UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*, **Plaintiffs,** **v.** **UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,** **Defendants.**	**Case No. 1:17-cv-00998-ESH-RMM**

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT (DKT. 186)

Plaintiffs Haendel Crist Calisto Alves de Almeida, Prashanth Batchu, Lucas Calixto, Shu Cheng, Seung Joo Hong, Wanjing Li, Ye Liu, Kusuma Nio, Jae Seong Park, and Emeka Udeigwe (collectively, "Plaintiffs"), for themselves and the Class, by and through undersigned counsel, respectfully move this Court to strike Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment and Defendants' Cross Motion For Summary Judgment ("Cross Motion") (Dkt. 186).

As set forth in the accompanying Memorandum of Points and Authorities, Defendants have failed to comply with applicable rules and the orders concerning the current partial summary judgment briefing. In particular, Defendants' Cross Motion (a) does not set forth the requisite Statement of Facts, and (b) incorporates by reference all or portions of previous defense motions, from this case and another case, thereby circumventing the page limits imposed by the Court. In their Motion for Partial Summary Judgment, Plaintiffs complied with the rules. Because Defendants' noncompliance follows two previous Court instructions on this very issue, Plaintiffs

submit that the appropriate remedy is for the Court to deem Plaintiffs' Statement of Facts as the material undisputed facts for summary judgment purposes and strike Defendants' Cross Motion.

For the reasons set forth in the accompanying Memorandum of Points and Authorities, Plaintiffs respectfully request that the Court grant Plaintiffs' motion.

Dated: October 19, 2018

Respectfully submitted,

/s/ Douglas W. Baruch

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUSUMA NIO, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:17-cv-00998-ESH-RMM**
UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT (DKT. 186)

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INTRODUCTION

This Motion is prompted by Defendants' failure to comply with applicable rules and orders concerning the current partial summary judgment briefing. In particular, Defendants' Cross Motion (Dkt. 186) (a) does not set forth the requisite Statement of Facts, and (b) incorporates by reference all or portions of previous defense motions, from this case and another case, thereby circumventing the page limits imposed by the Court.

By not submitting the required Statement of Facts, Defendants' Cross Motion muddles the summary judgment record in a manner that creates confusion where none should exist. As shown below, Defendants' noncompliance is unjustified, particularly because this Court previously identified the exact same shortcoming in Defendants' earlier briefing. By mixing and matching the administrative record and other "facts," Defendants seek to have their cake and eat it too – avoid discovery by arguing that the case is an administrative record case only, but then justify the questioned policy with information outside of the administrative record that Plaintiffs never have had the opportunity to explore and test. Finally, Defendants improperly add more than 150 pages of additional briefing by "incorporating" prior briefing on various topics in their current filing.

None of these tactics should be permitted. In their Motion for Partial Summary Judgment (Dkt. 177), Plaintiffs complied with the rules, separately specifying the facts while adhering to the Court's page limitations. Because Defendants' noncompliance follows two previous Court instructions on this very issue, Plaintiffs submit that the appropriate remedy is for the Court to deem Plaintiffs' Statement of Facts as the material undisputed facts for summary judgment purposes and strike Defendants' Cross Motion.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS

A. Local Rules and the Court's Order Require Filing of a Statement of Facts

Local Rule 7 sets forth specific procedures for the parties to follow in moving for or opposing summary judgment. In most cases, a "motion for summary judgment shall be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue." L. Civ. R. 7(h)(1). A response in opposition to the motion "shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." *Id.* And, when deciding a motion for summary judgment, "the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." *Id*.

However, where judicial review of a cause of action is limited to an administrative record, "motions for summary judgment and oppositions thereto shall include a statement of facts with references to the administrative record." L. Civ. R. 7(h)(2). This Court reviewed this very rule with the parties during a hearing earlier this year. At the time, the Court pointed to Local Rule 7(h)(2) and reiterated its mandate that in administrative record cases, "motions for summary judgment and oppositions shall include a statement of facts with reference to the administrative record." *See* Mar. 26, 2018 Teleconference Tr. at 4:1–3. The Court then ordered Defendants to conform their existing summary judgment motion to that rule. Dkt. 124 at 2 ("**[D]efendants shall file a statement of facts** supporting their motion to dismiss, or in the alternative motion for summary judgment, **consistent with D.C. Local Civil Rule 7(h)(2)**[.]" (emphasis added)).

B. The Court Has Authority to Grant the Requested Relief

Local Rule 7(h)'s requirements serve important purposes and should be enforced. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996) ("The importance of filing a proper Rule 108(h) [predecessor to Rule 7(h)] statement is well established.").[1] The rule "places the burden on the parties and their counsel, who are most familiar with the litigation and the record, to crystallize for the district court the material facts and relevant portions of the record." *Id.*

Parties must strictly comply with local rules when moving for or opposing summary judgment motions. *See Gardels*, 637 F.2d at 773 ("Requiring strict compliance with the local rule is justified both by the nature of summary judgment and by the rule's purposes."); *Sloan v. Urban Title Servs., Inc.*, 689 F. Supp. 2d 123, 126 (D.D.C. 2010) ("Because of the significance of this task and the potential hardship placed on the court if the parties are derelict in their duty, courts require strict compliance with LCvR 7(h)(1)."). Failure to submit a proper statement of facts violates the rule. *See Burke v. Gould*, 286 F.3d 513, 519 (D.C. Cir. 2002) (noting that "failure denies the nonmovant of an opportunity fairly to contest the movant's case" (internal quotation marks omitted)); *Hinson ex rel. N.H. v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 91 (D.D.C. 2008) ("Local Civil Rule 7(h)(2) does not alter the parties' obligations to submit statements of material fact in support of motions for summary judgment in administrative review cases"); *Robertson v.*

[1] *See also id.* at 150 (recognizing that the rule requiring a statement of facts "assists the district court to maintain docket control and to decide motions for summary judgment efficiently and effectively"); *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988) (noting that, pursuant to the rule requiring a statement of facts, the district court is not "obliged to sift through hundreds of [records] in order to make [an] analysis and determination of what may, or may not, be a genuine issue of material disputed fact"); *Gardels v. CIA*, 637 F.2d 770, 773 (D.C. Cir. 1980) (explaining that the Local Rule's procedure "isolates the facts that the parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record").

Am. Airlines, Inc., 239 F. Supp. 2d 5, 8 (D.D.C. 2002) ("Past decisions emphasize that the movant's statement must specify the material facts and direct the court and the non-movant to those parts of the record which the movant believes support the statement.").

This Court has authority to strike a deficient Local Rule 7(h) Statement of Facts and the accompanying motion. *See Hinson*, 579 F. Supp. 2d at 97–98 (noting that the court had previously struck plaintiff's motion for summary judgment for failure to submit a statement of facts and ordered plaintiff to refile the motion in compliance with Rule 7(h)); *Jackson*, 101 F.3d at 151, 154 ("As litigants repeatedly have been reminded, failure to file a proper [statement of facts] may be fatal to the delinquent party's position." (internal quotation marks omitted)); *Gardels*, 637 F.2d at 773 ("The courts of this circuit have held that failure to file a proper . . . Statement [of Facts] in making or opposing a motion for summary judgment may be fatal to the delinquent party's position.").

The Court also has authority to deem Plaintiffs' Statement of Facts the material undisputed facts for summary judgment purposes. *See, e.g.*, *Jackson*, 101 F.3d at 154 ("Therefore, having struck [the party's deficient] statement, the district court properly deemed as admitted the material facts set forth in the [other party's proper] statement of material facts not in dispute."); *Twist*, 854 F.2d at 1424 (affirming a district court's decision to deem a party's statement of material facts admitted when the opposing party failed to comply with the local rule and noting that "[w]hen counsel fails to discharge this vital function" of filing a proper statement of facts, counsel "may not be heard to complain that the district court has abused its discretion by failing to compensate for counsel's inadequate effort."). Indeed, the D.C. Circuit has affirmed "strict compliance with the district court's local rules on summary judgment when invoked by the district court." *Burke*, 286 F.3d at 517; *see also Jackson*, 101 F.3d at 154; *Gardels*, 637 F.2d at 773; *Canady v. Erbe*

Elektromedizin GmbH, 307 F. Supp. 2d 2, 9 n.7 (D.D.C. 2004) ("Because the rule helps the district court maintain docket control and decide motions for summary judgment efficiently, the D.C. Circuit has repeatedly upheld district court rulings that hold parties to strict compliance with this rule."); *Robertson*, 239 F. Supp. at 8 (same).

II. THE COURT SHOULD GRANT THE REQUESTED RELIEF

A. Defendants' Cross Motion Does Not Include the Requisite Statement of Facts

Under Local Rule 7(h)(2) and consistent with this Court's prior order (Dkt. 124), Defendants were required, at a minimum, to submit a Statement of Facts with specific references to the administrative record. No such statement appears in their Cross Motion.

While the Cross Motion includes a section entitled "Factual Background" (Dkt. 186 at 3-11), that portion of the brief is no substitute for a Local Rule 7(h)(2) Statement. *See Gardels*, 637 F.2d at 773 (holding that the "amorphous" statement in the movant's brief incorporating by reference its answer and various affidavits did not satisfy the predecessor to Local Rule 7(h)); *Robertson*, 239 F. Supp. 2d at 8 ("Past decisions emphasize that the movant's statement must specify the material facts and direct the court and the non-movant to those parts of the record which the movant believes support the statement. Merely incorporating entire affidavits and other materials without reference to the particular facts recited therein is not sufficient." (citation omitted)). Indeed, when Defendants employed the same briefing method in their initial summary judgment motion (Dkt. 116), this Court told Defendants as much: "First of all, the government has to file a Rule 7(h). I don't know how you've missed that." Mar. 26, 2018 Teleconference Tr. at 3:15–16. When Defendants claimed that they were exempt from the requirement due to the APA claim, *id.* at 3:19–20, the Court made clear that Defendants were wrong:

> No, look at B. There is a subpart. You got hung up on this last time on the other motion. I'm sorry. It's rule 7, local rule 7(h)(2) paragraph one shall not apply to cases in which judicial review is based solely on the administrative record.
>
> In such cases, motions for summary judgment and oppositions shall include a statement of facts with reference to the administrative record.

Id. at 3:21–4:3. In response, Defendants told the Court that they had "endeavored to comply with" Local Rule 7(h), and that their "Motion for Summary Judgment had a statement of facts section with references to the administrative record." *Id.* at 4:4–6. But this Court rejected that approach: "I think it should be a separate piece of paper. The way it is for summary judgment with the administrative record because then they come back and make -- if it is in there, get it out and put it one, two, three." *Id.* at 4:8–12.[2] The Court ordered Defendants to comply with Local Rule 7(h)(2). Dkt. 124 at 2. Defendants then filed a Statement of Facts. Dkt. 127.

Notwithstanding this history, Defendants knowingly repeated their noncompliance. In other words, Defendants elected to file in the exact same manner that this Court already determined to be insufficient. The resulting Cross Motion is a deficient summary judgment pleading.

B. Defendants' Cross Motion Is Otherwise Deficient and Noncompliant

Beyond the above deficiencies, Defendants' Cross Motion is improper because (1) it cites to matters outside of the administrative record; (2) it purports to dispute Plaintiffs' Statement of Facts, which is limited to and supported by the administrative record (or pre-approved Plaintiffs' Appendix documents); and (3) it incorporates by reference multiple prior briefings, thereby compounding the non-administrative record citations and defying the Court's page limitations on this round of briefing. None of this is proper.

[2] Notably, the Court previously reminded Defendants to file a statement of facts. *See* Jan. 23, 2018 Status Conference Tr. at 70:11–12, 74:13–15 ("You have to file under the local rules, a statement of facts that are supported by the record. . . . I need an administrative record that has a statement that is tied to the documents, the way it says A.R. this and A.R. that.").

1. Defendants Improperly Rely on Non-Record Evidence

The "Factual Background" portion of Defendants' Cross Motion does not distinguish between facts in opposition to Plaintiffs' Motion for Partial Summary Judgment and those in support of Defendants' Cross Motion. What is clear, however, is that Defendants claim this summary judgment briefing should be decided based on the administrative record. Dkt. 186 at 3 n.2. Yet, their Cross Motion, is replete with references to material that is not in the administrative record, including at least 14 separate citations to a USCIS declaration (D. Renaud, Dkt. 128-1) that is not in the record and a citation to a non-record DoD declaration (S. Miller, Dkt. 25-2). *See, e.g.*, Dkt. 186 at 9.[3]

Defendants also cite to or incorporate filings/briefs that were never made part of the administrative record. *See, e.g.*, Dkt. 186 at 3 n.3 (incorporating Dkts. 19 and 31); Dkt. 186 at 5 (citing to Dkt. 19-1). Likewise, in defense of the MSSD Policy, Defendants cite to and rely on the October 13, 2017 *DoD* Memo, which is not part of the *USCIS* administrative record. *See* Dkt. 186 at 8, 26 (citing to Dkt. 58-3). USCIS had every opportunity to designate or to seek to add these items to the administrative record, but chose to rely on the one it certified as complete. None of these documents are part of the administrative record. And while it may be understandable that Defendants would want to cite these declarations and non-record evidence to fill the void that exists in the administrative record with respect to the MSSD Policy, they cannot do so now. *See*

[3] Of course, if Defendants are permitted to go outside of the administrative record by citing to these declarations, this is no longer only an administrative record review case, and Plaintiffs must be afforded the opportunity to take discovery in order to test and, as appropriate, challenge the assertions of these fact witnesses. In other words, if these declarations are admitted into the record, Plaintiffs will seek, under Rule 56(d), the opportunity to depose these declarants in order to have an opportunity to fairly respond to the Cross Motion.

Oceana, Inc. v. Locke, 674 F. Supp. 2d 39, 49 (D.D.C. 2009) (Huvelle, J.) (granting motion to strike a summary judgment motion for relying on a document outside the administrative record).

As a result of Defendants' approach, their brief is an undifferentiated jumble of factual and legal assertions, some citing to one administrative record (of USCIS), some citing to another (of DoD, for a different policy), some citing to extra-record material, and some citing to nothing at all. This is precisely what Local Rule 7(h)(2) is designed to prevent and what this Court told Defendants to avoid.

2. Defendants Improperly Purport to Dispute Agency Record Facts

Notwithstanding their assertion that this is an administrative record review case, such that Local Rule 7(h)(1) does not apply, Defendants purport to dispute the facts set forth in Plaintiffs' Statement of Facts, even though Plaintiffs cite to the administrative record (or pre-approved Plaintiffs' Appendix) for each factual assertion. In fact, in a footnote, Defendants summarily proclaim that they "do not agree that the 'Statement of Facts' set forth in Plaintiffs' motion for summary judgment is accurate." Dkt. 186 at 3 n.2. While Defendants fail to identify a single inaccuracy in Plaintiffs' Statement of Facts, Defendants are attempting to contest record facts and citing to materials outside of the administrative record, which means that Defendants are *not* treating this as an administrative record-only case.

It is important to note here that Plaintiffs' Statement of Facts is incorporated in Plaintiffs' Motion (and within the briefing page limitation) and cites only to the administrative record and the documents the Court has approved for Plaintiffs' Appendix. And a review of Plaintiffs' Statement of Facts shows that there is no fact that Defendants can dispute, as this information

comes directly from Defendants' own documents.[4] Defendants cannot have it both ways. They cannot claim that this is only an administrative record case to avoid discovery and ignore the applicable legal standard for summary judgment on Constitutional claims, but then claim that they generally dispute Plaintiffs' Statement of Facts. *See Hinson*, 579 F. Supp. 2d at 92 ("LCvR 7(h)(2) 'recognizes that in cases where review is based on an administrative record the court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record.'" (quoting comment to Local Civil Rule 7(h))).

In any event, in order to properly dispute Plaintiffs' Statement of Facts, Defendants would have had to file a responsive Statement of Facts under Local Rule 7(h), specifying the facts (from Plaintiffs' Motion) that are in dispute and citing to evidence supporting Defendants' position. Defendants did not file any such statement in opposition to Plaintiffs' Statement of Facts. All of this creates confusion and prejudices Plaintiffs. From Defendants' Cross Motion, Plaintiffs and the Court cannot know (a) which factual assertions of Plaintiffs, if any, Defendants are disputing, (b) what facts Defendants are relying on for their positions, and (c) how those "facts" are supported (*e.g.*, administrative record references if an administrative record-only case).

3. Defendants Defy the Page Limits and Further Prejudice Plaintiffs

Compounding the prejudice to Plaintiffs (in terms of being able to understand and respond to Defendants' position) and defying the page limitations set by the Court for this briefing, Defendants have imported wholesale hundreds of pages of additional briefing and background material. For example, in footnote 3 of their Cross Motion, Defendants state the following:

> **Additional relevant background is set out in detail in the Court's prior opinions**, *see* ECF Nos. 44, 72, 73. Defendants also **incorporate by reference** the

[4] When examined, the Court will find that each assertion flows directly from materials in the record, usually via direct quotations or paraphrased statements that are irrefutable.

> Statutory and Regulatory Backgrounds of the naturalization process, 8 U.S.C. § 1440, and the MAVNI Program, as set forth in Defendants' Opposition to Plaintiffs' preliminary injunction motion, ECF Nos. 19, 31, and as laid out by the Court in its Memorandum Opinion denying the preliminary injunction, ECF No. 44.[5]

Dkt. 186 at 3 n.3 (emphasis added); *see also id.* at 3 ("Defendants also hereby renew their Motion to Dismiss and **incorporate those arguments by reference**[.]" (emphasis added)); *id.* at 45 n.19 ("Defendants **incorporate by reference all filings in *Kirwa*** to assert that the decision of whether and when to de-certify a Form N-426 . . . ." (emphasis added)); *id.* at 45 n.19 ("Defendants . . . therefore, **incorporate by reference all of the United States' filings in *Kirwa* on this point** [regarding background checks]." (emphasis added)).

By incorporating by reference multiple lengthy briefs, Defendants have circumvented the Court's Order limiting Defendants' brief to 60 pages. *See* Dkt. 159 at 1; *see also Davis v. Pension Benefit Guar. Corp.*, 734 F.3d 1161, 1167 (D.C. Cir. 2013) (declining to permit incorporation of arguments presented to the district court, as this would circumvent the court's rules on the briefing length). Indeed, in addition to almost 50 pages of argument in their brief, Defendants incorporate more than 150 pages of separate briefing. Dkt. 186 at 3 n.3, 42 n.17, 45 n.19, 47 n.20.

Defendants' incorporation of separate briefing prejudices Plaintiffs since it is not clear on which arguments Defendants are making. *See, e.g.*, Dkt. 186 at 45 n.19, 47 n.20 (incorporating "all filings in *Kirwa*"). Moreover, Defendants' flouting of the Court's Order regarding page limitations is unfair to Plaintiffs, who have strictly adhered to the limits.

CONCLUSION

For these reasons, Plaintiffs request that their Motion be granted.

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[5] Defendants' previous noncompliant motion for summary judgment included a similar Factual Background section and almost identical footnote, incorporating, as the "relevant background," the same opinions and briefs. Dkt. 116-1 at 3 n.2.

Respectfully submitted,

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