# In the United States Court of Federal Claims

MICHAEL E. KELLY, *et al*,

*Plaintiffs,*

v.

THE UNITED STATES,

*Defendant*.

No. 21-1949 L
(Filed: August 25, 2023)

**ORDER**

On August 21, 2023, plaintiffs filed an opposed motion for leave to file a surreply in opposition to the government's motion to dismiss the amended complaint. ECF No. 41. This request is in addition to plaintiffs' motion to exceed the page limit by ten pages, which this Court granted on June 20, 2023. ECF No. 32. This Court **denies** the motion because plaintiffs have failed to demonstrate that the government's reply raised new arguments.

The "standard for granting a 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." *Ute Indian Tribe of Uintah & Ouray Indian Rsrv. v. United States*, 145 Fed. Cl. 609, 617 n.6 (2019) (citing *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)). The Court has discretion to grant or deny leave to file a surreply. *Id*. The use of a surreply is improper when it serves as nothing more than "an effort to get the last word." *Am. Safety Council, Inc. v. United States*, 122 Fed. Cl. 426, 431 (2015) (internal citations omitted).

In their motion, plaintiffs assert, without elaboration, that the government's reply "raises a number of new arguments and counter-factual scenarios." ECF No. 41 at 1. A party seeking leave to file a surreply bears the burden to show "the moving party raised new arguments that were not included in the original motion." *Longwood Vill. Rest., Ltd. v. Ashcroft*, 157 F. Supp. 2d 61, 68 n.3 (D.D.C. 2001). Plaintiffs have not met this burden. The motion does not specifically point out any allegedly new argument or scenario. Because the government bears the burden of persuasion in its motion to dismiss, the government is generally entitled to the last word. *See generally* RCFC 5.4 (prescribing only an initial, an opposing and a reply brief as a matter of right).

Nor should plaintiffs rely on the content of the surreply to enumerate the allegedly new arguments. The Federal Circuit has noted that "the prejudice from improper surreply arguments is difficult to eliminate once such arguments have been read by the court." *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1361 (Fed. Cir. 2005). If the Court must read the surreply argument to understand the basis upon which the motion is made, the non-moving party is prejudiced even if the motion is denied.

Therefore, the Court **DENIES** the plaintiffs' motion for leave to file a surreply.

**IT IS SO ORDERED.**

s/ Molly R. Silfen
MOLLY R. SILFEN
Judge