

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHRISTINE VARAD,)	
)	C.A. No. 06 CA 11370 MLW
Plaintiff,)	
v.)	
)	
REED ELSEVIER INC. d/b/a/ Lexis Nexis)	
Corporation, Lexis Nexis Accurint,)	
)	
Defendant.)	

DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION TO STRIKE AFFIDAVITS

Defendant Reed Elsevier Inc. (“Reed”) hereby opposes plaintiff Christine Varad’s (“Plaintiff” or “Varad”) Motion To Strike Attorney Affidavits of Henry Z. Horbaczewski and Christopher Donnelly as Appended To Defendant’s Opposition To Plaintiff’s Motion For Summary Judgment (“Motion to Strike”).¹ Plaintiff’s Motion to Strike is without merit, as it is based on faulty premises – namely that (i) if conflicting “evidence” purportedly exists to counter statements made in an affidavit, then the affidavit must be stricken, and (ii) affidavits require supporting documentation to make them admissible. As Plaintiff’s underlying premises are incorrect, her Motion to Strike necessarily fails. Nor does Plaintiff’s portrayal of the affidavits as filled with “legal conclusions and speculation” fare any better. To the contrary, the affidavits of Henry Z. Horbaczewski (“Horbaczewski Aff.”), John M. Byrne (“Byrne 2d Aff.”) and T. Christopher Donnelly (“Donnelly Aff.”) (collectively referred to as “Reed’s Affidavits”) are proper – they are all attested to based upon personal knowledge and set forth facts, as opposed to conclusions of law or speculation. Accordingly, Plaintiff’s Motion to Strike is properly denied.

¹ Although Plaintiff does not include the “Second Affidavit of John M. Byrne” in the title of her Motion to Strike, she argues that such affidavit should be stricken as well. Reed opposes the striking of any affidavits submitted on its behalf. Further, Plaintiff incorrectly states that the subject affidavits were “appended” to Reed’s opposition to her motion for summary judgment. The affidavits were filed separately, but contemporaneously, with Reed’s opposition.

ARGUMENT

I. Reed's Affidavits Comply with Summary Judgment Standards.

Despite her attempt to characterize them to the contrary, Reed's Affidavits fully comply with the applicable summary judgment standards. In order to be admissible for summary judgment, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); see also Goguen v. Textron, Inc., 234 F.R.D. 13, 16 (D. Mass. 2006). In this case, each of Reed's Affidavits – which are all signed under the pains and penalties of perjury – are attested to based upon the affiants' personal knowledge. See Horbaczewski Aff., Bryne 2d Aff., & Donnelly Aff. at ¶ 1. Further, Reed's Affidavits set forth straightforward facts to which the affiants are competent to testify. See id. Plaintiff offers nothing to support her allegations to the contrary.

With regard to Mr. Horbaczewski's Affidavit, Plaintiff contends that it should be stricken because certain corporate filings of Seisint, Inc. "do not document that Seisint, Inc. has any interest whatsoever in the above named civil action." Plaintiff's Motion to Strike, p. 3. Putting aside the fact that the filings Plaintiff attaches to her Motion (Seisint's purported 2006 annual report and 2003 articles of incorporation) would not document an interest in a particular litigation, what does this have to do with Mr. Horbaczewski's Affidavit? Mr. Horbaczewski attests to three simple facts: (1) he is Senior Vice President and General Counsel of Reed Elsevier, Inc., (2) Reed is a separate legal entity from Seisint, and (3) Reed never received from Plaintiff a 93A demand letter, or any other correspondence concerning the allegations in this litigation prior to the suit being filed. Plaintiff offers no valid reason why such testimony is

improper.²

Plaintiff next argues that Mr. Byrne's Second Affidavit should be stricken because the same corporate filings "negate the truthfulness" of Mr. Byrne's statement that he is "Director and Senior Corporate Counsel for Seisint, Inc." Plaintiff's Motion To Strike, p. 5. Assuming *arguendo* that such was the case, contradictory evidence would simply go to the weight accorded to the affidavit by the fact-finder, as opposed to its admissibility. See McLellan Highway Corp. v. United States, 95 F. Supp. 2d 1, 10 (D. Mass. 2000)(in denying motion to strike affidavit testimony, court stated "[b]ecause a piece of evidence [affidavit testimony] allegedly contradicts official records does not make it inadmissible.").³

Plaintiff finally argues that the Donnelly Affidavit should be stricken because it "improperly speculates without prerequisite knowledge as to Plaintiff's relationship with F&W Publishing, Adams Media and the Massachusetts and Maine Board of Bar Examiners." Plaintiff's Motion To Strike, p. 6. The first five paragraphs of the Donnelly Affidavit simply recite the procedural background of the case to date. The remaining sixth paragraph sets forth the discovery that lead counsel for Reed believes is necessary in light of the Plaintiff's claims and allegations. There is nothing speculative about counsel's assessment of the discovery necessary to oppose summary judgment.⁴ In fact, it is because Reed does not have the

² Plaintiff's contention that Mr. Horbaczewski's Affidavit should be stricken because it does not attach separate documentation to "support that he has any relationship with Reed Elsevier Inc...." is erroneous, as there is no requirement in the applicable rules or case law that affidavits based upon personal knowledge require supporting documentary evidence. See generally Fed. R. Civ. P. 56. Mr. Horbaczewski obviously has personal knowledge of his position at Reed and the separate status of Reed and Seisint.

³ The corporate filings are not inconsistent with Mr. Byrne's Second Affidavit, as he does not claim to be a member of Seisint's board of directors, but rather only states "I am Director and Senior Corporate Counsel" which is his internal title at Seisint. See Byrne 2d Aff. ¶ 1.

⁴ Plaintiff also argues that the Donnelly Affidavit should be stricken because Reed failed to timely file a response to her summary judgment motion. Prior to any opposition being due, however, Reed moved to stay the filing of its opposition [docket entry 13] until after the court decided Reed's Motion to Substitute Seisint, Inc. and Dismiss Reed. In its Motion to Stay, Reed alternatively requested a 30 day extension (until December 12th) to file

“prerequisite knowledge as to Plaintiff’s relationship” with these entities that the discovery is necessary.

CONCLUSION

Plaintiff puts forward no valid reason to justify striking any of Reed’s Affidavits. The Affidavits are attested to upon personal knowledge and are properly before this Court. Plaintiff’s Motion to Strike must therefore be denied.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(E), Reed respectfully requests that this Court schedule a hearing on Plaintiff’s Motion to Strike, as it believes that oral argument will assist the Court in rendering a fair decision.

REED ELSEVIER INC.
By its attorneys,

/s/ Kristin M. Cataldo
T. Christopher Donnelly (BBO #129930)
Kristin M. Cataldo (BBO #654033)
Donnelly, Conroy & Gelhaar, LLP
One Beacon Street, 33rd Floor
Boston, Massachusetts 02108
(617) 720-2880

Dated: December 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2006, I caused a copy of the foregoing to be served on the following by regular mail to Christine M. Varad, P.O. Box 583, Milton, MA 02186.

/s/ Kristin M. Cataldo
Kristin M. Cataldo

an opposition. Because the Court had not yet ruled on its Motion to Stay, Reed timely filed its opposition on December 12, 2006.