UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORGANIZATION FOR COMPETITIVE MARKETS, Plaintiff, v. OFFICE OF INSPECTOR GENERAL, USDA, Defendant, and NATIONAL CATTLEMEN'S BEEF ASSOCIATION, Defendant-Intervenor.	)	Civil Action No. 14-1902 (EGS)

PLAINTIFF'S OPPOSITION TO OIG'S MOTION FOR SURREPLY

Plaintiff opposes OIG's unwarranted motion for leave to file a surreply, which proposes yet another in a years-long pattern of prejudicial delays and disruptions caused by OIG. *See generally*, Pl. Op. Br. at 5-7, ECF No. 90. OIG's motion for a surreply is meritless. It contains no discussion of the actual legal standards on which a court should resolve a motion for surreply, cites not a single case relating to surreplies in support of its position, and primarily asks not for a surreply but for the Court to simply accept OIG's "position on the underlying issues" and not consider Plaintiff's direct responses to them. *See* OIG Motion for Surreply, ECF No. 103 ("OIG Mot."). In a startling lack of candor, OIG ignores that every "new" matter it complains of is a specific response to arguments made in OIG's opposition brief (and also readily connects to matters raised in Plaintiff's opening brief). OIG's motion has no basis in law, but transparently—

and prejudicially—seeks to distort the briefing process in order to game the last word for itself and effectively be permitted an extra seven pages of argument after using the maximum number in its opposition brief.[1]

Plaintiff did not raise any new matters in its reply, instead properly hewing strictly to arguments made in OIG's opposition brief and matters raised in Plaintiff's opening brief. The Court should deny OIG's attempt to improperly and prejudicially expand the (third) briefing schedule in this matter to unfairly manufacture itself a litigation advantage.

I. Standard of Review

The Local Rules of this Court contemplate just "three memoranda associated with any given motion: (i) the movant's opening memorandum; (ii) the non-movant's opposition; and (iii) the movant's reply." *Crummey v. Soc. Sec. Admin.,* 794 F.Supp.2d 46, 62 (D.D.C. 2011), *aff'd,* 2012 WL 556317 (D.C. Cir. Feb. 6, 2012)(citing to LCvR 7). Surreplies are disfavored. *Id.* If a "reply does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate." *Id.* at 63. To merit a surreply, the matter presented in the reply "must be truly new." *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 238 F. Supp. 2d 270, 277 (D.D.C. 2002). A reply that is directly responsive to the opposition brief does not raise a "new" matter that can warrant a surreply. *See, e.g., Kim v. United States*, 840 F.Supp.2d 180, 191 (D.D.C. 2012) and *Baptist Mem'l Hosp. v. Sebelius*, 765 F.Supp.2d 20, 31 (D.D.C. 2011). If surreplies were permitted

[1] This isn't the first time in this case that OIG has attempted to alter a briefing schedule to its advantage. After the Court vacated the first briefing schedule and stayed the case—due to OIG's surprise disclosures with its summary judgment brief despite a court order to have released them five months earlier—OIG then attempted to change the filing order of the new briefing schedule. *See* ECF No. 69. Plaintiff objected (ECF No. 70) and the Court agreed, ordering a second briefing schedule that retained the standard staggered filing order. Minute Order, Jan. 18, 2018. (That second briefing schedule would also be vacated due to OIG's decision two days before the filing deadline to yet again *reprocess* previously processed records in this case.)

just to rehash matters already raised in the briefs, "briefing would become an endless pursuit." *Crummey*, 794 F.Supp.2d at 63.

II. Plaintiff's reply brief did not raise any new matters.

OIG's motion purports to identify five "new arguments" contained in Plaintiff's reply. Each of the five items, however, are directly responsive to arguments in OIG's opposition brief and easily connected to issues raised in Plaintiff's opening brief.

1. OIG first objects to a paragraph in Plaintiff's reply that calls out two conflicting interpretations of the deliberative process test contained in OIG's opposition brief. OIG Mot. at 2. Plaintiff's argument is self-evidently, then, a direct response to OIG making two inconsistent and irreconcilable arguments in its opposition brief, one broadly encompassing the entirety of the audit process and the other narrowly connected to a specific deliberative process identified within in the responsive record. *See* Pl. Reply at 8, ECF No. 102. OIG fails to note in its motion the telling first line of the paragraph of Plaintiff's reply that expressly connects the reply to OIG's brief:

> Plaintiff also notes an ironic and not insignificant contrast in deliberative process policies argued *in various sections of Defendant's brief*. (emphasis added).

Id. OIG's own decision to file an opposition brief with conflicting constructions of the deliberative process privilege—one of which must be wrong—does not justify a surreply when Plaintiff identifies the inconsistency. Moreover, OIG can hardly claim entitlement to a surreply to address inconsistencies it should have addressed in its own brief prior to filing it.

In any event, OIG's improperly broad application of the deliberative process privilege to the entirety of the audit process is not a matter new to the reply brief, but an issue expressly raised in Plaintiff's opening brief (and throughout this case). *See* Pl. Op. Br. at 8-10, ECF No. 90 (arguing against OIG's "expansive application" of Exemption 5 and that OIG "misconstrues the deliberative

process analysis"). Plaintiff's opening brief compared OIG's position that the audit process itself is a single continuous deliberative process with long-established D.C. Circuit precedent rejecting the same type of claim applied to the entirety of a management review process. *See id.* (citing to *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975). Plaintiff's concluding paragraph in that section of its opening brief argues that while FOIA extends OIG a narrow protection for "truly deliberative communications about legal or policy matters, it does not extend complete confidentiality to *all* personnel for *all* discussion, deliberation, and analysis." *Id.* at 10 (emphasis in original). So argument in Plaintiff's reply brief that OIG's application of Exemption 5 is improperly overbroad is no more than an expansion on an argument raised in Plaintiff's opening brief. An argument that "merely expands on previously-made arguments or responds to arguments" raised in an opposition "does not raise new matters requiring an additional response." *See Baptist Mem'l. Hosp. v. Sebelius*, 765 F.Supp.2d 20, 31 (D.D.C. 2011), *aff'd sub nom. Baptist Mem'l. Hosp., Inc. v. Sebelius*, 11-5112, 2012 WL 1859132 (D.C. Cir. May 14, 2012).

2. OIG's next two claims involve matters raised in Plaintiff's opening brief and Plaintiff's direct response to cases raised in OIG's opposition brief. Item 2 remarkably claims Plaintiff hadn't previously argued that Exemption 5 applies differently to audit communications between OIG and another agency when the agency itself is the subject of the audit, than it does when the audit is of a third party. OIG. Mot. at 3. But Plaintiff's opening brief expressly raised that very argument in a section titled, "The relationship between an auditing Inspector General and an agency under audit is not 'deliberative.'" Pl. Op. Br. at 12-15, ECF No. 90. Unsurprisingly, that section presented detailed argument relating to the legal authority that requires deliberative independence between an auditing OIG and an agency under audit. *Id.* Plaintiff even cited to specific case authority that recognized the very same distinction between audits of third parties and audits of an agency itself:

> When an Inspector General is conducting an audit of its own agency, the need for independence from agency officials in carrying out the audit is paramount.

Id. at 12 (citing *Neighborhood Assistance Corp. of Am., v. U.S. Dept. of Hous. and Urb. Dev.*, 19 F. Supp. 3d 1, 22 n. 11 (D.D.C. 2013)). Even the first line of text in the section of Plaintiff's reply brief OIG objects to in Item 2 contains a citation that points back to the discussion of *Neighborhood Assistance* in Plaintiff's opening brief relating to the "distinction between internal audits of another agency and external audits of third parties." Pl. Reply at 9 (citing to Pl. Op. Br. at 12, ECF No. 90).

For purposes of its surreply motion, OIG ignores the extensive argument on this issue in Plaintiff's opening brief and claims Plaintiff's reply makes this argument for the first time. What OIG disingenuously fails to acknowledge is that the two paragraphs specifically objected to are directly responsive to OIG's opposition brief (even including page citations to that brief), and OIG's interpretation of its primary case on the issue. *See* Pl. Reply at 9-10, ECF No. 102. In its opposition brief OIG cited a case it claimed found that deliberative process privilege was shared "between an auditor and auditee" (referring to Amtrak's OIG and Amtrak). OIG Br. at 10, ECF No. 98 (citing *Moye, O'Brien v. Natl. R.R. Passenger Corp.*, 376 F.3d 1270, 1273 (11th Cir. 2004)). In reply, Plaintiff pointed out that the case had no such holding, that the agency (Amtrak) *was not* the auditee, and that the case did not even involve a question of deliberative process "between an auditor and auditee" (which in the cited case was a third party contractor). Pl. Reply at 9-10, ECF No. 102. The final sentence of the text to which OIG objects clearly ties the section directly to the agency's opposition brief: "Defendant misstates the holding [of *Moye*], then presents the case as standing for something it doesn't." *Id.* OIG's misunderstanding of a case it relied on in its opposition brief provides no ground on which to permit a surreply.

3. The next item OIG objects to, like the previous item, is a paragraph in Plaintiff's reply brief that directly responds to a case OIG relied on in its opposition brief (although again OIG entirely omits this material fact from its motion). OIG Mot. at 3. One needn't read beyond the opening line of that paragraph in Plaintiff's reply to see the connection to argument in OIG's opposition:

> The next case Defendant purports shows a deliberative process privilege between an audit[or] and auditee does not even appear to have involved an audit at all. Def. Br. 10-11.

Pl. Reply at 10, ECF No. 102. Plaintiff replied further that the case OIG invoked inappositely involved a question of privilege for an OIG "advisory opinion and recommendation" to assist the agency with improving operations. *Id.* Plaintiff responded that OIG's reliance on the case is flawed, "given the material difference between OIG audits—which must be conducted in strict accordance with Government Auditing Standards—and OIG's less formal duties, such as efficiency improvement reports. *See* 5 U.S.C. app. 3 § 4 (requiring that audits, but not other OIG duties, comply with government auditing standards)." Pl. Reply at 10. As with the previous item, Plaintiff is certainly entitled to demonstrate in its reply OIG's misrepresentation of the facts and holdings of cases relied on in the opposition brief.[2]

4. The fourth item to which OIG objects (Mot. at 3-4) relates to a single sentence in which Plaintiff—commenting on OIG's opposition brief arguments—notes that the "purpose of the narrow deliberative process exemption to disclosure under FOIA is to ensure that decisions

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[2] Although unclear from its motion, if OIG is challenging as "new" Plaintiff's discussion of the legal differences the IG Act requires of audits than of less formal advisory functions, a surreply is unwarranted because "[a]n attorney is presumed to know the law." *Pogue*, 238 F.Supp.2d at 277. OIG's opposition failed to account for the Act's unique independence requirements for audits; Plaintiff replied by pointing out the flaw and explaining why it was fatal to OIG's opposition argument on the issue. Pl. Reply at 10, ECF No. 102.

regarding essential government duties are robust and not curbed by improper influence." Pl. Reply at 10, ECF No. 102. Hardly a new matter, the nature of the deliberative process privilege and the distinction between (protected) deliberation and (unprotected) communication have been central throughout the briefs. Plaintiff ended that paragraph of its reply by again referencing the *Neighborhood Assistance* decision previously raised in its opening brief. *Id.*

5. OIG's final objection claims Plaintiff's reply brief contained "two new factual assertions." OIG Mot. at 4. It didn't. The first "fact" assertion is nothing more than argument over an issue that has been covered fully by the briefs: whether the deliberative process can be invoked between an auditor and auditee. Pl. Reply at 10, ECF No. 102. It is neither factual nor is it a new matter.

OIG's second objection relates to Plaintiff's argument about record evidence that suggests "when AMS learned that OIG's proposed report findings might be an embarrassment for USDA, the auditor and audited entity worked together to produce a new report (presumably one that was less embarrassing for USDA)." Pl. Reply at 13, ECF No. 102. OIG fails to acknowledge is that the rest of the paragraph following that line cites directly to record evidence submitted with Plaintiff's opening brief. *Id.* at 13-14. The subsequent paragraph further cites to the AMS statement that there was "a LOT of heartburn over the report as written" and fear that "it will reflect poorly on USDA (as a whole) if released as is." *Id.* at 14. Again, Plaintiff's discussion about the implications of record evidence that may show improper government conduct is an argument raised and discussed in all three briefs. Plaintiff's reply presents no new matter that could warrant a surreply.

III. OIG improperly seeks relief wholly unrelated to a surreply.

In a move most revealing of OIG's true purpose, the final paragraph asks the Court to "not consider the Plaintiff's improperly raised arguments and should *simply uphold USDA-OIG's*

position on the underlying issues." OIG Mot. at 4-5 (emphasis added). OIG docketed the motion—and submitted a proposed order—styling the requested relief as a request for leave to file a surreply to address "new" arguments. But OIG abruptly shifts gears in its final paragraph and effectively asks the Court to strike portions of Plaintiff's brief, and after striking them to rule that the remaining brief—without the stricken arguments—amounts to a failure to address OIG's positions on the issues. *Id.* In effect, OIG wants the Court to order a drastic remedy that would prevent Plaintiff's ability respond to and demonstrate weaknesses in OIG's opposition. (As its second choice, though, OIG will settle for a surreply. *Id.* at 5.) What this final paragraph makes clear is that the true purpose of OIG's motion is to distort the briefing process by striking Plaintiff's replies to its flawed arguments, or if not that, then to improperly expand the briefing, gain seven additional pages of argument (despite using the 45-page limit in its opposition brief), and maneuver for the last word in this case.

Ironically, OIG's request to "simply uphold [its] position on the underlying issues" demonstrates that the matters being addressed in this motion are not "truly new." OIG Mot. at 4-5. OIG suggests that certain arguments can be treated as conceded if the Court strikes portions of Plaintiffs' reply. *Id.* Clearly then, those portions of Plaintiff's reply are responsive to issues that have been previously raised. Plaintiff certainly appreciates why OIG wants a chance to rehabilitate its opposition arguments, but this is a problem of OIG's own devising, not from Plaintiff's right to address the flaws of OIG's opposition cases, OIG's apparent lack of familiarity with the IG Act's expressly stated differences between audit requirements and less formal functions, or the various inconsistencies and weaknesses of its arguments. OIG's failure "to put forth its best case in its opposition is not grounds for permitting a surreply." *See U.S. v. Baroid Corp.*, 346 F.Supp.2d 138, 144 (D.D.C. 2004).

CONCLUSION

OIG's motion is meritless and prejudicial. It would unfairly prevent Plaintiff from directly responding to deficiencies in OIG's opposition brief, or, in the alternative, would unfairly expand the briefing process to seize the last word on matters already briefed. OIG's view of the proper scope of surreplies is as ill-conceived as its view of the proper scope of the deliberative process privilege—an issue that now has been raised and briefed by all parties. OIG's motion for additional briefing should be denied.

Dated: April 23, 2019

Respectfully submitted,

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