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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

YOWIE NORTH AMERICA, INC.
and HENRY M. WHETSTONE, JR.,

Plaintiffs,

vs.

CANDY TREASURE, LLC; and
KEVIN GASS,

Defendants.

CASE NO. 13-CV-1906 BEN (JMA)
**ORDER DENYING EMERGENCY
MOTION TO FILE SUR-REPLY
AND SUPPLEMENTAL
DECLARATION OF KEVIN GASS
IN OPPOSITION TO MOTION
FOR PRELIMINARY
INJUNCTION**
[Docket No. 47]

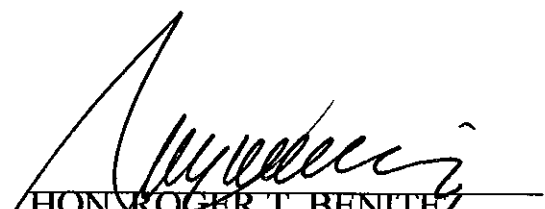
Presently before the Court is Defendants' Emergency Motion to File Sur-Reply and Supplemental Declaration of Kevin Gass in Opposition to Motion for Preliminary Injunction. (Docket No. 47.) Defendants seek leave to file a response to Plaintiffs' Reply in Support of the Motion for Preliminary Injunction, arguing that Plaintiffs presented new evidence in their Reply.

Where a reply brief presents new evidence, "the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond." *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1006) (internal quotation marks omitted). However, evidence submitted with a reply brief is not new evidence when it is submitted to rebut arguments raised in the opposition brief. *EEOC v. Creative Networks, LLC*, No. CV-05-3032, 2008 U.S. Dist. LEXIS 103381, at *6 (D. Ariz. Dec. 12, 2008). Here, a review of the Reply as well as the supporting

1 declarations reveals that the evidence submitted is not new evidence, but rather is
2 responsive to the arguments raised in the opposition brief. Accordingly, Defendants'
3 Emergency Motion is **DENIED**.

4 **IT IS SO ORDERED.**

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6 DATED: December 09, 2013


HON. ROGER T. BENITEZ
United States District Judge

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