

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.

14 NATIONAL AERONAUTICS
15 AND SPACE ADMINISTRATION,
16 Defendant.

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

**REPLY TO OPPOSITION TO MOTION TO
STRIKE AND OPPOSITION TO MOTION
REQUESTING LEAVE TO FILE DECLARATION**

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19 COMES NOW Defendant National Aeronautics and Space Administration (“NASA”) and
20 submits this Reply to Plaintiff’s Opposition to Motion to Strike (#54) and this Opposition to
21 Plaintiff’s Motion Requesting Leave to File Declaration. (#54). Plaintiff appears to concede that
22 his exhibits are inadmissible without a supporting declaration to authenticate them. This Court
23 should strike the exhibits on that basis alone. Plaintiff also failed to lay a proper foundation for the
24 public records exception to the hearsay rule and thus the documents should be stricken as
25 inadmissible hearsay.

26 For three reasons, Plaintiff’s request for leave to file a declaration should also be denied.
27 First, briefing in this matter has been completed, thereby rendering the submission of the declaration
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1 untimely. Second, Plaintiff offers no explanation for his failure to submit a timely declaration and
2 thus he has not established excusable neglect. Third, accepting the declaration for
3 filing would prejudice Defendant, who would then be required to submit additional briefing to
4 address the declaration. Defendant should not be put to this task where the case has already been
5 fully briefed. Accordingly, this Court should deny Plaintiff's request for leave to file the
6 declaration.

7 ARGUMENT

8 **A. Plaintiff offers no authority to refute Defendant's authorities that the exhibits are 9 inadmissible.**

10 Defendant moved to strike the exhibits attached to Plaintiff's Reply to NASA's Opposition
11 to Margolin's Motion for Summary Judgment (#49) and the exhibits attached to Plaintiff's
12 Opposition to NASA's Cross Motion for Summary Judgment (#50). Plaintiff did not include a
13 declaration in support of the exhibits attached to either brief. The exhibits are thus inadmissible
14 because they are not properly authenticated, their contents are not subscribed as true under penalty
15 of perjury and they constitute hearsay. *See Robinson v. Penner*, 2008 WL 544912 (E.D. Cal.)
16 ("Motions for summary judgment may be supported by affidavits or declarations sworn to be true
17 under penalty of perjury."); *Countryside Oil Co. v. Travelers Ins. Co.*, 928 F. Supp. 474, 482 (D.
18 N.J. 1995) (unauthenticated documents may not be used to support or defeat a motion for summary
19 judgment); *Kephart v. Data Systems Intern, Inc.* 243 F. Supp. 2d 1205, 1209 (D. Kan. 2003)
20 (hearsay that is not admissible at trial may not be used in connection with a motion for summary
21 judgment).

22 Plaintiff does not offer any argument or authority to refute Defendant's arguments and legal
23 authorities concerning the need for a declaration and authentication. Under the circumstances,
24 Plaintiff has conceded that those arguments and authorities have merit. *See Harrison v. District of*
25 *Columbia*, 2006 WL 949856 (D.D.C.) ("[I]f the opposing party files a responsive memorandum, but
26 fails to address certain arguments made by the moving party, the court may treat those arguments as
27 conceded[.]"); *Taylor v. City of New York*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003) ("Federal courts
28 may deem a claim abandoned when a party moves for summary judgment on one ground and the

1 party opposing summary judgment fails to address that argument in any way). Accordingly, this
2 Court should grant Defendant's motion and strike the exhibits.¹

3 **B. The public records exception to the hearsay rule — Evidence Rule 803(8) — does not
4 apply.**

5 Plaintiff claims that his exhibits are admissible under the public records exception to the
6 hearsay rule — Evidence Rule 803(8). But Plaintiff simply cites the rule and offers no explanation
7 or analysis as to how or why the rule applies. Plaintiff's failure to brief the issue is a sufficient
8 reason for this Court to reject it. *See James River Ins. Co. v. Hebert Schenk*, 523 F.3d 915, 920 (9th
9 Cir. 2008) (refusing to consider issue that was "inadequately presented"); *Hashim-Tiggs v.*
10 *Schneider*, 2207 WL 185095 (W.D. Wis. 2007) (court declined to address issues on the ground that
11 they were "inadequately briefed"). In any event, the public records exception does not apply.

12 The public records exception is triggered when a party establishes — through a statement on
13 the face of the document at issue or through extrinsic evidence — that the document sets forth: (A)
14 "the activities of the office or agency," (B) "matters observed pursuant to duty imposed by law," or
15 (C) "factual findings resulting from an investigation made pursuant to authority granted by law."
16 *Demirchyan v. Gonzales*, 2010 WL 3521784 at 10 (E.D. Cal.); Fed. R. Evid. 803(8). When he filed
17 his opposition and reply briefs, Plaintiff offered no extrinsic evidence to support any of those three
18 factors. Nor did he point to any statement on the face of the exhibits that establishes at least one of
19 those factors. Accordingly, the rule does not apply and this Court should strike the exhibits.

20 **C. This Court should deny Plaintiff's request for leave to file his declaration.**

21 Plaintiff has requested leave from this Court to file his declaration to include with his reply
22 (#49) and opposition briefs. (#50). This Court should deny the request, for the reasons explained
23 below.

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26 ¹Plaintiff also asserts that he received the documents in question from the following sources:
27 NASA, other government agencies and the web sites for NASA and other government agencies.
28 But Plaintiff cites no authority that obtaining documents from those sources obviates the need to
address the evidentiary challenges expressed by Defendant.

1 **1. This case has already been fully briefed.**

2 Briefing in this case was completed on November 1, 2010, when Defendant filed its reply
3 brief. (#52). Both parties filed their briefs in accordance with the briefing schedule agreed upon by
4 the parties and approved by this Court. (#41, #48). Allowing the declaration to be submitted at this
5 late date would thus violate the deadlines established in that briefing schedule. Because the
6 deadline for briefing and submitting evidence has passed, this Court should deny Plaintiff's request
7 for leave to file his declaration.

8 **2. Plaintiff has not established good cause for the untimely filing.**

9 This Court may extend the time for filing for "good cause" if a party "failed to act because of
10 excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). In assessing what constitutes excusable neglect,
11 courts examine the good faith of the moving party, the extent of the delay involved and the danger
12 of unfair prejudice to the non-moving party. *Pioneer Investment Services v. Brunswick Associates*,
13 113 S.Ct. 1489, 1497 (1993); *Mendez v. Knowles*, 535 F.3d 973, 980 (9th Cir. 2008).

14 Plaintiff offers no explanation why he did not submit his declaration with his briefing,
15 thereby precluding this Court from determining whether excusable neglect warrants allowing the
16 untimely filing. *See See General Atomics v. U.S. Nuclear Regulatory Commission*, 1995 WL
17 230511 (S.D. Cal.) ("General Atomics does not even attach an affidavit explaining why this
18 declaration is almost one week late."); *Cooley v. Great Southern Wood Preserving*, 2005 WL
19 1163608 at 9 (11th Cir. 2005) ("plaintiffs offered no explanation for why they did not timely file
20 their own declarations"). Nor has Plaintiff addressed or discussed the applicable authorities, noted
21 above, related to untimely filings and excusable neglect. Plaintiff's failure to brief the pertinent
22 issues is a sufficient basis for rejecting Plaintiff's argument. *See James River Ins. Co. v. Hebert*
23 *Schenk*, 523 F.3d 915, 920 (9th Cir. 2008) (refusing to consider issue that was "inadequately
24 presented" and concluding issue to be waived); *Hashim-Tiggs v. Schneider*, 2207 WL 185095 (W.D.
25 Wis. 2007) (court declined to address issues on the ground that they were "inadequately briefed").

26 Moreover, it appears likely that Plaintiff failed to submit a timely declaration because he is
27 unfamiliar with the Rules of Evidence. But ignorance of the rules — whether procedural or
28 evidentiary — is insufficient to establish excusable neglect. *See Fahmy v. Hogge*, 2009 WL 33418

1 at 2 (C.D. Cal.) (“[T]he sole reason for Plaintiff’s failure to submit admissible evidence in opposing
2 Defendant’s motion to dismiss was her own negligence. The Ninth Circuit has repeatedly held that
3 failure to read and follow an applicable rule, or ignorance of the law, does not constitute excusable
4 neglect.”). Accordingly, this Court should deny Plaintiffs’ request for leave to submit his
5 declaration.

6 **3. Defendant would be prejudiced by the untimely filing.**

7 Allowing the submission of the declaration when briefing is now complete would prejudice
8 Defendant. Defendant would be required to submit additional briefing to address the declaration.
9 This would unnecessarily consume Defendant’s time and resources. Defendant has already spent
10 considerable time responding to Plaintiff’s opposition brief, which exceeded LR 7-4’s 30-page limit
11 by 46 pages. (#56). Defendant should not be put to the task of again spending extra time
12 responding to Plaintiff’s declaration where Plaintiff repeatedly neglects to follow the Rules of
13 Evidence and Procedure. Accordingly, the request for leave to file the declaration should be denied.
14 *See Lindner v. Meadow Gold Dairies*, 515 F. Supp. 2d 1166, 1172 (D.C. Hawaii 2007) (“Lindner
15 fails to set forth the reasons for his original oversight. Seeing no good cause for the delay and in
16 light of the potential prejudice to SFG, the court denies Linders’ Motion for Leave to file
17 Supplemental Declarations.”); *Pincay v. Andrews*, 389 F.3d 853, 858 (9th Cir. 2004) (“ignorance of
18 fact may excuse; ignorance of law does not excuse”).

19 **CONCLUSION**

20 For the reasons explained above, this Court should enter an order striking the exhibits
21 attached to Plaintiff’s reply (#49) and opposition (#50) briefs. This Court also should deny
22 Plaintiff’s Motion Requesting Leave to File Declaration. (#54).

23 Respectfully submitted,

24 DANIEL G. BOGDEN
25 United States Attorney

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

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CERTIFICATE OF SERVICE

JED MARGOLIN,
Plaintiff,
v.
NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION,
Defendant.

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

The undersigned hereby certifies that service of the foregoing **REPLY TO OPPOSITION TO MOTION TO STRIKE AND OPPOSITION TO MOTION REQUESTING LEAVE TO FILE DECLARATION** has been made by electronic notification through the Court's electronic filing system or, as appropriate, by sending a copy by first-class mail to the following addressee(s) on November 16, 2010:

ADDRESSEE:

JED MARGOLIN
1981 Empire Road
Reno, NV 89521-7430

/s/ Holly A. Vance
Holly A. Vance