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19 and MURIEL SPOONER, on behalf of themselves
20 and all others similarly situated

21 **UNITED STATES DISTRICT COURT**
22 **CENTRAL DISTRICT OF CALIFORNIA**
23 **SOUTHERN DIVISION**

24 JOYCE WALKER, KIM BRUCE
25 HOWLETT, and MURIEL
26 SPOONER, on behalf of themselves
27 and all others similarly situated,

28 Plaintiffs,

v.

LIFE INSURANCE COMPANY OF
THE SOUTHWEST, a Texas
corporation,

Defendant.

CLASS ACTION

CASE NO.: CV 10-9198 JVS (RNBx)

Formerly Case No.: 3:10-cv -04852
JSW

from Northern District of California

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
LEAVE TO FILE A REPLY TO
LSW'S SUBSTITUTED
SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF CLASS CERTIFICATION**

District Judge James V. Selna
Date: Sept. 18, 2012
Court: 10C

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**NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE A REPLY
TO LSW'S SUBSTITUTED SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF CLASS CERTIFICATION**

TO THE COURT, DEFENDANT, AND ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs Joyce Walker, Kim Howlett, and Muriel Spooner ("Plaintiffs") respectfully request leave to file a reply to LSW's substituted supplemental memorandum, declarations and exhibits thereto. Plaintiffs' reply memorandum and reply declaration are attached hereto as Exhibits 1 and 2.

For the reasons discussed in Plaintiffs' request, and in light of new arguments raised by LSW on issues that exceed the scope of the Court's requested supplemental briefing, the Court should afford Plaintiffs the opportunity to respond.

Counsel for Plaintiffs met and conferred with counsel for LSW concerning this motion, and LSW does not assent to the filing of the proposed Reply and related documents. Plaintiffs have styled their motion in the same manner as LSW styled its Motion for Leave To File a Substituted Supplemental Memorandum and accordingly have not set the motion for hearing, which is in the Court's discretion.

DATED: October 5, 2012

KASOWITZ BENSON TORRES & FRIEDMAN
LLP

By: s/Brian P. Brosnahan
Brian P. Brosnahan

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs respectfully request leave to file a reply to LSW’s 18-page
4 substituted supplemental brief because it addresses issues outside the scope of the
5 briefing permitted by the Court, includes entirely new arguments, submits
6 incomplete deposition testimony, and misstates the record.

7 First, LSW’s substitute supplemental memorandum ignores the Court’s
8 directive to the parties to limit their supplemental briefing to the issue of
9 ascertainability. LSW has instead addressed other arguments that fall outside the
10 scope of the Court’s Order, including citing authority on the merits of whether its
11 illustrations are likely to deceive and, for the first time, attempting to distinguish
12 *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010), a decision
13 cited by Plaintiffs in both their moving and reply papers, but not mentioned by
14 LSW in its opposition papers or at oral argument.

15 Second, LSW’s substitute memorandum confuses the record. LSW’s
16 discussion of the policy files (at pp. 5-11) blends misrepresentations with new and
17 evolving positions in an attempt to confuse the Court about the state of the
18 documentary record. For example, LSW continues to insist that 56% of file
19 evidence conflicts, but its substitute brief deleted footnote 5 of LSW’s previous
20 brief, which attempted falsely to justify LSW’s 56% calculation. Although LSW’s
21 deletion of that footnote was appropriate, there is no longer any basis for its
22 continued reliance on the inaccurate 56% figure.

23 Third, LSW’s substitute memorandum raises new and misleading arguments
24 that contradict earlier positions that it took in its class certification opposition.
25 LSW previously argued in its opposition papers that the date an illustration is used
26 should be determined by the date the illustration was printed, but its substitute brief
27 takes the new and inconsistent position that the print date should be ignored.

1 Fourth, Plaintiffs are entitled to respond under the rule of completeness.
2 LSW relies on a snippet of deposition testimony to advance inaccurate assertions
3 about the named Plaintiffs.

4 Finally, Plaintiffs should be provided with the opportunity to close the
5 briefing on their motion particularly in light of the Court’s decision to allow LSW
6 to file a substitute memorandum after the parties complied with the Court’s
7 original directive of simultaneous filing. Fairness dictates that since LSW has been
8 now granted the opportunity to respond to Plaintiffs’ brief, Plaintiffs should be
9 afforded the same opportunity.

10 **II. THE COURT POSSESSES DISCRETION TO AFFORD PLAINTIFFS**
11 **THE OPPORTUNITY TO SUBMIT A REPLY BRIEF**

12 Though the Court’s minute order indicates that the matter is deemed
13 submitted after both parties’ filing of their supplemental briefs, numerous courts
14 have recognized that the exercise of “the Court’s exercise of discretion in favor of
15 allowing a surreply is appropriate where the movant raises new arguments in its
16 reply brief.”¹ Though these authorities are in the context of surreplies, the
17 principles of fairness animating the decisions are equally applicable to the
18 supplemental briefing at issue here. Indeed, after both parties filed their
19 supplemental briefs on September 25, 2012, and the matter was “deemed
20 submitted,” LSW filed a request for leave to file a substitute brief, and the Court
21 exercised its discretion to allow its filing (without providing Plaintiffs the
22 opportunity to oppose the motion). For the reasons discussed herein, the Court
23 should similarly exercise its discretion by allowing Plaintiffs to close the briefing
24

25 _____
26 ¹ *Concerned Citizens for a Safe Cmty. v. Office of Fed. Detention Trustee*, 2011
27 U.S. Dist. LEXIS 122899 *4 (D. Nev. Oct. 24, 2011) (citing *Heffelfinger v. EDSC.*,
28 580 F. Supp. 2d 933, 966 n.116 (C.D. Cal. 2008)); see also *CYBERSitter, LLC v.*
P.R.C., 805 F. Supp. 2d 958, 964 (C.D. Cal. 2011) (granting leave to file surreply
“because Defendants relied on new legal authority in their reply papers”).

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1 with the reply filed herewith.²

2 **III. PLAINTIFFS SHOULD BE PROVIDED THE OPPORTUNITY TO**
3 **RESPOND BECAUSE LSW’S BRIEF RAISES NEW ARGUMENTS**
4 **OUTSIDE THE SCOPE OF THE REQUESTED BRIEFING**

5 **A. LSW’s Brief Exceeds The Scope Of The Court’s Order.**

6 The Original and Amended Orders both stated that the parties “shall file the
7 supplemental submission *discussed on the record.*”³ The only supplemental
8 submission discussed on the record concerned the ascertainability issue, about
9 which the Court requested argument in its tentative ruling. The parties were
10 therefore clearly instructed to limit their supplemental briefing to the topic of
11 ascertainability, and specifically, to the nature of LSW policyholder files and to
12 whether it will be administratively feasible to determine subclass membership
13 based on these files and other case management techniques. Notwithstanding the
14 Court’s instructions, LSW’s filing contains new arguments that have nothing to do
15 with the identification of class members. For example, the first argument section
16 of LSW’s substitute memorandum is dedicated entirely to raising arguments
17 relating to predominance and reliance, arguing that it is improper to adjudicate
18 common law fraud and UCL claims without examining the “the entire universe of
19 what was conveyed to each policyholder.”⁴ Indeed, LSW submits briefing on
20 *Davis v. HSBC*, 2012 U.S. App. LEXIS 18503 (9th Cir. Aug. 31, 2012), a case that
21 discusses the likely to deceive test under the UCL and *not once* touches on
22 ascertainability or determination of class membership. LSW also—for the first

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24 ² *Transp. Factoring Assocs. v. Textron Fin. Corp.*, 2005 U.S. Dist. LEXIS 28634,
25 *11 (D. Az. Nov. 16, 2005) (granting leave to file surreply because it “affords
[plaintiff] an opportunity to respond to the new argument [in the reply] and cures
any prejudice from its lateness.”).

26 ³ Original Order, Dkt. 338, at 1; Amended Order, Dkt. 341, at 1 (emphasis added).

27 ⁴ LSW’s Substitute Supplemental Memorandum In Opposition to Class
28 Certification (Dkt. 346) (“LSW’s Sub. Mem.”), at 3.

1 time—addresses and attempts to distinguish *Yokoyama v. Midland Nat’l Life Ins.*
2 *Co.*, 594 F.3d 1087 (9th Cir. 2010), a controlling decision regarding reliance that
3 was cited by Plaintiffs in both their moving and reply papers, but not mentioned by
4 LSW in its opposition papers or at oral argument.⁵ Not only are LSW’s attempts to
5 distinguish *Yokoyama* unavailing, they are plainly not within the scope of the
6 briefing.

7 **B. LSW’s Substitute Brief Is Misleading And Attempts To Confuse**
8 **The Record And The Court.**

9 At oral argument, the Court questioned whether the reference to the “policy
10 applied for” in the LSW application means the particular type of policy applied for,
11 such as Paragon or Provider. LSW had not previously suggested this, and counsel
12 for Plaintiffs responded that the phrase “policy applied for” referred to the
13 particular configuration of the policy, e.g., face amount, planned premium, etc.

14 Apparently seizing on the Court’s question, LSW’s first supplemental brief
15 argued that “[t]he more plausible reading of the language means what it says – ‘the
16 policy applied for’ is Paragon or Provider.”⁶ But as demonstrated in Plaintiffs’
17 supplemental brief, the NAIC regulation and LSW’s own executives make clear
18 that the “policy applied for” refers not simply to the type of policy but to the
19 particular configuration of the policy, encompassing specifics such as face amount,
20 underwriting class, planned premium, etc. LSW’s assertion that the most plausible
21 reading is that the policy applied for is Paragon or Provider was grossly misleading
22 because the question is not what is a “plausible reading” of the words (which are
23 derived from the NAIC model regulation enacted as California Insurance Code
24 section 10509.958(a)), but how LSW actually interprets and applies those words,
25

26 _____
27 ⁵ *Id.* at 3-4.

28 ⁶ LSW’s Supplemental Memorandum In Opposition to Class Certification, filed
September 25, 2012 (Dkt. 340) at 6 n.5.

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1 in its day to day processing of policy applications. LSW has been applying this
2 regulation for decades, and its corporate executives (none of whom submitted
3 testimony in support of the newly minted assertion of its counsel) are well aware
4 that “the policy applied for” is not “Paragon or Provider,” but the particular
5 configuration of the policy (even including details like specification of the name of
6 the agent).

7 After reviewing Plaintiffs’ supplemental brief, LSW apparently decided to
8 delete this argument from its substitute brief.⁷ But having deleted this argument,
9 LSW is left with no basis for its calculation that 56% of the file evidence conflicts.
10 Yet LSW’s substitute brief continues to advance the incorrect 56% calculation in
11 an attempt to confuse the record and the Court.

12 Similarly, whereas Plaintiffs submitted as Exhibit A to the Supplemental
13 Dinglasan Declaration (Dkt. 339) a policy-by-policy description of all 400 policy
14 files, LSW responds only with aggregated data on entirely separate topics that are
15 irrelevant to the question of whether a policyholder received a sales illustration.
16 As discussed in Plaintiffs’ proposed reply, this approach confuses the record by
17 suggesting purported conflicts that do not in fact exist.

18 **C. LSW’s Substitute Brief Takes New And Inconsistent Positions**

19 LSW’s substitute brief also raises new arguments that are inconsistent with
20 positions previously advanced in the litigation. For example, for the first time
21 LSW argues that it is improper to rely on illustration print dates as evidence of
22 use—directly reversing and contradicting its earlier position that used illustration
23

24 _____
25 ⁷ In addition to the cites in Plaintiffs’ original supplemental brief, other documents
26 produced by LSW in discovery and the testimony of its own executives at
27 deposition further confirm that the policy “as applied for” refers to the
28 configuration of features such as underwriting or funding. [Proposed] Second
Supplemental Declaration of Lesa Dinglasan, Exs. C, D & E.

1 print dates to determine the date of use. Indeed, this methodology was the
2 foundation of Mr. Perla’s calculations in his declaration submitted in opposition to
3 Plaintiffs’ motion to certify.⁸ As this is an entirely new and inconsistent argument,
4 Plaintiffs should be afforded the opportunity to respond.

5 **D. Plaintiffs Should Be Provided Leave To File A Reply Pursuant To**
6 **The Rule Of Completeness.**

7 LSW’s substitute brief relies on a single page of deposition testimony to
8 advance the new assertion that “Howlett and Spooner received illustrations
9 prepared July 27, 2007, but neither signed until July 30, 2007” and that “Ms.
10 Spooner was unsure whether she first saw the illustration before or after she
11 dictated her application.” LSW’s Sub. Mem. at 6 n.7. But the experience of Mr.
12 Howlett and Ms. Spooner is telling: their sales illustrations were printed on July
13 27, 2007 and were first reviewed and signed on July 30, 2007 in the same single
14 meeting with their agent during which their applications were prepared and signed;
15 their agent then submitted the illustrations and the applications to LSW.⁹ Plaintiffs
16 should be allowed to respond under the rule of completeness. In the words of one
17 court, a party is “certainly entitled to supplement the record with other portions of
18 [a witnesses’ testimony] to *rebut* and give context to the excerpts cited in [the other
19 parties’] supplemental brief.”¹⁰

20 **E. The Changed Nature of LSW’s Substitute Brief Justifies Allowing**
21 **a Reply from Plaintiffs Because Plaintiffs Are The Moving Party**

22 As mentioned above, LSW has raised numerous new arguments outside the
23 scope of the issues upon which the Court requested supplemental briefing. LSW
24

25 ⁸ Declaration of Timothy Perla Concerning Policy Sample at ¶¶ 7-10.

26 ⁹ See Howlett Decl. Ex. A (Dkt. 231-1); Spooner Decl. Ex. A (Dkt. 232-1); Shapiro
27 Decl. (Dkt. 265) Ex. J; Supp. Dinglasan Decl. Ex. B (Dkt. 339-2); [Proposed]
28 Second Supplemental Dinglasan Decl. Exs. B & F.

¹⁰ *MShift, Inc. v. DIC*, 747 F. Supp. 2d 1147, 1178 (N.D. Cal. 2010).

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1 should not be allowed to use the Court’s request for narrow supplemental briefing
2 as an excuse to raise new and out-of-scope arguments, without affording Plaintiffs
3 a chance to reply.¹¹

4 This is particularly true because the Court’s statements at oral argument and
5 in the Original Order created a common seven-day deadline upon which the parties
6 would file simultaneous supplemental briefs—which the parties did, in fact, file on
7 September 25, 2012. At the close of the hearing, in response to a query from
8 Charles Freiberg, counsel for Plaintiffs, the Court stated that Plaintiffs would be
9 granted seven days to submit their supplemental brief.¹² Jonathan Shapiro, counsel
10 for LSW, then asked “can we have seven *also*” to submit a brief.¹³ The Court thus
11 granted LSW the same seven days as it had granted Plaintiffs. Nothing about the
12 exchange suggested that LSW’s time to submit its supplemental brief would be
13 measured in addition to Plaintiffs’ time, or that LSW would have both the
14 opportunity to respond to Plaintiffs’ submission and have the final word on
15 Plaintiffs’ motion. In its Original Order, the Court confirmed the unambiguous
16 record in ordering: “Counsel shall file the supplemental submission discussed on
17 the record not later than September 25, 2012.”¹⁴

18 If LSW had requested an opportunity for seven days to oppose Plaintiffs’
19 supplemental brief, Plaintiffs would have requested an opportunity to Reply
20 because it is Plaintiffs’ motion. Allowing LSW to substitute a new brief pursuant
21 to the Amended Order changes the nature of this briefing; rather than simultaneous
22 briefs, LSW has filed a responsive 18 page opposition to Plaintiffs’ brief. Under
23

24 ¹¹ *Cf. In re Hitachi*, 2011 U.S. Dist. LEXIS 90882, *12-14 (S.D. Cal. Aug. 12,
25 2011) (granting plaintiffs leave to file sur-reply where defendant raised new
arguments in reply brief).

26 ¹² Sept. 18 Tr. at 66:21-67:1 (emp. added).

27 ¹³ *Id.* at 67:3-4.

28 ¹⁴ *See* Original Order, Dkt. 338, at 1.

1 normal motion practice, Plaintiffs would be entitled to file a reply brief in support
2 of their motion.¹⁵ Fairness dictates that since LSW has now been granted the
3 opportunity to respond to Plaintiffs' brief, as the moving party on class
4 certification, Plaintiffs should be afforded the same opportunity to reply.

5 **VI. CONCLUSION**

6 In light of the above, Plaintiffs respectfully request that they be granted
7 leave to file the reply brief, and supporting documents, attached as an exhibit
8 herewith.

9
10 DATED: October 5, 2012

KASOWITZ BENSON TORRES & FRIEDMAN
LLP

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12
13 By: s/Brian P. Brosnahan
14 Brian P. Brosnahan
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28 ¹⁵ See L.R. 7-4, 7-9, 7-10.