UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RACHEL TUDOR, *Plaintiff-Appellant/Cross-Appellee*, v. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and the REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, *Defendants-Appellees/Cross-Appellants*.	Nos. 18-6102 / 18-6165

OPPOSITION TO MOTION FOR LEAVE TO FILE SURREPLY

Defendants Southeastern Oklahoma State University and the Regional University System of Oklahoma oppose Plaintiff's motion to file a surreply.

Briefing is complete in this cross-appeal. In the last four months, the parties have filed four briefs totaling roughly 250 pages and 53,000 words. Moreover, this Court has already granted the parties a significant word extension. *See* Order Granting Joint Motion to File Oversized Briefs, 1/2/19. Nevertheless, Plaintiff now seeks to get another bite at the apple by filing a substantial surreply covering multiple issues. Plaintiff wants to have the last word, even though federal rules provide for the opposite. *See* Fed. R. App. P. 28.1(c) (detailing the four briefs allowed in a cross-appeal). For the following reasons, Plaintiff's motion should be denied and the surreply struck.

On March 4, Defendants filed their final reply, along with a supplemental appendix that (1) the parties jointly agreed on; and (2) contained documents omitted by Defendants *and* Plaintiff from their original appendices.[1] In their unopposed motion to file the supplement, Defendants notified the Court—relying on Plaintiff's express representations—that Plaintiff planned to file a "short surreply by March 11 solely to discuss the added documents" in the supplemental appendix. *See* Unopposed Motion to File Supplemental Appendix, 2/22/19. On March 13, Plaintiff unveiled the surreply in question. Despite Plaintiff's representation, the brief was not filed by March 11,[2] and it does not "solely" discuss the additional appendix documents—not even close. Rather, the brief illegitimately focuses almost entirely on attacking Defendants' reply.

The introductory paragraph of Plaintiff's proposed surreply, for instance, never mentions the supplemental appendix; rather, Plaintiff says a surreply is needed to "reclaim the integrity of this process" because Defendants have allegedly "skirt[ed] standards of review, lodge[d] inappropriate and otherwise inept attacks on Dr. Tudor's

[1] Plaintiff's motion for a surreply makes no mention of Plaintiff's own omissions. For example, Defendants' supplement included 30 pages of the trial transcript that Plaintiff omitted in the original appendix. *See* Reply Brief of Defendants-Appellees/Cross-Appellants ("Defs' Reply") at 6 n.4. And Defendants' original appendix included several of Plaintiff's other omissions. *E.g.,* Defs' App'x Vol. 2 at 422-99 (exhibits from Defendants' reinstatement response below).

[2] Plaintiff never explains why the motion was not filed by March 11. Plaintiff vaguely implies that this was because Defendants amended their appendix again on March 11. *See* Plaintiff's Opposed Motion for Leave to File Surreply ("Pl's Mot.") at 2. But Defendants' March 11 filings simply involved redacting and sealing documents that were filed by Defendants on March 4 pursuant to Plaintiff's request; the March 11 filings added nothing new that would necessitate giving Plaintiff a longer time to respond.

credibility, and invite[d] this Court to sit as a finder of fact." Plaintiff's Proposed Surreply ("Pl's Surreply") at 1 (attached to Pl's Mot.). Indeed, Plaintiff cites the supplemental appendix in just 2 out of 31 footnotes, and even those citations simply offer cumulative support for rebuttal arguments Plaintiff seeks to lodge. *See id.* at 3 n.6 (string-citing original and supplemental appendix materials in the midst of an argument section on expert case law); *id.* at 9 n.29 (citing Plaintiff's passport as one of several pieces of evidence that Plaintiff is female). Plaintiff's proposed brief, in other words, is unapologetically centered on materials and case law already briefed by the parties.

Plaintiff admits as much in the accompanying motion, saying that Plaintiff's "reasons" for a surreply are, *inter alia*, (1) to respond to Defendants' allegations that Plaintiff made misrepresentations, (2) to dispute characterizations of case law made in Defendants' reply, and (3) to "present argument as to why this Court cannot sit as a finder of fact." Pl's Mot. at 2-3. This is transparent: Plaintiff just wants another brief in order to get the last word. Plaintiff's effort should be struck. *Cf. Echo Acceptance v. Household Retail Servs.*, 267 F.3d 1068, 1091-92 (10th Cir. 2001) ("If the latter portion of Echo's 'Reply Brief' had been submitted to the Clerk of Court under the correct title, 'Appellee's Sur–Reply Brief,' it would not have been accepted for filing.").

To be sure, Plaintiff also claims in the motion that Defendants misrepresented "facts appearing in the record below, including materials Southeastern neglected to initially include in its original appendix." Pl's Mot. at 2. But Plaintiff's motion does not identify a single example of an alleged misrepresentation of the supplemental appendix

by Defendants. Nor does Plaintiff's proposed surreply.[3] That is to say, Plaintiff made a serious accusation against Defendants—ostensibly in an attempt to show compliance with Plaintiff's prior representation about the narrow nature of the surreply—and then made no effort whatsoever to back it up. This type of misleading behavior should be strongly discouraged, not rewarded with an additional brief.

Plaintiff also claims that Defendants, in a footnote, mischaracterized a specific portion of Plaintiff's trial testimony as false. *See* Pl's Surreply at 6-8 & nn.22-25. But, again, this does not concern anything in the supplemental appendix—it is purely a rebuttal to Defendants' reply brief. *See id.* (containing no citations or references to the supplemental appendix). Nor is it a new issue raised by Defendants in the reply brief; rather, it was a footnote supporting Defendants' direct response to an argument made by Plaintiff. *See* Defs' Reply at 25 n.12 & accompanying text. This Court is perfectly capable of reading the parties' existing briefs and cited testimony to determine if Defendants are correct. Moreover, this case in no way hinges on the cited testimony—and Plaintiff never claims otherwise—which is why Defendants relegated the statement to a footnote in the first place. Despite the surreply's *raison d'être*, Plaintiff makes no

[3] The supplemental appendix contains Volumes 5 through 13 of Defendants' appendix. Those volumes are only cited in Footnotes 6 and 29 of Plaintiff's proposed surreply. Neither citation involves an accusation that Defendants misrepresented the specific items in question.

effort to dispute the many other times that Defendants more prominently pointed out Plaintiff's falsehoods, virtually conceding that Plaintiff's claims were indefensible.[4]

In the end, Plaintiff cites a single authority to justify the surreply, *Fleming v. Coulter*, but that authority is unpublished[5] and readily distinguishable. *Fleming* was not a cross-appeal, where both parties file multiple briefs, but instead involved a pro se prisoner (and the briefing difficulties often associated therewith) who failed to offer any meritorious reason why a single-issue surreply was unwarranted. *See* 573 F.App'x 765, 768 n.4 (10th Cir. 2014) (unpublished). That is a far cry from the present scenario, where the parties are represented by attorneys and have submitted hundreds of pages of briefs, and Defendants herein have put forward several legitimate reasons why Plaintiff's omnibus surreply is unwarranted and should be struck.

Nevertheless, Plaintiff indicates *Fleming* entitles a party to file a surreply whenever a reply brief claims that the opposing party misrepresented the record (or case law or the standard of review). *See* Pl's Mot. at 2-3. Such a rule would be untenable. Nearly all

[4] *See, e.g.*, Defs' Reply at 6 ("Plaintiff asserts that Defendants 'have not argued let alone shown that admission of Parker's testimony sowed prejudice.' … This is false."); *id.* ("*Kinser* never says admission of expert testimony is typically deemed harmless; Plaintiff appears to have invented this idea."); *id.* ("This is also a fabrication, as *Sanjuan* says nothing about prejudice being rare or unusual."); *id.* at 9 ("Plaintiff erroneously says Defendants' 'own witnesses testified that the best means of flushing out discrimination … in the tenure review process is to have outside academics … evaluate applications.'"); *id.* at 20 ("Plaintiff also invents testimony out of whole cloth … For example, Plaintiff's claim that 'Scoufos asked House what she thought Tudor's genitals looked like' is a fabrication.").

[5] Plaintiff violated Tenth Circuit Rule 32.1(A) by failing to mention the unpublished nature of this opinion in its motion.

reply briefs are going to assert that the opposing party inaccurately discussed case law or the record—that's the nature of adversarial litigation. Granting Plaintiff's motion, or even delaying such a decision until later, would in essence allow a surreply to become the norm in every case. Indeed, Plaintiff's logic would dictate that Defendants in this very appeal would be entitled to file a sur-sur-reply, given that Plaintiff now accuses Defendants of: (1) "misstatements and distortions of law and fact," (2) "repeatedly misrepresent[ing] facts appearing in the record below," and, most drastically, (3) impugning "the integrity of this process." Pl's Mot. at 2-3. And that sur-sur-reply would elicit a response from Plaintiff, which would lead Defendants to file another brief, and so on. It would be turtles all the way down.

This Court should treat Plaintiff's motion for what it is: a late and illegitimate attempt to circumvent the Court's rules to get one last swing at Defendants. There is no need for additional briefing along the lines of Plaintiff's proposed surreply, especially when particular issues can be teased out at oral argument. Plaintiff's motion should be denied and the proposed surreply struck from the record entirely.[6]

Date: March 22, 2019

[6] Defendants in this pleading do not address the merits of the arguments made in Plaintiff's proposed surreply. This response only opposes the motion to file a surreply as improper.

Respectfully submitted,

/s/ Zach West

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d) because, excluding the parts exempted, it contains 1,530 words, as calculated by the program Microsoft Word 2016. It was prepared using the proportionally spaced serif typeface Garamond (14-point main text and 13-point footnotes).

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CERTIFICATE OF SERVICE

I certify that on March 22, 2019, I caused the foregoing **Opposition to Motion for Leave to File Surreply** to be filed with this Court and served on all parties via the CM/ECF filing system.

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