

DECLARATION OF JOANNE OSINOFF

I, Joanne Osinoff, hereby declare and state:

1. I am employed as an Assistant United States Attorney and Chief of the General Civil Section, in the Civil Division of the United States Attorney's Office for the Central District of California ("USAO"). My duties include supervision of the defense of civil actions against the United States, its agencies and officers.

2. I make this declaration based upon my personal knowledge of the facts and my review of official records of the USAO. If called to testify, I would and could do so.

3. I make this declaration in support of the Defendants' Opposition to the Plaintiff's Application for TRO filed in *Empyreal Enterprises d/b/a/ Empyreal Logistics v. United States of America, et al.*, CV 22-0094 JWH (SHK).

4. I learned of the filing of the complaint and application for temporary Restraining Order (TRO) in *Empyreal Enterprises*, supra, on Friday, January 14, 2022 at approximately 5:40 p.m. I did not personally receive any phone call or voicemail or email from Plaintiff regarding the filing of the complaint and TRO. Plaintiff made no attempt to provide notice to me or to engage in a meet and confer to discuss the claims or possible resolution. My name and title are listed on the USAO public website.

5. Plaintiff's counsel emailed copies of the complaint, the application, two declarations and proposed order to a general email box in the late afternoon on the Friday before a long holiday weekend. I have access to this general email box, however, I receive no computer notification or notification of any kind when an email is received therein.

6. Friday, January 14, 2022 is the Friday before Martin Luther King Day, which falls on Monday, January 17, 2022 and is designated a Federal holiday. Federal offices, including the USAO, are closed on Monday, January 17, 2022. It is difficult to reach representatives of client agencies on a Friday afternoon and that difficulty is compounded by the holiday weekend.

7. Attached hereto as Exhibit 1 is a true and correct copy of the complaint

1 filed on September 3, 2021, in *United States of America v. \$165,620.00 in United States*
2 *Currency*, 6:2021-cv-01215 HLT (D. Kansas).

3 8. Attached hereto as Exhibit 2 is a true and correct copy of the Warrant of
4 Arrest In Rem and Order for Notice also filed in *United States of America v.*
5 *\$165,620.00 in United States Currency*, 6:2021-cv-01215 HLT (D. Kansas).

6 I declare under penalty of perjury that the foregoing is true and correct.

7 Executed on January 15, 2022, at Los Angeles, California.

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9 /s/ Joanne Osinoff
10 JOANNE OSINOFF
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6 Attorneys for Defendant Shannon D. Dicus, San Bernardino County Sheriff-Coroner, in
his official capacity
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 EMPYREAL ENTERPRISES, LLC,
d/b/a EMPYREAL LOGISTICS

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13 Plaintiff,

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15 v.
16

17 The United States of America; the
U.S. Department of Justice; Attorney
18 General MERRICK GARLAND, in
his official capacity; the Federal
19 Bureau of Investigation;
20 CHRISTOPHER A. WRAY, Director
of the Federal Bureau of Investigation,
21 in his official capacity; KRISTI
22 KOONS JOHNSON, Assistant
23 Director of the Federal Bureau of
Investigation overseeing the FBI's Los
24 Angeles Field Office, in her official
25 capacity; the Drug Enforcement
Administration; ANNE MILGRAM,
26 Administrator of the Drug
27 Enforcement Administration, in her
official capacity; SHANNON D.
28

Case No. 5:22-cv-00094-JWH-SHK

DEFENDANT SHANNON D. DICUS'
OBJECTION TO PLAINTIFF'S NEW
EVIDENCE FILED WITH REPLY

Honorable District Court Judge
John W. Holcomb

Honorable Magistrate Judge
Shashi H. Kewalramani

DICUS, San Bernardino County
Sheriff-Coroner, in his official
capacity as the head of the San
Bernardino County Sheriff's Office.

Defendants.

I.

INTRODUCTION

Although the parties stipulated to allow Plaintiff Empyreal Enterprises, LLC, doing business as Empyreal Logistics, an opportunity to file a reply brief in support of its Renewed Application for Temporary Restraining Order (Dkt. 36), this stipulation did not set aside the well-settled notions of fair play in litigation. It is nearly black letter law that evidence produced in support of a moving party's request for the first time on reply deprives the opposing party an opportunity to respond and is improper. Accordingly, Defendant San Bernardino County Sheriff-Coroner Shannon D. Dicus, in his official capacity, hereby objects to any consideration of Empyreal Enterprise's newly filed Supplemental Declaration of Dierdra O'Gorman (Dkt. 50), Supplemental Declaration of David Bass (Dkt. 53), Declaration of Eric Picardal (Dkt. 54), Declaration of Michael Jerome (Dkt. 55), and all exhibits thereto. Sheriff Dicus further requests that these items and all portions of the reply brief that reference them be stricken from the record.

II.

RELEVANT PROCEDURAL BACKGROUND

Plaintiff Empyreal Enterprises, LLC, doing business as Empyreal Logistics ("Plaintiff") filed its Complaint on January 14, 2022. Dkt. 1. Plaintiff filed an Ex Parte Application for Temporary Restraining Order on the same day. Dkt. 17, 18. The Court denied that application for lack of notice without prejudice. Dkt. 32.

Plaintiff, the federal defendants, and Defendant San Bernardino County Sheriff-Coroner Shannon D. Dicus, in his official capacity ("Sheriff"), stipulated to allow Plaintiff

1 to file a renewed ex parte application with a modified briefing schedule. Dkt. 35.
 2 Although the briefing schedule permitted Plaintiff to file a reply, the parties did not
 3 stipulate to allow Plaintiff to file new evidence with that reply. *Id.* The Court granted the
 4 stipulation via modified order on January 19, 2022. Dkt. 37.

5 Plaintiff filed a Renewed Application for TRO on January 19, 2022. Dkt. 36. In
 6 support, Plaintiff filed a Declaration of Dierdra O’Gorman and a declaration of counsel
 7 with two exhibits. Dkt. 36-1 through 36-4.

8 Federal Defendants filed an opposition on January 25, 2022. Dkt. 45. Sheriff also
 9 filed an opposition on January 25, 2022. Dkt. 46.

10 On January 27, 2022, Plaintiff filed a reply brief along with four new declarations,
 11 multiple exhibits, and an application for leave to file items under seal that were not
 12 previously disclosed to the defendants in the two separate applications. Dkt. 49-55.

13 The Sheriff hereby objects to the consideration of any new evidence filed for the
 14 first time with Plaintiff’s reply.

15 III.

16 LEGAL STANDARDS

17 It is well-settled, in a variety of procedural phases of litigation, that a moving party is not
 18 permitted to offer new evidence for the first time with its reply. This tactic is unduly
 19 prejudicial because it deprives the opposing party of an opportunity to respond to the
 20 newly proffered evidence. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894-99
 21 (1990); *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (“[A]rguments raised for
 22 the first time in a reply brief are waived.”); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.
 23 2007) (“The district court need not consider arguments raised for the first time in a reply
 24 brief.”); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (court should not consider
 25 new evidence submitted in reply without affording non-moving party opportunity to
 26 respond); *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1273 n. 3 (9th Cir.1993) (striking parts
 27 of reply brief presenting new information); *Love v. Scribner*, 691 F.Supp.2d 1215, 1235
 28 (S.D.Cal. 2010) (quoting *Rivera–Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742 (1st

1 Cir.1995) (factors to consider before exercising discretion to reopen the record, including
 2 whether moving party's explanation of why information was not included earlier is bona
 3 fide).

4 "Generally, 'reply briefs are limited in scope to matters either raised by the
 5 opposition or unforeseen at the time of the original motion.' 'New evidence submitted as
 6 part of a reply is improper' because it does not allow the defendant an adequate
 7 opportunity to respond. For this reason, the district court may decline to consider new
 8 evidence or arguments raised in reply, and generally 'should not consider the new evidence
 9 without giving the non-movant an opportunity to respond.'" *Townsend v. Monster*
 10 *Beverage Corp.*, 303 F. Supp. 3d 1010, 1027 (C.D. Cal. 2018).

11 IV.

12 LEGAL ARGUMENT

13 The large volume of new evidence submitted by Plaintiff on January 27, 2022 is not
 14 properly before the Court because defendants have not been afforded an opportunity to
 15 respond. Plaintiff has not articulated any reason this evidence could not have been filed
 16 with the moving papers with one exception of the probable cause portion of the November
 17 2021 search warrant. Even in that case, the information does not directly respond to any
 18 argument raised by Sheriff because it was redacted from the opposition. Accordingly,
 19 each of the items discussed below should be stricken from the record.

20 A. Plaintiff's New Evidence Is An Improper Attempt to Bolster Its Deficient 21 Application for a Temporary Restraining Order; All Newly Filed Evidence Should 22 Be Disregarded As Untimely.

23 In Plaintiff's Reply to Sheriff's Opposition (Dkt. 52), Plaintiff relies on newly filed
 24 evidence. Plaintiff does not explain the inclusion of this new evidence in the reply brief.
 25 This tactic appears to be an improper attempt to bolster an insufficient application. Sheriff
 26 objects to this tactic and requests that all new evidence be stricken from the record.

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1 Plaintiff first seeks leave to file client lists, a supplemental declaration of Deirdra
2 O’Gorman, a “Police Stop Procedures Card”, and a large “mitigation packet” from public
3 view. See Dkt. 49. These items were not included in the original or renewed application
4 for temporary restraining order. No explanation has been provided as to why they did not
5 make this request sooner.

6 In particular, Plaintiff relies on the Supplemental Declaration of Dierdra O’Gorman,
7 dated January 27, 2022 (filed under seal and not provided to the Sheriff until 6:25 p.m. on
8 January 27, 2022) in its reply to bolster its argument that Plaintiff *and its clients* operate
9 “in full compliance with cannabis and financial laws and regulations and are in good
10 standing with the State of California.” Reply, Dkt. 52, 9:19-10:2. This same assertion
11 was made with the original application. The supplemental support for this claim, which
12 is still deficient if considered, was not provided until the Sheriff argued Plaintiff failed to
13 meet its burden on the application. Given this improper attempt to bolster its original lack
14 of evidentiary support, the untimely supplemental declaration of Ms. O’Gorman and
15 attached exhibits, whether sealed or not, should be stricken.

16 While claiming not to attack the state court warrant itself (Reply, Dkt. 52, 1:12-
17 4:17), Plaintiff relies on a variety of new evidence to attack the probable cause declaration
18 in the state court warrant obtained by Sherriff’s deputies. Reply, Dkt. 52, 10:3-10:14
19 (citing the Supplemental Declaration of David Bass, dated January 27, 2022, Declaration
20 of Eric Picardal, and Declaration of Michael Jerome, Dkt. 53, 53-1, 54, 55). Mr. Bass
21 contends he did not have the warrant when the application was filed, however, this is
22 irrelevant because Sheriff did not rely on the redacted probable cause declaration in
23 opposition. Further, Plaintiff had access to all the Empyrean employees to get statements
24 and had all the recordings that could have been presented with its original application.
25 Plaintiff failed to do so and now seeks to cure those omissions to the detriment of the
26 opposing parties. These new declarations and exhibits should be stricken as an improper
27 attempt to bolster a deficient application without giving the Sheriff adequate opportunity
28 to respond.

1 B. The Supplemental Declaration of David Bass and Exhibits Should Be Disregarded.

2 In addition to the improper inclusion of the new evidence described above,
3 Plaintiff's counsel David Bass seems to be declaring himself an expert on certain matters
4 and rendering legal opinions and conclusions in a declaration instead of in his argument
5 papers based on review of evidence Plaintiff failed to file with either application. As to
6 the Sheriff, Mr. Bass buries an explanation in his declaration that a copy of the warrant
7 was not provided to him until January 25, 2022 (Dkt. 53 ¶ 21). He then renders opinions
8 regarding whether the portion of the warrant that the Sheriff redacted in opposition to the
9 renewed application is consistent with recordings that Plaintiff did not put before the court.
10 Dkt. 53 ¶¶ 22-28. These opinions are again buried in a declaration rather than squarely
11 responsive to any arguments raised in opposition to the renewed application. Therefore,
12 the January 27, 2022 Declaration of David Bass and Exhibit A thereto should be
13 disregarded as not properly before the Court.

14 C. The Declaration of Eric Picardal Should Be Disregarded As Untimely.

15 Plaintiff has not explained why it was unable to file the Declaration of Eric Picardal,
16 its former employee, prior to filing its reply. In addition to being untimely, the declaration
17 is objectionable to the extent it contains statements for which Mr. Picardal lacks personal
18 knowledge. For example, even though he was not present for the entire stop in November
19 2021, he opines that "the driver may have told the deputy" something that prompted a
20 specific question. Dkt. 54 ¶ 10. The Sheriff requests the Court disregard this untimely
21 new evidence as well.

22 D. The Declaration of Michael Jerome Should Be Disregarded As Untimely.

23 The entire Declaration of Michael Jerome, filed in support of the reply, also
24 constitutes an improper attempt to bolster Plaintiff's deficient application for temporary
25 restraining order. Dkt. 55. This declaration contains a recitation of conversations
26 supposedly also captured on audio recordings that were in Plaintiff's possession since the
27 first stop in November 2021. Mr. Jerome did not explain the delay in providing a
28 declaration in support of his current employer's application. Therefore, this declaration

1 should also be stricken.

2 IV.

3 CONCLUSION

4 For the reasons presented above, Defendant San Bernardino County Sheriff-
5 Coroner Shannon D. Dicus, in his official capacity, objects to any consideration of
6 Plaintiff's newly filed Supplemental Declaration of Dierdra O'Gorman (Dkt. 50),
7 Supplemental Declaration of David Bass (Dkt. 53), Declaration of Eric Picardal (Dkt. 54),
8 Declaration of Michael Jerome (Dkt. 55), and all exhibits thereto. The Sheriff respectfully
9 requests the Court strike these items from the record.

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11 DATED: January 28, 2022

Respectfully submitted,

12 TOM BUNTON
13 County Counsel

14 /s/ Heidi K. Williams

15 HEIDI K. WILLIAMS

16 Deputy County Counsel

17 Attorneys for Defendant

Shannon D. Dicus, San Bernardino County
Sheriff-Coroner, in his official capacity