

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

THE YARD MILKSHAKE BAR )  
PROPERTIES, LLC, and )  
THE YARD MILKSHAKE BAR )  
FRANCHISING, LLC, )

Plaintiffs, )

CIV. ACT. NO. 1:20-cv-498-TFM-MU

v. )

BBH CREATIONS, LLC; BO STEELE )  
a/k/a ROBERT K. STEELE; and )  
SHERRI STEELE, )

Defendants. )

**ORDER**

Pending before the Court is Plaintiff The Yard Milkshake Bar Properties, LLC and Plaintiff The Yard Milkshake Bar Franchising, LLC (collectively “Plaintiffs”) *Motion to Strike Affidavit or, in the Alternative Motion for Leave to File Sur-Reply* (Doc. 16, filed 02/01/21).

On December 21, 2020, Defendant BBH Creations, LLC, Defendant Bo Steele, and Defendant Sherri Steele (collectively “Defendants”) filed a Motion to Dismiss. Doc. 8. On January 11, 2021, Plaintiffs filed a response in opposition. Doc. 10. On January 19, 2021, Defendants filed a Reply. Doc. 11. At issue here is the exhibit to Defendants’ Reply brief—the *Affidavit of Robert Steele*. Doc. 11-1, Exhibit A. Defendants justify their submission of an affidavit alleging additional relevant facts because they “only learned of relevant information concerning a compulsory counter-claim after Defendants’ Motion to Dismiss was initially filed.” Doc. 11, at 1, n.1.

Plaintiffs argue that they are disadvantaged by Defendants’ failure to file the *Affidavit of Robert Steele* until their Reply Brief. Consequently, they request that this Court strike the Affidavit

and any argument in the Reply Brief relying on it. Doc. 16 at 4. Plaintiffs reason that the Affidavit “includes additional information seeking to refute the allegations of the Complaint that should have been included with the initial motion to dismiss and which have no relevance whatsoever to the alleged compulsory counterclaim.” *Id.* at ¶ 6. Furthermore, Plaintiffs argue that Defendants’ failure to file the Affidavit with its initial motion to dismiss precludes the Plaintiffs from having the opportunity to respond substantively. *Id.* at ¶ 8.

The motion is **GRANTED in part** and **DENIED in part**. The motion is **DENIED** as to striking Robert Steele’s Affidavit. However, the alternative request to file a sur-reply is **GRANTED**. Plaintiffs may file their sur-reply no later than **February 26, 2021**. To be clear, this sur-reply shall not exceed the scope of the reply and its attached affidavit.

**DONE** and **ORDERED** this 18th day of February 2021.

s/Terry F. Moorer  
TERRY F. MOORER  
UNITED STATES DISTRICT JUDGE