UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDITH SCHLAIN WINDSOR, in her capacity as Executor of the estate of THEA CLARA SPYER, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	10 Civ. 8435 (BSJ) (JCF) ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO BLAG'S MOTION FOR CLARIFICATION, ADDITIONAL PAGES, AND LEAVE TO FILE SUR-REPLY

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Plaintiff Edith Schlain Windsor respectfully submits this memorandum of law in opposition to the motion by the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") for clarification, additional pages, and leave to file a sur-reply.

INTRODUCTION

Through its motion, BLAG seeks: (1) a page extension for its reply brief in support of its motion to dismiss; (2) an extension of time to file its reply brief in connection with its motion to dismiss; and (3) permission to file a sur-reply in connection with Plaintiff's motion for summary judgment. While Plaintiff does not oppose BLAG's request for a page extension in connection with its reply brief in support of its motion to dismiss (currently due on September 9), she respectfully submits that BLAG's two other requests should be denied because they are without any factual or legal support or justification.

ARGUMENT

A. BLAG Should Not Be Granted an Extension of Time to File its Reply In Support of Its Motion to Dismiss

BLAG contends that the August 29 Docket Entry stating, "Set/Reset Deadlines: Replies due by 9/16/2011," extends the deadline for it to file its reply brief in support of its motion to dismiss. Plaintiff respectfully submits that that was not what the Court ordered nor intended.

The Scheduling Order, dated May 11, 2011 (to which BLAG stipulated), provides that Plaintiff's opposition to BLAG's motion to dismiss and reply brief in support of her motion for summary judgment were due on August 19 and that BLAG's reply in support of its motion to dismiss is due on September 9. On August 10, Plaintiff

filed her motion to strike, which sought to strike documents referenced by BLAG in its brief and Rule 56.1 statement in connection with Plaintiff's motion for summary judgment. The motion to strike related solely to issues pertaining to the motion for summary judgment and not to BLAG's motion to dismiss. Thus, on August 15, the Court adjourned the deadline for Plaintiff to file her reply brief in support of her motion for summary judgment while it considered her motion, but made clear that the briefing on the motion to dismiss would continue in accordance with the Scheduling Order. (*See* Aug. 15 Order at 2 ("[T]he deadline for submission of [the opposition to BLAG's motion to dismiss] remains August 19 . . . .").)

In accordance with the Court's instructions, Plaintiff filed her opposition to BLAG's motion to dismiss on August 19. On August 29, 2011, in connection with its decision on Plaintiff's motion to strike, the Court ordered that Plaintiff's reply brief in support of her motion for summary judgment be due by September 16, and said nothing about BLAG's motion to dismiss. Thus, it is clear that the August 29 docket entry—entered the same day as the Court's order—refers only to the motion for summary judgment, and does nothing to alter the dates with respect to BLAG's motion to dismiss.

BLAG argues that the Court should nonetheless extend BLAG's time to file its reply brief because: (1) under the initial Scheduling Order, Plaintiff's motion for summary judgment was going to be fully briefed before BLAG's motion to dismiss; and (2) there was supposed "uncertainly in the briefing scheduling imposed by Plaintiff's interposition of her failed motion to strike." As set forth below, both arguments lack merit.

What the rules, of course, provide is that a party has the opportunity to respond last with respect to *its own motion*. Here, BLAG can do so with respect to its motion to dismiss. There is no good reason—and BLAG fails to articulate any—why BLAG's reply in support of its motion to dismiss needs to be filed at the same time as Plaintiff's reply in support of her motion for summary judgment. BLAG's claimed "uncertainty" about the briefing schedule also seems disingenuous at best, given that the Court held explicitly in connection with the motion to strike that Plaintiff's deadline for responding to the motion to dismiss was otherwise unaltered. As a result, there could be no doubt that the timing of BLAG's reply also remained unchanged. Indeed, if BLAG was confused about the deadline for its reply brief, it could have sought clarification on *August 15* when the Court issued its order, rather than one week before its deadline, but it chose not to do so. It thus appears that BLAG's instant motion is nothing more than an attempt to capitalize on a typographical error in a clerk's docket entry.

Given that BLAG has not identified any principled reason why it needs more than the three weeks already provided under the Scheduling Order to file its reply brief, Plaintiff respectfully requests that BLAG's motion be denied.

B. BLAG Should Not be Allowed to File a Sur-reply on Summary Judgment

Plaintiff also respectfully submits that a sur-reply brief is not warranted here. As the Court is aware, the rules do not provide for the submission of sur-reply briefs. *See* Local Civ. Rule 6.1.

BLAG asserts that it should be permitted to file a sur-reply because Plaintiff will have filed more pages of briefing in support of her motion for summary judgment than BLAG filed in its opposition. This makes no sense. This Court's rules provide that a moving party *always* has more pages in support of her motion that the non-

moving party. That Plaintiff has more pages here certainly does not provide any reason for the filing of a sur-reply. (Obviously, BLAG had more pages in connection with the briefing on its motion to dismiss than did Plaintiff.)

Moreover, BLAG has not identified any arguments that it wanted to, but could not, make in its opposition brief. Nor could it. This Court granted BLAG's request to file a total of seventy (70) pages in support of its motion to dismiss and opposition to Plaintiff's motion for summary judgment. (BLAG then chose to allocate forty five pages to its motion to dismiss and twenty five pages to its opposition to Plaintiff's motion for summary judgment.) BLAG thus has had ample opportunity to respond to Plaintiff's motion for summary judgment. And Plaintiff has not opposed a single request by BLAG for an extension of the page limit in its briefs. If BLAG thought that it needed more than the seventy pages it was granted for its opposition brief, it needed only to ask. But that does not mean that it should now get the opportunity to file a sur-reply.

Further, to the extent BLAG is complaining that the Court has granted Plaintiff additional pages for her reply brief, that is a problem entirely of BLAG's own making. Indeed, in these circumstances, it is hard to understand what real issue BLAG could possibly complain of. Plaintiff always had the ability to file a reply brief responding to whatever contentions BLAG was going to make in its summary judgment opposition papers. Here, BLAG chose to insert a host of new evidentiary materials at that point in the proceedings. Thus, all that is really different is that Plaintiff received an extension of time to submit her reply brief, hardly a radical alteration of either the agreed upon schedule or the rules. Moreover, Plaintiff's need for additional pages on reply here is due, in large part, to the fact that BLAG chose to rely on hearsay articles in its

opposition to Plaintiff's motion for summary judgment, without providing Plaintiff the opportunity to present expert testimony as to the reliability or accuracy of those materials, or even producing the vast majority of them previously in discovery. Plaintiff now needs to respond to those articles in her reply brief. Allowing BLAG to submit a sur-reply with new hearsay evidence (as we expect it would do) would thus only require an additional response from Plaintiff, wasting the Court's and the parties' resources, and with no realistic end in sight. Even under rational basis review, and even under the "constitutional facts" doctrine as interpreted by BLAG, Plaintiff is entitled to the opportunity to demonstrate that the justifications put forward by BLAG to save a challenged statute are so lacking in factual support as to be irrational. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

BLAG's argument that a sur-reply is warranted to "restore the balance contemplated in the original scheduling order" also lacks merit. As discussed above, the Scheduling Order conforms to the general rule that a party can respond last on its own motion. That is the balance that should be maintained here.[1] Significantly, BLAG has not provided any substantive reason why this Court should depart from the rules and allow it to file a sur-reply. It does not claim that there are any new issues that require a response, nor could it, since Plaintiff has not even filed her reply brief yet. Accordingly, BLAG's request to file a sur-reply should be denied. *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

[1] Ironically, BLAG opposed the sequence of the briefing initially before Judge Francis and sought a schedule that would have had the motion to dismiss fully briefed before the motion for summary judgment.

which, in fairness, required that [plaintiff] be given an opportunity to respond, the request to file a sur-reply is denied."); *Turley* v. *ISC Lackawanna, Inc.*, No. 06 Civ. 794S, 2011 WL 1104270, at *7 (W.D.N.Y. Mar. 23, 2011) ("Plaintiff's request to file a sur-reply is denied. Plaintiff does not specify what he needs to respond to in his sur-reply or what additional investigation is needed."); *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) ("[T]he court denies [plaintiff's] motion for leave to file a surreply, which essentially seeks permission to reargue the same points addressed in its previous submissions. Neither the Federal Rules of Civil Procedure nor the Local Rules permit such a surreply, and the Court is under no obligation to give plaintiff another chance to make his arguments.") (internal quotation omitted).[2]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny BLAG's motion for clarification and leave to file sur-reply.

[2] Notably, the Scheduling Order also set an expedited briefing schedule to account for Plaintiff's age and failing health. BLAG has provided no reason why it should be able to make an end-run around that schedule.

Dated: New York, New York
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