IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Aimee Maddonna, Plaintiff, v. United States Department of Health and Human Services, et al., Defendants.	)	Civil Action No. 6:19-cv-03551-JD

DEFENDANTS HENRY MCMASTER'S AND MICHAEL LEACH'S REPLY IN SUPPORT OF MOTION TO STRIKE

Plaintiff's Opposition does not dispute that this Court's rules nowhere authorize or even mention her use of a separate statement of undisputed facts. Instead, she points to (1) a plainly inapplicable local rule, (2) commentary on Rule 56(c) that directly undermines her argument, (3) a grab bag of old and *pro se* cases, none of which says anything about whether a separate factual statement is actually permitted (while she simultaneously ignores known caselaw to the contrary), and (4) the startling assertion that the seven-page factual recitation in her Memorandum "is virtually identical" to the 14-page factual recitation in her Statement of Undisputed Material Facts ("SUMF"). What is more, Plaintiff admits in her Opposition that she would suffer no prejudice from striking the SUMF. *See* ECF No. 124 at 3. Plaintiff's response confirms that State Defendants' Motion should be granted. Each of her arguments is rebutted in turn below.

First, Plaintiff claims that her separate statement of facts is permitted as "supporting documentation" under Local Civil Rule 7.05(B). *See* ECF No. 124 at 1. But a statement of facts is not, by definition, "documentation." It is not a transcript, a document exchanged in discovery, or

any other sort of evidentiary exhibit. It is, instead, an attorney's summary of the facts in the record with supporting citations, just like the "concise statement of the facts . . . with reference to the location in the record" that must be included in the memorandum by Local Civil Rule 7.05(A)(2).

Second, the committee note to Rule 56 on which Plaintiff purports to rely, *see* ECF No. 124 at 1–2, provides her with no support. To the contrary, when read in full, it directly *contradicts* her claim. The note explains that Rule 56(c)(1) "*does not* address the form for providing the required support." Fed. R. Civ. P. 56(c), advisory committee notes to 2010 amendments. Rather, the form of such motions and their support is governed by Local Rules and practice—which (as explained in State Defendants' Motion to Strike) do not permit the filing (and incorporation by reference) of a separate factual statement. Indeed, the committee note makes that exact point:

> Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.

Id. In other words, contrary to Plaintiff's argument, the committee note explains that Rule 56(c) does *not* itself authorize or require any specific filing format, and it certainly does not authorize a separate statement facts.

Third, the cases Plaintiff cites do not represent the more recent and more common cases from this District that contradict Plaintiff's argument—including at least one case of which she is aware. Plaintiff identifies three cases from this District in which the parties included separate statements. But two of those cases are close to a decade old, one included a three-page statement "of undisputable facts" filed by a *pro se* litigant, and another is an unusual case in which the federal government's summary judgment argument is only two paragraphs long. This is hardly evidence of a common practice. Instead, in a case known to Plaintiff's counsel, Judge Norton more recently granted in part a motion to strike and acknowledged the defendant's "consternation with the

plaintiffs' submission of the SUMF without seeking consent from the City or leave from the court" and "remind[ed] plaintiffs of the need to conform to this district's local rules." Order, *Billups v. City of Charleston*, No. 2:16-cv-00264 (Sept. 25, 2017) at 1 n.1.[1]

Fourth, Plaintiff's sole response to the prejudice caused by her maneuver is to argue that it caused no real harm because the factual recitation in her Memorandum is "virtually identical" to her SUMF. *See* ECF No. 124 at 3. This assertion beggars belief. A seven-page, 2,283-word Statement of Facts isn't anywhere close to "identical" to a 14-page, 4,465-word SUMF. Nor will it do to argue, as Plaintiff does, that there's no real harm because even if she were to update the factual recitation in her Memorandum to cite directly to the source material (rather than citing to the SUMF), that change would lengthen her Memorandum by only a few pages. *See id.* at 3–4. That argument is a red herring. Plaintiff's error is not simply that her Memorandum's factual assertions cite to the SUMF rather than to the source documents. Her error—and the resulting prejudice—is that the SUMF allows her to expand and elaborate on those factual assertions and to shoehorn in new ones that are not found in the Memorandum's Statement of Facts. For example, the SUMF alleges (incorrectly) that SCDSS "invests CPAs with governmental authority." *See* SUMF ¶ 4 (ECF No. 110-2 at 1). The Statement of Facts in Plaintiff's Memorandum contains no such assertion. This supposedly "undisputed" assertion in the SUMF is one that State Defendants must rebut—in addition to rebutting the factual misapprehensions in Plaintiff's Memorandum itself. Likewise, Plaintiff's SUMF includes erroneous assertions about Miracle Hill's supposed proselytization of children in foster care. *See* SUMF ¶¶ 22–23 (ECF No. 110-2 at 1). These

[1] In the present case, during the parties' attempts to resolve this issue, Plaintiff relied (erroneously) on *Billups* in support of her SUMF, apparently unaware at that time that the SUMF in *Billups* gave rise to a Motion to Strike that Judge Norton granted in part. The absence of any reference to *Billups* in her subsequent Opposition seems a tacit admission that it is contrary to her arguments.

assertions are neither found in nor supported by her Memorandum's Statement of Facts, but her legal arguments rely on them as if they are undisputed facts. *See* Pl's Mot. for Summ. J. at 14 (ECF No. 110). State Defendants must, therefore, rebut them along with the erroneous factual assertions in the Memorandum itself.

Finally, Plaintiff concedes in her Opposition she could revise and "refile her memorandum[,] replacing the 'SUMF ¶' citations with direct references to the exhibits themselves, [and] the entire memorandum would still be fewer than the allotted 35 pages." ECF No. 124 at 3–4. The Court should order the Plaintiff to do just that and should strike the separate statement. That would be much simpler for State Defendants and for the Court, which will be able to discern what evidence is claimed to support which point, rather than being forced to refer to a separate attorney's summary to find out which *other* exhibits purportedly support the claim. And if Plaintiff can be taken at her word that the two documents are interchangeable, she won't suffer any prejudice from this Court's order.

Striking Plaintiff's SUMF offers not only retrospective relief and ensures compliance with the Court's rules, but provides a prospective, prophylactic effect to deter future violations. If the Motion to Strike is not granted, Plaintiff will likely attach a lengthy statement of facts to her Opposition, and perhaps to her Reply as well, further prejudicing Defendants and complicating the Court's analysis of the Cross Motions for Summary Judgment. The Court should grant State Defendants' Motion to Strike so the proper limits are known and followed going forward.

CONCLUSION

For the reasons above, the Court should grant State Defendants' Motion and require Plaintiff to refile a Memorandum that complies with the rules.

Respectfully submitted

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