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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF TIME TO FILE REPLY**

Plaintiffs object to Defendants' request for a three-week extension of the deadline to file their reply briefs because Defendants improperly seek to offer new evidence or arguments on reply, and because such an extension would further delay fair process for Plaintiffs. Plaintiffs' counsel asked Defendants' counsel to consider a shorter extension that would not require postponing oral argument on the parties' motions for summary judgment, currently scheduled for October 19, 2015. Defendants seek a lengthier extension in order to submit evidence that they could have submitted in their moving papers, unnecessarily delaying resolution of Plaintiffs' claims.

Defendants base their request for an extension in part on their anticipated need to submit additional declarations in support of their motions for summary judgment. Defendants, however, had every opportunity to submit evidence in support of their motions with their initial briefs, and indeed they submitted three declarations and related exhibits at that time. *See* Decl. of Deborah O. Moore, ECF No. 252; Decl. of G. Clayton Grigg, ECF No. 253; Decl. of Michael Steinbach, ECF No. 254. As explained in Plaintiffs' opposition briefs, Defendants relied in their motions to a new and unprecedented degree on their argument—in support of which they provided evidence in the form of declarations—that the assessments underlying placement on the No Fly List are "predictive judgments" to which the Court must defer. *See id.*; Pls.' Opp. to Defs.' Mot. for Summ. J., ECF No. 267 at 3. Thus, it was Defendants, not Plaintiffs, who opened the "factual

record" regarding such "predictive judgments" in their motions. *See* Defs.' Motion, ECF No. 294 at 3. Plaintiffs responded to Defendants' arguments and evidence with declarations from two experts who examined Defendants' predictive model and explained why it entails an extremely high risk of error. *See* Decl. of Marc Sageman, ECF No. 268; Decl. of James Austin, ECF No. 269. Those arguments and evidence were entirely proper because Plaintiffs submitted them in *response and opposition* to Defendants' motions and initial briefs.

Defendants now seek to submit evidence from new, yet-to-be-identified declarants along with their reply briefs. *See* Defs.' Mot., ECF No. 294 at 2 (stating that Defendants are in the process of "identifying and securing appropriate declarants"). Such new evidence would be improper at this stage. Generally, "reply briefs are limited in scope to matters either raised by the opposition or unforeseen at the time of the original motion." *Burnham v. City of Rohnert Park*, 1992 WL 672965, at *1 n.2 (N.D. Cal. May 18, 1992); *see also Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n. 3 (9th Cir. 1993) (striking parts of reply brief presenting new information); *Morris v. Guetta*, No. LA CV12-00684 JAK, 2013 WL 440127, at *8 (C.D. Cal. Feb. 4, 2013) ("New evidence submitted as part of a reply is improper."). Defendants could have, and should have, submitted any such evidence along with their opening briefs, in which they placed "predictive judgments" at the center of their defense of the revised No Fly List redress process and requested the Court to defer to those judgments. Defendants did not do so, and the Court should not consider any such new evidence now. *See S.E.C. v. Private Equity Mgmt. Grp., Inc.*, No. CV 09-2901 PSG (EX), 2009 WL 2488044, at *7 (C.D. Cal. Aug. 10, 2009) (declining to consider new evidence submitted on reply that could have been included with opening papers).

If the Court is inclined to allow Defendants to submit such evidence, however, Plaintiffs request that they be given an opportunity to respond to Defendants' additional evidence by sur-reply. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) ("Where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond.").

Plaintiffs also object to Defendants' request for a three-week extension because it would almost certainly require a continuance of oral argument on the parties' motions for summary judgment (particularly if the Court permits Plaintiffs the opportunity to respond by sur-reply). Because Plaintiffs dispute the basis for Defendants' three-week request—that an extension is warranted in order to allow Defendants to secure new evidence from additional declarants—Plaintiffs cannot agree to an extension as long as Defendants seek. Where possible, Plaintiffs have worked with Defendants to avoid disputes regarding procedural matters involving scheduling. But Plaintiffs remain very concerned about further delaying resolution of their claims. The stigma and hardship associated with Plaintiffs' placement on the No Fly List worsen with the passage of time, and the Court has recognized the need to resolve Plaintiffs' claims as soon as practicable. *See, e.g.*, Case Management Order, ECF No. 152 at 2.

Plaintiffs therefore oppose Defendants' motion for a three-week extension of the deadline to file reply briefs in support of their motions for summary judgment. To the extent that the Court grants Defendants' motion and permits Defendants to submit additional evidence on reply, Plaintiffs respectfully request that they be given three weeks to file sur-replies responding to Defendants' new evidence and arguments.

Dated: September 15, 2015

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing response brief was delivered to all counsel of record via the Court's ECF notification system.

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