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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BONA FIDE CONGLOMERATE, INC.,
Plaintiff,
v.
SOURCEAMERICA,
Defendant.

Case No.: 3:14-cv-00751-GPC-AGS

**ORDER GRANTING PLAINTIFF’S
EX PARTE APPLICATION FOR
LEAVE TO FILE SUR-REPLY
RESPONDING TO DEFENDANT’S
EVIDENTIARY OBJECTIONS**

[ECF No. 464.]

On July 11, 2017, Plaintiff filed an *ex parte* application for permission to file a sur-reply responding to Defendant’s objections to Plaintiff’s evidence offered in opposition to Defendant’s pending motion for summary judgment or, alternatively, partial summary judgment. (Dkt. No. 464.)

“Ex parte applications are a form of emergency relief that will only be granted upon an adequate showing of good cause or irreparable injury to the party seeking relief.” *Clark v. Time Warner Cable*, No. CV 07 1797 VBF(RCX), 2007 WL 1334965 at *1 (C.D. Cal. May 3, 2007) (citing *Mission Power Eng’g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995)). An *ex parte* application must address why the regular noticed motion procedures must be bypassed. *Mission Power Eng’g Co.*, 883 F. Supp. at 492. The

1 reasons provided “must be supported by deposition transcripts or by affidavits or
2 declarations whose contents would be admissible if the deponents, affiants or declarants
3 were testifying in court.” *Id.* Second, the moving party must be “without fault” in creating
4 the need for *ex parte* relief or establish that the urgency occurred as a result of excusable
5 neglect. *Id.*; *see also Langer v. McHale*, No. 13CV2721-CAB-NLS, 2014 WL 4922351, at
6 *2 (S.D. Cal. Aug. 20, 2014) (denying *ex parte* motion because defendants failed to make
7 an adequate showing of good cause or irreparable injury to warrant *ex parte* relief).

8 “A party may object that the material cited to support or dispute a fact cannot be
9 presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2). The
10 Advisory Committee Notes regarding the 2010 amendments to Rule 56 explain:

11 Subdivision (c)(2) provides that a party may object that material cited to support or
12 dispute a fact cannot be presented in a form that would be admissible in evidence.
13 The objection functions much as an objection at trial, adjusted for the pretrial
14 setting. The burden is on the proponent to show that the material is admissible as
15 presented or to explain the admissible form that is anticipated. There is no need to
16 make a separate motion to strike. If the case goes to trial, failure to challenge
17 admissibility at the summary-judgment stage does not forfeit the right to challenge
18 admissibility at trial.

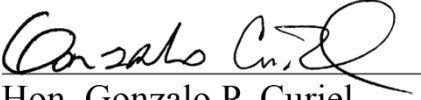
17 Fed. R. Civ. P. 56 advisory committee’s note. Courts have observed that Rule 56(c)(2)
18 contemplates allowing the proponent of the evidence to respond to evidentiary objections.
19 *See, e.g., SEC v. Strategic Glob. Investments, Inc.*, No. 16-CV-514 JLB (WVG), 2017
20 WL 1387187, at *7 (S.D. Cal. Apr. 17, 2017) (“When a party objects that material cited
21 to dispute a fact cannot be presented in a form that would be admissible at trial, as
22 Plaintiff does here, the burden shifts to the proponent of the evidence to either show that
23 the material is admissible as presented or explain the admissible form that it anticipates it
24 will produce at trial.”).

25 Defendant attached to its reply brief 67 pages of evidentiary objections to Plaintiff’s
26 evidence offered in opposition to Defendant’s pending motion. (Dkt. Nos. 459-2, 459-3.)
27 Plaintiff’s proposed sur-reply is likewise lengthy. (Dkt. No. 464-1.) The Court observes
28 that the parties have also asserted evidentiary objections in response to each other’s separate

1 statements of undisputed material facts. While the Court expresses concern regarding the
2 voluminous evidentiary objections asserted in relation to the pending motion for summary
3 judgment, because Plaintiff's sur-reply ultimately consists solely of responses to
4 Defendant's evidentiary objections, the Court **GRANTS** Plaintiff's leave to file its
5 proposed sur-reply.

6 **IT IS SO ORDERED.**

7 Dated: July 12, 2017

8 
9 Hon. Gonzalo P. Curiel
United States District Judge

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