

1 Robert R. Beltz, State Bar No. 006297
 John P. Kaites, SBN 012767
 2 Tiffany F. Broberg, SBN 024066
 RIDENOUR, HIENTON, KELHOFFER,
 3 LEWIS & GARTH, P.L.L.C.
 201 North Central Avenue, Suite 3300
 4 Phoenix, Arizona 85004-1052
 (602) 254-9900

5 *Attorneys for Defendant Joseph Arpaio*

6
 7 **IN THE UNITED STATES DISTRICT COURT**
 8 **FOR THE DISTRICT OF ARIZONA**

9
 10 CHARLES HALE, aka LEONARD HALE,
 11 Plaintiff,
 12 v.
 13 JOSEPH M. ARPAIO,
 14 Defendant.

NO. CV 05-0175-PHX-SRB

**MOTION TO STRIKE PLAINTIFF’S
 STATEMENT OF FACT IN
 OPPOSITION TO DEFENDANT’S
 MOTION FOR SUMMARY
 JUDGMENT
 AND
 DEFENDANT’S REPLY IN
 SUPPORT OF MOTION FOR
 SUMMARY JUDGMENT**

(Assigned to the Hon. Susan R. Bolton)

(Oral Argument Requested)

18 Defendant Joseph M. Arpaio (“Defendant”), by and through undersigned counsel,
 19 and pursuant to Rules 12(f) and 56 (e), Federal Rules of Civil Procedure (“R.Civ.P.”),
 20 and Local Rule 56.1, United States District Court, District of Arizona (“LR Civ.”),
 21 hereby respectfully requests that this Court strike Plaintiffs’ Response to Defendant’s
 22 Motion for Summary Judgment, and in the alternative hereby replies to Plaintiffs’
 23 Statement of Fact in Opposition to Defendant’s Motion for Summary Judgment
 24 (Plaintiff’s “Response”).
 25
 26

1 Plaintiff Hale fails to raise an issue of fact to preclude summary judgment for
2 Defendant in this matter. Additionally, Plaintiff's Response is in non-conformance with
3 R. Civ. P. 56(e) and LR Civ. 56.1. These Rules require a party moving for summary
4 judgment to set forth separately from the memorandum of law, and in full, the specific
5 facts on which that party relies in support of the motion, and that specific facts be set
6 forth in serial fashion and not in narrative form. Plaintiff's Response completely omits
7 both the Memorandum and Separate Statement of Facts, as required by the Rules, and
8 only sets forth a self-serving declaration that is insufficient to raise an issue of fact and
9 that sets forth alleged facts not in evidence.
10
11

12 Plaintiff is not exempt from the Rules of Civil Procedure governing the filing of
13 oppositions to summary judgment.¹ Plaintiff even avers to understand these rules.²
14 Plaintiff's Response should be stricken for its substantial non-compliance with the Rules.
15 Additionally, Defendant's Statement of Facts in support of his Motion for Summary
16 Judgment should be deemed admitted and Defendant's Motion for Summary Judgment
17 be granted for lack of a genuine issue of material fact. This Motion and Reply is
18 supported by the accompanying Memorandum of Points and Authorities, the Statement
19 of Facts in Support of Defendant's Motion for Summary Judgment previously filed with
20
21
22

23 ¹ The liberal standard applied to pro se plaintiffs does not relieve a plaintiff of his duty to meet the requirements
24 necessary to defeat a motion for summary judgment. *Veloz v. New York*, 339 F.Supp.2d 505 (S.D.N.Y.2004),
affirmed 178 Fed.Appx. 39, 2006 WL 1082836.

25 ² By Plaintiff's own admission in Plaintiff's Response, "the Plaintiff understands what Summary Judgment entails."
26 *See*, Plaintiff's Response at Page 1, paragraph 3.

1 this Court, and the rest of the Court's file in this matter, all incorporated herein by this
2 reference.

3 **RESPECTFULLY SUBMITTED** this 16th day of August, 2007.

4
5 RIDENOUR, HIENTON, KELHOFFER,
6 LEWIS & GARTH, P.L.L.C.

7 By s/ Tiffany F. Broberg
8 Tiffany F. Broberg
9 Attorney for Defendant Joseph Arpaio

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Motions for Summary Judgment and Responses Thereto Must Comply with**
12 **the Federal Rules of Civil Procedure and District Court Rules of Practice.**

13 Plaintiff's Response fails to comply with the rules governing motions for
14 summary judgment and responses thereto. In accordance with Rules 12(f) and 56(e), R.
15 Civ. P., Plaintiffs' Response should be stricken because Plaintiff fails to support his
16 position with any reference to any evidence in this matter. *See* Rule 12(f), R.Civ.P.
17 (allows an "insufficient defense, or any redundant, immaterial, impertinent, or scandalous
18 matter" to be stricken from the record).

19 Rule 56(e) provides, in part, that "[s]upporting and opposing affidavits shall be
20 made on personal knowledge, shall set forth such facts as would be admissible in
21 evidence, and shall show affirmatively that the affiant is competent to testify to the
22 matters stated therein." Further, "the adverse party's response, by affidavits or as
23 otherwise provided in this rule, must set forth specific facts showing that there is a
24 genuine issue for trial. If the adverse party does not so respond, summary judgment, if
25
26

1 appropriate, shall be entered against the adverse party.”

2 In the case at hand, the Plaintiff’s Response sets forth neither a statement of facts
3 nor a memorandum of law in support of his opposition to Defendant’s Motion for
4 Summary Judgment. The Response, although it is titled as a “Statement of Fact,” is
5 comprised of only a “Declaration” of Plaintiff Hale. There is no separate statement of
6 facts, nor is there a controverting statement of facts. There are no exhibits, nor are there
7 references to the exhibits found in Defendant’s Statement of Facts in Support of the
8 Motion for Summary Judgment.
9
10

11 Additionally, Plaintiff’s Response fails to cite to any specific portion of the record
12 where support for the few facts cited by Plaintiff can be found. In responding to a
13 Motion for Summary Judgment, though the responding party may show its position by
14 affidavit or by memorandum, and the memorandum must make reference to some
15 evidence that is supported by a separate statement of facts.³ Plaintiff’s Response fails to
16 refer the Court to any portion of the record where his asserted facts may be found,
17 therefore the affidavit form of the memorandum of law is insufficient to satisfy the Rules
18 of Civil Procedure and Local Practice.⁴ Since Plaintiff’s Response sets forth neither a
19 separate statement of facts nor a substantially compliant memorandum or affidavit of
20 laws, the Response is deficient and should be stricken in its entirety.
21
22
23

24 ³ See, *Maxwell v. Fidelity Financial Services, Inc.*, 184 Ariz. 82, 86, 907 P.2d 51, 55 (1995), (a party can respond to
25 a motion for summary judgment by memorandum, but the memorandum must reference depositions, answers to
26 interrogatories, or admissions on file to comply with the rule).

⁴ Defendant also objects to the numerous hearsay assertions set forth without any foundation in Plaintiffs’ Response,

1 **II. Defendant's Statement of Facts is Uncontroverted by Plaintiff's Response,**
2 **Therefore Facts Are Deemed Admitted.**

3 Local Rule 56.1(b), United States District Court, District of Arizona sets forth
4 requirements for opposing motions for summary judgment. In addition to memorandum
5 of law, Plaintiff's opposing pleadings must contain a controverting statement of facts,
6 setting forth:

7 (1) for each paragraph of the moving party's separate
8 statement of facts, a correspondingly numbered paragraph
9 indicating whether the party disputes the statement of fact set
10 forth in that paragraph and a reference to the specific
11 admissible portion of the record supporting the party's
12 position if the fact is disputed, and (2) any additional facts
13 that establish a genuine issue of material fact or otherwise
14 preclude judgment in favor of the moving party.

15 L.R. Civ. 56.1(b). Further,

16 Each numbered paragraph of the statement of facts set forth
17 in the moving party's separate statement of facts shall, unless
18 otherwise ordered, be deemed admitted for purposes of the
19 motion for summary judgment if not specifically controverted
20 by a correspondingly numbered paragraph in the opposing
21 party's separate statement of facts.

22 *Id.* Plaintiff's Response sets forth neither a controverting statement of facts nor a
23 separate statement of facts in compliance with Rule 56, R. Civ. P. that could be
24 reasonably considered controverting. Therefore, Defendant respectfully requests this
25 Court deem the facts set forth in Defendant's Statement of Facts in Support of Motion for
26 Summary Judgment admitted for purposes of the motion, and that the Motion for
Summary Judgment be granted.

including statements allegedly made by Defendant to the prison staff and others, and alleged facts not disclosed or otherwise supported by the evidence. See argument below.

1 **III. Plaintiff's Response Fails to Set Forth an Issue of Fact to Preclude Summary**
2 **Judgment In Favor of Defendant.**

3 Even if Plaintiff's Response were not completely deficient under Rule 56, R. Civ.
4 P. and LR Civ. 56.1, the Response fails to establish a genuine issue of material fact or
5 otherwise preclude judgment. The Plaintiff's Response is a self-serving affidavit, which
6 can not create an issue of fact as a matter of law. Further, Plaintiff cites to references that
7 are hearsay and/or and have not been previously disclosed during discovery. Therefore,
8 Plaintiff's Response fails on the merits in addition to the procedural defects, and
9 Defendant's Motion for Summary Judgment should be granted.
10

11 Where party is proceeding pro se, the Court has obligation to read his supporting
12 papers liberally, but a pro se party's bald assertion, completely unsupported by evidence,
13 is not sufficient to overcome motion for summary judgment.⁵ Nor is a party's conclusory
14 affidavit enough to defeat a motion for summary judgment without factual support in the
15 record.⁶
16

17
18 In order to satisfy the requirement of Rule 56(e), an affidavit must be based upon
19 personal knowledge, set forth facts that would be admissible in evidence, and show that
20 the affiant is competent to testify to the matters stated therein.⁷ It is not enough that an
21 affiant assert that he or she has personal knowledge of the facts recited; the facts
22

23
24 ⁵*Lee v. Coughlin*, 902 F.Supp. 424 (S.D.N.Y.1995), *reconsideration granted* 914 F.Supp. 1004, *on reconsideration*
26 F.Supp.2d 615.

25 ⁶*Sea-Land Service, Inc. v. Lozen Intern., LLC.*, 285 F.3d 808 (9th Cir. 2002), *discussing See McDonnell v. Cournia*,
990 F.2d 963, 969 (7th Cir.1993) ("Self-serving assertions without factual support in the record will not defeat a
26 motion for summary judgment.").

⁷*Allen v. International Telephone and Telegraph Corp.*, 164 F.R.D. 489, 492 (D.Ariz.,1995).

1 themselves must show that they are matters known to the affiant personally and are not
2 based upon hearsay or upon “information and belief.”⁸ This Circuit has held that self-
3 serving affidavits are cognizable to establish a genuine issue of material fact, but only if
4 they state facts based on personal knowledge and are not too conclusory.⁹ A conclusory,
5 self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient
6 to create a genuine issue of material fact.¹⁰

8 Further, to the extent that Plaintiff’s declaration says anything substantive, it is
9 inadmissible because it contradicts his earlier deposition testimony.¹¹ Under the “sham”
10 affidavit rule, a party cannot create an issue of fact precluding summary judgment by an
11 affidavit contradicting his prior deposition testimony.¹²

13 The claims in Plaintiff’s declaration are all either contradictory to earlier claims
14 and assertions, overly conclusory without a factual basis, based upon inadmissible
15 hearsay or someone else’s knowledge, or based upon documents or assertions not
16 properly disclosed during discovery in this matter. The statements in the “Declaration”
17 are not supported by the evidence in this case, nor do they raise an issue of material fact.

19
20 Regarding Count I of the Complaint, the Complaint asserts that Plaintiff suffered
21 headaches and a weight loss of sixteen pounds from an insufficient diet. (*See*, paragraph
22 2 of Defendant’s Statement of Facts in Support of Motion for Summary Judgment,
23

24 ⁸ *E.g., Cermetek, Inc. v. Butler Aypak, Inc.*, 573 F.2d 1370, 1377 (9th Cir.1978).

25 ⁹ *See United States v. Shumway*, 199 F.3d 1093, 1103-04 (9th Cir.1999).

26 ¹⁰ *F.T.C. v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997), *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.1993); *United States v. One Parcel of Real Property*, 904 F.2d 487, 492 n. 3 (9th Cir.1990)

1 previously filed in this matter, hereinafter “SOF ¶ ___”). Plaintiff’s explanation for the
2 insufficiency of his diet was that there was not enough food to support the calories he
3 believes he requires, (SOF ¶¶ 3, 4, 5), although his current Response complains of poor
4 nutritional value causing heart attacks, strokes and hypertension. In addition, Plaintiff’s
5 complaint was that he was hungry, (SOF ¶ 7), though his Response claims a sensitive
6 stomach. These statements are contradictory, thus this portion of the Response must be
7 stricken. Further, the statements regarding a news interview on the local ABC affiliate
8 regarding prison nutrition are hearsay and not personally known to the Plaintiff.¹³

11 As to Count II, Plaintiff’s Response sets forth the same conclusory allegation
12 about unsanitary conditions at the Durango Jail that he made in his Complaint, and still
13 does not provide evidentiary support for his conclusions. Further, Plaintiff claims anew
14 in the Response that he complained of the bug bites to a detention officer and quotes that
15 officers’ response, but this officer’s name or description was never disclosed to
16 Defendant as a potential witness. The alleged quote must be stricken as hearsay, and
17 since the detention officer was never disclosed, the Defendant was not given the
18 opportunity to depose him as to these allegations. Therefore, this portion of the Response
19 must be stricken as inadmissible and unsupported by the evidence.

23 ¹¹ *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217 (9th Cir 2005)

24 ¹² *Id.*

25 ¹³ These statements are also objectionable for lack of foundation and earlier disclosure. A search of the ABC 15
26 website, www.ABC15.com, found no results, therefore the existence of this news report or the time in which the
report was made cannot be substantiated. Further, the nutritionist alleged to be on this newscast was not disclosed
as a potential witness, therefore the claims as to nutrition in the jails cannot be substantiated or refuted. Also, the
time frame and location in which the nutrition study was allegedly performed is not known to Defendants, but it is

1 As to Count III, Plaintiff's Response claims that overcrowding was the reason for
2 the riots and fights, which caused his alleged injuries. However, Plaintiff stated in his
3 deposition that the fights were about anything and everything, and that the only incident
4 he was involved in occurred because of racial issues, not overcrowding. (SOF ¶¶ 22-25).
5 Therefore, this portion of the Response is baldly contradictory and must be stricken.
6

7 **IV. Without Opposition Thereto, Defendant's Motion for Summary Judgment**
8 **Should be Granted.**

9 Plaintiff's Response is in substantial non-compliance with Rule 56(e), R.Civ.P.
10 and LR Civ. 56.1. As such, this submission is deficient and in as much, should be
11 stricken. Defendant's Motion for Summary judgment is therefore unopposed. Further,
12 under LR Civ. 56.1(b), the facts set forth in Defendant's Statement of Facts should be
13 deemed admitted. Without a sufficient response, "summary judgment, if appropriate,
14 shall be entered against the adverse party." R.Civ.P. 56(e).
15

16 As set forth in Defendant's Motion for Summary Judgment, Plaintiff has failed to
17 show any actual injury attributable to the Durango jail facility as alleged in his
18 Complaint. Furthermore, Plaintiff has failed to show physical injury as required under
19 the Prison Litigation Reform Act ("PLRA"), 42 U.S.C § 1997e(e), to support his claim of
20 mental and emotional injuries. Therefore, Defendant respectfully requests this Court
21 grant Defendant's Motion for Summary Judgment as both materially unopposed, and
22 because there are no genuine issues of fact raised by Plaintiff's Response to preclude
23

24
25
26 likely not to be during Plaintiff's detention in the Durango Jail.

1 summary judgment at this time.

2 **V. Conclusion**

3 Because of the foregoing, Plaintiff's Response should be stricken as being a
4 procedurally and factually inadequate opposition to a summary judgment motion.
5 Plaintiff has no separate memorandum of law and statement of facts, nor does he cite to
6 the evidence accumulated in this matter in support of his bald assertions. Plaintiff's
7 attempts to raise an issue of fact to preclude summary judgment are substantively and
8 procedurally insufficient. Therefore, Defendant respectfully requests this Court to strike
9 Plaintiff's Response and grant Defendant's Motion for Summary Judgment as it is
10 unopposed. In the alternative, Defendant requests its Motion for Summary Judgment be
11 granted because Plaintiff's Response fails to raise a genuine issue of material fact to
12 preclude summary judgment in this matter.
13
14
15

16 **RESPECTFULLY SUBMITTED** this 16th day of August, 2007

17
18 RIDENOUR, HIENTON, KELHOFFER,
19 LEWIS & GARTH, P.L.L.C.

20 By s/ Tiffany F. Broberg
21 Tiffany F. Broberg
22 Chase Tower
23 201 N. Central Avenue
24 Suite 3300
Phoenix, Arizona 85006
Attorneys for Defendant Joseph Arpaio

25 **ORIGINAL** of the foregoing electronically
26 filed this 16th day of August, 2007 with:

1 Clerk of the U.S. District Court
2 Arizona District Court
3 401 West Washington Street, Suite 130, SPC 1
4 Phoenix, Arizona 85003-2118

5 **COPY** of the foregoing hand-delivered to:

6 The Honorable Susan Bolton
7 United States District Court
8 Sandra Day O'Connor U.S. Courthouse
9 401 West Washington Street, SPC 59
10 Phoenix, AZ 85003-2158

11 **COPY** of the foregoing sent via U.S. Mail to:

12 Charles aka Leonard Hale
13 #047036
14 A.S.P.C. Yuma - Cheyenne
15 P.O. Box 13005
16 Yuma, Arizona 85366
17 PRO SE

18 By: s/ Jil Chandler
19 Jil Chandler

20
21
22
23
24
25
26