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**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

EMPYREAL ENTERPRISES, LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA, et
al.,

Defendants.

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

**PLAINTIFF'S RESPONSE TO
DEFENDANT DICUS'S
OBJECTION TO NEW EVIDENCE
FILED WITH REPLY**

Honorable John W. Holcomb

Plaintiff hereby responds to Sheriff Dicus's Objection to Plaintiff's New Evidence Filed with Plaintiff's Reply. (ECF 56).

This Court has discretion to consider all evidence submitted by Plaintiff in an application for TRO or preliminary injunction. "[I]n deciding a motion for a preliminary injunction, the Court has broad discretion to consider all arguments and evidence, including hearsay and other inadmissible evidence, declarations

1 from interested parties, and arguments raised for the first time in a reply.”). *Brinton*
 2 *Bus. Ventures, Inc. v. Searle*, 248 F. Supp. 3d 1029, 1032 (D. Or. 2017).

3 **First**, it is blackletter law that the rules of evidence do not strictly apply to
 4 preliminary injunctions or *ex parte* applications for a TRO. *Univ. of Texas v.*
 5 *Camenisch*, 451 U.S. 390, 395 (1981) (“a preliminary injunction is customarily
 6 granted on the basis of procedures that are less formal and evidence that is less
 7 complete than in a trial on the merits.”). “Due to the urgency of obtaining a
 8 preliminary injunction at a point when there has been limited factual development,
 9 the rules of evidence do not apply strictly to preliminary injunction proceedings.”
 10 *Herb Reed Enter., LLC v. Florida Ent’t Mgmt., Inc.*, 736 F.3d 1239, 1250 n. 5 (9th
 11 Cir. 2013). For example, courts may consider inadmissible evidence, such as
 12 hearsay evidence, in determining whether to issue a temporary restraining order or
 13 preliminary injunction. *See Houdini Inc. v. Goody Baskets LLC*, 166 F. App’x 946,
 14 947 (9th Cir. 2006) (“[T]he district court did not abuse its discretion in considering
 15 hearsay and biased evidence of actual confusion because the rules of evidence do
 16 not strictly apply to preliminary injunction proceedings.”); *Republic of the*
 17 *Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988).

18 This applies equally to applications for temporary restraining orders. *See*
 19 *Torres v. Milusnic*, 472 F. Supp. 3d 713, 721 n.21 (C.D. Cal. 2020), enforcement
 20 granted in part, denied in part, No. CV204450CBMPVCX, 2021 WL 3829699
 21 (C.D. Cal. Aug. 27, 2021); *see also Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389,
 22 1394 (9th Cir. 1984) (In deciding whether to issue a temporary restraining order,
 23 the district court “may give even inadmissible evidence some weight, when to do
 24 so serves the purpose of preventing irreparable harm before trial.”).

25 Federal district courts in this Circuit may and do consider new evidence and
 26 new arguments submitted in reply briefs and supplemental declarations at the TRO
 27 stage. *See, e.g., Ei Corp., Inc. v. Gallant Cap. Partners, LLC*, No.
 28 220CV01119APGNJK, 2020 WL 4018929, at *1 (D. Nev. July 16, 2020) (“The

1 defendants object to Ei's hearsay evidence as well as to the reply and supplemental
2 declarations. But I can consider hearsay when ruling on a TRO motion.”) (citing
3 *Herb Reed*, 736 F.3d 1239, 1250; *Marcos*, 862 F.2d 1355, 1363); *Brinton Bus.*
4 *Ventures*, 248 F. Supp. at 1032.

5 **Second**, as the Sheriff recognizes, a reply brief may address “matters either
6 raised by the opposition or unforeseen at the time of the original motion.” Obj. 4
7 (quoting *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1027 (C.D.
8 Cal. 2018). That is, in fact, what the evidence Plaintiff submitted addresses.

9 The evidence submitted by Plaintiff in its January 27, 2022 filings meets
10 these criteria. It was:

11 (1) in response to newly obtained evidence not in Plaintiff’s possession at
12 the time of its TRO application and which were only obtained this week (the
13 unredacted November 16, 2021 search warrant and the May 17 and 18, 2021
14 Kansas dashcam videos quoted from in David Bass’s Supplemental Declaration).
15 Plaintiff has been trying to obtain both pieces of evidence for months, but it has
16 been unable to do so until this week due to the Defendants’ refusal to promptly
17 provide them;

18 (2) evidence offered related to that newly obtained evidence (the Declaration
19 of Eric Picardal regarding the Nov. 16 phone conversation with Deputy Franco
20 described in the unredacted search warrant, the Declaration of Michael Jerome
21 regarding a Nov. 16 phone call with Deputy Franco *excluded from* the unredacted
22 search warrant, the Supplemental Declaration of David Bass regarding the
23 unredacted search warrant and Kansas dashcam videos, the Nov. 30 mitigation
24 packet which addresses the allegations made about the Nov. 16 seizure);

25 (3) in response to new evidence offered by the Defendants (the Declaration
26 of FBI Special Agent David Ricker quoted brief (and misleading, by omission)
27 excerpts from Empyreal’s Police Stop Procedures Card, ECF 45-1 at ¶ 8, but did
28 not attach the actual document, which Plaintiff has now provided for the Court); or

(4) offered in rebuttal to an attempt to impeach a witness. In its opposition, the Sheriff alleged the testimony provided by Empyrean CEO Deirdra O’Gorman about the legality of her business and her clients’ business operations was unreliable as “a conclusory and self-serving declaration from the financially invested Chief Executive Officer.” ECF 46 at 1; *id.* at 10, 11. In response to the Sheriff’s attempt to impeach their declarant, Plaintiffs have provided sealed documents demonstrating that Plaintiffs’ clients do, in fact, hold cannabis licenses in good standing with their respective state agency, just as Ms. O’Gorman testified.

Third, although this is nominally an *ex parte* proceeding, the Sheriff has now been afforded the opportunity to not only file an opposition on an abbreviated briefing schedule but has also now had an opportunity to object or respond to the new evidence offered by Plaintiff by filing this very Objection. Plaintiff does not object to the Court considering any rebuttals to Plaintiff’s evidence presented by the Sheriff in its Objection.

This Court has discretion to consider Plaintiff’s supplementary evidence given the urgent nature of this proceeding and should do so given that critical, relevant evidence was only obtained after Plaintiff filed its application for TRO.

Dated: January 28, 2022

Respectfully submitted,

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