

2. The Sur-Reply Motion argues that Defendants' Reply improperly made three new arguments. But, as shown below, the Reply's only "new" arguments respond directly to documents attached -- for the first time -- to Plaintiff's Response. Yet, that is the whole point of a reply brief -- to address the issues raised in the response brief. Thus, there is nothing improper about any of the so-called "new" arguments in the Reply.

The First Argument

3. According to the Sur-Reply Motion, the first purported new argument in the Reply is that the "merits" of the Trustee's malpractice claim are not relevant to the Unclean Hands Defenses. But, this argument is not new at all. It has always been Defendants' position that these Defenses are not directed at the so-called "merits" of the Trustee's malpractice claim. That was obviously this Court's understanding as well, because that is precisely why the Court bifurcated this case to deal with the Unclean Hands Defenses first -- before doing discovery relating to the merits of the Trustee's malpractice claim. If anyone thought the merits impacted these Defenses, they would have objected to bifurcation on that ground. But, no one did. Indeed, one of Plaintiff's arguments against bifurcation was that there would be "double" discovery -- first as to the Unclean Hands Defenses and then as to the merits.

4. Thus, as set forth in the Reply, it is Plaintiff who improperly tried to inject the merits of his underlying malpractice claim into this phase of the case by arguing in his Response that his case has merit. But, as we demonstrated in the Reply, the Unclean Hands Defenses are not based on the "merits" of the Trustee's case. This is merely a straw man erected by the Trustee in hopes of distracting the Court from the real issues at this stage of the case and the Maxwell analysis that is at the heart of the Unclean Hands Defenses.

The Second Argument

5. The second challenged argument is the Reply's argument that some of the documents submitted with Plaintiff's Response are inadmissible hearsay. Of course that is a "new" argument. Before receiving Plaintiff's Response, Defendants did not know what documents, if any, Plaintiff was going to use in opposition to the Summary Judgment Motion. Thus, the Reply simply addressed documents that -- for the first time -- were raised in, or attached to, Plaintiff's Response. That is the whole point of a reply brief.

6. Plaintiff should not now get a second bite at the apple to go back and try to establish the admissibility of documents when that foundation should have been established in his Response. In all events, most of these inadmissible documents go to the Trustee's misplaced "merits" arguments so that they really do not have to be considered for the Court to rule on Defendants' Summary Judgment Motion.

The Third Argument

7. The Reply's third purported new argument (according to the Sur-Reply Motion) is that Plaintiff did not create a question of fact based upon documents attached to the Response that were: (a) unauthenticated; (b) obtained outside this litigation; and (c) never produced in this litigation. Again, while this is a new argument, it directly responds to documents first put at issue by Plaintiff's Response. Thus, it was entirely appropriate to address them in the Reply. In all events, as will now be shown, Plaintiff should not get another chance to lay a foundation for documents that should have been done in the Response.

Plaintiff's Alternative Request For Discovery

8. Alternatively, the Sur-Reply Motion asks the Court to open "merits" discovery to allow Plaintiff to lay the foundation for the documents he relies upon in the Response. There is no basis for this request.

9. Indeed, there are only two relevant possibilities. The first is that, as explained in the Reply, the documents on which Plaintiff's Response relied go to the "merits" and, thus, are irrelevant to Defendants' Summary Judgment Motion. If that is correct, then the authentication and hearsay objections are moot, and there is no need to consider them or to conduct discovery with respect thereto.

10. The only other possibility is that the "merits" documents are relevant to the Unclean Hands Defenses and the Summary Judgment Motion (they are not). If they are relevant, then Plaintiff was required to obtain the necessary testimony to establish the foundation for those documents during discovery relating to the Unclean Hands Defenses. No one stopped him from doing so. In the end, Plaintiff had over a year to do whatever discovery he wanted to do relating to the Unclean Hands Defenses. Nevertheless, he did almost no discovery and took no depositions. Plaintiff should not be permitted to: (a) float the documents in the Response in hopes that there will be no objection to them; and (b) then, if there is an objection, have a "do-over" to obtain the discovery he chose not to timely pursue. Accordingly, Plaintiff's alternative request should also be denied.

Conclusion

11. As Defendants show in the Reply, Plaintiff's entire Response seemed to be an effort to confuse the issues -- i.e., by arguing the "merits" of his case -- so that the Court might hesitate to grant summary judgment. The Sur-Reply Motion establishes beyond debate that that

was and is Plaintiff's motive. The unsaid, but thinly-veiled, threat is that, if Plaintiff loses on summary judgment, he is going to appeal and blame his loss on this Court's bifurcation of the case and unwillingness to let him conduct discovery regarding the "merits" of his case.

12. But, nothing could be further from the truth. Plaintiff never objected to bifurcation on the ground that he needed "merits" discovery to respond to the Unclean Hands Defenses. Plaintiff had years to do whatever discovery he wanted to do relative to those Defenses and the Summary Judgment Motion that everyone knew was coming. And, if Plaintiff truly thought the Unclean Hands Defenses were dependent on the so-called "merits" of his case, he could have moved to open "merits" discovery on the basis that those Defenses could not be decided before all discovery was complete. He never did any of those things. Rather, now with briefing complete, Plaintiff files this Sur-Reply Motion in a last ditch effort to confuse the issues once again and impliedly threaten this Court that its decision to bifurcate this case will be scrutinized on appeal.

13. The fact of the matter is that the Maxwell analysis -- and the pending Summary Judgment Motion -- have nothing to do with the so-called "merits" of the Trustee's case, and Defendants' Summary Judgment Motion should be decided on the basis of the already filed briefs.

WHEREFORE, Defendants respectfully request the Court to deny Plaintiff's Motion for Leave to File Sur-Reply or, Alternatively, to Open Merits Discovery, and that it grant Defendants such other and further relief as is appropriate.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

Stephen Novack, an attorney, hereby certifies that he caused a true and correct copy of the foregoing Defendants' Response to Plaintiff's Motion for Leave to File Sur-Reply or, Alternatively, to Open Merits Discovery to be served through the ECF system upon the following:

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on this 27th day of August, 2009.

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