

1 Marc Van Der Hout, Cal. Bar No. 80778
2 Johnny Sinodis, Cal. Bar No. 290402
3 Van Der Hout LLP
4 360 Post Street, Suite 800
5 San Francisco CA 94108
6 (415) 981-3000
7 [REDACTED]

Sadaf M. Doost, Cal. Bar No. 346104
Baher A. Azmy, admitted *pro hac vice*
Katherine Gallagher, admitted *pro hac vice*
Maria C. LaHood, admitted *pro hac vice*
Astha Sharma Pokharel, admitted *pro hac vice*
Samah Sisay, admitted *pro hac vice*
Pamela C. Spees, admitted *pro hac vice*
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

[REDACTED]

12 Attorneys for Plaintiffs DEFENSE FOR CHILDREN INTERNATIONAL – PALESTINE, et al.

13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 DEFENSE FOR CHILDREN
16 INTERNATIONAL – PALESTINE; AL-
17 HAQ; AHMED ABU ARTEMA;
18 MOHAMMED AHMED ABU ROKBEH;
19 MOHAMMAD HERZALLAH; A.N.;
20 LAILA ELHADDAD; WAEIL ELBHASSI;
21 BASIM ELKARRA; and DR. OMAR EL-
22 NAJJAR

23 Plaintiffs,

24 v.

25 JOSEPH R. BIDEN, JR., *President of the*
26 *United States*, ANTONY J. BLINKEN,
27 *Secretary of State*, LLOYD JAMES
28 AUSTIN III, *Secretary of Defense*, in their
official capacities,

Defendants.

Case No.: 23-cv-5829

**MOTION FOR ADMINISTRATIVE
RELIEF FOR LEAVE TO FILE SUR-
REPLY TO DEFENDANTS’ MOTION TO
DISMISS REPLY**

Hearing: January 26, 2024, at 9:00 am

1 Pursuant to Civil Local Rules 7-3(d) and 7-11, Plaintiffs respectfully request leave to file a
2 Sur-Reply to Defendants’ January 12, 2024 Reply in Support of their Motion to Dismiss, ECF No. 64.
3 The Motion is scheduled for hearing on January 26, 2024 at 9:00 a.m. *See* ECF No. 36. With
4 Defendants’ consent, Plaintiffs seek leave to file the attached ten-page Sur-Reply to respond only to
5 issues raised by Defendants for the first time in their Reply (Section II of their Reply). *See, e.g., Finley*
6 *v. Fax*, 683 F. App’x 630, 631 (9th Cir. 2017) (denial of leave to file a sur-reply is not an abuse of
7 discretion where defendants’ reply raised no new issues that necessitated further argument).
8

9 For the first time on Reply, Defendants make two entirely new arguments that the Alien Tort
10 Statute (“ATS”)—28 U.S.C. § 1350—is “unavailing” because relief is barred by the Federal Tort
11 Claims Act, 28 U.S.C. § 1346(b)(1), and because the Court has no authority to recognize a private
12 cause of action against Defendants under the ATS. Defs.’ Reply Br. 6-15. “It is well established in this
13 circuit that ‘[t]he general rule is that appellants cannot raise a new issue for the first time in their reply
14 briefs.’” *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (internal
15 quotations omitted). Defendants spend half of their 20-page Reply on these new ATS arguments.
16 Although Defendants claim that Plaintiffs “assert for the first time in their opposition brief that they
17 seek to rely on the Alien Tort Statute,” Defs.’ Reply Br. 6, Plaintiffs’ Complaint identified 28 U.S.C.
18 § 1350 as one of the jurisdictional bases to bring their claims arising under customary international
19 law, which is part of federal common law. Compl. ¶ 33, ECF No. 1. Plaintiffs should not be penalized
20 for Defendants’ oversight.
21

22 Courts routinely grant sur-replies to address new arguments raised in a reply. *See, e.g., Iglesia*
23 *Cristiana Luz y Verdad v. Church Mut. Ins. Co.*, No. 15-CV-05621-RMW, 2016 WL 692839, at *2
24 n.2 (N.D. Cal. Feb. 19, 2016) (granting a motion for leave to file a sur-reply when new arguments
25 were raised in a reply); *Gold v. Lumber Liquidators Inc.*, No. 14-CV-05373-TEH, 2017 WL 2688077,
26 at *2 (N.D. Cal. June 22, 2017) (same). Even when an argument was not raised for the first time in a
27
28

1 reply, courts have permitted a sur-reply where there was no prejudice, and it would “allow the Court
2 to thoroughly consider the parties’ arguments.” *Leuzinger v. Cnty. of Lake*, 253 F.R.D. 469, 477 (N.D.
3 Cal. 2008). Plaintiffs should be permitted leave to file the attached short Sur-Reply to respond to
4 Defendants’ new arguments to avoid prejudice and to allow the Court the full benefit of the parties’
5 arguments.
6

7 Defendants have consented to Plaintiffs’ Motion for Leave to File a Sur-Reply that is between
8 5-10 pages and that responds only to the arguments raised in Section II of Defendants’ Reply in
9 Support of their Motion to Dismiss.

10 Dated: January 16, 2024

Respectfully submitted,

11
12 Johnny Sinodis, Cal. Bar No. 290402
13 Marc Van Der Hout, Cal. Bar No. 80778
14 Van Der Hout LLP
15 360 Post Street, Suite 800
16 San Francisco, CA 94108
17 (415) 981-3000
18 [REDACTED]

/s/ Astha Sharma Pokharel
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20 [REDACTED]
21 [REDACTED]
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23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]