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*pro se*

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII**

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LUIS SANCHO, et al.,	)	Civil No. CV08-00136 HG
	)	
Plaintiffs,	)	<b>OPPOSITION TO “FEDERAL</b>
	)	<b>DEFENDANTS’ <i>EX PARTE</i></b>
vs.	)	<b>APPLICATION TO STRIKE</b>
	)	<b>PLAINTIFFS’ UNTIMELY</b>
US DEPARTMENT OF ENERGY,	)	<b>RESPONSES TO FEDERAL</b>
et al.,	)	<b>DEFENDANTS’ MOTION TO</b>
	)	<b>DISMISS OR, IN THE</b>
Defendants.	)	<b>ALTERNATIVE, FOR AN</b>
	)	<b>OPPORTUNITY TO REPLY”</b>
	)	
	)	Date: September 2, 2008
	)	Time: 10:00 A.M.
	)	Court: Hon. Helen Gillmor

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**OPPOSITION TO “FEDERAL DEFENDANTS’ *EX PARTE* APPLICATION  
TO STRIKE PLAINTIFFS’ UNTIMELY RESPONSES TO FEDERAL  
DEFENDANTS’ MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
FOR AN OPPORTUNITY TO REPLY”**

Plaintiffs oppose the lengthy *Ex Parte* application by way of a brief response, due to time constraints, as follows:

1. Rule 16 Scheduling Order Directs Plaintiffs to Follow LR 56.1

Plaintiffs draw this Court's attention to the *Rule 16 Scheduling Order* filed herein on June 16, 2008, and in particular to its pages 8-9.

In particular, on the second paragraph, it states:

"All parties, pro se or not, are also required to comply with the Local Rules of the United State District Court for the District of Hawaii. Rule LR56.1 sets out the local requirements for summary judgment motions and for opposition to such motions.  
..."

Plaintiffs submit that they were specifically ordered to follow the procedures of Local Rule LR56.1. In that LR 56.1 is additive to Federal Rules of Civil Procedure [FRCP], Rule 56 [summary judgments], plaintiffs submit that the time requirements for filing are those contained in FRCP Rule 56, and no other. The fact that the local rule, and the rule of civil procedure, share the same number [56] is not coincidence, but reflective of the fact that the two go hand-in-hand together.

However, as mentioned before, if this Court believes that other rules reflect the filing times, again, defendants have still failed to show in any manner how they were prejudiced by plaintiffs following what they believed was a plain directive from this Court to follow the procedures of Local Rule

56.1 and FRCP Rule 56 [also referenced by this Court in its Scheduling Order, on page 9].

2. Local Rule 56.1(h) Mandates Dismissal of Motion

Local Rule 56.1(h) references that the *Concise Statement* shall have all of the affidavits, exhibits, declarations, etc., attached to it and to no other pleadings. In the motion that was filed by defendants, the affidavits, exhibits, declarations, etc. were attached to the Memorandum of Law, and included in the appendix. No *Concise Statement* is referenced anywhere in either the motion itself, or in the Memorandum of Law, and in fact plaintiffs never received a *Concise Statement*, though they did receive the voluminous exhibits and declarations of the defendants. Accordingly, since none of the Affidavits or Declarations were attached to a Concise Statement as required by LR 56.1, they must be stricken as failing to comply with the local rules. Having been stricken, the motion for summary judgment is thus barren and devoid of factual affidavit or declaration, thereby unsupported, and therefore must be dismissed.

3. Failure to File *Concise Statement* Mandates Dismissal

Even if defendants' arguments were correct with respect to the time requirements for plaintiffs to file their opposition, the failure of defendants to include a *Concise Statement* in either the motion itself, or in the

memorandum of law in support of the motion, or even a hint of a reference to such, shows that the motion failed to comply with the *Concise Statement* requirement of LR56.1, even if affidavits and exhibits were separately filed as attachments to the Memorandum of Law. Due to that failure to comply, plaintiffs were under no obligation to file any kind of response, timely or late, with respect to the motion. Accordingly, the motion should be dismissed.

4. Combined Motion is a Summary Judgment Motion

By combining a “motion to dismiss” with a Summary Judgment motion, such motion is converted to a pure Summary Judgment motion for procedural purposes. This is no different that when a moving party, in filing a “motion to dismiss” attaches factual affidavits thereto to support the motion, by so doing it is converted into a Summary Judgment motion. This is well-accepted procedure with voluminous case annotation thereon. Due to the exigencies of submitting this Opposition on the same day as the *ex parte* motion was received, plaintiffs are unable to present the extensive case annotations of that general principle of law, but would be more than willing to fully brief this honorable Court thereon, should it be deemed desirable. However, this is such a common principle that such additional briefing is likely not required. *A fortiori*, because defendants attached

affidavits, declarations, exhibits, etc. in support of their motion, it is a motion for summary judgment, notwithstanding their failure to attach said affidavits, declarations, and exhibits to a *Concise Statement* as required by the local rules.

Dated: August 27, 2008

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Walter L. Wagner

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Luis Sancho