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17 **UNITED STATES DISTRICT COURT**
18 **SOUTHERN DISTRICT OF CALIFORNIA**
19 **SAN DIEGO DIVISION**

20 IN RE: BANK OF AMERICA
21 CALIFORNIA UNEMPLOYMENT
22 BENEFITS LITIGATION
23
24
25
26
27
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Case No. 21-MD-02992-GPC-MSB

**RESPONSE IN OPPOSITION TO
PLAINTIFFS' *EX PARTE*
MOTION FOR LEAVE TO FILE
SURREPLY TO DEFENDANT'S
MOTION FOR A PROTECTIVE
ORDER.**

Ctrm: 2D – 2nd Floor
Judge: Hon. Gonzalo P. Curiel

1 Plaintiffs’ *Ex Parte* Motion for Leave to File a Surreply (ECF 479, “Motion”
2 or “Mot.”) is both procedurally deficient and substantively without merit. Plaintiffs’
3 Motion does not comply with the Local Rule requirements for *ex parte* motions.
4 Moreover, the evidence that Plaintiffs believe merits a surreply was presented in
5 response to an argument raised in Plaintiffs’ opposition and is not “new”—it was
6 marked as an exhibit *by Plaintiffs* at a deposition this winter. Thus, Plaintiffs’ Motion
7 should be denied.

8 In any event, Plaintiffs’ proposed surreply is for naught because it continues
9 to completely ignore that Faiz Ahmad—the person to whom Mr. Moynihan
10 supposedly gave the “[REDACTED]” for the fraud filter—specifically and
11 unambiguously testified that [REDACTED]

12 [REDACTED] ECF 453
13 (“Motion for Protective Order”) at 7, 16; ECF 472 (“Reply”) at 1–3.

14 **I. Plaintiffs’ *Ex Parte* Motion Does Not Comply with Local Rule 83.3(g).**

15 As a preliminary matter, Plaintiffs’ Motion for Leave to File a Surreply (ECF
16 479) is not properly before the Court. Contrary to Local Rule 83.3(g)’s requirements,
17 Plaintiffs filed their motion on an *ex parte* basis without the requisite supporting
18 affidavit or declaration. *See* ECF 479. Plaintiffs, of course, could not comply with
19 the Local Rule because they made no attempt to notify BANA or its counsel of their
20 intent to file the motion, and have no reason for seeking *ex parte* relief that was not
21 permitted in the first place under the parties’ *agreed* briefing schedule (ECF 447).
22 *See* Local Rule 83.3(g). Plaintiffs’ procedural defaults alone warrant denial of the
23 relief sought in their Motion. *See Hammett v. Sherman*, 2020 WL 1908775, at *1
24 (S.D. Cal. Apr. 10, 2020) (denying *ex parte* motion where movant failed to attempt
25 to provide notice as required by Local Rule 83.3(g)).

26 **II. There Is No Basis for Plaintiffs to File a Surreply.**

27 Plaintiffs’ Motion should also be denied because Plaintiffs have not shown any
28 valid reason warranting a surreply. Courts “generally view motions for leave to file

1 a sur-reply with disfavor,” and deny such requests absent a “valid reason for such
2 additional briefing.” *Whitewater W. Indus., Ltd. v. Pac. Surf Designs, Inc.*, 2018 WL
3 3198800, *1 (S.D. Cal. June 25, 2018). Courts particularly deny requests for
4 surreplies where, as here, a “reply and exhibits are not misleading, nor [] present new
5 arguments, but rather provide a counter response” to the opposition brief. *Whitewater*
6 *W. Indus.*, 2018 WL 3198800, *1; *see also Valdez v. Zhang*, 2023 WL 11992434, at
7 *1 (S.D. Cal. Feb. 27, 2023).

8 Relevant here, Plaintiffs’ opposition brief articulated a speculative,
9 unsupported theory that Mr. Moynihan provided necessary approvals of the fraud
10 filter to Faiz Ahmad after a meeting on September 27, 2020. ECF 465 (“Opposition”)
11 at 12–15. BANA’s Reply responded to and refuted Plaintiffs’ theories, and offered
12 testimony and evidence in support. *See* ECF 472 (“Reply”) at 1–4; *see also* Mot. at
13 1 (conceding that BANA presented Ms. Bessant’s role and email to respond to
14 arguments and “inferences” raised in their opposition). Plaintiffs’ Motion points to
15 one piece of evidence, an email indicating [REDACTED]
16 [REDACTED] (Hoyle Decl. Ex. 18), and argues that this “new evidence” merits a
17 surreply. Mot. at 1. But Ms. Bessant’s email and [REDACTED] are
18 not “new evidence” presented at the “eleventh hour.” Indeed, Plaintiffs [REDACTED]
19 [REDACTED]
20 [REDACTED] *See*
21 Hoyle Decl. Ex. 20, Ahmad Tr. at 193:8–196:8 (testifying regarding Hoyle Decl. Ex.
22 18).¹ Thus, Plaintiffs’ Motion should be denied because the evidence cited in
23 BANA’s Reply “merely respond[s] to the arguments raised by [Plaintiffs] in their
24 opposition, which is in keeping with the nature and purpose of a response” and
25 “provides a counter response to [Plaintiffs’] allegations.” *Whitewater*, 2018 WL
26 3198800, at *1 (denying request for a surreply).

27
28 ¹ Despite knowing about this email for months, Plaintiffs never once sought to
depose Ms. Bessant. *See* ECF 473 (Hoyle Decl.) ¶ 13.

* * *

For the reasons stated herein, BANA respectfully requests that the Court deny Plaintiffs' *ex parte* Motion and request for leave to file a surreply.

Further, and in any event, the Court can reject the arguments raised in Plaintiffs' surreply on their face because Plaintiffs' continued speculation that Mr. Moynihan approved the fraud filter has no evidentiary support. *See* ECF 453 (Mot. for Protective Order) at 16–19; ECF 472 (Reply) at 1–4. Indeed, Plaintiffs' surreply continues to espouse the theory that the "[REDACTED]" to implement the fraud filter was sought and received by Faiz Ahmad. *See* Mot. at 2. At the same time, it continues to completely ignore Mr. Ahmad's testimony on this issue, in which he clearly and unambiguously testified that: [REDACTED]

[REDACTED] ECF 472 (Reply) at 1–3 (quoting Riffie Decl. Ex. 5, Ahmad 244:18–22, 93:25–94:20); ECF 453 (Mot. for Protective Order) at 7, 16 (citing the same). Thus, Plaintiffs already know the answer to the question posited by their surreply: Mr. Moynihan did *not* approve the fraud filter.

Dated: May 9, 2025

Respectfully submitted,

By: s/ Matthew L. Riffie

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Southern District of California by using the CM/ECF system on May 2, 2025. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: May 9, 2025

s/ Matthew L. Riffie