

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES

**JANE DOE 1 AND JANE DOE 2'S OPPOSITION TO JEFFREY EPSTEIN'S MOTION
FOR LEAVE TO FILE A REPLY ON OR BEFORE AUGUST 22, 2019**

COME NOW Jane Doe 1 and Jane Doe 2 (also referred to as “the victims”), by and through undersigned counsel, to respond in opposition to Intervenor Epstein’s Motion for Leave to File a Reply (DE 468). Epstein’s motion for leave to file some sort of open-ended “reply” is, in truth, a motion for leave to file an open-ended “sur-reply.” It is simply a request to get the last word in. His motion provides another illustration of Epstein attempting to use his vast resources to obtain opportunities that other litigants never receive. It is also designed to thwart the victims’ efforts to obtain an expedited ruling on remedies in this case that has spanned more than eleven years. Sur-replies are heavily disfavored. The Court should deny Epstein’s motion to file one.

RELEVANT FACTUAL BACKGROUND

A quick summary of the procedural background will demonstrate how Epstein’s is unfairly attempting to extend and delay proceedings. On July 7, 2008, Jane Doe 1 (and later Jane Doe 2) filed this petition for enforcement of their rights under the Crime Victims’ Rights Act, arguing that their right to confer (and other rights) had been violated. DE 1. Eleven years later, on February 21, 2019, this Court agreed, granting summary judgment on this point for the two victims. DE 435. The Court directed the parties to confer with 15 days on how to schedule proceedings on remedy.

DE 435 at 33. The Government and the victims made submissions on the issue, with the victims urging a rapid resolution of the scheduling issue. *See* DE 440, 447. The Court granted the Government's motion in part, giving the parties nearly two months (until May 10, 2019) to file their proposed schedules on remedy issues. DE 448.

On May 10, 2019, the Government filed its proposed schedule, which would have taken approximately six months to bring all the remedies briefing to a conclusion. DE 451. On the same day, the victims proposed a schedule, requesting "procedures that will expedite providing a remedy to Jane Doe 1 and 2." *Id.* at 11. On May 10, Epstein, too, filed a short proposal, requesting that "he should be given an opportunity to file a response to the substantive legal briefs of the parties" DE 453 at 2. Acting quickly, three days later this Court entered a scheduling order, noting that the victims were the moving party and thus required to set out their position first, followed by the Government and Epstein, with the victims having the last word. DE 454 (*citing* Fed. R. Civ. P. 8(a)(3) and setting briefing schedule).

After this schedule was in place, Jane Doe 1 and 2 filed their opening submission rapidly, on May 23, 2019, twenty days ahead of deadline. DE 458. Thereafter, Epstein's sought a 14-day extension to respond. DE 459 at 2-3. The motion was unopposed, and the Court granted it.

Thereafter, on June 24, 2019, the Government filed its remedies response to Jane Doe 1 and 2. DE 462. On July 8, 2019, Epstein filed his response to Jane Doe 1 and 2 and the Government. DE 463. On July 9, 2019, Jane Doe 1 and 2 replied to the Government. DE 464. On July 23, 2019, Jane Doe 1 and 2 replied to Epstein – noting that all of the briefing directed by the Court had been completed and requesting that the Court expedite its ruling on remedies. DE 466 at 63-64.

The next day, Epstein filed a motion for leave to file what he called a “reply” to Jane Doe 1 and 2. DE 468.

DISCUSSION

I. EPSTEIN’S MOTION TO FILE WHAT IS IN TRUTH A “HEAVILY DISFAVORED” SUR-REPLY SHOULD BE DENIED.

Epstein’s request to file a “reply” should be denied. As the facts just recounted make clear, Epstein’s effort is, in truth, nothing more than a request to file a sur-reply. *See* DE 458 (victims’ remedy submission); DE 463 (Epstein’s response in opposition); DE 466 (victims reply to Epstein). Presumably the reason that Epstein wants to obscure the procedural posture is that “surreplies are heavily disfavored by courts.” *Warrior Energy Servs. Corp. v. ATP Titan M/V*, 551 Fed.Appx. 749, 751 n.2 (5th Cir. 2014) (quotation omitted). As one district court explained, “[s]urreplies, and any other filing that serves the purpose or has the effect of a surreply, are highly disfavored, as they usually are a strategic effort by the nonmovant to have the last word on a matter.” *United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, No. 1:06CV433-HSO-RHW, 2014 WL 12713070, at *1 (S.D. Miss. Oct. 24, 2014).

The Court should deny Epstein’s motion to file a “reply” – because that is not a straightforward description of what he seeks. He seeks to file a sur-reply. And because Epstein has strategically decided not to file a motion for leave to file a sur-reply – nor to argue that he meets the stringent standards for such a motion -- the Court should deny his motion on these grounds alone.

II. EPSTEIN HAS NOT SHOWN EXCEPTIONAL GROUNDS FOR A SUR-REPLY.

In any event, even construing Epstein’s motion to be a motion for leave to file a sur-reply, the Court should deny it. Epstein offers no good reason for departing from the Court’s earlier

schedule. Jane Doe 1 and 2's reply to Epstein tracked precisely the arguments that he advanced in his response brief. *Compare* DE 463 at ii-iii (table of contents for Epstein's response brief containing argument headings I, II, III, ... VIII, followed by one page of procedural preservation issues) *with* DE 466 at i-ii (table of contents for victims' reply brief containing argument headings I, II, III, ... VIII, followed by two pages of procedural preservation issues). In proceeding with a point-by-point reply, the victims' reply obviously did not expand the issues presented. "Where the movant's reply does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate." *Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011), *aff'd*, 11-5231, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012). Otherwise, "briefing would become an endless pursuit." *Id.* See, e.g., *City of Riviera Beach v. Unnamed Gray, Two Story Vessel*, No. 09-80594-CIV, 2009 WL 8575966, at *6 (S.D. Fla. Nov. 19, 2009) (refusing to grant leave for sur-reply where reply was limited to rebutting arguments in response).

In an effort to demonstrate some need for further briefing, Epstein presents a series of bullet points. But his bullet points are inaccurate or provide no basis for a sur-reply.

(a) Epstein first claims that Jane Doe 1 and 2 "raise an issue, for the first time, about the binding nature of the NPA on other districts, which is not relevant to the issues before the Court and has never been briefed before this Court." DE 468 at 2 (*citing* DE 466 at 3-5. If this issue is truly "not relevant" to the issues before the Court, then obviously there is no need for Epstein to file a sur-reply on the matter – the Court would simply ignore it. But in light of Epstein's response, it is an issue that is relevant to crafting remedies. The Court will notice that much of the material in this section simply quotes from Epstein's own response brief. See DE 466 at 7-8 (quoting and discussing Epstein's "background" section in his brief). And, remarkably, Epstein claims that the issue of NPA's breadth has "never been briefed before this Court." DE 468 at 2. But, in fact, Jane

Doe 1 and 2 main point in discussing this issue was that, in fact, the breadth of the NPA was briefed previously years ago. Indeed, it was in light of that earlier briefing that the victims had crafted their remedies with reference to the Southern District of Florida. *See* DE 466 at 3-4 (citing DE 205-6 at 301; DE 205-2 at 8-9). If Epstein wanted to challenge this earlier briefing on the issue, he had his opportunity to do – a further sur-reply is not appropriate.

(b) Epstein next argues that Jane Doe 1 and 2 “rely on sealed documents that Mr. Epstein has never seen . . . to argue, for the first time at the remedy phase, that a purported conflict of interest that allegedly plagued one of Mr. Epstein’s lawyers somehow requires partial rescission of the NPA.” *Id.* at 2 (*citing* DE 466 at 19-23, 48, which in turn relies on DE 348). It is not true that Epstein “has never seen the documents in question.” In fact, they were served on his law firm more than three years ago. *See* Exhibits 1 and 2 (reflecting service on Epstein counsel of DE 348 and 358). In addition, CM/ECF notifications of the sealing motions were provided at the time.

Moreover, Epstein inaccurately describe why Jane Doe 1 and 2 raised this point. It was Epstein who asserted in his response brief that the existing “record conclusively refutes any bad faith by his counsel,” DE 463 at 20, making an extended argument for four pages to that effect. *Id.* at 20-24. Indeed, Epstein went so far as to claim that “[t]here is simply no evidence of impropriety by Mr. Epstein’s counsel either before or after the NPA was signed.” *Id.* at 23. Given these (and other related) arguments, the victims were certainly entitled to reply by pointing to evidence that they possessed refuting those claims – and pointing to a discovery request they had advanced to the Government more than three years earlier that would have provided significant evidence on the subject.

Jane Doe 1 and 2 have requested further guidance from the Court on how to handle this issue. *See* DE 466 at 22 (unredacted version). But Epstein provides no good reason for a sur-reply based on existing briefing.

(c) Epstein next argues that Jane Doe 1 and 2 rely on a case, *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1999), that “Epstein has never had an opportunity to address.” DE 468 at 2. But the victims cited this case in their response to the Government back on July 9, 2019. *See* DE 464 at 19, 25. If this one case was so important, Epstein could have sought to expand his briefing on July 10, for example. Instead, he waited until *after* the final brief was in to belated argue the point.

Moreover, it was Epstein who first raised various due process and related arguments about why the NPA could not be rescinded (DE 463 at 27-33, 33-39, 39-43, 43-46), leading to Jane Doe 1 and 2 responding to his argument by citing an Eleventh Circuit precedent. Citing a twenty-year-old Eleventh Circuit case hardly constitutes need for a sur-reply. Epstein certainly had every opportunity to “address” Eleventh Circuit law regarding whether illegal pleas are binding on this Court – he appears to simply be disappointed that he did not bring this case to the Court’s attention while the victims did.

(d) Epstein next argues that Jane Doe 1 and 2’s reply “adopt[s] positions that are different from their initial submission,” claiming that the “partial rescission” remedy that the victims described in their reply brief is different than the one they described in their initial submission. DE 468 at 2. Epstein is simply confused – the “partial rescission” remedy that the victims set out in their opening brief is (unsurprisingly) the same one that they set out in their reply. As Jane Doe 1 and 2 specifically explained in their opening remedies brief: “The NPA’s immunity provisions are void and unenforceable, certainly as to Jane Doe 1 and 2 – and likewise [as] *to any other victim*

who would like to see Epstein prosecuted.” DE 458 at 1 (emphasis added). In other words, under the partial rescission remedy, a victim would have to step forward and want to “see Epstein prosecuted” in order for the immunity provisions applicable to that victim to become “unenforceable.” *Id.*

(e) Epstein next notes that Jane Doe 1 and 2 accused Epstein of “misleading briefing” for using ellipses to excise the words “compensatory or punitive damages” in his section about release of claims. DE 468 at 3. Epstein maintains that his use of ellipses was not misleading, even though they excluded the words forming the centerpiece of the victims’ argument. The victims believe that his use was misleading. But, in any event, the issue now is properly presented to this Court. The Court can simply read the relevant words of the release in the settlement agreement – there is no basis for some sort of sur-reply on this textual disagreement.

(f) Epstein next argues that Jane Doe 1 and 2 took that position that this Court’s order allowing him to file “affidavits and declarations” undermined his procedural due process argument. DE 468 at 3. This is true – Jane Doe 1 and 2 did make that point in their reply. But Epstein’s position that he has never had the opportunity to respond to such an argument is mystifying. He argued at length that he had not received procedural due process. DE 463 at 14-25. Jane Doe 1 and 2 simply replied by noting that due process involves notice and an opportunity to be heard – and this Court had specifically offered Epstein the opportunity to be heard by providing evidence. A sur-reply is hardly needed to shed light on this subject, which involves the plain text of the Court’s initial briefing order.

(g) Epstein next argue that Jane Doe 1 and 2 “mischaracterize” his discussion of the *Walker* case, because his reference to what was “entirely confused” was only to Jane Doe 1 and 2’s description of the case, rather than to the Seventh Circuit’s holding. DE 468 at 3. This quibble

over “mischaracterizing” an advocate’s description of the case rather than the case’s holding provides no basis for a sur-reply. The Court can certainly read through the passages in the two briefs – and the Seventh Circuit’s powerful holding that a plea bargain “vitiating by illegality” is unenforceable, *United States v. Walker*, 98 F.d 944, 946 (7th Cir. 1996) – without the need for some sur-reply on the topic.

(h) As the coup de grâce, Epstein finally argues that Jane Doe 1 and 2 have somehow “advocate[d] for a remarkably primitive view of the constitutional role of defense lawyers” DE at 3. If this sort of back-and-forth on whether an advocate’s view is “primitive” becomes the basis for motions for sur-replies, this Court will be very busy indeed!

This Court’s rules “do not provide for a sur-reply as of right.” *La Gorge Palace Condo Ass’n, Inc. v. QBE Ins. Corp.*, 733 F. Supp. 2d 1332, 1334 (S.D. Fla. 2010). Generally, the “standard for granting leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party’s reply.” *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002) (internal quotation omitted). As the facts recounted above make clear, Epstein could have contested every one of the subjects he complains about when he filed his response. Given that surreplies are “heavily disfavored,” *Warrior Energy Servs. Corp.*, 551 Fed.Appx. 749, 751 n.2 (5th Cir. 2014), Epstein has not carried his heavy burden of showing the need for one.

III. EPSTEIN IMPROPERLY SEEKS TO BROADLY RE-OPEN BRIEFING RATHER THAN RESPOND TO SPECIFIC POINTS OF CONCERN.

Not only has Epstein failed to provide justification for a sur-reply, but he clearly intends something different than what is done in those rare instances where a court allows a sur-reply. As appears from a careful reading of his motion, Epstein does not seek leave to simply file a specific

sur-reply to specific issues of concern raised in Jane Doe 1 and 2's reply; rather, Epstein seeks broad relief – “leave to file a reply.” DE 468 at 4. And while raising eight specific bullet points, he prefaces his argument with the claim that these eight points are merely illustrative. *See* DE 468 at 2 (raising eight bullet points as “among other things” to which he would reply). This suggests that if the Court were to grant Epstein's motion for a “reply,” he would file a broadside attack on the victims' reply – triggering the need for the victims seek leave to file a sur-sur-reply – the “endless pursuit” that causes trial courts great concern. *Crummey v. Soc. Sec. Admin.*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011).

This Court has denied leave to file a sur-reply where it is clear that the sur-reply will not be used “to counter new arguments” but rather to “raise a host of new arguments” *Lebowitz v. Toyota Motor Sales, U.S.A., Inc.*, No. 11-21798-CIV, 2011 WL 13223745, at *5 (S.D. Fla. 2011). Moreover, the Court has the ability to handle any concerns about newly-raised arguments without triggering an extended tit-for-tat round of sur-replies and sur-sur-replies – it can simply ignore any “new” argument in the victims' reply. *See Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV, 2008 WL 4500258, at *2 (S.D. Fla. 2008) (“To the extent that Defendant has raised made new arguments—other than those that specifically address points made by Plaintiff in its Response—the Court will ignore such arguments.”).

IV. EPSTEIN'S MOTION APPEARS TO BE FILED FOR PURPOSES OF DELAY.

Jane Doe 1 and 2 have requested several times for this Court to provide an expedited ruling on their remedies requests. *See, e.g.*, DE 466 at 67 (“Jane Doe 1 and 2 continue to request a rapid ruling on remedies by this Court. Any delay in ruling could further compound the damage that has already been done to Epstein's Florida victims”); *see also* 464 at 68. And, in the face of this request, Epstein asks for not only broadly re-opening the briefing with a new “reply” but also

for a full thirty days to file this “reply.” Victims counsel – operating with far fewer resources than Epstein – filed their reply to his extensive response within 15 days. Against that backdrop of the victims’ request for the Court to move rapidly, Epstein’s unexplained request for 30 days suggests that his motion is nothing but a delay tactic.

The only justification that Epstein’s high-powered legal team offers for needing thirty days to draft the sur-reply is that Epstein is currently detained in New York’s Metropolitan Correctional Center (MCC) and “[a]s a result, it is more time-consuming to review drafts of a submission with him before the submission is filed.” DE 468 at 4. But it appears that Epstein has (once again) been able to use his vast wealth to obtain special treatment. According to a recent media report, Epstein’s New York legal team is “rubbing people the wrong way by monopolizing one of the rooms designated for lawyer-client meetings in the Special Housing Unit at the MCC. A half-dozen attorneys are listed as representing Epstein, and they come in shifts to maintain control of the room, according to the source.” Steven Brown & Larry McShane, *New Jeffrey Epstein Court Papers Mention Ongoing Investigation of Others*, N.Y. DAILY NEWS, July 25, 2019.¹ Epstein thus uses his wealth to obtain favored treatment, because “[o]ther attorneys typically wait for hours to get some time with their clients” in the MCC. *Id.*

Epstein’s vast legal team has recently shown its ability to use the tens of millions of dollars at Epstein’s fingertips to file legal pleadings rapidly ... when it serves his purposes. For example, in the Southern District of New York, Epstein was denied bail by court order entered Thursday, July 18, 2019. Three business days later, on July 23, 2019, Epstein filed his notice of appeal with the Second Circuit. *U.S. v. Epstein*, No. 19-2221 (2d. Cir.). Here, Epstein’s motion for a sur-reply

¹ <https://www.nydailynews.com/new-york/ny-jeffrey-epstein-jail-20190725-magu4viirczbgr65pe6qjcw3y-story.htm>.

is filed by a number of lawyers at major law firms, who surely could have proposed an expedited schedule if the only purpose of the motion was to secure an opportunity to present to the Court briefing on specific subjects that truly necessitated a sur-reply. Instead, they seek a full 30 days for such a filing – while the victims continue to await justice.

CONCLUSION

For all these reasons, Epstein’s motion for leave to file a “reply” (DE 468) – i.e., a sur-reply – should be denied.

DATED: July 29, 2019

Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on July 29, 2019, on counsel of record using the Court's CM/ECF system:

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