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8 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO
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10 RICHARD ENOS, JEFF BASTASINI,
11 LOUIE MERCADO, WALTER
12 GROVES, MANUEL MONTEIRO,
13 EDWARD ERIKSON and VERNON
NEWMAN,

14 Plaintiffs,

15 vs.

16 ERIC HOLDER, as United States
17 Attorney General, and ROBERT
18 MUELLER, III, as Director of the
Federal Bureau of Investigation,

19 Defendants.
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CASE NO.: 2:10-CV-02911-JAM-EFB

PLAINTIFFS' OBJECTIONS TO
MATERIAL SUBMITTED BY THE
DEFENDANTS IN SUPPORT OF
THEIR OPPOSITION TO SUMMARY
JUDGMENT

Date: January 25, 2012
Time: 1:30 p.m.
Place: Courtroom 6, 14th Floor
Judge: Hon. John A. Mendez

21 By and through undesigned counsel, Plaintiffs RICHARD ENOS, JEFF
22 BASTASINI, LOUIE MERCADO, WALTER GROVES, MANUEL MONTEIRO,
23 EDWARD ERIKSON, and VERNON NEWMAN hereby object and move to strike
24 material presented to the Court by the Defendants in support of their Motion to
25 Dismiss and in support of their Opposition to Summary Judgment.

26 Date: January 18, 2012

27 /s/ Donald E. J. Kilmer, Jr.
Attorney for the Plaintiffs
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1 Before ordering summary judgment in a case (either on a party's motion or
2 sua sponte), the court should rule on evidentiary objections that are material to its
3 ruling. *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010).

4 In footnotes 7 and 8 of the Defendants' Memorandum of Points and
5 Authorities in Support of their Motion to Dismiss (Dkt # 32-1) and in their
6 opposition to Plaintiffs' motion for summary judgment, the Defendants cited to and
7 submitted various "articles" contained in an appendix. (Dkt # 49, and 49-2 through
8 49-8)

9 Usually, a party opposing a motion for summary judgment must set forth
10 specific material facts showing a "genuine dispute" as to a "material fact" and/or a
11 party may oppose the motion on substantive legal grounds. Fed.R.Civ.P. 56(a),(c)(1).

12 The opposing party may not rest upon its pleadings. Rather, to avoid
13 summary judgment, it must affirmatively show a "genuine dispute" as to a
14 "material fact." See Fed.R.Civ.P. 56(c). "(T)he non-movant need not match the
15 movant witness for witness, nor persuade the court that her case is convincing, she
16 need only come forward with appropriate evidence demonstrating that there is a
17 pending dispute of material fact." *Waldridge v. American Hoechst Corp.* (7th Cir.
18 1994) 24 F.3d 918, 921. To establish a "genuine dispute" of material facts, the
19 opposing party must either:

- 20 ● Cite to particular materials in the record that show such dispute,
21 Fed.R.Civ.P. 56(c)(1)(A); or
- 22 ● Show the moving party's materials fail to establish absence of a
23 genuine dispute, Fed.R.Civ.P. 56(c)(1)(B); or
- 24 ● Show the moving party cannot produce admissible evidence to support
25 its factual position, Fed.R.Civ.P. 56(c)(1)(B); or
- 26 ● Object to the moving party's materials on the ground that they cannot
27 be presented in a form that would be admissible in evidence.
28 Fed.R.Civ.P. 56(c)(2).

1 The Defendants have not sought to introduce this material in support of a
2 motion to conduct additional discovery under Fed.R.Civ.P. 56(d). They have
3 submitted the material in support of factual assertions made in their Motion to
4 Dismiss and in support of their opposition to Plaintiff's Motion for Summary
5 Judgment. But the material submitted by the Defendants is not admissible
6 evidence. Admissibility is determined under the Federal Rules of Evidence. Thus,
7 for example, a "hearsay assertion that would not be admissible if testified to at trial
8 is not competent material for a Rule 56 affidavit. *Sarno v. Douglas*
9 *Elliman-Gibbons & Ives, Inc.* (2nd Cir. 1999) 183 F.3d 155, 160; *Hurd v. Williams*
10 (3rd Cir. 1985) 755 F.2d 306, 308 – inadmissible lay opinion not considered.

11 The material submitted by the Defendants does not comply with the Federal
12 Rules of Evidence. The defects include but are not limited to:

- 13 1. The material is not submitted as part of any affidavit or declaration by
14 a party or designated expert. Therefore it is not testimony.
- 15 2. The material is not part of any discovery provided by the Defendants,
16 in fact the first time that some of the material was mentioned (but not
17 provided) was in the Defendants' Motion to Dismiss (Dkt # 32-1). The
18 first time the material was provided was in the Defendants' Appendix
19 filed in opposition to Plaintiffs' Motion for Summary Judgment filed on
20 January 11, 2012. (Dkt # 49-2 through 49-8)
- 21 3. The articles lack foundation.
- 22 4. The articles are hearsay.
- 23 5. The articles are not relevant.

24 Plaintiffs hereby move to strike and exclude from consideration any of the
25 aforementioned material submitted by the Defendants.

26 Respectfully Submitted on January 18, 2012.

27 /s/ Donald Kilmer
28 Donald Kilmer, Attorney for the Plaintiffs