



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dena Briscoe, et al.,)	
Plaintiffs,)	
v.)	1:03-cv-2084
John E. Potter, et al.,)	
Defendants.)	

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO STRIKE**

The Plaintiffs' complaint accuses the Defendants of serious misconduct – knowing that the Brentwood facility was contaminated with anthrax, but intentionally misleading the Plaintiffs into believing it was safe. In keeping with the nature of their motion as a challenge under Rule 12(b) to the legal sufficiency of the complaint, the Defendants argued in their Motion to Dismiss that the complaint failed to state a claim upon which relief could be granted for a variety of legal reasons. While thus seeking dismissal on the basis of purely legal defects and while making clear that "this Court may not consider facts outside the complaint in deciding this motion," the Defendants also noted for the record that they flatly denied the Plaintiffs' allegations that they knew the Brentwood facility was contaminated with anthrax or knew the Brentwood workers were at risk for anthrax. *See* Mot. to Dismiss at 5 n.2; *see also id.* at 15 n.3. And the Defendants noted that the GAO's preliminary findings supported the Defendants' position. *Id.* at 5 n.2. Despite the Defendants' express acknowledgment that the Court may not consider this dispute of fact in ruling on the Defendants' Motion to Dismiss, the Plaintiffs now move to strike these passages from the Defendants' memorandum. The Plaintiffs' motion to strike is without merit and should be denied.

Discussion

The Plaintiffs argue that their Motion to Strike should be granted because the Defendants have "improperly attempt[ed] to influence this Court's decision" by citing facts outside the complaint, Mot. to Strike at 2, and the Plaintiffs request that the Court "not consider" the Defendants' statements in ruling on the Defendants' Motion to Dismiss, Mot. to Strike at 4. The Plaintiffs' stated concerns are misplaced, because the Defendants neither requested nor expected that in deciding the

Motion to Dismiss the Court would consider the Defendants' denials of the allegations of the complaint or the GAO testimony and report that support those denials. In fact, the Defendants specifically recognized in their Motion to Dismiss that their denials of the complaint's factual allegations were *not* offered for consideration in deciding that Motion. *See* Mot. to Dismiss at 5 n.2 (acknowledging that "this Court may not consider facts outside the complaint in deciding this motion").¹ It is therefore difficult to understand the Plaintiffs' contention that the Defendants were "improperly attempt[ing] to influence this Court's decision." Mot. to Strike at 2. And because the Defendants already have informed the Court that it may not consider their denials, it is difficult to understand why the Plaintiffs believed it necessary to move the Court for an Order stating that the Court may not consider those denials. *Cf. Great West Life Assur. Co. v. Levithan*, 834 F. Supp. 858, 864 (E.D. Pa. 1993) ("Motions to strike are generally viewed with disfavor . . . [and] often are not granted if there is an absence of a showing of prejudice to the moving party.").

Plaintiffs' position appears to be that if a person accused of misconduct challenges the legal sufficiency of the complaint, the person is prohibited from stating for the record that he also denies the complaint's factual allegations. There is no support in law or common sense for such a position, and in fact it is not uncommon for litigants to make clear that although they must accept the plaintiff's allegations as true for purposes of a motion to dismiss, they actually dispute the allegations. *See, e.g., Adair v. England*, 183 F. Supp.2d 31, 41 n.13 (D.D.C. 2002) (noting defendant's dispute of allegation that had to be taken as true for purposes of motion to dismiss); *Kohl Partners, LLC v. City of Manchester*, No. Civ. 03-162-M, 2003 WL 22474626, at *4 n.6 (D.N.H. Oct. 30, 2003) (same). It was in no way improper for the Defendants to note their denials of the factual allegations of the complaint, especially given the seriousness of the allegations of indifference to the health of Brentwood employees of which the Defendants stand accused by the Plaintiffs. Placing the Defendants' denials on the record avoided any misunderstanding of the Defendants' actual position in regard to the allegations, and given the clear disclaimer in the Defendants' Motion to Dismiss, noting the Defendants' actual position did not create any danger of

¹Similarly, the Defendants do not request or expect the Court to determine whether the letter mailed to Senator Daschle was "heavily sealed" (*see* Mot. to Strike at ¶ 4, 7) in order to decide Defendants' Motion to Dismiss.

misleading the Court or prejudicing the Plaintiffs.

The manner in which the Plaintiffs have presented their allegations against the Defendants further confirms the appropriateness of the statements that the Plaintiffs ask this Court to strike. The Plaintiffs' attorneys have undertaken extensive efforts to publicize their irresponsible accusations against the Defendants through statements about this case on Judicial Watch's website and in news conferences.² These actions threaten morale and raise undue concerns within the Postal Service workforce, where it is logical to presume that the proceedings in this case are closely followed by many. In this context, it is wholly appropriate for the Defendants, in filing a motion to dismiss where they are required to accept the Plaintiffs' allegations as true for purposes of the motion, to include a footnote making it clear that they flatly deny the allegations of deliberate indifference to the health and welfare of Brentwood employees and to note that the preliminary findings of the GAO corroborate their denials.³ For the Defendants to proceed otherwise would risk creating a false impression both within the Postal Service and in the public at large that the Plaintiffs' charges have substance.

²See Brentwood Anthrax Survivors File Notice of Class Action Lawsuit Against Postmaster General, Senior Postal Service Managers - Notice of October 15, 2003 Press Conference, available at www.judicialwatch.org/3515.shtml.

³The Plaintiffs argue that the Court cannot take judicial notice of the GAO testimony and report cited in the Defendants' Motion to Dismiss at 5 n.2. See Mot. to Strike at 2, 4. The Defendants, however, never asked the Court to take judicial notice of the GAO materials. Far from asking the Court to disregard the Plaintiffs' allegations in favor of the GAO Report and to grant the motion to dismiss on the ground that the Plaintiffs' allegations are untrue, the Defendants' Motion to Dismiss expressly recognized that "this Court may not consider facts outside the complaint in deciding this motion." Mot. to Dismiss at 5 n.2. Whether the GAO Report or testimony would be a proper subject of judicial notice need not be considered at this time; for now, all the Defendants have done is to point out that if they are required to file an Answer, they will dispute the Plaintiffs' allegations and that preliminary findings of an independent investigative body will support the Defendants' position.

Conclusion

For the reasons set forth above, the plaintiffs' Motion to Strike should be denied.

DATED: MARCH 15, 2004

RESPECTFULLY SUBMITTED

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