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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN E. KROLL,

Plaintiff,

vs.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, a/k/a IVGID, a governmental subdivision of the State of Nevada; et al.,

Defendants.

Case No. 3:08-cv-00166-ECR-RAM

Plaintiff's Reply to Defendants' Opposition to Motion to Strike Affidavits of Bill Horn and Ramona Cruz

and

Certificate of Service

Defendants have moved pursuant to FRCP Rule 12(b)(1) to dismiss Plaintiff's First Amended Complaint on subject-matter jurisdictional grounds, attaching two Affidavits in support of their Motion. They have thus made a factual attack rather than a facial attack on subject matter jurisdiction. The difference between the two is explained in *Safe Air for Everyone v. Meyer,* 373 F.3d 1035 (9th Cir. 2004)(emphasis added):

> "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, **in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction."** Id. at 1039. **If the moving party converts "the motion to dismiss into a factual motion by presenting affidavits** or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.*

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Thus, like other Rule 12 motions to dismiss, when "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." FRCP Rule 12(d). Defendants' Opposition contention that "the provisions of FRCP 56(e) do not apply in the instant matter" is therefore in error.

Plaintiff's Motion to Strike the Affidavits of Bill Horn and Ramona Cruz asks this Court to exclude these matters outside the pleadings because they are not made on personal knowledge and do not meet the evidentiary standard required by Rule 56(e). If they are so excluded, we return to the ordinary Rule 12 rubric that the allegations of the complaint are taken as true, and all reasonable inferences therefrom must be made in Plaintiff's favor for purposes of evaluating a dismissal thereof. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). By making their attack factual rather than facial, Defendants concede that Plaintiff alleges his federal jurisdictional claims well enough to overcome a Motion to Dismiss as a matter of law. As stated in *Wolfe*:

> Where a defendant in its motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) asserts that the allegations in the complaint are insufficient to establish subject matter jurisdiction as a matter of law (to be distinguished from a claim that the allegations on which jurisdiction depends are not true as a matter of fact), we take the allegations in the plaintiff's complaint as true. *Id*.

Even if this Court finds the challenged Affidavits sufficient to support the Defendants' factual allegations and also finds that based thereon this Court somehow lacks jurisdiction to proceed further herein, Plaintiff has filed the Affidavit of Ronald L. Code dated May 2, 2008 as well as Plaintiff's own Affidavit dated May 6, 2008 attached to the "Emergency Motion to Enjoin Defendant IVGID's Policy No. 136 Regulating Speech as Void on its Face" directly contradicting the Affidavit of Bill Horn. Plaintiff has thus fulfilled his obligation to "furnish affidavits or other evidence necessary to satisfy his burden of establishing subjecting matter jurisdiction" when a 12(b)(1) movant goes outside the pleadings as here. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1067 (2004). *See also* FRCP Rule 56(e)(2).

Movant agrees with Defendants that an Affidavit need not necessarily recite that it is made on personal knowledge where that fact appears clearly from the document read as a whole. (See page 1 of Plaintiff's Memorandum supporting his Motion to Strike Affidavits filed May 3, 2008). But here, that reading shows affirmatively that Ramona Cruz's Affidavit is based on hearsay, not personal knowledge, and Defendants seem to recognize that in their Opposition, where they claim at page 2 that the Affiant's 15-year employment with defendant INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT "provides her access to the information concerning the

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District's finances which, in turn, provides the basis for the information set forth in her affidavit. Plain and simply," say these Defendants, "from a review of the records of IVGID Ms. Cruz was able to provide the information she did in her affidavit."

This is rank hearsay and not the proper way to prove Official Records. First, the Affiant refers to certain unidentified "records of IVGID" from which she draws her "clear" conclusion as to what they say. FRCP Rule 56(e)(1) provides that

> **If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit.**

That requirement has not been met here. *See also* Rule 1005, Federal Rules of Evidence.[1] It is, in addition, fundamental that the best evidence of the contents of whatever unidentified IVGID records Ms. Cruz is relying upon is not her testimony but the writing itself. FRE Rule 1002[2]. Nor have the criteria set forth in FRCP Rule 44: "Proving an Official Record[3] been met here.

It is curious that Ms. Cruz's "substitute affidavit" as Defendants call it at page 2 of their Opposition is completely different from her earlier Declaration. The May 21, 2008 "Substitute Affidavit" replaces the foundation for her first Affidavit dated April 30, 2008 — then declared under Penalty of Perjury to have been made "to the best of my recollection" — with the statement that her conclusions now come "from my review of the records of IVGID." Does that stark change of foundational rationale in a sworn Affidavit not of itself reveal the untrustworthiness of both of these Affidavits, requiring their exclusion from consideration in Defendants Rule 12(b)(1)

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[1] Rule 1005. Public Records
The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

[2] Rule 1002. Requirement of Original
To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

[3] Rule 44. Proving an Official Record
(a) Means of Proving.
(1) Domestic Record.
Each of the following evidences an official record — or an entry in it — that is otherwise admissible and is kept within the United States, any state, district, or commonwealth, or any territory subject to the administrative or judicial jurisdiction of the United States:
(A) an official publication of the record; or
(B) a copy attested by the officer with legal custody of the record — or by the officer's deputy — and accompanied by a certificate that the officer has custody. The certificate must be made under seal:
(i) by a judge of a court of record in the district or political subdivision where the record is kept; or
(ii) by any public officer with a seal of office and with official duties in the district or political subdivision where the record is kept.

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Motion to Dismiss? Movant respectfully submits that it does.

As to the Affidavit of Bill Horn also challenged herein, it is difficult to know what to make of Defendants' footnoted declaration that

> "the affidavit of Ronald L. Code does nothing to refute the affidavit of Bill Horn. Nowhere does Mr. Code state either he or anyone else asked to enter the IVGID beaches to engage in activities protected by the First Amendment. More importantly, nowhere does Mr. Code testify that Plaintiff requested he be granted access to IVGID beaches to engage in activities protected by the First Amendment."

Mr. Code's Affidavit says very specifically that on August 2, 2005 he and another man had gone to each of the Beach Properties to exercise their First Amendment rights and were turned away by the guards on the orders of Mr. Horn's office. Do the Defendants herein somehow contend that Mr. Code was *not* cloaked with the protections of the First Amendment when he tried to gain entry that August 2nd "wearing a T-shirt which made a policy statement regarding Yucca Mountain" and with the stated purpose "to communicate my strong feelings against nuclear dumping in Nevada to my neighbors using these beach parks" at that time? When Mr. Code wrote his letter of August 3, 2005 the next day demanding that General Manager Bill Horn "immediately change this policy" because "it directly violates my First Amendment rights", could Mr. Horn have possibly been in any doubt about Mr. Code's desire to enter the IVGID beaches to engage in activities protected by the First Amendment"? And two months later, on October 3, 2005, Mr. Code wrote to Mr. Horn protesting the long delay in IVGID's promised response to his First Amendment complaints and noted "that by taking no action, the Board continues to deny me my rights." Indeed in all the correspondence attached to the May 2, 2008 Ronald Code Affidavit this gentleman says the same thing in different ways, so how can the Defendants pretend now that "nowhere does Mr. Code state either he or anyone else asked to enter the IVGID beaches to engage in activities protected by the First Amendment"? Of course it is not for the Defendants but for this Court to determine just what it is these witnesses are saying in their Affidavits and whether they say it in a way that establishes that they personally know what they are talking about. The Affidavit of Bill Horn does not do that.

Defendants contend that it is even "more important" that Mr. Code's Affidavit does not declare that Plaintiff ever requested and was denied access to the IVGID Beaches . Why would this be in Mr. Code's Affidavit? He can only testify as to matters about which he has personal knowledge, and his Affidavit aims to refute Mr. Horn's "best recollection" that as General Manager he never had a request from people like Mr. Code to practice their constitutional rights on

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the Beach Properties, and never prevented them from doing so. Plaintiff can speak for himself on this issue, as he does in his May 6th Affidavit mentioned above, and throughout his Complaint, such as Paragraph 60 setting forth his failed efforts to gain entry to the Beaches on the 4th of July to celebrate with his neighbors Free Speech itself on the nation's birthday.

Plaintiff contends in this Motion to Strike Affidavits that if Bill Horn were required to remove his "to the best of my recollection" qualification to each of the statements of fact he purports to be making in his Affidavit of April 30, 2008, a very different picture of the actual facts involved in this lawsuit would emerge. To permit him such a qualification, the Court would be removing the sting of the Penalty of Perjury that impresses upon all witnesses the overwhelming importance of telling the truth in any legal proceeding, and the serious consequences for deliberately not doing so. Mr. Horn's Affidavit is fatally attenuated in this regard and must be stricken.

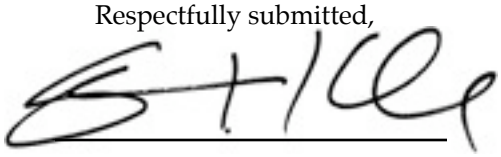
Conclusion

The Affidavits of Bill Horn and Ramona Cruz attached to Defendants' Motion to Dismiss Complaint filed herein on April 30, 2008, and — if the Court chooses to recognize the "substitute affidavit" of Ramona Cruz filed with their Opposition dated May 21, 2008 — all fail to " be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated" as prescribed by FRCP Rule 56(e)(1). They are thus inadmissible to support Defendants' factual challenge to this Court's jurisdiction over Plaintiff's Complaint under FRCP Rule 12(b)(1).

Plaintiff prays that his Motion to Strike the Affidavits of Bill Horn and Ramona Cruz filed herein on May 3, 2008 be granted.

DATED: at Crystal Bay, Nevada this 23rd day of May, 2008.

Respectfully submitted,



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CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 5(b) FRCP, I certify that I am the attorney for Plaintiff in the above entitled action, and that on this date I caused a true and correct copy of the "**Plaintiff's Reply to Defendants' Opposition to Motion to Strike Affidavits of Bill Horn and Ramona Cruz**" herein to be served upon the parties or attorneys by electronically filing the same with this Court pursuant to and in compliance with its CM/ECF filing system, to which the following named attorney for all named defendants is a signatory:

Stephen C. Balkenbush, Esq.
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
6590 South McCarran Blvd. Suite B
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DATED: this 23rd day of May, 2008.

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