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 AGENCY, et al.,	)	(consolidated with 19-2198 and 19-3270)
Defendants.	)	

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SUR-REPLY

Plaintiffs do not dispute that they submitted new evidence with their summary judgment reply brief. That ordinarily justifies a sur-reply. *See, e.g., Alexander v. F.B.I.*, 186 F.R.D. 21, 52 (D.D.C. 1998) ("Because plaintiffs have presented new evidence before the court . . . , good cause exists to permit [defendant] to file a surreply addressing the contents of this filing."). Nevertheless, Plaintiffs ask the Court to deny Defendants an opportunity to respond to Plaintiffs' new evidence. None of Plaintiffs' arguments have merit.

First, Plaintiffs argue that the documents they submitted for the first time with their reply "were of no surprise" and they claim that EPA should have "proactively ma[d]e its argument" in its opposition brief. Opp'n to Def's Mot. for Leave to File Sur-Reply ("Opp'n"), ECF No. 33, at 1, 3. Plaintiffs' argument appears to be that a non-movant must foresee evidence that the movant might choose to submit with its reply and preemptively address that evidence in its opposition. Plaintiffs cite no authority whatsoever supporting such a requirement, and Defendants are aware of none.

Plaintiffs' position is especially untenable considering the nature of the evidence they

submitted with their reply, which Defendants could not possibly have foreseen. For example, Plaintiffs' new evidence includes a declaration claiming that "EPA did not communicate with Ecological Rights Foundation at all regarding [a particular FOIA] request until February 10, 2020[.]" Second Declaration of Stuart Wilcox ¶ 2. But as discussed in Defendants' proposed sur-reply, that assertion is demonstrably incorrect. *See* Proposed Sur-Reply at 1-2. Defendants obviously could not have foreseen that Plaintiff would provide the Court with an inaccurate description of EPA's communications regarding a particular FOIA request. Plaintiffs also contend that their arguments in their reply are not new because they previously made arguments about alleged processing delays generally, Opp'n at 6, but Plaintiffs never contended, before submitting their reply, that EPA had caused any processing delays regarding the request identified in the Second Wilcox Declaration, or that EPA did not communicate about that request until February 2020. Those arguments and the evidence submitted in support are unquestionably new.[1]

Likewise, Defendants could not have foreseen that Plaintiffs would misconstrue a particular FOIA release as containing redactions to portions of records on grounds of non-responsiveness, and argue in their reply that those redactions support Plaintiffs' interpretation of EPA's FOIA regulations. As explained in the proposed sur-reply, the redactions that Plaintiffs refer to are to separate non-responsive records. *See* Proposed Sur-Reply at 3-5. Plaintiffs apparently believe EPA should have reviewed all of its FOIA responses and then speculate about ways in which Plaintiffs might misconstrue those responses in order to preempt Plaintiffs' arguments in EPA's opposition. Of course, there is no such requirement when opposing a motion.

[1] Rather than oppose Defendants' motion to file a sur-reply, Plaintiffs should have withdrawn the Second Wilcox Declaration after Defendants demonstrated that it contains false statements. *See* D.C. Rules of Professional Conduct, Rule 3.3(a)(1) (providing that a lawyer shall not knowingly "[m]ake a false statement of fact or law to a tribunal *or fail to correct a false statement of material fact* or law previously made to the tribunal by the lawyer[.]") (emphasis added).

Plaintiffs also argue that EPA "chose not to proactively address" the fact that certain of Plaintiffs' FOIA requests were subject to EPA's Awareness Notification Process. Opp'n at 5. Again, there was no reason for Defendants to address that in its opposition. Plaintiffs have misinterpreted the Awareness Notification Process as evidence that the Rule is causing "political interference" in EPA's FOIA program, but the Awareness Notification Process is not evidence of political interference at all. Proposed Sur-Reply at 2-3. And, in any event, the Awareness Notification Process is not challenged in this case so it is irrelevant to whether EPA's 2019 FOIA Rule has caused "political interference."[2]

Plaintiffs also argue that a sur-reply will "further clutter the Court's docket and will, by its own logic, require still further briefing in order to properly allow EcoRights, the party with the burden of proof, to submit its argument last." Opp'n at 1. But Plaintiffs have it backwards. The fact that they have the burden of proof means that they must submit their evidence first and allow Defendants an opportunity to offer evidence in response. Plaintiffs should not be able to extinguish Defendants' right to respond by submitting new evidence with their reply, as they did. There is no "right" to the last word when Plaintiffs act in this fashion.

Plaintiffs next ask the Court to deny Defendants' motion because "sur-replies are disfavored." Opp'n at 2. But although that may be true generally, the "district court routinely grants such motions when a party is 'unable to contest matters presented to the court for the first time' in the last scheduled pleading." *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003). That is indisputably the situation here, and Plaintiffs cite no decisions denying leave to file

[2] The Awareness Notification Process predates the challenged Rule. *Compare* Second Wilcox Decl., Ex. 4 (memorandum dated November 16, 2018 describing Awareness Notification Process) *with* Comp. ¶ 1 (challenging FOIA Rule dated June 26, 2019).

a sur-reply under circumstances such as these.[3]

Lastly, the Court should deny Plaintiffs' summary request to submit a sur-sur-reply and still further "factual support." Opp'n at 7. Plaintiffs did not submit a proposed sur-sur-reply and did not explain in any detail what issues the sur-sur-reply would address, what additional evidence Plaintiffs would submit, or how the filing would be helpful to the Court. Instead, Plaintiffs' request to file a sur-sur-reply is a transparent attempt to fix mistakes in the reply and to deny Defendants an opportunity to rebut Plaintiffs' evidence. If Plaintiffs' vague request to submit unidentified "additional evidence" entitled them to a sur-sur-reply, then briefing would never end. In short, Plaintiffs have advanced no specific basis for protracting the briefing and have failed to meet their burden to justify a sur-sur-reply.

[3] None of Plaintiffs' cited cases suggest a sur-reply should be disallowed here. *See Hall v. United States Dep't of Labor*, No. 18-5100, 2018 U.S. App. LEXIS 31116, at *2 (D.C. Cir. Nov. 1, 2018) (denying leave to file sur-reply without analysis because "appellant has not demonstrated that the requested relief is warranted"); *Crummey v. SSA*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011) (denying leave to file sur-reply where the movant's reply "largely rehashed its prior argument, citing to the evidence submitted with its opening memorandum" and therefore "did not deprive [the non-movant] of a meaningful opportunity to respond to its argument"); *Cunningham v. SEC*, No. 16-1237, 2017 U.S. App. LEXIS 5684, at *1 (D.C. Cir. Mar. 31, 2017) (denying leave to file sur-reply without analysis where "petitioner has not shown any grounds for filing one here"); *Taylor v. Law Office of Galiher, Clarke & Galiher*, No. 15-7093, 2016 U.S. App. LEXIS 669, at *1 (D.C. Cir. Jan. 14, 2016) (denying leave to file sur-reply without analysis because "appellant has not demonstrated the requested relief is warranted"); *Beaird v. Gonzales*, No. 07-5312, 2008 U.S. App. LEXIS 7647, at *1 (D.C. Cir. Apr. 4, 2008) (denying leave to file sur-reply without analysis where "the lodged surreply does not contribute meaningfully to the panel's consideration of the motion for summary affirmance"); *In re Papst Licensing GmbH & Co. KG Litig.*, 967 F. Supp. 2d 22, 37 n.21 (D.D.C. 2013) (denying leave to file sur-reply where the reply "did not raise new issues"); *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012) (denying leave to file sur-reply where the "alleged new arguments" did not provide sufficient grounds for a sur-reply); *Bigwood v. United States DOD*, 132 F. Supp. 3d 124, 154 (D.D.C. 2015) (denying leave to file sur-reply where the argument in reply "was neither novel nor unexpected").

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director, Federal Programs Branch

/s/ *Joshua Kolsky*
JOSHUA M. KOLSKY
Trial Attorney
D.C. Bar No. 993430
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW Washington, DC 20005
Tel.: (202) 305-7664
Fax: (202) 616-8470
E-mail: joshua.kolsky@usdoj.gov

Attorneys for Defendants