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

10	JED MARGOLIN,	)	Case No. 3:09-CV-00421-LRH-VPC
11	Plaintiff,	)	
12	v.	)	
13	NATIONAL AERONAUTICS	)	<b><u>OPPOSITION TO</u></b>
14	AND SPACE ADMINISTRATION,	)	<b><u>MOTION TO STRIKE</u></b>
15	Defendant.	)	

16  
17 COMES NOW Defendant National Aeronautics and Space Administration ("Defendant")  
18 and opposes Plaintiff's Motion to Strike. (#55). The arguments Plaintiff makes in support of his  
19 motion are unfounded and frivolous. Accordingly, this Court should deny the Motion to Strike, as  
20 explained more fully below.

21 **ARGUMENT**

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

24 Plaintiff seeks to strike Defendant's reply brief (#52), claiming that the use of the word  
25 "government" in the title of the document improperly suggests that "there is a new defendant" and  
26 that "the entire force and majesty of the United States Government has come to bear on [Plaintiff]."  
27 (#55 at p. 1). Plaintiff overlooks that courts routinely refer to federal agencies that are named as  
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1 defendants in lawsuits as the “government.” *See, e.g., Lane v. Dep’t of Interior*, 523 F.3d 1128 (9<sup>th</sup>  
2 Cir. 2008) (court refers to Department of Interior as “government”); *Garcia v. U.S. Air Force*, 533  
3 F.3d 1170 (10<sup>th</sup> Cir. 2008) (court refers to Air Force as “government”).<sup>1</sup>

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

6 Plaintiff argues that Defendant’s reply brief should be stricken because Defendant  
7 “confus[es]” Optima Technology Corporation and Optima Technology Group. (#55 at pp. 4-9).  
8 The reply brief’s statements about those entities, however, are supported by the sworn testimony of  
9 Courtney B. Graham. (#46-1 at p. 2 ¶7, p. 10 ¶40; #52 at p. 16 ¶ 8). Plaintiff’s mere disagreement  
10 with Graham’s testimony does not warrant that her testimony — or Defendant’s reply brief — be  
11 stricken. *See Kerns v. Sealy*, 496 F. Supp.2d 1306, 1310 n. 5 (S.D. Ala. 2007) (“a party’s  
12 disagreement with the arguments presented in a filing is not a valid basis for the extraordinary  
13 remedy of striking that filing altogether”); *United States v. Templeton*, 972 F.2d 352, 1992 WL  
14 189398 at 3-4 (7<sup>th</sup> Cir. 1991) (“the mere fact that the [defendants] disagree with [the officer’s]  
15 statements does not warrant striking those statements from the record”); *United States v. Kneapler*,  
16 2010 WL 3029001 at 8 (S.D. Fla.) (“the [party] provides no authority to support the proposition that  
17 a disagreement about the contents of a sworn declaration is grounds to strike that declaration”).  
18

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

20 Plaintiff claims that he had “no reason” to believe that the index attached to Defendant’s  
21 opposition and cross motion for summary Judgment was a *Vaughn* index. (#55 at p. 11). On that  
22 basis, he seeks to strike all references to the index in Defendant’s reply brief. (#55 at p. 11). This  
23 Court should reject Plaintiff’s argument.  
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26  
27 <sup>1</sup>Plaintiff also contends that Defendant lacks standing to appear in this lawsuit because no  
28 Notice of Appearance was filed. (#55 at p. 3). But Defendant properly appeared in this case with its  
filing of a Motion to Dismiss and Non-Opposition to Motion to Correct Docket. (#8, #9).

1 Defendant included the *Vaughn* index as an exhibit with Defendant's opposition and cross  
 2 motion for summary judgment. (#44, Ex. I). That index included 396 entries that identified the  
 3 withheld documents and the applicable exemptions that bar disclosure. (#44, Ex. I). Defendant's  
 4 briefing also included a declaration from Courtney Graham, which addressed the contents of the  
 5 index. (#42-1). Although the index identified 396 entries and exemptions, Plaintiff elected to  
 6 address only nine of those entries: 113, 114, 117, 197, 232, 233, 236, 237 and 247. (#49 at pp. 7-9,  
 7 20). Plaintiff's decision to address nine entries shows that he knew that the index disclosed  
 8 Defendant's basis for withholding documents. Under the circumstances, Plaintiff's claim that he  
 9 did not know the index was a *Vaughn* index is disingenuous. Because Plaintiff specifically elected  
 10 to challenge only nine of the index's entries, this Court should not consider the 387 entries that  
 11 Plaintiff decided not to address. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will  
 12 not manufacture arguments for an appellant, and a bare assertion does not preserve a claim[.] \* \* \*  
 13 Judges are not like pigs, hunting for truffles buried in briefs."); *Entertainment Research Group v.*  
 14 *Genesis Creative Group*, 122 F.3d 1211 (9th Cir. 1997) (declining to consider claims where party  
 15 failed to present "a specific, cogent argument for our consideration"). Plaintiff's failure to address  
 16 387 of the entries is also tantamount to a waiver of the right to challenge them. *See James River Ins.*  
 17 *Co. v. Hebert Schenk*, 523 F.3d 915, 920 (9th Cir. 2008) (refusing to consider issue that was  
 18 "inadequately presented" and concluding issue to be waived).<sup>2</sup>

19  
 20 **D. Defendant did not waive its right to challenge the *Klamath* decision.**

21 Plaintiff seeks to strike Defendant's reply brief because, he claims, Defendant addressed the  
 22 *Dep't of Interior v. Klamath Water Users*, 532 U.S. 1 (2000) case for the first time in its reply brief.  
 23 (#55 at p. 12-13). Plaintiff is mistaken. Defendant argued in its opposition and cross motion for  
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25 <sup>2</sup>Plaintiff also faults Defendant for failing to include the redacted documents in the index.  
 26 (#55 at p. 11). But the Graham Declaration addresses the redacted documents. (#42-1, ¶¶ 32-34).  
 27 Thus, there was no need to include those documents in the index. In any event, if Plaintiff had a  
 28 problem with the index, he should have moved to strike the index — not Defendant's reply brief.  
 The fact that Plaintiff now objects to the index does not entitle him to an order striking Defendant's  
 reply brief and Plaintiff cites no authority for that novel argument.

1 summary judgment that Plaintiff's reliance on *Klamath* was misplaced because the case did not  
2 address the grounds for non-disclosure discussed in Defendant's briefing. (#46 at p. 16 n. 4).  
3 Defendant took that same position in its reply brief. (#52 at pp. 10-11). The fact that Defendant's  
4 reply brief explained in more detail the basis for its argument does not warrant striking the brief and  
5 Plaintiff cites no authority that striking the brief is warranted under those circumstances.

6  
7 **E. Plaintiff did not waive its right to challenge the Fein e-mail.**

8 Plaintiff admits that Defendant "respond[ed] to the Fein [e-]mail, indirectly \* \* \*." (#55 at  
9 p. 13). Nonetheless, Plaintiff goes on to argue that Defendant "waived its right to respond" to the e-  
10 mail. (#55 at p. 14). Plaintiff's admission that Defendant "respond[ed]" to the e-mail, albeit  
11 "indirectly," is an admission that Defendant did *not* waive its argument concerning the e-mail. In  
12 any event, Defendant's opposition and cross motion show that Defendant responded to the e-mail.  
13 Plaintiff attached the e-mail as an exhibit to establish that Plaintiff's patent infringement claim was  
14 denied on the date of the e-mail — July 12, 2004 — rather than the date that the patent  
15 infringement claim was formally denied — March 19, 2009. Defendant responded to that argument  
16 in its opposition and cross motion by arguing that the documents generated after March 19, 2009 —  
17 not July 12, 2004 — are post-decisional for purposes of Exemption 5. (#46 at p. 16 n. 3). In short,  
18 Defendant addressed Plaintiff's argument concerning the Fein e-mail and thus there was no waiver.

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

21 Plaintiff objects to the following sentence in Defendant's reply brief because, he claims, the  
22 sentence responds to an argument that Plaintiff made in his reply brief: "Plaintiff also asks this  
23 Court to sanction NASA and Graham but he has offered no admissible evidence to warrant such  
24 sanctions." (#55 at p. 14). Plaintiff is correct that the sentence responds to a request for sanctions  
25 that Plaintiff made in his reply brief. (#49 at p. 21). But a reply brief is an inappropriate vehicle for  
26 requesting sanctions. *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by  
27 motion."). Accordingly, this Court should disregard Plaintiff's request to impose sanctions because  
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1 he did not make the request via motion. This Court should also disregard Plaintiff's request because  
2 there is nothing in the record to support an award of sanctions. In any event, even if the Court  
3 strikes the sentence responding to Plaintiff's request for sanctions, the striking of that sentence  
4 should not change this Court's evaluation of this case on the merits and Defendant would still be  
5 entitled to an order granting summary judgment in its favor.

6 **CONCLUSION**

7 For the reasons argued above, this Court should deny Plaintiff's Motion to Strike.

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9 Respectfully submitted,

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12  
13 /s/ Holly A. Vance  
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