IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER Plaintiff, v. NATIONAL SECURITY AGENCY Defendant.	) Civil No. 10-0196 (BAH)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO ALTER OR AMEND THE COURT'S APRIL 8, 2015 MEMORANDUM OPINION AND ORDER

The Court made several significant, material mistakes in its disallowance of certain attorneys fees in this case based on misrepresentations by the opposing counsel. The Court wrongfully concluded that the plaintiff engaged in certain "tactics" during negotiation that were intended to "prolong this litigation" and consequently "disallow[ed] all fees sought after" October 1, 2014. But the chronology of the deadlines established by this Court and the timing of the NSA's offers of judgment make very clear that it was the NSA who prolonged the litigation and who engaged in tactics intended to create a false impression of good faith negotiation. In direct contrast, EPIC sought at all times to expedite the resolution of the fee matter and to meet the Court's own deadlines without additional delay. It is not only inaccurate but also illogical to conclude that the plaintiff in a FOIA case would seek to delay the resolution of the fee matter. As outlined below, EPIC respectfully requests that this Court alter its prior Memorandum Opinion and Order and increase EPIC's award of attorneys' fees and costs to $46,367.

Standard of Review

Under Rule 59(e) a "motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). A motion filed under Rule 59(e) "may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment." *F.S. v. District of Columbia*, ___ F.R.D. ___, No. 10-1203, 2014 WL 4923025, at *1 (D.D.C. Oct. 2, 2014). But the motion should be granted where the district court finds the "need to correct a clear error or prevent manifest injustice." *Alston v. District of Columbia*, 770 F. Supp. 2d 289, 296 (D.D.C. 2011).

In order to satisfy the standards of Rule 60(b) and justify altering or amending a judgment, a litigant must establish that "one of the rule's enumerated grounds for relief is satisfied" and that "some 'actual prejudice' flowing from the supposed misconduct or other circumstances claimed" warrant relief. *F.S.*, 2014 WL 4923025, at *2. The Rule specifies that relief may be granted on the basis of "(1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b). *See also* Order, *EPIC v. DHS*, No. 12-333 (GK) (D.D.C. filed Jan. 8, 2013) (Judge Kessler granting EPIC's Motion for Reconsideration in a similar FOIA case).

The Court's Analysis on Pages 18 and 19 Is Based on a Fundamental Misunderstanding of the Chronology of the Settlement Negotiations

1. The NSA first served an Offer of Judgment to EPIC on October 1, 2014, the day before Court's October 2, 2014, Joint Status Report deadline. Def.'s Opp'n at 5. The NSA served a second Offer of Judgment on October 16, 2014, the same day as the Court's October 16, 2014, Joint Status Report deadline. Def.'s Opp'n at 5. In both

instances, it was EPIC that was expected to respond within 24 hours to the NSA's offer to avoid further delay. The NSA's October 2nd Offer of Judgment was sent on the eve of the Court's deadline and after a several-week-long period where the agency failed to respond to EPIC's multiple requests for a fee negotiation. *See* Pl's Reply at 20 n.6. The NSA never made an effort to negotiate a fee settlement during this period, and both of the agency's offers of judgment were for less than fifty percent of what the Court ultimately awarded.

2. The Court concluded, based on misrepresentations by the NSA's that EPIC's settlement counteroffers did not "appear to have been submitted with a deadline for consideration, alerting the defendant that it would be required to respond within a set period of time." Mem. Op. at 18. This is plainly incorrect. EPIC clearly indicated to the NSA that the counteroffers coincided precisely with the deadlines established by this Court. The NSA misrepresented this fact in its opposition when it said that EPIC "proceeded to withdraw" the offers without noting that EPIC's counteroffers were structured to avoid further delay. *See* Def.'s Opp'n at 5.
3. The Court also concluded, based on misrepresentations in the NSA's opposition, that "Disturbingly, both offers of judgment *from the plaintiff* [sic] were extended within 24 hours of a deadline for a submission to the Court regarding the status of settlement discussions." Mem. Op. at 18 (emphasis added). First, it was obviously not EPIC that made "both offers of judgment" since only the government may make a Rule 68 offer in a FOIA case. Second, the correct formulation makes clear the problem with the Court's conclusion. The Memorandum Opinion should state, "Disturbingly, both offers of judgment *from the defendant* were extended within 24 hours of a deadline

for a submission to the Court regarding the status of settlement discussions." This then makes clear that it was the NSA, not the plaintiff, that engaged in "disturbing" "tactics." The timing of these offers indicates that the agency intended to prolong the fee negotiation, as an Offer of Judgment under Rule 68 triggers a ten-day review that would necessarily require an extension of the deadline set out in the status report. Remarkably, the agency used this tactic twice—waiting until the day before the Court established deadline to serve an Offer of Judgment. These are the "sharp-edged tactics" that should concern the Court.

4. The Court also mistakenly concluded, based on the NSA's misrepresentations, that EPIC extended settlement offers "for the express purpose of allowing the parties to make representations to the Court that were true at the time the required submissions were made, and were then withdrawn almost immediately after the submissions were filed." Mem. Op. at 18. This is incorrect. As the chronology demonstrates, EPIC's counteroffers were timed to coincide with the Court's deadlines in order to seek a timely settlement of the matter. EPIC contacted opposing counsel several times over the weeks leading up to the Court's October 2, 2014, deadline in an attempt to initiate settlement negotiations. Opposing counsel did not respond to any of EPIC's communications until the day before the Court's deadline. *See* Def.'s Opp'n at 5. At that point, EPIC had less than 24 hours to consider the NSA's Offer of Judgment prior to the filing of the Joint Status Report. In response, EPIC made a counteroffer aligned with the Court's Joint Status Report deadline, and the NSA declined to accept that offer prior to the Court's deadline. The purpose of this offer was to attempt to settle the case as expeditiously as possible prior to the Court's deadline. The same is

true of EPIC's counteroffer made in response to the NSA's Offer of Judgment provided on October 16, 2014, the same day as the Court's deadline.

5. As a result of these mistakes based on the NSA's misrepresentations, the Court concluded that "plaintiff's actions were designed to give the appearance of progress in negotiations to the Court, thereby forestalling the setting of a briefing schedule and prolonging this litigation." Mem. Op. at 19. That is entirely incorrect and exactly backwards. EPIC sought at all times to resolve the negotiations prior to the Court's deadlines.

6. Similarly, the Court mistakenly concluded, based on the NSA's misrepresentations, that the EPIC submitted "offers to the defendant that 'exploded' after the submission of status reports to the Court indicating potential progress in negotiations." Mem. Op. at 19. This is also incorrect. The NSA refused to provide any settlement offers except during the 24 hours prior to the Court's deadlines. EPIC merely responded to those offers with proposed counteroffers, requesting that the agency provide a response prior to the Court's deadlines.

The Court's Mistakes Resulted in 'Actual Prejudice' to EPIC And Were Caused By the NSA's Material Misrepresentations and Omissions

The Court concluded, based on its mistaken interpretation of the settlement negotiation history in this case, that the plaintiff had engaged in "tactics" that were intended to "forestall[] the setting of a briefing schedule and prolonging this litigation" as well as "increasing the costs to all parties involved." Mem. Op. at 19. But the exact opposite is true. EPIC sought at all times to comply with the Court's deadlines and resolve the fee matter expeditiously.

It is the NSA, not EPIC, that repeatedly ignored the Court's schedule and sought to prolong this litigation. As a result of the agency's tactics and refusals to settle, EPIC incurred substantial fees preparing the fee motion and related documents. That work would have been unnecessary if the agency had accepted EPIC's offers made at the outset, and the agency should not be allowed to benefit from its own malfeasance.

These mistakes and misrepresentations resulted in clear errors in the Court's April 8, 2015, judgment.

CONCLUSION

For the foregoing reasons, EPIC respectfully submits that the Court should alter or amend its April 8, 2015, Memorandum Opinion and Order and award a total of $46,367 in attorneys' fees and costs to which EPIC is both entitled and eligible under the Freedom of Information Act.

Respectfully submitted,

Dated: April 17, 2015

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