IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant.	)	Case No. 1:18-cv-00902

OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY

The Electronic Privacy Information Center ("EPIC") moves this Court for leave to file a sur-reply in response to the reply brief filed by the Internal Revenue Service on July 10, 2018. EPIC argues that leave is appropriate because the Service "characterizes EPIC's Opposition as calling for equitable estoppel" when "EPIC did not invoke or rely on equitable estoppel in its Opposition, and the IRS has never before raised that issue in this case." Motion for Leave [Dkt. No. 13] at 1. The Service's reply brief contains no "new" arguments in support of the Service's motion to dismiss that warrant a sur-reply. Rather, it merely responded to *Plaintiff's arguments*. EPIC's motion should accordingly be denied and the proposed sur-reply stricken.

Argument

A sur-reply "may be filed only by leave of Court, and only to address new matters raised in a reply, to which a party would otherwise be unable to respond." *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 276-77 (D.D.C. 2002). "The matter must be truly new," (*id.* at 277), for example, "when the opposing party's reply brief include[d] a supplemental declaration." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85 (D.D.C. 2014).

Importantly, a sur-reply "may not be used simply to correct an 'alleged mischaracterization,' or to reiterate arguments already made.'" *Iyoha v. Architect of Capitol*, 282 F. Supp. 3d 308, 319 (D.D.C. 2017) (quoting *Nix El v. Williams*, 174 F. Supp. 3d 87, 92 (D.D.C. 2016)).

EPIC's motion and sur-reply run afoul of all of these rules. First, EPIC openly admits that it seeks leave to file a sur-reply in order to correct and "address" the IRS's "characteriz[ation] of EPIC's Opposition as calling for equitable estoppel." Mot. for Leave at 1. As the *Iyoha* court explained, *supra*, the desire to address a characterization, even a mischaracterization, is not good cause for leave to file a sur-reply. *Iyoha*, 282 F. Supp. 3d at 319.

Second, EPIC is simply wrong that the Service raised a "new" argument because EPIC did not raise an estoppel argument in its Opposition.[1] While EPIC did not use the word "estoppel" in its opposition, it argued – for nearly nine pages (Opposition to Motion to Dismiss ("Opp'n") [Dkt. No. 10] at 8-16) – that the IRS may not assert an exhaustion defense. EPIC argued that: (1) the IRS's "own prior acts" at the administrative level are "inconsistent with" failure to exhaust (Opp'n at 6, 8-9); and (2) EPIC "reasonably relied on the IRS's representation that judicial review would be available." (*id.* at 13). EPIC concluded that "the IRS cannot credibly argue that EPIC should not have done *exactly what the agency said it could do*." *Id.* at 13 (emphasis in original). In other words, it identified an "affirmative representation" by the IRS, argued that it "reasonably relied" on it to its detriment, and argued that the IRS's argument constitutes misconduct. Those allegations closely and carefully track all of the elements of

[1] EPIC's suggestion that a reply brief makes "new arguments" simply by pointing out why the opposition's arguments fail is nonsensical. That is the precise purpose of a reply brief.

estoppel. *See* Reply in Support of Motion to Dismiss [Dkt. No. 12] at 9 (quoting *Genesis Health Ventures, Inc. v. Sebelius*, 798 F. Supp. 2d 170, 183-84 (D.D.C. 2011)).

Finally, EPIC's actual proposed sur-reply does not offer any new argument either. Instead, EPIC repeats that the Service's decision to grant expedited processing under 5 U.S.C. § 552(a)(6)(E)(iii) required it to "process [EPIC's request] as soon as practicable," which therefore "precludes the IRS from arguing at this stage that EPIC failed to exhaust administrative remedies." Proposed Sur-Reply [Dkt. No. 13-1] at 3-4. EPIC said the same thing in its Opposition. Opp'n at 9 [quoting 5 U.S.C. § 552(a)(6)(E)(iii) and arguing that "when the IRS granted expedition to EPIC's request . . . the agency waived any right to deny processing that it allegedly had [granted] before."). That too dooms EPIC's motion for leave. *U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Companies, Inc.*, 507 F. Supp. 2d 45, 49 n.3 (D.D.C. 2007) (denying leave where proposed sur-reply does not "respond to any new arguments; rather it merely reiterates old ones."); *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002) (same).

Conclusion

For the above reasons, the Service requests that the Court deny the motion for leave to file a sur-reply and strike the proposed sur-reply submitted with Plaintiff's motion for leave.

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Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

DAVID A. HUBBERT
Deputy Assistant Attorney General

Ryan O. McMonagle
RYAN O. MCMONAGLE
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 227
Washington, D.C. 20044
202-307-1355 (v)
202-514-6866 (f)
Ryan.McMonagle@usdoj.gov

MEGAN E. HOFFMAN-LOGSDON
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 227, Ben Franklin Station
Washington, D.C. 20044
202 616-3342 (v)
202 514-6866 (f)
Megan.E.Hoffman-Logsdon@usdoj.gov

Of Counsel:

JESSIE K. LIU
United States Attorney