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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 VITALE & ASSOCIATES, LLC, a
Colorado limited liability company,

Case No. 2:12-cv-01400-JAD-VCF

13 Plaintiff,

14 v.

**SUE LOWDEN'S RESPONSE TO
PLAINTIFF'S REQUEST FOR LEAVE
TO TENDER SUBSTITUTE AFFIDAVIT
IN OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

15 SUE LOWDEN, an individual, and SUE
LOWDEN FOR US SENATE,

16 Defendants.

17
18 Defendant Sue Lowden ("Lowden") hereby files her Response to Plaintiff's
19 Request for Leave of Court to Tender Substitute Affidavit in Opposition to Motion for
20 Summary Judgment.

21 MEMORANDUM OF POINTS AND AUTHORITIES

22 I. INTRODUCTION

23 Nearly two weeks after briefing closed, and well after Lowden filed her Reply
24 in Support of her Motion for Summary Judgment (Doc. 68) and her Objection to
25 Materials Unsupported by Admissible Evidence (Doc. 67), Vitale's counsel, John
26 Head, revised a previously filed affidavit that was unsigned and not notarized, and
27 filed a motion asking the court for permission to substitute a signed, revised affidavit
28 for the unsigned, draft affidavit. There is no procedure to allow a party to substitute

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1 a previously filed, unsigned, and draft affidavit for a later revised, signed, and
2 notarized affidavit. Moreover, there is no recognized procedure whereby a party can
3 re-contour facts to benefit its case after the close of briefing on a matter, especially
4 under the guise that the original version of facts that were proffered just could not be
5 verified, reviewed, and signed by the affiant within the generous time frame allowed
6 by rule and a court order extending time to oppose a motion for summary judgment.

7 Plaintiff's tactic here is, frankly, litigation abuse.

8 If this Court were to grant plaintiff's request, there would be no reason for the
9 summary judgment rule to exist because an opposing party can simply offer a draft
10 affidavit with facts that it wished existed, but it could not verify, and then after the
11 close of briefing, submit a wholesale revision of the facts without any risk of
12 inconsistency since the first affidavit was unsigned and not sworn—i.e., not even an
13 affidavit.

14 If parties opposing motions for summary judgment can simply file unsigned,
15 draft affidavits and later ask the court to substitute an affidavit crafted after
16 reviewing the movant's response, the summary judgment rule is mocked, as is its
17 requirement that the opposing party offer—in its opposition—evidence to support its
18 position. This Court should not accommodate, much less reward, a flagrant violation
19 of court rules and should instead find plaintiff's tactic to be what it is—a bad faith
20 violation of Rule 56(h) that merits sanctions. At a minimum, this Court should reject
21 Vitale's request to substitute a later revised, signed, and notarized affidavit after the
22 close of briefing.

23 **II. LEGAL ARGUMENT**

24 Plaintiff Vitale & Associates, LLC ("Vitale" or "plaintiff") seeks permission to
25 substitute a signed, notarized, and revised affidavit in the place of an unsigned,
26 unnotarized, and draft affidavit that was previously filed. See Doc. 70. Vitale cites
27 to Rule 56(d) of the Federal Rules of Civil Procedure and Lujan v. Nat'l Wildlife
28

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1 Fed'n, 497 U.S. 871 (1990) to support its request. However, neither authority
2 supports Vitale's request.

3 On March 28, 2014, Vitale filed its Response to Lowden's Motion for Summary
4 Judgment that included an unsigned and unnotarized Affidavit of Robert Uithoven in
5 Opposition to Motion for Summary Judgment. See Doc. 62-32. Instead of seeking
6 even more time to respond to Lowden's Motion for Summary Judgment, with Vitale
7 having previously requested and received an enlargement of time, Vitale decided to
8 file the unsigned draft affidavit because the execution of the affidavit was, according
9 to him, merely "a formality." See Doc. 58, Doc. 60, Doc. 62-32, and Doc. 70 at 2.

10 Importantly, no procedure exists to allow a party to replace a previously filed
11 unsigned, draft affidavit with a signed, notarized and later revised affidavit. When
12 Vitale's counsel, John Head, filed the Response to Sue Lowden's Motion for Summary
13 Judgment, which included the unsigned, draft affidavit, he represented to the Court
14 that the filing was not for any improper purpose. See Fed. R. Civ. P. 11. He also did
15 not bother to draft a footnote saying that a signature on the draft affidavit was
16 forthcoming, or to otherwise notify the court of any of the alleged travel and affiant
17 issues he raises in his motion. Instead, plaintiff filed a draft of an affidavit that it
18 hoped someone would sign, and then revised the actual affidavit after the close of
19 briefing so that it could tailor the facts to accommodate its position without
20 subjecting the affiant to a penalty of perjury.

21 Moreover, plaintiff's filing of an unsigned, draft affidavit has needlessly
22 increased the cost of litigation by having forced the parties to engage in more motion
23 practice. And, plaintiff's motion for leave is clearly without merit. Contrary to
24 Vitale's assertion, Rule 56(d) of the Federal Rules of Civil Procedure does not allow
25 Vitale to substitute an updated and properly signed and notarized affidavit for an
26 unsigned, draft affidavit. Vitale likely cites Rule 56(d) for the proposition that "[i]f a
27 nonmovant shows by affidavit or declaration that, for specified reasons, it cannot
28 present facts essential to justify its opposition the court may . . . allow time to obtain

1 affidavits or declarations” Fed. R. Civ. P. 56(d)(2). However, instead of
2 complying with the Federal Rules of Civil Procedure by submitting a declaration of
3 counsel stating that it needed additional time to obtain an affidavit to present
4 essential facts to support its opposition, Vitale decided to just file a draft of an
5 affidavit, probably hoping it would slip by without objection. That is simply not the
6 procedure allowed, and the court should not allow the rule to be vitiated by accepting
7 Vitale’s “do it anyway and see what happens” procedure.

8 Next, in Lujan, the Supreme Court affirmed the district court’s decision in
9 declining to admit affidavits that were untimely. Lujan, 497 U.S. at 894–95. The
10 Supreme Court noted that “any extension of a time limitation must be ‘for cause
11 shown.’” Id. at 896. “[A]ny *post* deadline extension must be ‘upon motion made,’ and
12 is permissibly only where the failure to meet the deadline ‘was the result of excusable
13 neglect.’” Id. (emphasis in original). Here, Vitale’s explanation fails to demonstrate
14 excusable neglect. Instead, it supports a finding that Vitale’s counsel, John Head,
15 violated Rule 11 of the Federal Rules of Civil Procedure and that he had an
16 opportunity to ask for yet another extension of time, but chose to not do so.
17 Specifically, the filing of an unsigned, unnotarized, and draft affidavit is certainly an
18 improper purpose that needlessly increases the cost of litigation. See Fed. R. Civ.
19 P. 11(b).

20 This Court should not accept Vitale’s untimely affidavit that was revised after
21 the motion for summary judgment was completed. See Lujan, 497 U.S. at 895;
22 Doc. 71 at 2. If the Court were to allow Vitale to substitute a previously unsigned,
23 unnotarized and draft affidavit with an affidavit revised after the completion of
24 briefing, there would be no reason for any nonmovant to cite to particular parts of
25 materials in the record to support the assertion that a fact is genuinely disputed.
26 Instead, parties opposing a motion for summary judgment can draft fictional
27 affidavits without consulting the affiant and later submit a revised affidavit with the
28 benefit of reviewing the completed motion for summary judgment briefing. This

1 Court should reject Vitale's request to substitute its unsigned, unnotarized, and draft
2 affidavit with a signed, notarized, and revised affidavit.

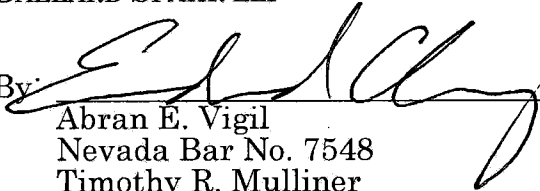
3 III. CONCLUSION

4 Even though Vitale knew Robert Uithoven's affidavit was unsigned,
5 unnotarized and in draft form, Vitale elected to file it. Vitale should have, but did
6 not, make a second request for additional time to oppose the motion for summary
7 judgment, and instead, apparently decided to see if the unsigned affidavit would just
8 slip through the process. Having been called out via objection, Vitale seeks the
9 Court's permission to file a newly crafted affidavit that was revised with the benefit
10 of the completed motion for summary judgment briefing. Vitale has not
11 demonstrated excusable neglect, and even if he did, the manner in which he
12 approached this issue was improper. More importantly, there is no procedural
13 mechanism by which to allow a party to take a test run via an unsigned draft of an
14 affidavit, then to substitute a revised, recrafted, and now signed affidavit in an effort
15 to create a genuine issue of material fact. If a party can proceed in that manner,
16 then there is no need for Rule 56 to exist.

17 For these reasons, defendant Lowden respectfully requests that plaintiff's
18 motion be denied.

19 Dated: April 30, 2014.

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21 By: 

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CERTIFICATE OF SERVICE

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I hereby certify that on the 30 day of April, 2014, and pursuant to Fed. R. Civ. P. 5(b), a true and correct copy of the foregoing **Sue Lowden's Response to Plaintiff's Request for Leave of Court to Tender Substitute Affidavit in Opposition to Motion for Summary Judgment**, was electronically filed and served through the Court's CM/ECF system, which will send a notice of electronic filing to the following:

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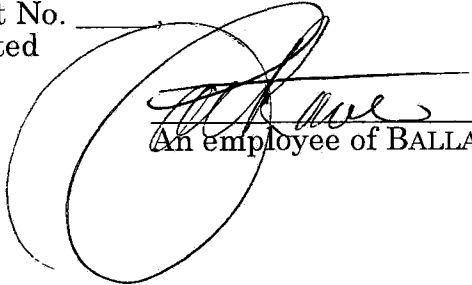
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