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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JED MARGOLIN, Plaintiff, vs. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, Defendant.	Case No. 3:09-cv-00421-LRH-(VPC) REPLY TO OPPOSITION TO MOTION TO STRIKE (#59)

Comes now Plaintiff, Jed Margolin ("Margolin"), appearing pro se, and files his Reply to NASA's Opposition to Motion to Strike (#59)[1] . NASA asserts that the arguments Margolin presents in his Motion to Strike are unfounded and frivolous. Margolin responds that NASA's arguments in their Opposition to Margolin's Motion to Strike are unfounded, frivolous, and vexatious.

[1] NASA's Opposition to Margolin's Motion to Strike (#59) will be referred to as either "NASA Opposition to MTS" or "#59".

Argument

A. NASA argues (NASA Opposition to MTS at 1, lines 23-23):

> **A. Courts routinely refer to federal agencies named as defendants in lawsuits as the "government."**

NASA cites two cases: *Lane v. Dep't of Interior*, 523 F.3d 1128 (9th Cir. 2008) and *Garcia v. U.S. Air Force*, 533 F.3d 1170 (10th Cir. 2008).

NASA might be correct that courts routinely refer to Agencies and Departments of the Executive Branch of the United States as "The Government." Margolin admits his experience with the Judicial Branch of the United States is limited. However, Margolin stands by his logic (#55 at 2, lines 18 - 22):

> Under the United States Constitution the United States Government consists of three branches: the Executive Branch, the Legislative Branch, and the Judicial Branch.
>
> Both NASA and the Department of Justice are part of the Executive Branch but are not literally the Executive Branch. They are certainly not the Legislative Branch (Congress) or the Judiciary.

This is not a frivolous argument. For courts to refer to Agencies and Departments of the Executive Branch as "The Government" is to abdicate their duty to be a co-equal branch of the United States Government. In particular, it would mean that the courts consider themselves to be subservient to the Executive Branch.

Or, this may simply be a **synecdoche**. In English grammar a synecdoche is where a part of something is used to refer to the whole thing (*Pars pro toto*) or the whole thing is used to refer to a part (*Totum pro parte*). A synecdoche can be considered a form of **metaphore**. Synecdoche

can be used very effectively (and evocatively) in literature, especially love poetry. That does not mean its use is frivolous. Literature is important to human culture. And the use of synecdoche is one of the ways that language evolves. For example:

- Describing a complete vehicle as "wheels"
- Calling a worker "a pair of hands"
- A sailor is a “hand”
- All "hands" on deck

However, the Law requires great precision in the use of words, and the use of synecdoche is not appropriate, even if “everyone does it.”

It is ironic that NASA cites *Lane v. Dep’t of Interior.* The complete title of the case is *Melinda J. LANE, Plaintiff-Appellant v. DEPARTMENT OF the INTERIOR; Gale A. Norton, in her professional capacity as Secretary of the Interior; Fran Mainella, in her professional capacity as Director, Defendants-Appellees*. This was a Freedom of Information Act action where the Plaintiff named not only the Agency (Department of the Interior) as the Defendant but also *Gale A. Norton, in her professional capacity as Secretary of the Interior* (the Head of the Agency) as well as *Fran Mainella, in her professional capacity as Director*, who wasn’t even the Head of the Agency, only its Director. When Margolin named “Charles F. Bolden, Administrator, National Aeronautics and Space Administration” as defendant (Document 1), NASA’s Counsel mounted a concerted campaign to have the case dismissed (Document 9). In the process she failed to answer the complaint. She also failed to answer the First Amended Complaint

(Document 12-2). Nonetheless, Margolin gave her considerable slack because he wants the case decided on its merits. Unfortunately, NASA does not.

B. NASA argues (NASA Opposition to MTS at 2, lines 4 -5):

> **B. The reply brief's statements about Optima Technology Corporation and Optima Technology Group are supported by sworn testimony.**

Even if NASA is successful in suppressing Margolin's exhibits from his Motion for Summary Judgment (Document 32) NASA's production of the Order of the Arizona Court (which ruled that Optima Technology Corporation/Zandian' assignments were fraudulent and ordered the Patent Office to strike those assignments from its records) was reproduced in Margolin's Motion to Strike (#55 Exhibit 3 at 27) supported by a Supplemental Declaration (#55 at 17).

NASA has steadfastly refused to discuss the Order of the Arizona Court even though they knew about it. It was among the 4,000 or so pages that NASA produced in November 2009. These were documents that Courtney B. Graham personally reviewed. See #42-1 Graham Declaration ¶¶ 28, 29, and 40.

NASA places a great deal of importance on Declarations, but only its own Declarations. NASA evidently believes its Declarations take precedence over an Order of the U.S. District Court for the District of Arizona.

If this Court (U.S. District Court for the District of Nevada) issues an Order, will NASA ignore it, too, in favor of its own Declarations?

And why is Defamation of Ownership of the Patents so important to NASA and NASA's Counsel that they are willing to risk sanctions over it? It is likely that the answer is in the redacted, withheld, and/or uncharacterized documents that NASA either has in its possession or has transferred to another agency.

C. NASA argues (NASA Opposition to MTS at 2, lines 19-20):

> **C. Plaintiff waived the right to challenge those Vaughn index entries that he did not address in his briefing.**

NASA makes the same argument they made in Government's Reply (#52 at 3, lines 1 - 15.) Margolin replies with the same argument he made in Motion to Strike (#55 page 9, line 5 - page 11, line 12). This can be summarized as follows.

1. After NASA produced the approximately 4,000 pages of documents in November, 2009, they stated they were not required to produce an index (#30, NASA's Answer to Second Amended Complaint at 7, lines 18 -19).

2. The Graham Declaration (Document 42-1) ¶ 39 refers to "Margolin FOIA Withheld Index Final" not "*Vaughn* Index."

3. Exhibit I (Document 44) is entitled "Margolin FOIA Withheld Index Final.xls" not "*Vaughn* Index."

4. The "Margolin FOIA Withheld Index Final.xls" does not contain descriptions of the redacted documents in the approximately 4,000 pages NASA sent Margolin in November 2009.

5. The entries that Margolin discussed in the "Margolin FOIA Withheld Index Final.xls" were exemplars to show that the "Margolin FOIA Withheld Index Final.xls" was not a *Vaughn*

Index. See Document 55 at 11, lines 1-2 ("A *Vaughn* Index has very demanding requirements"), referring to Document 50 page 25, line 11- page 26, line 18). As a result, Margolin did not waive anything.

D. NASA argues (NASA Opposition to MTS at 3, line 20):

> **D. Defendant did not waive its right to challenge the Klamath decision.**

NASA failed to address Klamath in its Answer to Second Amended Complaint (Document 30) ¶ 28 at 10, lines 4 -9, answering Second Amended Complaint (Document 16-1) ¶ 28 at 39.

In NASA's Opposition to Motion For Summary Judgment and Cross-Motion for Summary Judgment (Document 42) NASA responded to Klamath with only a conclusory statement in a footnote (Document 42 at 16, lines 27 - 28), not accompanied by argument.

NASA argues now that (#59 at 4, lines 3 - 5),

> "The fact that Defendant's reply brief explained in more detail the basis for its argument does not warrant striking the brief and Plaintiff cites no authority that striking the brief is warranted under those circumstances."

What NASA characterizes as "explained in more detail" is the argument that they failed to provide in their Opposition to Motion For Summary Judgment and Cross-Motion For Summary Judgment (#42).

NASA's assertion that Margolin cited no authority in his Motion to Strike is incorrect. In Margolin's Motion to Strike (#55 at 12, lines 20 - 21) he cited The Federal Rules of Civil Procedure Rule 56(e)(2).

E. NASA argues (NASA Opposition to MTS at 4, lines 6-7):

> **E. Plaintiff did not waive its right to challenge the Fein e-mail.**

Plaintiff is Margolin, and Margolin has no wish to challenge the Fein e-mail. He is the one who brought up the Fein e-mail.

According to NASA's Notice of Errata (#60) NASA meant to say, "**E. Defendant did not waive its right to challenge the Fein e-mail."** [2]

NASA asserts (#59 at 4, line 8 - 11):

> Plaintiff admits that Defendant "respond[ed] to the Fein [e-]mail, indirectly * * *." (#55 at p. 13). Nonetheless, Plaintiff goes on to argue that Defendant "waived its right to respond" to the e-mail. (#55 at p. 14). Plaintiff's admission that Defendant "respond[ed]" to the e-mail, albeit "indirectly," is an admission that Defendant did not waive its argument concerning the e-mail.

Margolin's Motion to Strike (#55 at 13, lines 19 -24) says (quoting NASA Document 42):

> In NASA's Opposition to Motion For Summary Judgment and Cross-Motion for Summary Judgment (Document 42) NASA responds to the Fein mail, indirectly, with only a conclusory statement in a footnote. (Document 42, page 16, lines 24 - 26):
>
> > [3] Plaintiff argues that documents created after 2004 are post-decisional. Plaintiff is mistaken. The patent infringement claim was denied on March 19, 2009. (Graham Dec. ¶ 7). Thus, that is the determinative date for post-decisional documents.

In Document 42 NASA does not reproduce the Fein email. NASA does not refer to Margolin's reproduction of the Fein email. NASA does not even refer to the Fein email by name. How much

[2] Margolin does not see anything in the Federal Rules of Civil Procedure or this Court's Local Rules to permit such a filing. This must be an Undocumented Privilege. If there are other Undocumented Privileges, Margolin would like to receive a list of them.

more indirect can a reference be? And NASA offers no argument, only a conclusion. What should we believe, a NASA email from 2004 that constructively denied Margolin's claim and was followed by more than six years of behavior that confirmed that decision, or the self-serving Graham Declaration written in 2010?

NASA further argues that by repeatedly stating that "the documents generated after March 19, 2009 -not July 12, 2004- are post-decisional for purposes of Exemption 5" they have addressed the Fein email of July 2004. (#59 at 4, lines 15 -18)

As with Klamath, by failing to respond to the Fein email (other than indirectly, and with only a conclusory statement) in NASA's Opposition to Motion For Summary Judgment and Cross-Motion for Summary Judgment (Document 42) NASA has waived their right to respond. See Federal Rules of Civil Procedure Rule 56(e)(2).

The Fein email is a material issue. It occurs to Margolin that the significance of the Fein email is an issue of Fact, not an issue of Law. The Court is the Trier of Fact in this case. Perhaps the Court should consider ruling on this Fact, and then NASA and Margolin can brief the Case all over again.

F. NASA argues (NASA Opposition to MTS at 4, lines 19-20):

> **F. This Court should disregard Plaintiff's request for sanctions because Plaintiff did not make the request via motion.**

NASA further argues (NASA Opposition to MTS at 4, lines 21-25):

> Plaintiff objects to the following sentence in Defendant's reply brief because, he claims, the

> sentence responds to an argument that Plaintiff made in his reply brief: "Plaintiff also asks this Court to sanction NASA and Graham but he has offered no admissible evidence to warrant such sanctions." (#55 at p. 14). Plaintiff is correct that the sentence responds to a request for sanctions that Plaintiff made in his reply brief. (#49 at p. 21). But a reply brief is an inappropriate vehicle for requesting sanctions.

NASA's argument is vexatious.

In Margolin's Motion to Strike (#55 at 14, lines 13 - 19) he argues:

> **E. NASA Miscites a Margolin Document in order to reply to a document that they have no right to reply to in Government's Reply.**
>
> In Footnote 6 (GR page 14) the second reference to Document 50 ("#50 at p. 21") is actually in Document 49 (Margolin's Reply to NASA's Opposition to Margolin's Motion for Summary Judgment), page 21, line 3 - 12. NASA does not have the right to reply to Document 49 here. Therefore, Margolin respectfully requests that the sentence citing "#50 at p. 21" be stricken.

NASA is attempting to mislead the Court into believing that Margolin argued for sanctions in his Motion to Strike and they have used it to argue against sanctions. Margolin did not argue for sanctions in his Motion to Strike. The word "sanctions" does not even appear in his Motion to Strike. He moved that the sentence citing "#50 at p. 21" be stricken because it does not refer to Document 50, it refers to Document 49, which NASA does not have the right to respond to in Government's Reply (#52).

Although Margolin appreciates the free legal advice offered by NASA's Counsel (he should move for sanctions instead of requesting them) Margolin points out that in his Second Amended Complaint (#16-2, duplicated in #19) in Requested Relief (#16-1 at 96, line 25) his Requested Relief included that the Court, "F. Grant such other relief as the Court may deem just and proper." (#16-1 at 97, line 14)

Margolin believes the Court has broad discretion in these matters. If the Court believes that the actions of NASA and NASA's Counsel merit sanctions, the Court may sanction them. The Court may believe that the actions of NASA and NASA's Counsel merit only a Reprimand, or maybe, a Stern Warning. The Court may also believe that the actions of NASA and NASA's Counsel are acceptable behavior under the Standard of Conduct in a case where the Parties are clearly at each other's throats. (While NASA may not be familiar with the concept of **synecdoche** Margolin assumes they know what a **metaphore** is.)

Conclusion

For the foregoing reasons Margolin respectfully requests:

1. That NASA's request (#59) that the Court deny Margolin's Motion to Strike be denied; and
2. That the Court grant Margolin's Motion to Strike (#55);

Respectfully submitted,

/Jed Margolin/

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Dated: December 3, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing REPLY TO OPPOSITION TO MOTION TO STRIKE (#59) has been made by electronic notification through the Court's electronic filing system on December 3, 2010.

/Jed Margolin/

Jed Margolin