

1 DANIEL G. BOGDEN
2 United States Attorney

3 HOLLY A. VANCE
4 Assistant United States Attorney
5 100 West Liberty Street, Suite 600
6 Reno, NV 89501
7 Tel: (775) 784-5438
8 Fax: (775) 784-5181

9 **IN THE UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 JED MARGOLIN,
12 Plaintiff,
13 v.

Case No. 3:09-CV-00421-LRH-VPC

14 NATIONAL AERONAUTICS
15 AND SPACE ADMINISTRATION,
16 Defendant.

MOTION TO STRIKE

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18 COMES NOW Defendant National Aeronautics and Space Administration ("Defendant")
19 and moves to strike the exhibits attached to Plaintiff's Reply to NASA's Opposition to Margolin's
20 Motion for Summary Judgment (#49) and the exhibits attached to Plaintiff's Opposition to NASA's
21 Cross Motion for Summary Judgment (#50). Plaintiff has not included a declaration in support of
22 the exhibits attached to either brief. The exhibits are thus inadmissible because they are not
23 properly authenticated and their contents are not subscribed as true under penalty of perjury. The
24 exhibits are also inadmissible because they contain hearsay. Accordingly, the exhibits should be
25 stricken. This motion is supported by Fed. R. Civ. P. 7(b).
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ARGUMENT

A. Plaintiff's exhibits are inadmissible because they are not supported by a declaration, they are not authenticated and they contain hearsay.

In the context of summary judgment proceedings, only admissible evidence can be properly considered by the Court. *See Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) ("the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment"). The admissibility of materials for summary judgment purposes is governed by the same rules of evidence that apply at trial. *Well Dairy, Inc. v. Travelers Indemnity Co.*, 241 F. Supp. 2d 945, 955-56 (N.D. Iowa 2003).

This is a Freedom of Information Act case in which Plaintiff attaches several exhibits to both his reply (#49) and his opposition (#50) briefs. No other information is provided in connection with these documents. No supporting affidavit or declaration is included with either brief. Plaintiff cannot simply attach random materials to a brief and expect those materials to be considered as evidence in support thereof. Because a declaration subscribed as true under penalty of perjury has not been provided in support of the exhibits, the exhibits are inadmissible. *See Robinson v. Penner*, 2008 WL 544912 (E.D. Cal.) ("Motions for summary judgment may be supported by affidavits or declarations sworn to be true under penalty of perjury."); 28 U.S.C. § 1746 (requiring that declaration be subscribed as true under penalty of perjury).

Plaintiff's failure to include a supporting declaration with his exhibits also renders the exhibits inadmissible for lack of authentication. *See Countryside Oil Co. v. Travelers Ins. Co.*, 928 F. Supp. 474, 482 (D. N.J. 1995) (unauthenticated documents may not be used to support or defeat a motion for summary judgment); *Orr*, 285 F.3d at 773 ("Authentication is a condition precedent to admissibility.") (internal quotation marks omitted); FRE 802 (setting forth authentication requirement). The exhibits are also inadmissible because they contain hearsay. *See Kephart v. Data Systems Intern, Inc.* 243 F. Supp. 2d 1205, 1209 (D. Kan. 2003) (hearsay that is not admissible at trial may not be used in connection with a motion for summary judgment); *See* FRE 801 (defining hearsay); FRE 802 (precluding admission of hearsay). Accordingly, the exhibits should be stricken.

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CONCLUSION

For the reasons explained above, this Court should enter an order striking the exhibits attached to Plaintiff's reply (#49) and opposition (#50) briefs.

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

/s/ Holly A. Vance
HOLLY A. VANCE
Assistant United States Attorney

