U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
SEP 13 PM 6:32
NANCY M.
MAYER-WHITTINGTON
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR LEAVE TO FILE SURREPLY

Plaintiffs' opposition to defendants' motion for leave to file a surreply is, as usual, characterized by invective rather than by cogent legal or factual argument. It is plaintiffs' own introduction in their reply of entirely new (although groundless) factual arguments, which were clearly available to them at the time of their opening motion, that has necessitated defendants' surreply.[1] The purpose of a reply is to respond to arguments made in the opposition, not to save factual arguments that properly should have been made in the opening argument in order to sandbag opposing counsel.[2]

---

[1]"The standard for granting leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Groobert v. President and Directors of Georgetown College*, ___ F. Supp. 2d ____, 2002 WL 1494675 *11 (D.D.C. June 27, 2002) (Urbina, J.) (internal citation omitted).

[2]*See Public Citizen Health Research Group v. National Inst. Of Health*, 209 F. Supp. 2d 37, 43-44 (D.D.C. 2002) (Kollar-Kotelly, J.) ("The Court highly disfavors parties creating new arguments at the reply stage that were not fully briefed during the litigation. *Senior Unsecured Creditors' Comm. of First Republic Bank Corp. v. FDIC*, 749 F. Supp. 758, 772 (N.D. Tex.1990) (noting that Defendant 'raised its third argument for the first time in its reply brief and the court will not consider it in deciding the motion to dismiss.'"); *see also Carbino v. West,* 168 F.3d 32, 34 (Fed. Cir. 1999) ("There are cogent reasons for not permitting an appellant to raise issues or

(continued...)

Plaintiffs' reply not only raised for the first time the contention that service upon Mr. Levitas was not proper, but left the incorrect impression that Mr. Levitas was no longer counsel of record in this matter. Unlike Interior attorneys McCarthy and Blackwell, Mr. Levitas actually filed a formal Notice of Appearance in this matter **and** both he and lead counsel for plaintiffs have specifically, and recently, requested that Mr. Levitas be served personally with pleadings. *See* Defendant's Surreply to Plaintiffs' Reply re (1) Plaintiffs' Motion to Strike Defendants' Opposition to Blackwell Contempt Sanctions; and (2) Motion for Enlargement of Time to Reply to Such Opposition, Ex. 1-3. Defendants have accommodated those requests. Plaintiffs cite no decision that disagrees with the holdings relied upon by defendants concerning proper service upon parties under Fed. R. Civ. P. 5. That failure alone dooms their position.

Plaintiffs' personal opinion that service upon Mr. Levitas was ineffective is not only entirely unsupported by law, but is undermined by their own service practices. Plaintiffs complain that service upon Mr. Levitas did not count because Mr. Levitas's name was not on the brief in question. Rather, they say, service had to be made upon the attorneys whose names were on the brief in order to be effective. Yet plaintiffs do not explain why they did not even attempt to serve Department of Justice attorneys Dodge Wells and Tracy Hilmer, who actually signed for the government on the Blackwell Opposition[3], the Opposition to plaintiffs' motion to strike the

---

[2](...continued)
arguments in a reply brief.") (citing appellate cases for this proposition). By placing a new argument in the Reply, Plaintiff does not permit Defendant . . . to competently respond to such an argument. *Wright v. United States,* 139 F.3d 551, 553 (7th Cir. 1998) ('The reason for this rule of waiver is that a reply brief containing new theories deprives the respondent of an opportunity to brief those new issues.').").

[3]The Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes (filed
(continued...)

Blackwell Opposition, and the Defendants' Motion for Leave to file the Surreply, even though plaintiffs' counsel actually called and corresponded with Mr. Wells about the service issue. Plaintiffs are thus hoist by their own petard.

Plaintiffs attack government counsel for not submitting to their provocation to engage in a schoolyard brawl. Plaintiffs' Opposition to Defendants' Motion for Leave to File Surreply re (1) Plaintiffs' Motion to Strike Defendants' Opposition to Blackwell Contempt Specifications; and (2) Motion for Enlargement of Time to Reply to Such Opposition, at 3 n.6 (filed on or about Sept. 11, 2002). The government sees no need to dignify plaintiffs' obviously unfounded name-calling. Leave to file the surreply has been sought simply to correct any misimpression left by the plaintiffs that Mr. Levitas was not currently a counsel of record for plaintiffs and therefore not a proper attorney to receive service on behalf of plaintiffs under Rule 5. Because plaintiffs challenge the service upon Mr. Levitas (and for that matter upon Mr. Harper) only in their reply and because their reply left a potential misimpression in the record, defendants' motion for leave to file their surreply is proper and should be granted.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
MICHAEL F. HERTZ
Directors

---

[3](...continued)
Aug. 12, 2002).

SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
Dodge Wells
Senior Trial Counsel
D.C. Bar No. 425194
Tracy L. Hilmer
D.C. Bar No. 421219
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 261
Ben Franklin Station
Washington, D.C. 20044
(202) 307-0474

DATED: September 18, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 18, 2002 I served the foregoing *Defendants' Reply to Plaintiffs' Opposition to Motion for Leave to File Surreply* by facsimile and U.S. Mail upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

and by U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

and by facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

Joseph S. Kieffer, III
Special Master-Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

Sean P. Schmergel