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 19 Ulrike Willimon, the United States of America, Hon. Michael B. Mukasey, and Hon. William P.
 20 Greene, Jr.

21 UNITED STATES DISTRICT COURT
 22 NORTHERN DISTRICT OF CALIFORNIA
 23 SAN FRANCISCO

24 VETERANS FOR COMMON SENSE and)	
25 VETERANS UNITED FOR TRUTH,)	No. C 07-3758-SC
26)	
27 Plaintiffs,)	
28)	
29 v.)	DEFENDANTS' INITIAL
30)	OPPOSITION TO PLAINTIFFS'
31)	MOTION TO STRIKE
32 Hon. GORDON H. MANSFIELD,)	DECLARATIONS SUBMITTED
33 Acting Secretary of Veterans Affairs,)	ON REPLY
34 <u>et al.</u> ,)	
35)	Date: December 14, 2007
36 Defendants.)	Time: 10:00 a.m.
37)	Courtroom: 1

38 **INTRODUCTION**

39 On December 10, 2007, Plaintiffs filed Plaintiffs' Objections to and Motion to Strike

1 Improper Declarations Submitted on Reply (“Motion to Strike Reply Declarations”), seeking to
2 strike the Declaration of Charles J. De Sanno in Support of Defendants’ Motion for Protection
3 Order (“De Sanno Declaration”) and the Declaration of Mark Bologna in Support of Defendants’
4 Motion for Protective Order (“Bologna Declaration”), and noticed the motion for hearing on
5 December 14, 2007. Plaintiffs neither acknowledge nor attempt to justify their second motion
6 noticed for hearing improperly this time just four days later. See N.D. Cal. Civ. R. 7-2(a); 7-
7 3(a), (c); McColm v. San Francisco Hous. Auth., 2006 U.S. Dist. LEXIS 93450 at *7-8 (N.D.
8 Cal. 2006) (“The local rules . . . do not provide for ‘counter-motions’ but instead require that all
9 motions be filed on a 35-day briefing schedule.”). Should the court choose to hear this motion
10 out of time, Defendants submit the following initial brief response in opposition.
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13 This unnecessary procedural motion should not distract the Court from the profound
14 defects in Plaintiffs’ complaint nor the unreasonably overbroad and premature discovery
15 Plaintiffs seek.

16 ARGUMENT

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18 Contrary to Plaintiffs’ contention, the De Sanno and Bologna declarations are proper
19 rebuttal declarations addressing inaccurate statements submitted by Plaintiffs in the Declaration
20 of Paul Sullivan in Support of Plaintiffs’ Motion to Strike Bowman Declaration and Opposition
21 to Defendants’ Motion for Protective Order (“Sullivan Declaration”). See, e.g., De Sanno Decl.,
22 ¶ 5 (“I submit this declaration to clarify and refute statements made in Mr. Sullivan’s
23 declaration”); Bologna Decl., ¶¶ 5-11, 13, 15 (detailing inaccuracies in Mr. Sullivan’s
24 declaration). Plaintiffs’ claim that the De Sanno and Bologna Declarations are “an obvious
25 attempt to cure the defects in the Bowman Declaration[,]” (Motion to Strike Reply Declarations,
26 at 2), is based on the faulty premise that the Declaration of Thomas G. Bowman (attached to
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1 Defendants' Notice of Motion and Motion for Protective Order to Stay Discovery at Attachment
2 B) ("Bowman Decl.") is defective. Defendant addressed this issue in their Opposition to
3 Plaintiffs' Motion to Strike Declaration of Thomas G. Bowman ("Opposition to Motion Strike
4 Bowman Declaration").

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6 Plaintiffs' hearsay objections in their Motion to Strike Reply Declarations fail for the
7 same reasons stated in the Opposition to Motion Strike Bowman Declaration. As this Court held,
8 "[t]he affidavit or testimony of an agency official, who is knowledgeable [about the issue to
9 which he testifies] . . . complies with the [personal knowledge] standard." Ramo v. Dep't of
10 Navy, 487 F. Supp. 127, 130 (N.D. Cal. 1979), aff'd, 692 F.2d 765 (9th Cir. 1982). As detailed
11 in the Opposition to Motion Strike Bowman Declaration, the holding of Londrigan v. FBI, 670
12 F.2d 1164, 1174 (D.C. Cir. 1981), that an agency official may testify as to matters he learns upon
13 review of agency documents and information made available to him in the course of his duties,
14 has been followed consistently by courts in this Circuit and elsewhere. See Opposition to Motion
15 Strike Bowman Declaration at Argument, Section I.

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18 Plaintiffs also object that the De Sanno and Bologna Declaration include "unqualified
19 expert opinion testimony." Motion to Strike Reply Declarations, at 4. In their attempt to keep
20 the tremendous cost and burden of response to 191 Requests for Production from the Court,
21 Plaintiffs advance an argument challenging the testimony of De Sanno and Bologna as
22 "unqualified expert opinion" that weakens their position. The De Sanno and Bologna
23 Declarations are similar in nature in all salient respects to the testimony provided by *Plaintiffs'*
24 declarant, Mr. Sullivan, in support of Plaintiffs' first motion to strike. Compare Bologna Decl., ¶
25 5 ("Mr. Sullivan's declaration relies on assumptions regarding the scope of the RFPs that are
26 inconsistent with those requests.") (cited in Motion to Strike Reply Declarations, p. 7), with
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1 Sullivan Decl., ¶ 9 (“Defendants’ estimates of cost and time for searching claim files are based
2 upon assumptions that ignore common sense.”); compare De Sanno Decl., ¶ 10 (“Complying
3 with the plaintiffs’ requests for production as they relate to searching for terms, phrases, and
4 names contained in email would place a significant burden on VA IT staff and resources as
5 described in the declaration of Mr. Bowman.”), with Sullivan Decl., ¶ 8 (“Defendants’ estimate
6 . . . is a vastly inflated estimate of the true costs that would be incurred.”). Although the form of
7 testimony in Plaintiffs’ and Defendants’ declarations may be similar, the base of knowledge of
8 the declarants differs. While it seems apparent that as a mid-level employee for a few years at
9 VA, Plaintiffs’ witness is not as qualified, if indeed he is qualified at all, as the VA witnesses
10 who have direct responsibility for the systems at issue, what cannot be gainsaid is that if the
11 Court declines to consider the Bologna and De Sanno declarations, it must also ignore Mr.
12 Sullivan’s testimony.^{1/}

13 CONCLUSION

14 For the foregoing reasons, Plaintiffs’ Motion to Strike Declarations Submitted on Reply
15 should be denied.

16 Dated December 12, 2007

17 Respectfully Submitted,

18 JEFFREY S. BUCHOLTZ
19 Acting Assistant Attorney General

20 ^{1/} Plaintiffs’ complaints about the meet and confer obligations not only misstate
21 Defendants’ efforts to comply therewith, but are entirely hollow in light of Plaintiffs’ intransigent
22 stance on *every* issue and failure to acknowledge that *any* of their 191 Requests for Production
23 (“RFP”) are overbroad. Second, this argument goes not to the instant motion to strike
24 declarations, but to another motion entirely Defendants’ Motion for Protective Order to Stay
25 Discovery (“Motion for Protective Order”). Third, this claim is entirely repetitious of arguments
26 Plaintiffs have already made (and Defendants have already rebutted) in briefing on the earlier
27 motion.
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