UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER	)	
Plaintiff,	)	
v.	)	**Civil No. 1:10-cv-00196 (BAH)**
UNITED STATES NATIONAL SECURITY AGENCY	)	
Defendant.	)	

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

INTRODUCTION

The Court should summarily deny the motion of Plaintiff Electronic Privacy Information Center ("EPIC") to alter or amend this Court's Memorandum Opinion and Order granting in part and denying in part EPIC's motion for attorneys' fees and costs.

This motion arises out of EPIC's two times making and then rapidly withdrawing offers to settle this case. Defendant National Security Agency ("NSA") described this activity in arguing for a reduction in EPIC's fees. *See* Def.'s Mem. of P. & A. in Opp'n to Pl.'s Mot. for Attorneys' Fees and Costs ("Def.'s Fee Opp'n") (ECF No. 45) at 5, 24-25. EPIC had an opportunity to fully brief this point, including correcting any facts it believed to have been incorrectly stated, providing additional factual context it deemed relevant, and defending the tactics NSA had called into question. But EPIC, as the Court has already noted, elected "not [to] dispute" NSA's description. Mem. Op. (ECF No. 51) at 18 n.7. The Court determined that EPIC's tactics were improper and reduced EPIC's fee award on account. *See id.* at 18-19. A

motion to alter or amend "is not simply an opportunity to reargue facts and theories upon which a court has already ruled," and with this motion—purporting to introduce new facts EPIC could have proffered earlier, and mounting new defenses it could have argued earlier—EPIC is clearly trying to have the prohibited "second bite at the apple." *Slate v. Am. Broadcasting Cos.*, 12 F. Supp. 3d 30, 37 (D.D.C. 2013) (quotation marks and citations omitted), *aff'd*, 584 F. App'x 2 (D.C. Cir. 2014). Accordingly, its motion should be summarily denied.

EPIC's motion fails on the merits as well. EPIC fails to identify any actual misrepresentations from NSA, even admitting to the activity NSA complained of in the first place: that the two offers in question were "timed to coincide with the Court's deadlines." *E.g.*, Mem. of P. & A. in Supp. of Pl.'s Mot. to Alter or Amend the Court's April 8, 2015 Mem. Op. and Order ("Pl.'s Mot. to Alter or Amend") (ECF No. 53-1) at 4. And the Court reasonably concluded based on the undisputed facts that EPIC's actions "subvert[ed]" the purpose of the Local Rules and "discourag[ed] negotiation in favor of submitting disputes for judicial resolution." Mem. Op. at 18-19. EPIC has fallen far short of its burden to identify an error that should "strike the court as wrong with the force of a five-week-old, unrefrigerated dead fish." *Slate*, 12 F. Supp. 3d at 35 (quotation marks, citation and alteration omitted).

Thus, whether it determines that EPIC has waived its arguments, or decides to reach the substance of EPIC's motion, the Court should deny EPIC's motion to alter or amend.

STANDARD OF REVIEW

"Reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Mohammadi v. Islamic Republic of Iran*, --- F.3d ---, 2015 WL 1499342, at *6 (D.C. Cir. Apr. 3, 2015) (quotation marks, citation and alteration omitted). EPIC asks the Court to alter or amend its April 8, 2015, Memorandum Opinion and Order pursuant to Federal

Rule of Civil Procedure 59(e), and it "bears the burden of establishing 'extraordinary circumstances' warranting relief from a final judgment." *Harrison v. Office of Architect of Capitol*, --- F. Supp. 3d ---, 2014 WL 4696814, at *2 (D.D.C. Sept. 23, 2014) (citation omitted).

"Rule 59(e) is not a vehicle to present a new legal theory that was available prior to judgment, or a chance for a party to correct poor strategic choices." *Slate*, 12 F. Supp. 3d at 35 (quotation marks, citations and alterations omitted). Rule 59(e) motions are viewed strictly, *see id.* ("The strictness with which such motions are viewed is justified by the need to protect both the integrity of the adversarial process in which parties are expected to bring all arguments before the court, and the ability of the parties and others to rely on the finality of judgments." (quotation marks and citation omitted)), and such a motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice," *id.* at 34 (quotation marks and citation omitted). A "final judgment must be 'dead wrong' to constitute clear error," *id.* at 35 (quotation marks and citation omitted), and manifest injustice, which is "an exceptionally narrow concept in the context of a Rule 59(e) motion," must entail "a result that is fundamentally unfair in light of governing law," *id.* at 35-36.

EPIC also seeks relief under Rule 60(b). "[T]he Rule 60(b) standard is more stringent than the standard under Rule 59(e)," *id.* at 37, and it is "the practice in this jurisdiction to construe Rule 60(b) motions filed, as here, within 28 days of the judgment as Rule 59(e) motions to alter or amend the judgment," *id.* (collecting cases).[1]

[1] EPIC makes reference to Rule 60(a) in its motion but not its memorandum. This Rule allows a court to "correct a clerical mistake or a mistake arising from oversight or omission," Fed. R. Civ. P. 60(a), and "is simply inapplicable since the relief the plaintiff seeks is not mere revision of a clerical error, but a substantive change in the result of the litigation," *Slate*, 12 F. Supp. 3d at 36-37.

ARGUMENT

I. EPIC HAS WAIVED THE ARGUMENTS IT ADVANCES IN SUPPORT OF ITS MOTION TO ALTER OR AMEND

This motion concerns EPIC's use of exploding offers during fee negotiations, which NSA identified as an issue in its memorandum opposing EPIC's fee motion. In particular, NSA stated that EPIC two times "extended a settlement offer to NSA, which it proceeded to withdraw, over the objection of NSA counsel, when NSA counsel filed [an] agreed upon Joint Status Report," Def.'s Fee Opp'n at 5, and argued that NSA should not be "made to reimburse EPIC for engaging in these tactics," *id.* at 24.

EPIC had an opportunity to address this issue in its fee reply brief. EPIC claimed in a short discussion of the matter that NSA's argument was "based on an inaccurate and incomplete description of the negotiation history in this case." Reply in Supp. of Pl.'s Mot. for Attorneys' Fees and Costs ("Pl.'s Fee Reply") (ECF No. 46) at 20. But it crucially declined to identify any purported inaccuracies in NSA's description, *see id.* at 20-21, and the only additional context it elected to provide was a description of the amount of time "spent communicating with opposing counsel," *id.* at 20, and generalized complaining about NSA's purportedly "obdurate behavior," *id.* at 21; *see id.* at 20 n.6. Nor did EPIC provide any substantive defense of the extension and rapid withdrawals of two offers of settlement, stating only, and conclusorily, that EPIC "made a reasonable, good faith offer to settle this mat[t]er prior to the deadline set by this Court." *Id.* at 20.

Thus, EPIC was able in its fee reply brief to address the very issues it raises in this motion, but chose not to reach them then. Indeed, this Court has already concluded that EPIC did not take advantage of its opportunity to brief these matters. *See* Mem. Op. at 18 n.7 ("[T]he defendant is submitting a general description of the plaintiff's conduct, which the plaintiff does

not dispute . . . ."). The Court should accordingly hold that EPIC has waived the arguments it is making here, and summarily deny the instant motion. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) ("Rule 59(e) . . . may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." (quotation marks and citation omitted)); *Slate*, 12 F. Supp. 3d at 34 ("'Rule 59(e) motions are aimed at reconsideration, not initial consideration,' and arguments raised for the first time on a Rule 59(e) motion may be deemed 'waived.'" (quoting *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012))); *cf. id.* at 35 ("The D.C. Circuit has observed that, under Rule 59(e), 'manifest injustice does not exist where . . . a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered.'" (alteration in original) (quoting *Ciralsky v. CIA*, 355 F.3d 661, 665 (D.C. Cir. 2004))).[2]

Finally, EPIC should have brought this motion to the attention of NSA before filing it. *See* LCvR 7(m); *Alkire v. Marriott Int'l, Inc.*, No. 03-1087 (CKK), 2007 WL 1041660, at *11 (D.D.C. Apr. 5, 2007); *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 26-27 (D.D.C. 2001). And it is obvious why. If a court order contains a clear error, the parties, on conferral, may be able to jointly propose an appropriate resolution. And if one party believes that its opponent has made a misrepresentation, at the very least it should bring its concerns to the attention of opposing counsel, giving the opponent an opportunity to correct the record if it needs correcting. Such consultation did not occur with regards to this motion, giving the Court

[2] Judge Urbina, when presiding over this case, entered a Standing Order stating that a motion to alter or amend "which simply seeks to relitigate already decided issues or raises issues for the first time which should have been advanced in the original motion will be considered a submission in violation of this order," and advising that the Court may accordingly "impose sanctions against the offending attorney." Standing Order for Civil Cases (ECF No. 6) ¶ 14; *see also Lewis v. Parker*, --- F. Supp. 3d ---, 2014 WL 4460279, at *15 (D.D.C. Sept. 10, 2014) (discussing similar Standing Order).

additional reason to summarily deny it. *See Alberts v. HCA Inc.*, 405 B.R. 498, 501 (D.D.C. 2009) ("Failure to comply with [Local Rule 7(m)] will result in denial of the motion." (citations omitted)).

II. EPIC HAS FAILED TO ESTABLISH EXTRAORDINARY CIRCUMSTANCES THAT WOULD JUSTIFY THE RELIEF IT SEEKS

Even if the Court concludes that EPIC has not waived the arguments it makes here, it should still deny EPIC's motion because the Court made no clear error and has done no manifest injustice.

A. NSA Has Not Made Any Misrepresentations

Despite making reference on multiple occasions to purported "misrepresentations" of NSA and/or its counsel, *e.g.*, Pl.'s Mot. to Alter or Amend at 1 (referring to "misrepresentations by the opposing counsel"); *id.* at 4 (referring to "the NSA's misrepresentations"), EPIC identifies only one instance in which it believes that NSA (or the undersigned) said anything incorrect (or incomplete):

> 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.

Id. at 3 (quoting Def.'s Fee Opp'n at 5). But EPIC acknowledges the very point that NSA was developing: that EPIC's settlement offers were extended shortly before the deadlines for Joint Status Reports, and were withdrawn at the precise moment when NSA filed the agreed upon Joint Status Reports. *See id.* at 4 ("EPIC's counteroffers were timed to coincide with the Court's deadlines . . . . EPIC made a counteroffer aligned with the Court's Joint Status Report deadline."). Identifying facts that the opposing party acknowledges to be true does not constitute a misrepresentation.

Perhaps EPIC's point is that NSA was aware *at the time the offers were made* that they would expire on the filing of the agreed upon Joint Status Reports. This is true, of course, but NSA did not represent otherwise. *See* Def.'s Fee Opp'n at 5, 24. And NSA's knowing that the offers would soon expire was irrelevant to the point NSA was making in its brief: that the offers were "on the table for less than twenty-four hours," and were withdrawn "over the objection of NSA counsel, and before NSA had had a reasonable opportunity to consider [them]." *Id.* at 24. NSA never said that it was *surprised* when the offers were withdrawn; it was arguing rather that it "should not be made to reimburse EPIC for concocting a strategy that culminates in the extension and rapid withdrawal of not one but two exploding offers, a tactic that is, under the circumstances presented in this case, entirely unproductive." *Id.* NSA did not omit any fact that was material or relevant to the argument it was making.

EPIC otherwise makes passing reference to various ways in which it believes that NSA has fallen short in its negotiation of fees. *See* Pl.'s Mot. to Alter or Amend at 3-4. Such generalized dissatisfaction does nothing to show that NSA has made any misrepresentations.[3]

[3] EPIC's complaints are also misplaced. First, EPIC has already complained to the Court about NSA's response time. *See* Pl.'s Fee Reply at 20 n.6. Second, Rule 68 Offers of Judgment are timely if made "[a]t least 14 days before the date set for trial." Fed. R. Civ. P. 68(a). And EPIC had a full "14 days after being served" to consider each Offer of Judgment, *id.*, which is plenty of time, and far longer than NSA could review EPIC's offers, which were withdrawn "before NSA had had a reasonable opportunity to consider [them]," Def.'s Fee Opp'n at 24. Third, NSA was surprised to see intimations in EPIC's brief concerning the amount of NSA's Offers of Judgment. EPIC's point seems to be that the Offers of Judgment were not good enough. But contrary to EPIC's suggestion, the *value* of an offer—the proverbial bird in the hand—is not defined solely by its dollar amount. EPIC had to expend additional litigation resources to obtain its present fee award, which is subject to appeal. EPIC also has a fee decision with which it is obviously not pleased, as evidenced by the instant motion.

B. The Court Has Reasonably Concluded that EPIC's Actions Subverted the Local Rules

The Court correctly understood NSA's allegation that EPIC two times withdrew settlement offers "'over the objection of [defense] counsel, and before [defense counsel] had had a reasonable opportunity to consider it.'" Mem. Op. at 18 (alterations in original) (quoting Def.'s Fee Opp'n at 24). It correctly determined that EPIC's offers "were extended within 24 hours of a deadline for a submission to the Court regarding the status of settlement discussions." *Id.* It reasonably concluded that "such sharp practice of extending and then withdrawing settlement offers subverts the purpose of . . . the local rules, which are designed to encourage settlement." *Id.*[4] And it reasonably decided to "disallow[] all fees incurred on and after October 1, 2014." *Id.* at 19. This chain of reasoning was right—not "dead wrong"—and gives the Court no cause to alter or amend either its Memorandum Opinion or its Order. *Slate*, 12 F. Supp. 3d at 35 (quotation marks and citation omitted).

As discussed above, EPIC does note correctly that its offers were "submitted with a deadline for consideration." Pl.'s Mot. to Alter or Amend at 3. In other words, NSA understood at the time it received EPIC's offers that EPIC was planning to withdraw them in a matter of hours. This may have been a source of some misunderstanding, *see* Mem. Op. at 18, but it is ultimately of no moment, as the crucial point is that EPIC's "deadlines" did not allow enough

[4] It does appear that there may have been a scrivener's error in the references to EPIC's offers of judgment made under Federal Rule of Civil Procedure 68. NSA, as the party "defending against a claim," made the Offers of Judgment, "to allow judgment on specified terms." Fed. R. Civ. P. 68(a). EPIC's offers, essentially to release its fee claims in exchange for payment, would not have resulted in judgment against the offeror, and were not made under Rule 68. But it makes no difference: as the Court noted, the Local Rules encourage settlement, just as Rule 68 does. *See* Mem. Op. at 18. And the Court should further reject EPIC's attempts to literally rewrite the Court's Opinion to criticize NSA when the Court was clearly discussing EPIC. *See* Pl.'s Mot. at 3-4 ("The Memorandum Opinion should state . . . ."); *see also Slate*, 12 F. Supp. 3d at 36-37 (explaining that Rule 60(a) is "simply inapplicable" when "the relief the plaintiff seeks is not mere revision of a clerical error, but a substantive change in the result of the litigation").

time for reasonable consideration of the offers. EPIC's withdrawing the offers ensured that those offers would never be accepted, thus "discouraging negotiation in favor of submitting disputes for judicial resolution." *Id.* at 19. In light of these facts that are not in dispute, the Court reasonably decided to disallow fees incurred on or after October 1, 2014. *See Slate*, 12 F. Supp. 3d at 35 ("[T]he Seventh Circuit has vividly observed that to be clearly erroneous, a decision must strike a court as more than just maybe or probably wrong; it must strike the court as wrong with the force of a five-week-old, unrefrigerated dead fish." (quotation marks, citation and alterations omitted)).

CONCLUSION

The Court should deny EPIC's motion to alter or amend.

Dated: May 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I caused a true and correct copy of the foregoing Defendant's Memorandum in Opposition to Plaintiff's Motion to Alter or Amend the Court's Memorandum Opinion and Order of April 8, 2015 to be served on plaintiff's counsel by way of the Court's electronic filing system.

Dated: May 1, 2015 /s/ Gregory Dworkowitz
GREGORY DWORKOWITZ