim that Defendants incorporated other briefing "by reference," *see* ECF No. 226, at 6, Defendants cited to these materials in the interest of completeness and leave it to the discretion of the Court whether to consider them.

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CERTIFICATE OF SERVICE
Civil Action No. 1:17-00998-ESH

I HEREBY CERTIFY that on this 15th day of February, 2019, a true copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing via e-mail to the following:

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