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5 **UNITED STATES DISTRICT COURT**  
6 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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8 CAROLL KING MENDEZ,  
9 Plaintiff,  
10 v.  
11 LOANME, INC., *et al.*,  
12 Defendants.

Case No. 20-cv-00002-BAS-AHG

**ORDER GRANTING DEFENDANTS’  
EX PARTE APPLICATION FOR  
LIMITED DISCOVERY**

**[ECF No. 16]**

13 On November 12, 2020, Defendants LoanMe, Inc. and Jonathan Williams moved *ex*  
14 *parte* to conduct limited discovery relating to Plaintiff’s purported arbitration opt-out letter  
15 before the evidentiary hearing on December 3, 2020. (ECF No. 16.) Defendants state that  
16 they have requested the opt-letter from Plaintiff on multiple occasions but have received  
17 no response. (*Id.* at 2.) The *ex parte* application is unopposed.<sup>1</sup>

18 Under Federal Rule of Civil Procedure 26(b)(1), any matter relevant to a claim or a  
19 defense is discoverable. In the context of arbitration, however, the Federal Arbitration Act  
20 (“FAA”) provides for discovery related to a motion to compel arbitration only if “the  
21 making of the arbitration agreement or the failure, neglect, or refusal to perform the same  
22 be in issue.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir.1999) (citing 9 U.S.C. §  
23 4). This also includes a party’s decision to opt out of an arbitration agreement. *See Erwin*  
24 *v. Citibank, N.A.*, No. 3:16-CV-03040-GPC-KSC, 2017 WL 1047575, at \*4 (S.D. Cal. Mar.  
25 20, 2017) (“[W]hether or not Plaintiff opted out of the 2015 Arbitration Agreement is

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27 <sup>1</sup> *Ex parte* applications that are not opposed within two Court days must be considered unopposed and may  
28 be granted on that ground. *See* Hon. Cynthia Bashant’s Standing Order for Civil Cases § 6. Plaintiff has  
not filed an opposition to the instant application.

1 dispositive of the first gateway question of arbitrability—it goes to the very heart of  
2 whether an agreement to arbitrate exists.”).


3 The Court finds it appropriate to grant Defendants’ request for limited discovery.  
4 The letter is directly related to whether an arbitration agreement was formed between the  
5 parties. The authenticity of the letter, specifically the date of its creation, is central to  
6 resolving whether or not Plaintiff timely opted out of the arbitration agreement.  
7 Defendants require the letter itself to determine whether the testimony of an ESI expert  
8 will be necessary at the evidentiary hearing. This testimony, in turn, may be necessary to  
9 the Court’s determination of the sole underlying issue in this case.

10 Further, the Court finds it appropriate to grant this relief *ex parte*. See *Mission Power*  
11 *Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995) (*ex parte* relief is  
12 appropriate where moving party shows it will suffer irreparable harm if the motion is not  
13 heard on an expedited schedule and that it did not create the circumstances warranting *ex*  
14 *parte* relief). First, Defendants did not create the circumstances necessitating this  
15 application. They have sufficiently demonstrated that they attempted to contact Plaintiff  
16 by telephone and email numerous times over a two-week period regarding production of  
17 the letter—and the filing of the instant application—but received no response. (Decl. of  
18 Elizabeth C. Farrell ¶¶ 2–4, ECF No. 16; Ex. A to Farrell Decl.) Second, as stated above,  
19 Defendants will suffer irreparable harm if they are unable to determine what evidence will  
20 be necessary to carry their burden at the evidentiary hearing.

21 Accordingly, the Court **GRANTS** Defendants’ Application (ECF No. 16).  
22 Defendants shall serve on Plaintiff, no later than **November 19, 2020**, a request for  
23 production of the opt-out letter referenced in Plaintiff’s Opposition to Defendants’ Motion  
24 to Compel (ECF No. 11), in native format (i.e., including any ESI), and any copies thereof.  
25 Plaintiff is ordered to respond to such request no later than **November 25, 2020**.

26 **IT IS SO ORDERED.**

27 **DATED: November 17, 2020**

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**Hon. Cynthia Bashant**  
**United States District Judge**