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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9 VICTORIA LAW,
10 PLAINTIFF,
11 vs.
12 FEDERAL BUREAU OF PRISONS,
13 DEFENDANT.

CASE No.: 4:24-cv-06628-YGR

**PLAINTIFF’S RESPONSE TO DEFENDANT’S
OBJECTION TO REPLY EVIDENCE**

HON. YVONNE GONZALEZ ROGERS
COURTROOM NUMBER: 1
DATE & TIME OF HEARING: SEPTEMBER 30,
2025

14 **I. INTRODUCTION**

15 The Bureau of Prisons’ (BOP’s) Opposition argues that it does not have to provide Plaintiff with
16 records regarding its misrepresentations in the largest sexual abuse scandal in its history. Included in
17 these time-sensitive newsworthy materials are materials that relate to whether BOP misrepresented facts
18 to *this* Court, to Congress, and to the public. In the Complaint (*Dkt.* No. 1) Plaintiff explained the need
19 for expedited release, including that reporting on these records could lead to release of people from
20 dangerous conditions in BOP and ICE custody. Following recommendations from Judge Tse, Plaintiff
21 filed a Motion for Partial Judgment on the Pleadings and Declaratory Judgment on August 19, 2025
22 (*Dkt.* No. 45) and a Reply (*Dkt.* No. 48) on September 9, 2025, with expert evidence invited by Judge
23 Tse in the May 27, 2025, hearing: “do you think that you could provide testimony that says that if they
24 use this particular software, that it would not decrease the production rate?” *Dkt.* No. 44, Tr. 17:23–25.
25

26 Rather than comply with its obligations under FOIA, defendant filed an Opposition (*Dkt.* No. 47)
27 and Objection (*Dkt.* No. 49) that focused on procedural objections but avoided answering the substance
28 Response to Defendant’s Objection 4:24-cv-06628-YGR

1 of the claims.¹ BOP characterizes the Motion and Reply as an attempt to relitigate Judge Tse’s Order
 2 instructing BOP to review 1,000 pages a month. *Dkt.* No. 42. That misstates the filings. The filings seek
 3 judgment beyond the scope of the referral to Judge Tse² – relief he concluded was properly in the
 4 jurisdiction of this Court – and raise a pattern and practice claim for declaratory judgment based on the
 5 fact that BOP is not, as it asserts, “producing documents in compliance with FOIA.” *Dkt.* No. 47 at 8–9.
 6

7 This Court should order that: (1) the Declaration is proper rebuttal evidence, or (2) if it is new
 8 evidence, it raises no fairness concerns and Defendant’s Objection constituted its opportunity to reply.

9 I. ARGUMENT

10 1. Evidence Is Proper Because It Directly Rebutts Defendant’s Opposition

11 The Bui Declaration is not new evidence; it is proper rebuttal evidence that establishes BOP’s
 12 ongoing practices constitute a continuing pattern of violations meriting declaratory judgement and BOP
 13 is not, as it claims, “producing documents in compliance with FOIA.” *Dkt.* No. 47 at 8–9.
 14

15 “Evidence is not ‘new,’...if it is submitted in direct response to proof adduced in opposition to a
 16 motion.” *Edwards v. Toys" R" Us*, 527 F. Supp. 2d 1197, 1206 at n. 31 (C.D. Cal. 2007) (citing *Terrell*
 17 *v. Contra Costa County*, 232 Fed.Appx. 626, 629 n. 2 (9th Cir. Apr. 16, 2007) (unpublished) (find reply
 18

19 ¹ Defendant’s objections to the Bui Declaration (*Dkt.* No. 48-2) are just one example of many delay and
 20 obstruction tactics BOP employed in 445 days since the request. See Henry Decl., *Dkt.* No 45-2
 (reflecting pattern of obstruction with prejudicial effect).

21 ² The Motion argued Plaintiff is entitled to partial judgment on the pleadings on FOIA violations Judge
 22 Tse instructed Plaintiff to resolve in this Court, including whether BOP is unlawfully withholding
 23 agency records by: failing to complete a search in violation of 5 U.S.C. §§ 552(a)(3)(A), (C)–(D);
 24 failing to make a timely determination under § 552(a)(6)(A)(i); improperly withholding records under §
 25 552(a)(4)(B); failing to process the expedited request “as soon as practicable” in violation of §
 26 552(a)(6)(E)(iii) and 28 C.F.R. §§ 16.5(b), (e); and failing to make records promptly available under §§
 27 552(a)(3)(A), (a)(6)(C)(i). Judge Tse indicated that this Court would be the appropriate forum to decide
 28 whether Plaintiff is entitled to declaratory judgment under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202
 because BOP continues to engaged in a pattern and practice of FOIA violations by failing to comply
 with statutory timing requirements, unlawfully withholding non-exempt records, failing to process
 expedited requests, failing to provide records in requested reproducible formats under § 552(a)(3)(B),
 and failing to show exceptional circumstances or due diligence under § 552(a)(6)(C)(i) – a defense BOP
 waived in a hearing.

1 evidence is not new where "[t]he Reply Brief addressed the same set of facts supplied in [a party's]
2 opposition to the motion but provides the full context to [that party]'s selected recitation of the facts").³
3 Courts permit reply declarations when they directly rebut opposition arguments. *See In re ConAgra*
4 *Foods*, 2014 WL 4104405, at *33 n.87 ("Evidence submitted in direct response to evidence raised in the
5 opposition, however, is not new."). Courts recognize that reply declarations may be used "to provide the
6 full context" to arguments raised in opposition. *See Terrell*, 232 Fed. App'x 626 at 629 n.2.

8 BOP's Opposition argues that it is "producing documents in compliance with FOIA." *Dkt.* No.
9 47 at 8–9. It alleges Plaintiff's arguments were "just a repackaging" of pace, determination, and
10 formatting issues already reviewed by Judge Tse, are "not ripe," and are within the scope of the
11 discovery referral. *Id.* at 3–4, 7–8, 9. BOP claims "These are issues the Court referred to Magistrate
12 Judge Tse, and Judge Tse has ruled on these issues." *Id.* at 2. "Judge Tse remains available to address
13 the...format of releases." *Id.* at 2. "Plaintiff seeks to burden this Court with a motion covering the issues
14 that Judge Tse decided." *Id.* at 4. Its Objection asserts "The declaration does not respond to any
15 argument made by the Defendant in opposition to the motion." *Dkt.* No. 49 at 2. However, in its
16 Opposition, Defendant relied upon previously submitted declarations to support its position that its
17 productions are timely and that its formatting complies with FOIA. *Dkt.* No. 47 at 7 (citing *Dkt.* Nos.
18 31-2 and 33-4). Plaintiff is entitled to rebut those statements with expert evidence showing the opposite.

21 The Declaration rebuts the Opposition's argument that Plaintiff's pattern claim was "just
22 repackaging" of arguments decided by Judge Tse. *Dkt.* No. 47 at 9. It refutes the claim that BOP is

24 ³ *See also Kamath v. DHS*, No. 3:23-cv-03531-JSC, at *2, 2024 WL 1077328, at *1 (N.D. Cal. Mar. 12,
25 2024) (evidence "not new" when it rebuts opposition); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 560,
26 2014 WL 4104405, at *33 n.87 (C.D. Cal. 2014) (same) (citing *Edwards v. Toys "R" Us*, 527 F. Supp.
27 2d 1197, 1205 n.31 (C.D. Cal. 2007)); *Cabrales v. BAE Sys. San Diego Ship Repair, Inc.*, 3:21-cv-
28 02122-AJB-DDL, at *2, 2024 WL 115799, at *1 (S.D. Cal. Jan. 10, 2024) (same) (citing *Synopsys, Inc.*
v. Mentor Graphics Corp., No. 12-6467 C MMC, 2013 WL 6577143, at *1, n.1 (N.D. Cal. Dec. 13,
2013) (same).

1 “producing documents in compliance with FOIA.” *Id.* at 8-9. The Declaration shows how BOP is
 2 making FOIA-noncompliant choices in its workflow: merging records into large, non-searchable PDFs
 3 that strip metadata and break email families even though FOIAXpress can readily export records in
 4 native, searchable form; reviewing 1,000 pages when the system is capable of a more industry standard
 5 of 5,000–10,000 pages monthly. It is proper rebuttal evidence that shows maintaining these practices
 6 across all productions demonstrates a continuing pattern of unlawful withholding.⁴ It shows how what
 7 the Opposition characterizes as compliance is, in fact, a systemic violation of FOIA’s mandates.
 8

9 **2. No Prejudice to Defendant**

10 BOP’s Objection is a sufficient response to what it claims is “new” evidence and regardless, it
 11 can argue its objection at a hearing; both obviating the need for any surreply.⁵ *See All Star Seed*, No. 12-
 12 cv-146, at *23, 2014 WL 1286561, at *15 (objections to the evidence in Objection sufficed); *Smith v.*
 13 *Microsoft Corp.*, No. 11-CV-1958, 2013 WL 6497073, at *2 (S.D. Cal. Dec. 10, 2013)(“[T]he chance to
 14 orally rebut the new evidence during a hearing on the issue” suffices). Defendant cites local rule 7-
 15 3(d)(1) and concludes that it is prejudiced because it did not have the opportunity to respond but cites no
 16 facts. *Dkt.* No. 49 at 2. BOP’s Objection avails BOP of its opportunity to respond. Additionally, if the
 17 Court were to exercise its discretion to so permit, BOP could raise its arguments at a hearing.
 18

19 **II. New Evidence is Admissible and Defendant’s Objection Is Sufficient**

20 If the Court concludes that the Declaration is not properly submitted as rebuttal evidence, it may
 21 still consider it. *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1202 (9th Cir. 2001) (the “[c]ourt had
 22

24 ⁴ The Motion and Reply argued BOP actions constitute a pattern that readily reproducible (5 U.S.C. §
 25 552(a)(3)(B)) records are not made “promptly available” (5 U.S.C. §§ 552(a)(3), (a)(4), (a)(6)) or “as
 soon as practicable” (5 U.S.C. § 552(a)(6)(E)(iii)) as the statute requires, and thus BOP is improperly
 withholding records under 5 U.S.C. § 552(a)(4)(B).

26 ⁵ Rather than an argument as to the admissibility of certain evidence, argument in the Objection
 27 constituted an inappropriate sur-reply and should be discarded. Furthermore, if the Court exercises its
 discretion to permit BOP a surreply, it should limit the Defendant’s the argument related to anything
 28 deemed “new evidence” the Bui Declaration.

1 discretion to consider the [new] issue even if it was raised in a reply brief.”); *El Pollo Loco, Inc. v.*
2 *Hashim*, 316 F.3d 1032, 1040-41 (9th Cir. 2003) (a “court may consider new evidence presented in a
3 reply brief if the ... court gives the adverse party an opportunity to respond”).

4 Even if the Court deems the Declaration “new evidence,” BOP had its opportunity to respond to
5 it in writing and did so through its Objection. Courts recognize that evidentiary objections themselves
6 constitute a legally sufficient response. *See All Star Seed v. Nationwide Agribusiness Ins. Co.*, No. 12-
7 cv-146, 2014 WL 1286561, at *15, (S.D. Cal. Mar. 30, 2014) (“With its objections to the evidence and
8 the present motion, defendant has amply argued its position concerning the ‘new evidence’ and
9 therefore, there is no need for a sur-reply.”); *Carrillo v. Schneider Logistics*, No. Civ. 11-8557, 2013
10 WL 140214, at *3, n.2 (C.D. Cal. Jan. 7, 2013) (“since [the defendant] brought this very objection in
11 what is effectively a sur-reply brief, [it] cannot reasonably complain that it has been deprived of a
12 chance to respond to this document”). Accordingly, this Court may fully consider Plaintiff’s Reply and
13 the Bui Declaration. *See Banga v. First USA, NA*, 29 F. Supp. 3d 1270, 1276 (N.D. Cal. Mar. 19, 2014)
14 (court may consider reply evidence if the adverse party had an opportunity to respond).
15
16

17 III. CONCLUSION

18 The Court can properly consider the Declaration because it directly rebuts the Opposition and
19 substantiates arguments already raised, which is proper reply evidence. If it so wishes, the Court may
20 treat the Declaration as new evidence and still properly consider it. Defendant identifies no substantive
21 prejudice. Plaintiff respectfully requests the Objection be overruled and the Declaration considered.
22

23 Dated: September 23, 2025

24 Signature: _____/s/
25 By: Caitlin Kelly Henry, Esq.