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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALAN BYARD, *et al.*,

Plaintiffs,

v.

THE CITY AND COUNTY OF SAN
FRANCISCO, *et al.*,

Defendants.

No. C 16-00691 WHA

**ORDER REGARDING
PLAINTIFFS' INSCRUTABLE
RECORD ON
SUMMARY JUDGMENT**

Defendants moved for summary judgment on March 7 (Dkt. No. 65). On March 16 an order granted a stipulated request to continue the deadline for plaintiffs' response from March 21 to March 23 (Dkt. No. 86). Plaintiffs requested this relief (to which defendants acquiesced) "due to the large number and complexity of the issues, and because Plaintiffs' counsel has the flu, with symptoms including fever and migraines" (Dkt. No. 85). The stipulation provided no sworn evidence of plaintiffs' counsel's illness, but it stated "[p]laintiffs assert that granting two extra days would allow them to prepare a more proper response" (*ibid.*).

On March 22, plaintiffs sought to enlarge the page limit on their opposition from twenty-five to thirty pages (Dkt. No. 88). An order enlarged the page limit to twenty-eight pages (Dkt. No. 89).

On March 23, plaintiffs filed their opposition (Dkt. No. 91). The brief in support was thirty pages long. An amended brief reduced its length to 28 pages (Dkt. No. 93).

1 The record submitted in support of plaintiffs’ opposition was incomprehensible.
2 Although most declarations in support of a brief identify and authenticate each exhibit appended
3 thereto, the declaration of Daniel Bakondi, counsel for plaintiffs, simply stated, “[a]ttached to
4 this declaration is the Plaintiff’s evidence in opposition that I was able to submit prior to the
5 deadline to file, as described in my complaint. There is additional evidence that I request time
6 to submit” (Dkt. No. 91-1, Bakondi Decl. ¶ 5). Attorney Bakondi explained that he had been
7 sick and that he had “been unable to complete [his] Opposition or shorten it as ordered or
8 submit all the evidence [he] ha[s] due to [his] running out of time” (*id.* ¶ 2). He offered no
9 explanation of why the extension that had already been granted due to his illness was
10 insufficient. He never filed a formal motion requesting an extension.

11 He then filed five additional documents. On the Court’s electronic filing system, four
12 were labeled “Exhibit attach,” and another was labeled “Exhibit” (Dkt. Nos. 91-2–91-6). One
13 document was 213 pages long, and appeared to contain a multitude of different documents.
14 There was no discernible way to identify where one document ended and the next began, such
15 as with a cover page at the start of each document. Worse, there was no way to determine
16 which document was which. (Some documents had bates stamps or exhibit stamps from
17 depositions, but those references were useless.) The other documents appended in docket entry
18 91 appeared to be individual transcripts, but Attorney Bakondi’s declaration never identified or
19 authenticated them.

20 In addition to the exhibits submitted with Attorney Bakondi’s declaration was a separate
21 filing, filed at 12:34 a.m. on March 24 (after the deadline), labeled “Exhibits” (Dkt. No. 92).
22 The primary document in that docket entry is an unlabeled 710-page document that included a
23 collection of hundreds of different documents. Again, there was no discernible way to identify
24 where one document ended and the next began or which document was which. The six
25 documents appended to that document entry were also each simply labeled “Exhibit.” They
26 varied in length: 1 page, 17 pages, 56 pages, 83 pages, 300 pages, and 285 pages. As with the
27 other exhibits already discussed, these additional documents were unlabeled, undifferentiated,
28 and unauthenticated.

1 Plaintiffs' brief exacerbated the issue. Most briefs cite exhibits by their title, and then
2 identifying either the docket entry and page number or the exhibit number and the name of the
3 declarant authenticating the document. Our plaintiffs' counsel failed to do so. Instead, they
4 simply referred to documents by some idiosyncratic shorthand without providing a key. Some
5 examples of citations to the record will suffice: "Police Commission hearing 10.17.2007" (Pls.'
6 Amd. Opp. at 14), "Chan's rejections, 25 appl." (*ibid.*), "Contoller's figures, Security
7 Contracts" (*id.* at 15), "History" (*id.* at 17, 21), "Union Square CBD, Yerba Buena, Castro" (*id.*
8 at 18), "3 beats doc, Depos, Decl." (*id.* at 21). To be clear, these citation issues existed in the
9 thirty-page version of plaintiffs' brief as well as the amended twenty-eight page version.

10 Plaintiffs' counsel did not timely file chambers copy of their massive and unintelligible
11 record, in violation of Civil Local Rule 5-1(e)(7). An order requested that plaintiffs' counsel
12 provide chambers copies "organized with tabs delineating and identifying each separate
13 exhibit" (Dkt. No. 97). Plaintiffs' counsel lodged chambers copies and filed a supplemental
14 declaration identifying each exhibit by the number on the tab separating the documents in the
15 chambers copies (Dkt. No. 98).

16 Upon review of that declaration, it became apparent that plaintiffs' counsel's sloppiness
17 had completely deprived defendants of any meaningful opportunity to respond to the factual
18 record, and imposed on the Court the Herculean task of making sense of the record. "The
19 district court need not examine the entire file for evidence establishing a genuine issue of fact,
20 where the evidence is not set forth in the opposing papers with adequate references so that it
21 could conveniently be found." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026,
22 1031 (9th Cir. 2001).

23 Here, plaintiffs' counsel has served us reams of purported evidence, but offered no way
24 to decode the mess. The supplemental declaration and organized chambers copies provide
25 some assistance, but there remains no way to correlate references in plaintiffs' brief to the
26 documents. Moreover, it does not appear the organized chambers copies have been provided to
27 defense counsel, so now, more than one week after they filed their reply, there is still no way
28 defense counsel could feasibly address the evidence.

1 Attorney Bakondi's "illness" can only explain a small measure of the egregious mess
2 before us (and to that extent, his failure to request an adequate extension is to blame). The fault
3 for this problem lies with Attorney Bakondi's work product, not with the plaintiffs themselves.

4 The Court is mindful that many of our plaintiffs are elderly (and, indeed, some have
5 deceased), and they deserve their day in court. But the defendants also have the right to a fair
6 summary judgment proceeding, and plaintiffs' counsel deprived them of that.

7 Accordingly, we will adopt the following procedure:

- 8 • By **FRIDAY APRIL 7 AT 5:00 P.M.**, plaintiffs' counsel will re-file
9 all of the evidence already provided, with each document filed as a
10 separate exhibit, labeled by number corresponding to the "tabs" in
11 Attorney Bakondi's supplemental declaration. A printed courtesy
12 copy of this filing, which should be identical to the chambers
13 copies lodged yesterday, shall be served on defense counsel by
14 **MONDAY APRIL 10 AT 5:00 P.M.**
- 15 • By **MONDAY APRIL 10 AT NOON**, plaintiffs' counsel may file a
16 second amended opposition to defendants' motion for summary
17 judgment. This opposition may not raise any new arguments or
18 cite any evidence not already cited or filed via ECF, but it must
19 reformulate each of the citations to identify the following: The
20 name of the declarant purporting to authenticate the document and
21 the docket number of that declaration, a descriptive title of the
22 document, the "tab" number of the document as identified in
23 Attorney Bakondi's supplemental declaration, the docket number
24 of the exhibit in the new filing set forth above, and the page
25 number(s) of that document purporting to support the factual
26 assertion in the brief. Plaintiffs' brief **SHALL NOT EXCEED THIRTY**
27 **PAGES.**
- 28 • Plaintiffs may *not* file any new evidence. However, a preliminary
review of the record filed by plaintiffs reveals that many
documents are not properly authenticated. Thus, this order will
allow plaintiffs to further supplement the record with proper sworn
authentication of the evidence (to which, of course, defendants
may object in their reply). Any new declarations must identify,
unambiguously, the documents purported to be authenticated.
- In conjunction with plaintiffs' new opposition, Attorney Bakondi
shall file a sworn declaration averring, on penalty of perjury, that
no new evidence has been filed or cited in plaintiffs' new
opposition.
- Defendants may reply to this new opposition by **THURSDAY**
APRIL 13 AT NOON.
- Defense counsel shall maintain a complete and adequate
accounting of all work done as a result of the foregoing procedure.
By **MONDAY APRIL 17 AT NOON**, they shall state the amount of
attorney's fees and costs incurred supported by a sworn declaration

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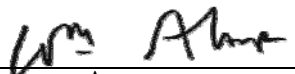
setting forth the hours worked and defense counsel's rate for that work (or, a reasonable rate, if defense counsel do not maintain a schedule of rates).

- Plaintiffs' *counsel* shall pay the amount of the fees and costs as a sanction for causing this mess by **THURSDAY APRIL 20 AT NOON**. This case will *not* move forward until the fees and costs are paid.
- Assuming fees and costs are promptly paid, we will hear oral argument on defendants' motion for summary judgment on **WEDNESDAY APRIL 26 AT 8:00 A.M.**
- Except for deadlines before Judge Ryu, all other dates, including the pretrial conference, trial date, and related deadlines are **VACATED**. New dates will be set at the hearing on summary judgment, provided, as stated, that plaintiffs' counsel has paid the sanctions ordered above.

This order reiterates this is a problem of plaintiffs' counsel's making only, not his clients'. If the sanctions ordered above are not timely paid, the Court will consider dismissing the action for lack of prosecution.

IT IS SO ORDERED.

Dated: April 6, 2017.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE