

1 **DISCUSSION**

2 A decision to grant or deny leave to file a surreply is committed to the “sound
3 discretion” of the court. *See Brady v. Grendene USA, Inc.*, No. 3:12-cv-0604-GPC-
4 KSC, 2015 WL 6828400, at *3 (S.D. Cal. Nov. 6, 2015); *United States v. Venture*
5 *One Mortg. Corp.*, No. 13-CV-1872 W (JLB), 2015 WL 12532139, at *2 (S.D. Cal.
6 Feb. 26, 2015). Such discretion “should be exercised in favor of allowing a surreply
7 only when a valid reason for such additional briefing exists, . . .” *Hill v. England*,
8 No. CVF05869RECTAG, 2005 WL 3031136, at *1 (E.D. Cal. Nov. 8, 2005).
9 Discretion to grant leave to file a surreply is proper when a party has submitted new
10 evidence with its reply brief. “[T]he district court may decline to consider new
11 evidence or arguments raised in reply, and generally ‘should not consider the new
12 evidence without giving the non-movant an opportunity to respond.’” *Townsend v.*
13 *Monster Beverage Corp.*, No. EDCV122188VAPKKX, 2018 WL 1662131, at *11
14 (C.D. Cal. Mar. 20, 2018) (quoting *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.
15 1996) and citing *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM
16 (CWx), 2006 WL 4749756, at *6 n. 52 (C.D. Cal. Sept. 25, 2006)).

17 Here, Plaintiffs have submitted 22 exhibits with their reply brief that were not
18 included with their motion for a preliminary injunction. (ECF No. 51-2.) The Court’s
19 expedited discovery order contemplated that Plaintiffs could file new evidence with
20 their reply based on documents produced by Defendants. (ECF No. 28.) Plaintiffs’
21 inclusion of new evidence in their reply was thus not improper. But it also provides
22 a valid reason for Defendants’ request to file a surreply to respond to the new exhibits.

23 Plaintiffs, however, contend that the evidence submitted with their reply is not
24 “new” to Defendants because Defendants produced the documents and, therefore, the
25 information was available to them before they opposed Plaintiffs’ preliminary
26 injunction motion. (ECF No. 53 at 3–4.) This argument is unavailing. The question
27 whether evidence is new for the purpose of assessing the propriety of a surreply is
28 about whether that evidence was introduced for the first time in a reply brief. *See*,

1 e.g., *Hodes & Nauser, MDs, P.A. v. Moser*, No. 2:11-cv-02365-CM-KMH, 2011 WL
2 4553061, at *1 n.2 (D. Kan. Sept. 29, 2011) (“[T]he entirety of the surreply is
3 properly before the court given the new evidence in AAPLOG’s reply brief) (citing
4 *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005) (indicating that a
5 surreply is proper when a party presents new evidence in a reply brief)). The fact the
6 party seeking to file a surreply produced the evidence in discovery does not make the
7 evidence any less new for the purposes of a surreply. Cf. *Provenz*, 102 F.3d at 1483
8 (considering response to new evidence submitted in reply in support of a motion for
9 summary judgment).

10 Lastly, Plaintiffs’ argument that they are entitled “to make the final argument”
11 on their preliminary injunction motion and to permit otherwise would be “unfair”
12 misses the mark. (ECF No. 53 at 2.) The question of fairness focuses on fairness to
13 the nonmoving party. While it may be true that surreplies “usually are a strategic
14 effort by the nonmoving party to have the last word on a matter,” *Liberty Legal*
15 *Found. v. Nat’l Dem. Party of the USA, Inc.*, 875 F. Supp.2d 791, 797 (W.D. Tenn.
16 2012), the inclusion of new evidence by a moving party in a reply “vitiat[e]s” the
17 nonmoving party’s “opportunity to effectively respond” if a court does not permit a
18 surreply, tailored to addressing that new evidence. See, e.g., *In re Walsh Constr. Co.*,
19 No. 3:15-CV-648-TBR, 2018 WL 1411267, at *2 (W.D. Ky. Mar. 21, 2018). Here,
20 the Court finds that it is in the interest of fairness to permit Defendants to file a
21 surreply, given the 22 new exhibits.

22 CONCLUSION & ORDER

23 For the foregoing reasons, the Court **GRANTS** Defendants’ request to file a
24 surreply in support of their opposition to Plaintiffs’ motion for a preliminary
25 injunction. (ECF No. 52.) **Defendants may file a reply, not to exceed 10 pages,**
26 **no later than May 15, 2018. No extensions of this deadline will be granted.**


27 Defendants shall limit their reply to responding to Plaintiffs’ new exhibits and
28 should take care not to reiterate arguments already made in their opposition (ECF No.

1 32), to the extent possible. To prevent an endless pursuit of briefing, Defendants shall
2 **not** file new exhibits with their surreply, nor should they raise new legal arguments.
3 Moreover, Defendants may not circumvent the Court's prior order denying their
4 previous *ex parte* motion to file a reply to CAIR-CA's *amicus curiae* brief. (ECF
5 No. 45.) The Court will disregard any arguments in Defendants' surreply to that
6 effect, including any arguments made in response to Plaintiffs' reply to CAIR-CA's
7 *amicus curiae* brief.

8 The Court further advises both parties that **no additional briefing on**
9 **Plaintiffs' pending motion for a preliminary injunction (ECF No. 26) will be**
10 **permitted.**

11
12 **IT IS SO ORDERED.**

13
14 **DATED: May 7, 2018**


Hon. Cynthia Bashant
United States District Judge