IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PROJECT ON PREDATORY STUDENT LENDING OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	Civil Action No. 2:17-cv-00210-NBF Hon. Nora Barry Fischer *(Electronic Filing)*

DEFENDANT'S SURREPLY IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

Plaintiff's Reply Brief cannot resuscitate its Motion to Strike, which was premised on an incomplete articulation of the legal standard for official-capacity knowledge and an unjustifiably aggressive view of the ban on legal conclusion testimony. Instead of withdrawing its motion, plaintiff attempts in vain to salvage it. For the reasons below, as well as those presented in Defendant's Memorandum in Opposition, ECF No. 64 (Feb. 22, 2018), plaintiff's motion to strike should be denied.

ARGUMENT

I. THE TESTIMONY OF DEFENDANT'S DECLARANTS IS WITHIN THE SCOPE OF THEIR OFFICIAL-CAPACITY KNOWLEDGE.

In seeking to strike Civil Chief Michal Comber and Attorney Advisor John Kornmeier's sworn statements based on the Declaration of Matthew Divelbiss, Plaintiff's Motion to Strike was fatally flawed because it did not account for the most relevant strand of case law – that on the scope of official-capacity testimony. Although Plaintiff's Reply Brief now acknowledges the official-capacity-testimony line of cases, plaintiff attempts to impose an artificial limit on the

applicability of those cases. Specifically, while plaintiff recognizes that official-capacity knowledge includes information learned from subordinates, *see* Pl.'s Reply Br. at 4-5, ECF No. 73 (Mar. 24, 2018), plaintiff argues that official-capacity knowledge cannot include information learned from opposing counsel, even information provided in sworn statements that the declarants reviewed in the scope of their official job duties. Plaintiff is mistaken: official-capacity knowledge includes material information learned in the scope of an official's duties, and is not limited to only information provided by subordinates. This is not some new or revolutionary concept. To the contrary, this principle is so fundamental that it is grounded in the Restatement of Agency (Third) of Agency § 5.06 (2006):

> For purposes of determining a principal's legal relations with a third party, *notice of a fact that an agent knows* or has reason to know is imputed to the principal *if knowledge of the fact is material to the agent's duties* to the principal, unless the agent
>
> (a) acts adversely to the principal as stated in § 5.04, or
>
> (b) is subject to a duty to another not to disclose the fact to the principal.

Id. (emphasis added). Applied here, because the declarants gained information as employees, and therefore as agents, of defendant, the information they learned may be imputed to the defendant, and that information is properly within the scope of official-capacity testimony. Notably, there is no authority for the specific limitation that plaintiff offers, *viz.*, that official-capacity knowledge is confined to only information received from subordinates.

To induce a contrary result, plaintiff misconstrues case law. The cases in which official-capacity knowledge encompasses information learned from subordinates do not mark the *outer limit* of official-capacity knowledge; rather those cases stand for the proposition that information learned from subordinates is comfortably within official-capacity knowledge. *See* Pl.'s Reply Br. at 4-5 (citing cases).

Nor is there any principled basis for the distinction that plaintiff attempts to draw. Official-capacity knowledge learned from subordinates is not inherently more reliable than knowledge gained from the sworn statements of opposing counsel, especially where those statements themselves are reliable and trustworthy. And plaintiff has not provided a single basis to question the veracity or reliability of the Divelbiss Declaration.

For these reasons, declarants' official-capacity knowledge includes the sworn statements provided in the Divelbiss Declaration of which declarants learned in the performance of their official duties.

II. DECLARANTS DO NOT TESTIFY TO LEGAL CONCLUSIONS.

Plaintiff also seeks to strike several statements by declarants Civil Chief Comber and Attorney Advisor Kornmeier as improper legal conclusions. *See* Pl.'s Reply Br. at 2-3. Again, plaintiff over-reads the case law, and none of the challenged statements in defendant's declarations constitutes improper legal conclusions.

As defendant pointed out in its Memorandum in Opposition, plaintiff's articulation of the law is too broad, and it would prevent any testimony on any fact that carries legal significance. *See* Def.'s Mem. in Opp. at 5-6. For instance, plaintiff has no response for the deficiency in its legal theory which would foreclose witnesses from testifying that they were "injured" or that another person acted "recklessly" or "purposely." Def.'s Mem. in Opp. at 6. Certainly, witnesses are not categorically barred from testifying on relevant facts that also happen to carry legal significance.

The lone reported case from this District cited by plaintiff highlights the extent of plaintiff's overextension of the law. *See* Pl.'s Reply Br. at 3 (citing *FedEx Ground Package Sys., Inc. v. Applications Int'l Corp.*, 695 F. Supp. 2d 216, 223 (W.D. Pa. 2010)). In that case, the court ruled that an expert witness could not testify in front of a jury where the expert would do

"nothing more than recite general legal principles and apply them to [the party's] version of the facts in the case." *FedEx*, 695 F. Supp. 2d at 221. Yet none of those circumstances is present here. Civil Chief Comber and Attorney Advisor Kornmeier are not testifying as experts. *Cf. id.* at 221 ("[D]istrict courts prohibit experts from offering legal opinion because such testimony is not helpful to the trier of fact."). In addition, the challenged declarations are before the Court at summary judgment, not a jury at trial, as in *FedEx*. *See id.* at 223; *cf.* Fed. R. Evid. 104(d) (preventing the jury from hearing inadmissible evidence). And neither declaration follows the sequence prohibited in *FedEx* of reciting general legal principles and applying them to the facts of this case. *See id.* Rather, the sworn statements that plaintiff challenges are fact-laden and without legal analysis, and they should not be stricken.

Finally, Plaintiff's Reply Brief does not rebut defendant's explanation of the legitimacy of paragraph 11(c) of the Declaration of Civil Chief Comber, which explained that the Hard Drives do not contain metadata identifying the discovery requests to which the data corresponded. That paragraph should not be stricken.

CONCLUSION

For these reasons, as well as those presented in Defendant's Memorandum in Opposition, ECF No. 64 (Feb. 22, 2018), Plaintiff's Motion to Strike should be denied.

April 12, 2018

Respectfully Submitted,

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