

1 JACKSON LEWIS LLP  
 Paul Trimmer  
 2 Email: trimmerp@jacksonlewis.com  
 Nevada Bar # 9291  
 3 3960 Howard Hughes Parkway, Suite 450  
 Las Vegas, NV 89169  
 4 Phone: 702.921.2460  
 Fax: 702.921.2461

5 René E. Thorne (admitted *pro hac vice*)  
 6 Email: thorne@jacksonlewis.com  
 Louisiana Bar # 22875  
 7 Jason M. Stein (admitted *pro hac vice*)  
 Email: steinj@jacksonlewis.com  
 8 Louisiana Bar # 30073  
 650 Poydras St., Ste. 1900  
 9 New Orleans, LA 70130  
 Phone: 504.208.1755  
 10 Fax: 504.208.1759

11 Ashley Abel (admitted *pro hac vice*)  
 Email: abela@jacksonlewis.com  
 12 South Carolina Bar # 10097  
 55 Beattie Place, Suite 800  
 13 Greenville, SC 29601  
 Phone: (864) 232-7000  
 14 Fax: (864) 235-1381

15 Attorneys for Defendant  
 Benefits Administration Corporation

16 **UNITED STATES DISTRICT COURT**  
 17 **DISTRICT OF NEVADA**

18 RETIRED INDEPENDENT GUARDS  
 19 ASSOCIATION OF NEVADA, ET AL

Case No.: 2:08-CV-00849-RLH-LRL

20 Plaintiffs,

21 v.

**BENEFIT ADMINISTRATION  
 CORPORATION'S MOTION FOR LEAVE TO  
 FILE SUR-REPLY IN OPPOSITION TO  
 PLAINTIFFS' REPLY IN SUPPORT OF  
 THEIR MOTION FOR A PROTECTIVE  
 ORDER**

22 BOARD OF TRUSTEES,  
 23 INDEPENDENT GUARDS  
 ASSOCIATION OF NEVADA-  
 24 WACKENHUT SERVICES  
 INCORPORATED PENSION TRUST  
 FUND; and

25 INDEPENDENT GUARDS  
 26 ASSOCIATION OF NEVADA, and  
 27 WACKENHUT SERVICES  
 INCORPORATED,

28 Defendants.

1 **BENEFIT ADMINISTRATION CORPORATION'S MOTION FOR LEAVE TO FILE**  
2 **SUR-REPLY IN OPPOSITION TO PLAINTIFFS' REPLY IN SUPPORT OF THEIR**  
3 **MOTION FOR A PROTECTIVE ORDER**

4 Defendant, Benefit Administration Corporation ("BAC" or "Defendant"), by and through  
5 its undersigned attorneys, Jackson Lewis LLP, Defendant BAC ("Defendant") moves for leave to  
6 file the attached Sur-reply in response to Plaintiffs' Reply in Support of its Motion for Protective  
7 order. The Sur-reply is necessary because Plaintiff's Reply contains inaccuracies and  
8 misstatements of law and fact regarding BAC's Opposition and position. This Motion is made  
9 and based on the attached Memorandum of Points and Authorities and any oral argument this  
10 Court deems appropriate.

11 Dated this June 10, 2011.

12 JACKSON LEWIS LLP

13  
14 /s/ Jason M. Stein  
15 René Thorne (admitted *pro hac vice*)  
16 Louisiana Bar # 22875  
17 Jason Stein (admitted *pro hac vice*)  
18 Louisiana Bar # 30073  
19 650 Poydras St., Ste. 1900

20 Paul Trimmer  
21 Nevada Bar # 9291  
22 3960 Howard Hughes Parkway, Suite 450  
23 Las Vegas, NV 89169  
24 New Orleans, LA 70130

25 Ashley Abel (*admitted pro hac vice*)  
26 South Carolina Bar # 10097  
27 55 Beattie Place, Suite\_800  
28 Greenville, SC 29601

Attorneys for Defendant,  
Benefits Administration Corporation

1                                   **BENEFIT ADMINISTRATION CORPORATION’S SUR-REPLY**  
2                                   **IN OPPOSITION TO PLAINTIFFS’ REPLY**  
3                                   **IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER**

4                   Benefit Administration Corporation (“BAC”) submits the following points to address the  
5 inaccuracies and defective arguments Plaintiffs have presented in their Reply Memorandum (Doc.  
6 No. 145):

- 7                   • Plaintiffs have not and cannot deny that they failed to request or hold the required Rule  
8 26-7 meet and confer conference, which alone requires denial of their motion.
- 9                   • Plaintiffs have not and cannot deny that they failed to notify Defendants that Mr. Johns  
10 could not host depositions at his office (which BAC identified as the location for  
11 Plaintiffs’ and their counsels’ convenience) before moving for a protective order.
- 12                   • Plaintiffs have not and cannot deny that they failed to submit a declaration which  
13 complies with LR 26-7 which unequivocally states, “**Discovery motions will not be**  
14 **considered** unless a statement of moving counsel is attached thereto certifying that, after  
15 personal consultation and **sincere effort** to do so, counsel have been unable to resolve the  
16 matter without court action.” LR-26-7 (emphasis added). They also failed to submit an  
17 affidavit attesting for the need for an emergency decision on their motion for protective  
18 order as LR 26-7 requires.
- 19                   • Plaintiffs have not and cannot deny that still they have failed to submit any evidence to  
20 support their conclusory claims of medical and financial inability to attend their  
21 depositions in Las Vegas, which the law requires, as demonstrated in BAC’s Opposition  
22 Memorandum.
- 23                   • Plaintiffs present blatantly false information when they claim that BAC that did not  
24 provide Plaintiffs ample time to create a deposition plan by noticing the depositions on  
25 May 16, 2011 without prior notice as demonstrated in BAC’s Opposition Memorandum,  
26 which BAC requested beginning in March.
- 27                   • No matter how much effort BAC would have put into trying to reach agreeable dates  
28 (which efforts already were more than reasonable), Plaintiffs were never going to  
voluntarily agree to appear for depositions. The entire history of their actions, including  
their recent pleadings, demonstrates that they believe BAC is not entitled to take their  
depositions.
- To the extent that Plaintiffs’ counsel claims that BAC did not consider his caseload when  
setting depositions for two weeks straight, the deposition schedule was a product of  
Plaintiffs’ counsel’s refusal to cooperate and his informing BAC during the March 31  
teleconference that he was available in June for depositions and Plaintiffs’ counsel never  
raised any issue concerning the two-week block of depositions prior to the motion for  
protective order.

- 1 • Plaintiffs have not addressed the law BAC presented in its Opposition Memorandum  
2 which requires actual evidence of hardship for them to meet their burden of proof for their  
3 request for a protective order. The fact that Plaintiffs allegedly are on fixed incomes is a  
4 nonsensical argument given that they have presented zero evidence to demonstrate the  
5 amount of those fixed incomes.
- 6 • Plaintiffs have not addressed the law BAC presented in its Opposition Memorandum  
7 which states that Plaintiffs are not entitled to provide discovery through means other than  
8 their depositions only. BAC Opposition Memorandum demonstrates that it has every  
9 right to take depositions of Plaintiffs in Las Vegas even if only to address their credibility  
10 in preparation for trial which seems particularly important given counsel's claims that  
11 they are easily confused. *Dieng v. Hilton Grand Vacations Co., LLC*, No. 2:10-cv-01723-  
12 LDG-PAL (D. Nev. March 1, 2011)(Magistrate Judge Leen explaining the law and  
13 denying motion for protective order), attached hereto as Ex. A.
- 14 • To the extent that Plaintiffs claim that depositions of the Nevada Plaintiffs should proceed  
15 first, this is yet another issue Plaintiffs never raised with BAC as it should have prior to  
16 filing their motion for protective order, which could have been resolved, and has zero  
17 bearing on the current papers.
- 18 • To the extent that Plaintiffs claim that the depositions are intended to harass, it is a  
19 mystery that Plaintiffs would take this position given that they: (1) never articulate why  
20 BAC should not be entitled to face Plaintiffs first-hand during depositions to assess their  
21 credibility; (2) have provided no written discovery responses or documents; and (3) have  
22 claimed that over 500 class members did not receive annual funding notices and that BAC  
23 should be penalized when the maximum penalty for such failure could reach tens of  
24 millions of dollars.<sup>1</sup>
- 25 • Plaintiffs' pejorative claims that BAC is "wolfishly steal[ing]" their rights through  
26 contrived staggered discovery is utterly baseless. BAC never conspired with the Board to  
27 stagger discovery to cause harm or delay and Plaintiff present zero evidence otherwise.
- 28 • Plaintiffs misstate the law when they claim that their testimony alone is sufficient for the  
Court to render judgment for them or even create a genuine issue of material fact to defeat  
summary judgment which they assert, apparently, as a way to keep this litigation alive.  
To the contrary, the law requires only that a "plan administrator shall use measures  
reasonably calculated to ensure actual receipt of the material by plan, participants,  
beneficiaries and other specified individuals." *Comm. Workers of America v. Commcast  
Cable Comm.*, No. 2:05cv950, 2008 U.S. Dist. LEXIS 20334, at \*6-14 (W.D. Pa. March  
12, 2008) (collecting cases around the country and explaining the standard on motion for  
summary judgment). Whether Plaintiffs actually received the documents is of no  
moment, and, even if the individual Plaintiffs testify that they never received the alleged

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<sup>1</sup> ERISA Section 502(c) and corresponding regulations potentially allow up to \$110 per day per participant for a failure to provide annual funding notice assuming Plaintiffs can prove that BAC served as the Plan administrator and the conduct meets the Ninth Circuit's test for a penalty (\$110 per day for 577 alleged class members equals \$63,470 per day as a maximum potential penalty).

1 missing documents, that would not save them from summary judgment. *Id.* In fact, courts  
2 routinely grant summary judgment, where as Defendants will do here, a defendant submits  
3 testimony that it followed a reasonable procedure for providing the documents allegedly  
4 not received. *Id.* Here, as Defendants have explained to Plaintiffs, Defendants sent the  
5 alleged missing documents to the addresses on file for the same location that Plaintiffs  
6 receive their pension checks through first class mail, return receipt requested, which meets  
7 the required standard under ERISA. *Id.* Plaintiffs have not presented any evidence that  
8 the distribution procedure was insufficient.

- 9 • Regardless, Plaintiffs miss the point which is that their failure to provide discovery, take  
10 discovery, follow court rules, and act with candor requires dismissal as a sanction the  
11 Ninth Circuit Court of Appeals encourages without regarding to the strength or weakness  
12 of their claims.
- 13 • It is noteworthy that Plaintiffs again failed to follow court rules by filing their Reply  
14 Memorandum after the Court-ordered June 9, 2011 deadline without requesting leave to  
15 file or explaining the reason for their failure and now have requested oral argument in  
16 their reply without following procedural rules for such a request.
- 17 • Plaintiffs have submitted no evidence to support their unfounded claim that they requested  
18 Defendants' depositions on several occasions. BAC invites Plaintiffs to discuss their need  
19 for depositions and from whom and when. BAC also invites Plaintiffs to explain why  
20 they believe are entitled to depositions in addition to the written discovery requests (which  
21 they failed to serve until after BAC filed its motion for sanctions and are too late) when  
22 they claim BAC is not entitled to depositions in addition to written discovery.<sup>2</sup>
- 23 • Yet another example of Plaintiffs' disingenuousness is their citation to attorney Stein's e-  
24 mail in which he states that the BAC will work in good faith regarding discovery and to  
25 reach a revised briefing schedule which Plaintiffs apparently cite to insinuate BAC has  
26 failed to do something it promised. (Doc. 145, p. 7). To the contrary, that e-mail relates  
27 to the potential need for BAC to receive additional discovery if Plaintiffs present  
28 information in their supplemental class certification memorandum which they had not  
previously raised and does not relate in any manner to the issues before the Court

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<sup>2</sup> BAC does not concede that Plaintiffs are entitled to responses to their written discovery, which it believes Plaintiffs served too late. However, BAC is willing to discuss Plaintiffs' position concerning whether their discovery requests are incurably tardy which is BAC's current position. If Plaintiffs are entitled to written discovery responses, the question becomes why they should also be entitled to take Defendants depositions, which presumably will cover the same items as the written discovery.

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- At the end of the day, Plaintiffs still have not presented any evidence that BAC served as the Plan’s administrator as that term is meant under ERISA or that Plaintiffs did not receive the alleged missing documents, much less that there were not sent in a manner reasonably calculated to reach Plaintiffs.

Dated this July 10th, 2011.

JACKSON LEWIS LLP

/s/ Jason Stein  
 Paul Trimmer  
 Nevada Bar # 9291  
 3960 Howard Hughes Parkway, Suite 450  
 Las Vegas, NV 89169

René Thorne (admitted *pro hac vice*)  
 Louisiana Bar # 22875  
 Jason Stein (admitted *pro hac vice*)  
 Louisiana Bar # 30073  
 650 Poydras St., Ste. 1900  
 New Orleans, LA 70130

Ashley Abel (admitted *pro hac vice*)  
 South Carolina Bar # 10097  
 55 Beattie Place, Suite\_800  
 Greenville, SC 29601

Attorneys for Defendant,  
 Benefits Administration Corporation

IT IS SO ORDERED.



UNITED STATES MAGISTRATE JUDGE

DATED: 6-30-11

**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that the service of the foregoing **MOTION FOR LEAVE TO FILE SUR-REPLY** was made this date by depositing a true copy of the same for mailing, at Las Vegas, Nevada, addressed to:

<p>Athan T. Tsimpedes Law Offices of Athan T. Tsimpedes 1420 New York Ave., NW, 7th Floor Washington, DC 20005 Phone: 202-638-2100 Fax: 202-449-3499 Email: <a href="mailto:atsimpedes@comcast.net">atsimpedes@comcast.net</a></p> <p>Larry C. Johns Law Office of Larry C. Johns 3017 W. Charleston Blvd., #30 Las Vegas, Nevada 89102 Phone: 702-387-5003 Fax: 702-387-5018 Email: <a href="mailto:lcjohns100@embarqmail.com">lcjohns100@embarqmail.com</a></p> <p><i>Attorneys for Plaintiffs, and all other individuals similarly situated</i></p>	<p>Elizabeth Rosenfeld Jeffrey L. Cutler Wohlner Kaplon Phillips Young &amp; Cutler 15456 Ventura Blvd., Suite 500 Sherman Oaks, CA 91403 Phone: 818-501-8030 ext. 313 Fax: 818-501-5306 Email: <a href="mailto:rosenfield@wkpyc.com">rosenfield@wkpyc.com</a> Email: <a href="mailto:jcutler@wkpyc.com">jcutler@wkpyc.com</a></p> <p>David Amesbury Amesbury Schutt &amp; Herr 703 S. Eighth Street Las Vegas, Nevada 89101 Phone: 702-385-5570 Fax: 702-385-4234 Email: <a href="mailto:David@amesbury-schutt.com">David@amesbury-schutt.com</a></p> <p><i>Attorneys for Defendant, Independent Guards of Nevada, Local No. 1</i></p>
<p>Scott M. Mahoney Mark J. Ricciardi Fisher &amp; Phillips LLP 3800 Howard Hughes Parkway, Suite 950 Las Vegas, Nevada 89169 Phone: 702-252-3131 Fax: 702-252-7411 Email: <a href="mailto:dclark@laborlawyers.com">dclark@laborlawyers.com</a> Email: <a href="mailto:smahoney@laborlawyers.com">smahoney@laborlawyers.com</a> Email: <a href="mailto:mricciardi@laborlawyers.com">mricciardi@laborlawyers.com</a></p> <p><i>Attorneys for Independent Guards Association of Nevada-Wackenhut Services Incorporated Pension Trust Fund</i></p>	<p>Andrew S. Brignone Adam P. Segal Brownstein Hyatt Farber Schreck, LLP 100 City Parkway, Suite 1600 Las Vegas, Nevada 89106 Phone: 702-382-2101 Fax: 702-382-8135 Email: <a href="mailto:abrignone@bhfs.com">abrignone@bhfs.com</a> Email: <a href="mailto:asegal@bhfs.com">asegal@bhfs.com</a></p> <p><i>Attorneys for Wackenhut Services Incorporated</i></p>

Dated this 10th day of June, 2011.

\_\_\_\_\_  
/s/ Rae Christakos  
An employee of JACKSON LEWIS LLP