

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 19-2181 (KBJ)
)	
U.S. ENVIRONMENTAL PROTECTION)	(consolidated with 19-2198 and 19-3270)
AGENCY, et al.,)	
)	
Defendants.)	
)	

OPPOSITION TO PLAINTIFFS’ MOTION FOR LEAVE TO FILE SUR-REPLY

Defendants previously moved for leave to file a surreply in opposition to Plaintiffs’ Cross-Motion for Partial Summary Judgment in civil action number 19-3270, one of the cases in this consolidated action. ECF No. 32. Plaintiffs now seek leave to file a purported “Sur-Reply to Defendants’ Motion for Leave to File Sur-Reply.” ECF No. 35-1. The Court should deny Plaintiffs’ motion because Plaintiffs’ proposed surreply does not relate to the issues raised by Defendants’ pending motion.

In deciding whether a surreply is warranted, “the court should consider whether the movant’s reply in fact raises arguments or issues for the first time, whether the non-movant’s proposed surreply would be helpful to the resolution of the pending motion, and whether the movant would be unduly prejudiced were leave to be granted.” *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012). Plaintiffs do not contend that Defendants’ reply raised any new arguments. Instead, Plaintiffs ask to file a surreply “to address a misstatement [Plaintiffs’] counsel made in the Second Declaration of Stuart Wilcox, Dkt. 31-1, where counsel unintentionally omitted certain immaterial communications from EPA and to address the relevance, or lack

thereof, of those communications to the case at hand.” Motion, ECF No. 35, at 1. Defendants appreciate that Plaintiffs have acknowledged the error in their counsel’s declaration, albeit 54 days after Defendants identified that error, *see* ECF No. 32. Nevertheless, a surreply is not the appropriate procedural mechanism to correct a mistake in a declaration; a notice of errata would suffice.¹

Plaintiffs’ proposed sur-reply also contains argument regarding alleged FOIA processing delays at EPA. ECF No. 35-1, at 3-4. That argument is not pertinent to the issues raised in Defendants’ motion for leave to file a surreply. Defendants’ motion sought leave to file a surreply to respond to new evidence that Plaintiffs submitted with their reply in support of their summary judgment motion. ECF No. 32. Plaintiffs opposed Defendants’ motion on the grounds that, in Plaintiffs’ view, Defendants should have anticipated that Plaintiffs would submit new evidence with their reply and should have preemptively addressed the evidence in Defendants’ summary judgment opposition. ECF No. 33. The surreply that Plaintiffs now seek to file does not pertain to those arguments.

For these reasons, the Court should deny Plaintiffs’ Motion for Leave to File Sur-Reply.

Respectfully submitted,

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/s/ Joshua Kolsky
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Trial Attorney

¹ Unfortunately, Plaintiffs’ corrected declaration replaces the error with speculation regarding the timing of EPA decisionmaking – a topic about which the declarant lacks any personal knowledge. *See* Corrected Second Declaration of Stuart Wilcox, ECF No. 35-3 ¶ 2.

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