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

11
12 HERRING NETWORKS, INC.,

13 Plaintiff,

14 v.

15 RACHEL MADDOW; COMCAST
16 CORPORATION; NBC UNIVERSAL
MEDIA, LLC; AND MSNBC CABLE
17 LLC.

18 Defendants.
19

CASE NO. 3:19-cv-01713-BAS-AHG

Assigned for All Purposes to:
Hon. Cynthia Bashant

**PLAINTIFF'S OBJECTION TO
NEW EVIDENCE SUBMITTED
WITH DEFENDANTS' REPLY IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND COSTS**

Action Filed: September 9, 2019
Trial Date: None

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1 Plaintiff Herring Networks, Inc. objects to new evidence filed by Defendants
 2 with their Reply Memorandum in support of their Motion for Attorneys’ Fees and
 3 Costs—specifically, a 2014 motion for attorneys’ fees filed by Miller Barondess,
 4 LLP in another matter (the “Fee Motion”). (Dkt 38-3.) Where new evidence is
 5 submitted with a reply, that evidence may be challenged by objection. *See*
 6 *Townsend v. Monster Bev. Corp.*, 303 F. Supp. 3d 1010, 1026-27 (C.D. Cal. 2018)
 7 (“parties routinely challenge new evidence filed in support of a reply by objecting to
 8 such new evidence.”).

9 **A. Defendants Improperly Submitted New Evidence In Their Reply**

10 Generally, “reply briefs are limited in scope to matters either raised by the
 11 opposition or unforeseen at the time of the original motion.” *Burnham v. City of*
 12 *Rohnert Park*, 1992 WL 672965, at *1 n.2 (N.D. Cal. May 18, 1992). “New
 13 evidence submitted as part of a reply is improper” because “the opposing party is
 14 deprived of the opportunity to respond.” *Morris v. Guetta*, 2013 WL 440127, *8
 15 (C.D. Cal. Feb. 4, 2013). For these reasons, “the district court may decline to
 16 consider new evidence or arguments raised in the reply, and generally ‘should not
 17 consider the new evidence without giving the non-movant an opportunity to
 18 respond.’” *Townsend*, 303 F. Supp. 3d at 1027.

19 Put simply: Defendants do not get a second chance to submit evidence with
 20 their Reply that they could have put forth with their moving papers. The Fee
 21 Motion is from 2014. (Dkt. 38-3 at 2.) If Defendants thought it was relevant to
 22 their Motion for Attorneys’ Fees and Costs, they should have included it in their
 23 moving papers. They failed to do so, and now Defendants are grasping at straws to
 24 justify their exorbitant rates.

25 **B. The Miller Barondess Fee Motion Shows That Defendants’ Fee**
 26 **Request Is Unreasonable**

27 In any event, the Fee Motion only undermines Defendants’ fee request here.
 28 The Fee Motion was filed in *Margosian v. Bank of the West*, a complex lender

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1 liability case where plaintiffs asserted more than 20 causes of action and sought to
2 recover more than \$20 million in damages. (Dkt. 38-3 at 4, 7.) Miller Barondess
3 defended nine depositions and responded to more than a hundred document requests
4 and interrogatories. (*Id.* at 4, 9.) Miller Barondess also filed a motion for judgment
5 on the pleadings, a demurrer, motions to compel, a motion for partial summary
6 adjudication, and a cross-complaint. (*Id.* at 4-5.) The case eventually proceeded to
7 a nine-day trial. (*Id.* at 10.) For all of this work, Miller Barondess sought only \$1.2
8 million in fees. (*Id.*) By comparison, here, Defendants seek nearly a *third* of that
9 amount for a single motion that challenged a single cause of action based on a single
10 statement.

11 Defendants also misrepresent the rates that Miller Barondess sought to
12 recover in *Margosian*. The Miller Barondess attorneys sought to recover a blended
13 hourly rate of \$500 for all three attorneys (two partners and one associate with 9
14 years’ experience) staffed on the matter. (*Id.* at 8.) This blended rate is less than
15 *one third* of what Defendants are seeking here for Mr. Boutrous. It’s also less than
16 the \$625 per hour that Defendants seek for Ms. Moshell and Mr. Rubin—associates
17 with less than three years of legal experience.

18 Moreover, the *Margosian* case demonstrates that Defendants overstaffed this
19 case. In *Margosian*—a complex matter that went to trial—Miller Barondess staffed
20 the case with only three attorneys. By comparison, Gibson Dunn staffed this case
21 with five attorneys, plus two paralegals and two “researchers,” to prepare one
22 pleadings motion.

23 DATED: July 10, 2020

MILLER BARONDESS, LLP

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25 By: /s/ Amnon Z. Siegel
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28 Inc.