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September 21, 2011

BY FACSIMILE

The Honorable Barbara S. Jones
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Windsor v. *United States*, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Jones:

We write on behalf of the plaintiff, Edith Schlain Windsor, in the above-captioned matter in response to the renewed motion for leave to file a sur-reply, filed yesterday by the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG").

* * *

Although the law is clear that a sur-reply is appropriate only where "'new or unexpected' arguments or issues [are] raised that necessitate a sur-reply" (Sept. 6, 2011 Order at 2), BLAG identifies no new legal or factual issues in Plaintiff's reply brief. Thus, while BLAG complains that Plaintiff challenges the reasoning of an Eleventh Circuit case, *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), which BLAG itself cited in its opposition brief, that Plaintiff distinguishes the cases BLAG cites as either irrelevant or based on overruled precedent, that Plaintiff mischaracterizes its position on the second of the heightened scrutiny factors, and that

Plaintiff disagrees as to the scope of the federal regulation of marriage, not one of these is actually a new issue. (Mem. in Supp. of Renewed Mot. for Leave to File Sur-Reply [herein after "Renewed Mot."] at 5–6.) Each and every one of these issues was either discussed in Plaintiff's moving brief or in BLAG's opposition brief.[1] In other words, while BLAG no doubt disagrees with what Plaintiff has argued, disagreement is present in virtually every case and does not provide a legitimate basis for a sur-reply.

Nor is BLAG entitled to a sur-reply because Plaintiff has submitted supplemental factual affidavits. Again, each of the affidavits cited by Plaintiff responds directly to a point raised in BLAG's opposition brief—namely, that gay men and lesbians have a "choice" about their sexual orientation, and that children are better off being raised by their biological mother and father. Again, neither of these issues is new to this case such that it would justify the filing of a sur-reply. Moreover, rebuttal expert affidavits were expressly contemplated by the May 11, 2011 Scheduling Order, which did not contemplate the submission of any sur-replies.

Finally, BLAG offers no legal support—because there is none—for its position that a sur-reply is warranted either because of the length of Plaintiff's submissions (all of which complied with the Court's orders regarding page limits) or because Plaintiff "got the last word."

BLAG Has Not Satisfied the Requisite Legal Standard

As the Court is aware, sur-reply briefs generally are not permitted and for good reason. *See* Local Civ. Rule 6.1. A party is obligated in its opposition papers to fully respond to all arguments put forward in an initial brief and to make any arguments it wishes to raise, and the moving party is then given the opportunity to reply. As the Court recognized in denying BLAG's previous motion for a sur-reply, a sur-reply is only appropriate where "'new or unexpected' arguments or issues [are] raised that necessitate a sur-reply." (Sept. 6, 2011 Order at 2.)

Here, BLAG identifies no new legal or factual issues presented in Plaintiff's reply papers because there are none. Instead, BLAG "essentially seeks permission to reargue the same points addressed in its previous submissions," but "[n]either the Federal Rules of Civil Procedure nor the Local Rules permit such a sur-reply, and the Court is under no obligation to give" BLAG "another chance to make [its] arguments." *OneBeacon Am. Ins. Co.* v. *Comsec Ventures Intern., Inc.*, No. 8:07-cv-900 (GLS), 2010 WL 114819, at *3 (N.D.N.Y. Jan. 7, 2010).

Neither Plaintiff's reply nor the supplemental affidavits and declarations submitted therewith put new facts or legal questions at issue, much less raised any issue that BLAG can credibly argue was unexpected. *Cifarelli* v. *Village of Babylon*, 93 F.3d 47, 53 (2d Cir. 1996) (approving district court reliance on an affidavit submitted in

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[1] *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 2, 10–11, 13 n.4, 36–39; Mem. in Supp. of Intervenor-Def.'s Opp'n to Pl.'s Mot. for Summ. J. at 5–7, 21–23.

support of reply brief despite a lack of sur-reply where the other party's response brief indicated it was already aware of the defense addressed in the affidavit); *Yu Chen* v. *LW Rest., Inc.*, No. 10 CV 200 (ARR), 2011 WL 3420433, at *7 n.16 (E.D.N.Y. Aug. 3, 2011) ("[T]he Court finds that plaintiffs' reply does not contain any new factual allegations or legal arguments sufficient to warrant the filing of a sur-reply."). Instead, as is typically the case, Plaintiff's papers responded to the arguments that BLAG put forward in its opposition.

A review of the supposedly "unexpected arguments" BLAG cites in its motion makes this plain. (Renewed Mot. at 5–6.) All are straightforward disputes as to legal issues fully briefed in the parties' prior papers. Thus, for example:

- BLAG cites Plaintiff's argument in her reply brief that BLAG's argument "relies entirely on overruled precedent or decisions that do not address the constitutional question presented." However, Plaintiff had already raised this issue in her opening brief, to which BLAG responded, and Plaintiff replied in due course. (*See, e.g.*, Pl.'s Mem. in Supp. of Mot. for Summ. J. [hereinafter SJ Mem.] at 13 n.4 (distinguishing *Lofton*, 358 F.3d 804); Mem. in Supp. of Intervenor-Def.'s Opp'n to Pl.'s Mot. for Summ. J. [hereinafter BLAG's Opp'n to SJ] at 5–7 (citing *Lofton* in support of BLAG's arguments); Reply Mem. in Supp. of Pl.'s Mot. for Summ. J. [hereinafter SJ Reply] at 9–13 (responding to BLAG's claims and cited case law).)

- BLAG cites Plaintiff's characterization of BLAG's position on the second essential factor of heightened scrutiny analysis. However, Plaintiff was only responding to BLAG's own argument. (BLAG Opp'n to SJ at 9 (addressing second prong of heightened scrutiny analysis); SJ Reply at 9–10 (characterizing BLAG's argument).)

- BLAG cites Plaintiff's articulation of the scope of prior federal regulation of marriage. However, Plaintiff not only raised this issue in her opening brief, to which BLAG responded in opposition, but she produced an expert witness whose testimony in both her affidavit and deposition were devoted in substantial part to the history of federal marriage regulation. (*See* SJ Mem. at 2, 10–11, 36–39 (addressing federal regulation of marriage and citing, *inter alia*, expert affidavit of Nancy Cott, Ph.D.); BLAG Opp'n to SJ at 21–23 (responding to Plaintiff's argument regarding the federal regulation of marriage); SJ Reply at 29–30 (replying to BLAG's arguments).) Indeed, for this purportedly "unexpected argument[] newly offered by the Plaintiff in her reply," BLAG had even *quoted* Plaintiff's opening brief in response. (*See, e.g.*, BLAG Opp'n to SJ at 21 (quoting Plaintiff's opening brief for the proposition that "never before, or since, has the federal government categorically disregarded state determinations of who is validly married and substituted its own definition").)

Because BLAG has identified no new issues raised in Plaintiff's reply brief, a sur-reply is clearly inappropriate under the circumstances. *See, e.g.*, *Siti-*

Sites.com, Inc. v. *Verizon Commc'n, Inc.*, No. 10 Civ. 3751 (DLC), 2010 WL 5392927, at *3 n.6 (S.D.N.Y. Dec. 29, 2010) ("[H]aving failed to identify any issue in the defendant's reply brief which, in fairness, required that [plaintiff] be given an opportunity to respond, the request to file a sur-reply is denied.").

Plaintiff's Supplemental Affidavits Responded to Issues in BLAG's Opposition Papers

BLAG takes the position that Plaintiff's supplemental affidavits should permit it to file a sur-reply. But the supplemental materials cited in Plaintiff's reply similarly do not raise any new factual issues either. Rather, Plaintiff's supplemental affidavits addressed only two issues: (1) whether sexual orientation is immutable; and (2) whether gay people make good parents. These issues were raised in Plaintiff's moving brief, and Plaintiff's reply addressed arguments made by BLAG in its opposition papers. (BLAG Opp'n to SJ at 10–12, 23–24.) *See Travelers Ins. Co.* v. *Buffalo Reins. Co.*, 735 F. Supp. 492, 495–96 (S.D.N.Y. 1990), *vacated in part on other grounds*, 739 F. Supp. 209 (S.D.N.Y. 1990) (denying leave to file a sur-reply because "each point in the reply brief directly responds to an issue raised in [the other party's] opposition papers"). Additionally, supplemental expert affidavits were specifically contemplated by the May 11, 2011 Scheduling Order, but there is no provision in that Order for any sur-reply. (May 11, 2011 Order ¶ 11.)

Furthermore, as this Court is aware from its decision on Plaintiff's motion to strike, the supplemental affidavits were necessitated only because BLAG chose in its opposition to rely on hearsay materials outside the discovery record in this case. Plaintiff, in her reply, submitted a cabined response to these materials consisting of supplemental affidavits from her own experts and one declaration from one of the authors of two of the articles cited by BLAG, Professor Lisa Diamond.

BLAG had every opportunity to depose Plaintiff's experts as to their views regarding the materials on which BLAG relied in its opposition, but BLAG did not. Moreover, BLAG had every opportunity to notice any of its hearsay declarants as witnesses, whom Plaintiff would have then deposed, but BLAG did not. Instead, BLAG cited for the first time in its opposition papers voluminous hearsay materials previously unmentioned and undisclosed throughout the discovery process in this case.

BLAG's arguments ring particularly hollow insofar as it suggests that Plaintiff has somehow introduced expert opinion testimony as to which it had no notice. (Renewed Mot. at 4.) Plaintiff's reply papers relied only on rebuttal expert affidavits, which were contemplated by the Scheduling Order and this Court's ruling on the motion to strike, and a declaration from Professor Diamond.[2] With respect to Professor

[2] Although BLAG complains that Professor Diamond is serving as an expert for Plaintiff, this is clearly not the case since she was not retained as an expert witness by Plaintiff. As she testified in her Supplemental Declaration (¶ 4): "I am providing these clarifications of my work on a scientific basis, and I have no other interest or

Diamond, it is BLAG that put her views at issue, not Plaintiff. BLAG is hardly in a position to complain that Plaintiff is using un-noticed opinion testimony, when BLAG itself persuaded the Court that such material can be relied upon in constitutional cases. (*See* Aug. 29, 2011 Order.) BLAG also suggests—incredibly—that materials "newly created" for the purpose of the litigation are somehow more suspect than the hearsay materials it cites. There is no basis for this claim; indeed, at the very least, Professor Diamond's declaration is sworn, and contains the views of the person who actually wrote the articles that BLAG purports to rely on. Thus, unlike BLAG's sources, it would be admissible even without recourse to the doctrine of constitutional facts.

It is worth noting that Plaintiff moved for summary judgment with supporting evidence as to DOMA's justifications under both rational basis and heightened scrutiny. (SJ Mem. at 10–30 (heightened scrutiny), 31–40 (rational basis).) Thus, BLAG itself made the decision to limit its position in opposition to Plaintiff's motion for summary judgment to the argument that DOMA has a rational basis and that heightened scrutiny does not apply, without reliance on expert testimony. To be sure, BLAG was entitled to do so under the rational basis standard. But Plaintiff was entitled to respond in order to show that the rationales BLAG proffered are not rooted in factual reality. *See, e.g., Minn.* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). BLAG cannot now claim that Plaintiff having done so entitles them to another brief—Plaintiff neither raised new issues nor possibly have surprised BLAG, particularly given the fact that BLAG received notice of Plaintiff's experts as far back as May 20, 2011, when BLAG was in possession of affidavits from each of Plaintiff's expert witnesses. *See Teva Pharm. USA, Inc.* v. *Sandoz, Inc.*, Nos. 08 Civ. 7611 (BSJ) (AJP), 09 Civ. 8824 (BSJ) (AJP), 2011 WL 4063297, at *3 & n.2 (S.D.N.Y. Aug. 15, 2011) (denying leave to file sur-reply expert reports where issues were raised in initial expert reports).

Neither A Desire for More Pages Nor a Desire to "Have The Last Word" Is a Permissible Basis for A Sur-Reply

In addition, BLAG offers no support, and Plaintiff is aware of none, for the proposition that either the page disparity in the parties' briefing or the order of briefing on its motion to dismiss or Plaintiff's motion for summary judgment provide any basis for permission to file a sur-reply. *See Gladstone Ford* v. *N.Y. Trans. Auth.*, 43 F. App'x. 445, 449 (2d Cir. 2002) ("Plaintiff had no tenable basis for seeking leave to file a sur-reply, at least where the proffered excuse had nothing to do with anything new in Defendants' reply papers."). Indeed, were these legitimate bases for a sur-reply, BLAG's first motion for a sur-reply would not have been denied as premature. (Mem. of Intervenor-Def. in Supp. of Mot. for Clarification, Additional Pages, and Leave to File

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involvement in this case. I have received no compensation for providing this affidavit." Thus, while she certainly has expertise that Plaintiff believes should be given weight by the Court, unlike Professors Lamb, Peplau, *et al.*, Plaintiff is not seeking to have her qualified as an expert and Professor Diamond's testimony is more analogous to that of a non-party witness.

Sur-reply at 4–5 (making same arguments as to page disparities and timing of briefs).) BLAG surely could have moved for additional pages for its opposition briefing, but did not do so. BLAG also complains about the length of Plaintiff's affidavits, but had BLAG chosen to submit expert testimony as the May 11 Scheduling Order explicitly contemplated, it too could have submitted its own expert affidavits. Having declined to build any evidentiary record in support of its own position, BLAG cannot now complain about Plaintiff's thorough efforts to support her own.

Plaintiff respectfully submits that BLAG's argument that it should be entitled to "the last word" has already been heard and rejected. (*See* Sept. 6, 2011 Order (rejecting request to extend deadline for motion to dismiss briefing).) Leaving aside the obvious lack of merit of this position, as explained in our memorandum dated September 6, 2011 responding to BLAG's first request for a sur-reply, BLAG cannot seek to have this issue reconsidered under the guise of the instant motion for leave to file a sur-reply.

Finally, it is not insignificant that BLAG does not explain anywhere in its moving brief how it intends to respond to Plaintiff's reply or supplemental affidavits. Surely, BLAG cannot now for the first time put in affidavits from previously undisclosed and undeposed experts it has retained since that would violate the May 11 Scheduling Order. Moreover, citations to new articles and the like will simply perpetuate the current briefing cycle, as Plaintiff is entitled to respond to any new hearsay "facts" asserted by BLAG. *Clover Leaf Creamery*, 449 U.S. at 464.

In other words, BLAG cannot keep adding new material to the record, necessitating an endless loop of new rounds of briefing on both sides. Given BLAG's approach to presenting support for its positions, we would expect that allowing BLAG to submit a sur-reply will lead to BLAG introducing still more new hearsay evidence. This will require an additional response from Plaintiff, thus wasting the Court's and the parties' resources. "Though many arguments might last forever, briefing has to end somewhere, and the rule is that it ends with the reply brief absent Court approval for a sur-reply." *Mem. Hermann Healthcare Syst.* v. *State Street Bank and Trust Co.*, No. 08 MDL 1945, 08 Civ. 5440 (RJH), 2010 WL 3664490, at *2 n.2 (S.D.N.Y. Sept. 17, 2010). *See also Baergas* v. *City of New York*, 04-cv-02944 (BSJ), Docket No. 84, July 1, 2005 (denying leave to file sur-reply where party argued that reply brief misstated evidentiary record).

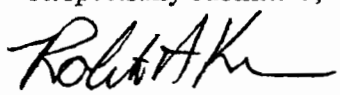
Plaintiff Edith Windsor is eighty-two years old, has a serious heart condition, and has respectfully made every effort to have her case heard as expeditiously as possible given the unique circumstances of this case resulting from BLAG's intervention. Had BLAG wished to develop additional factual issues, it should have done so within the dates ordered by the Court or in the briefs that it has already filed. It did not, and in fact, only two pages of BLAG's instant motion consists of new argument; the rest is simply a renewal of its prior (denied) motion for a sur-reply. BLAG

should not be allowed to drag this case out further to the detriment of Ms. Windsor and her legitimate interest in the timely rectification of her constitutional rights.

* * *

In light of the above, Plaintiff respectfully requests that BLAG's renewed motion for leave to file sur-reply should be denied. In the alternative, to the extent that the Court concludes that there is any basis for a sur-reply at all, Plaintiff respectfully requests that the Court issue an order providing that BLAG's sur-reply should be strictly limited to the specific issue or issues that warrant the filing of a sur-reply. Of course, we are available at the Court's convenience to address any questions Your Honor may have concerning the above.

Respectfully submitted,



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