Judge Leighton

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHINOOK INDIAN NATION, an Indian Tribe and a Washington nonprofit corporation, and as successor-in-interest to The Lower Band of Chinook Indians; and ANTHONY A. JOHNSON, individually and in his capacity as Chairman of the Chinook Indian Nation; and CONFEDERATED LOWER CHINOOK TRIBES AND BANDS, a Washington nonprofit corporation,

Plaintiffs,

v.

DAVID BERNHART, in his capacity as Secretary of the U.S. Department of Interior; U.S. DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; UNITED STATES OFAMERICA; and TARA KATUK MAC LEAN SWEENEY, in his capacity as Assistant Secretary – Indian Affairs,

Defendants.

CASE NO. C17-5668-RBL

DEFENDANTS' REPLY RE: MOTION TO STRIKE PLAINTIFFS' UNAUTHORIZED SURREPLY (DKT. # 101)

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Defendants David Bernhardt[1], the U.S. Department of the Interior, and Tara Katuk Mac Lean Sweeney[2], (hereafter collectively referred to as "the Department") through their attorneys, Brian T. Moran, United States Attorney, and Brian C. Kipnis, Assistant United States Attorney, for the Western District of Washington, hereby reply to the belated opposition of plaintiffs Chinook Indian Nation, Anthony A. Johnson, and Confederated Lower Chinook Tribes And Bands (hereafter collectively referred to as "CIN") to the Department's motion for an order striking CIN's Motion For Partial Summary Judgment Re: Claims II-V (Dkt. # 101), filed herein by on November 20, 2019, including the memorandum filed in support thereof.[3]

INTRODUCTION

CIN's opposition to the Department's motion to strike amounts to a litany of excuses, misrepresentations of the record, and attempted blame-shifting in a failed effort to justify its circumvention of the Local Rules of this District by submitting a surreply that CIN attempted to pass off as a motion for summary judgment. CIN's opposition never rebuts, nor attempts to rebut, that the sole reason for CIN's "summary judgment motion" was to respond to rebuttal arguments the Department made in the reply memorandum the Department filed in connection with the Department's own motion for summary judgment. In other words, as CIN's opposition tacitly concedes, its "summary judgment motion" was, in reality, a surreply filed in violation of the Local Rules of this District.

Moreover, as CIN admits, its motivation for this attempted circumvention of the Local Rules was improperly to ensure itself the last word in the dispute in the event that the Court would not hear

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1 David Bernhardt was confirmed by the Senate of the United States and assumed office as Secretary of the Interior on April 11, 2019. He is hereby substituted for former Secretary Ryan K. Zinke pursuant to Rule 25(d), F.R.Civ.P.

2 Tara Katuk Mac Lean Sweeney was confirmed by the Senate of the United States on June 28, 2018, and assumed office on July 30, 2018. She is hereby substituted for former Acting Assistant Secretary – Indian Affairs John Tahsuda pursuant to Rule 25(d), F.R.Civ.P.

3 CIN continues its pattern of flouting the procedural rules governing the briefing and consideration of motions in this District. Under LCR 7(d) (3) of the Local Rules of the United States District Court for the Western District of Washington, "[a]ny opposition papers shall be filed and served not later than the Monday before the noting date." Under this local rule, CIN's opposition to the Department's motion was required to be filed no later than Monday, December 17, 2019. As the docket will confirm, CIN did not file its opposition until Tuesday, December 18, 2019. Compounding its violation, CIN did not seek the permission of the Court to file a late opposition.

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oral argument on the motion. Dkt. # 106, p. 9, ll. 7-14. However, as CIN concedes, now that the Court has granted CIN's request for oral argument, CIN will have an opportunity to be heard in open court, making its wrongful efforts to circumvent the Local Rules through the filing of an authorized surreply unnecessary. *Id*. Accordingly, the motion to strike should be granted as requested.

ARGUMENT

I. THE MOTION TO STRIKE IS PROPER

CIN attempts to turn the tables on the Department, arguing that motions to strike are improper in this District except to strike material in a reply brief.[4] In substance, CIN argues that a litigant has no recourse under the Local Rules when his or her opponent blatantly violates those Rules in order to gain an unfair advantage. CIN is incorrect.

CIN overlooks that LCR 7(g)(5) specifically provides that "[t]his rule does not limit a party's ability to file a motion to strike otherwise permitted by the Federal Rules of Civil Procedure . . ." and that this Court has permitted generic motions to strike where a party seeks redress for violations of the Local Rules and the Federal Rules of Civil Procedure. *See, e.g., Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1268 (W.D. Wash. 2013) (striking improperly filed cross-motion); *and see Schwent v. Nat. Res. Conservation Serv.*, No. C16-5708BHS, 2017 WL 176220, at *1 (W.D. Wash. Jan. 17, 2017) (striking amended complaint filed without leave of court); *Held v. Northshore Sch. Dist.*, No. C13-1548 MJP, 2014 WL 6451297, at *7 (W.D. Wash. Nov. 17, 2014) (granting motion to strike belated filings); *Ford v. Educ. Opportunities for Children & Families*, No. 3:14-CV-05404-RBL, 2017 WL 1092069, at *1 (W.D. Wash. Mar. 21, 2017) (granting motion to strike late-disclosed expert); *Bonneville v. Kitsap Cty*., No. C06-5228RJB, 2006 WL 2289233, at *3 (W.D. Wash. Aug. 8, 2006) (granting motion to strike second amended complaint and motion for summary judgment); *Heggem v. Monroe Corr. Complex*, No. C11-5985 RBL/KLS, 2012 WL 1710964, at *2 (W.D. Wash. May 15, 2012) (granting motion to strike improper filings); *Bauman v.*

4 CIN also asserts that motions to strike are generally "disfavored." As an abstract proposition, this is undoubtedly true. (The same is true of surreplies.) Yet, however disfavored, motions to strike persist in federal practice for a reason and, as demonstrated by the many Western District of Washington cases cited below, they are not disfavored when properly applied in the liberal discretion of the Court to circumstances such as these where a party seeks to game the system through improper filings that are intended to circumvent rules that are put in place to ensure substantial justice and fair play.

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American Commerce Insurance Company, No. C15-1909MJP, 2016 WL 11627696, at *1 (W.D. Wash. Aug. 12, 2016) (granting motion to strike untimely response to attorneys' fees request). As these cases demonstrate, the Department's motion is well within the accepted practice under the Local Rules of this District.

II. LOCAL RULE 7(k) DOES NOT PROVIDE AUTHORITY TO FILE A SURREPLY

CIN asserts that, even if its "motion for summary judgment" is really a surreply, its surreply was nevertheless properly filed because CIN placed the label of "summary judgment" on the document and considered their surreply to be a "cross-motion for summary judgment" as allowed by LCR Rule 7(k).

As the Department set forth in its principal memorandum, the law is clear in the Ninth Circuit that "[t]he substance of the motion, not its form, controls its disposition." *Andersen v. United States*, 298 F.3d 804, 807 (9th Cir. 2002). CIN makes no effort to rebut the Department's showing that CIN's purported motion for summary judgment is, in both purpose and effect, a surreply to the Department's reply in support of the Department's motion for partial summary judgment. It is thus improper under LCR Rule 7(g) (2).

Nothing in LCR 7(k) changes the calculus. LCR 7(k) simply encourages parties who are contemplating filing (genuine) cross-motions for summary judgment to agree on a briefing schedule.[5] LCR 7(k) does not authorize a party to file an improper surreply by the simple mechanism of calling it a cross-motion for summary judgment.

III. SURREPLYS ARE NEVER PERMITTED ABSENT LEAVE OF THE COURT

Tacitly admitting that its motion for summary judgment was in fact a surreply, CIN argues that it was justified in filing a surreply, albeit under false pretenses, because the Department raised "new arguments" in its reply memorandum and CIN felt compelled to respond.

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5 Indeed, as CIN's own exhibit demonstrates, the Department's attorney attempted to negotiate a schedule with CIN's attorney for cross-motions for summary judgment, even going so far as to draft a stipulation to reflect a tentative agreement between the parties. Dkt. 107-1, p. 2. However, when CIN attempted to make changes in the tentative agreement to its advantage and, correspondingly, to the Department's disadvantage, the Department abandoned the idea of entering into a stipulated schedule for cross-motions for summary judgment. *Id*. at p. 3. Instead, the Department stipulated to CIN's request for additional time to file its opposition to the Department's summary judgment motion. *See* p. 7, *infra.*

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CIN's assertion that the Department introduced new arguments or presented new evidence in its reply memorandum is demonstrably false. CIN's assertions about the state of the Administrative Record is a classic "red herring." First, the original Administrative Record was lodged and served on CIN months before the Department ever filed its motion. Second, every document that was subsequently added to the original administrative record was in CIN's possession and added at CIN's insistence. Third, to the extent that CIN's arguments relied on documents that had not yet technically been placed in the Administrative Record, CIN was freely able to use those documents without limitation in its opposition memorandum to the Department's motion for summary judgment, and the Department did not object to their use – as CIN knew. In other words, CIN cannot claim either surprise or prejudice because of any stipulated additions to the Administrative Record. Finally, at no time has CIN shown precisely how its efforts to prosecute its case were in any way hampered by the "unsettled" Administrative Record. This is plainly just a convenient excuse that CIN has conjured up to justify its impermissible surreply.

Moreover, the Department did not assert any new arguments in its reply memorandum but simply rebutted arguments advanced by CIN in its opposition memorandum. First, in regards to CIN's previous failed attempt to file a cross-motion, the Department did not "object" to anything. Indeed, at no time did the Department ask the Court to make a ruling on whether CIN had effectively noted a cross-motion on the Court's calendar. Instead, the Department's reply simply documented in a footnote its understanding and belief that the conflicting signals in CIN's opposition memorandum were ineffective notice of a present intention to cross-move for a court order. The footnote further explained the Department's decision to proceed based on that understanding. In other words, this was not a "new argument" but simply a response to what CIN presented in its opposition memorandum. The onus was on CIN to clarify the record as to its intentions, but CIN did nothing except to complain about the Department's "objection."

Second, CIN contends that "[The Department] argued for the first time that the Department of Interior's ultimate decision not to adopt its proposed rule allowing for limited re-petitioning for once-denied tribes was not subject to APA review because it was not an informal policy but part of

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rulemaking." Dkt. # 106, p. 7, *ll*. 10-12. However, the Department did not make such an argument. CIN appears to be referring to footnote 14 in the Department's reply memorandum. See, Dkt. # 99, p. 7, n. 14. It is clear that this footnote contains no new argument but simply responds to an argument made by CIN in its opposition memorandum. Indeed, the footnote helpfully includes a page and line reference to the precise argument in CIN's opposition memorandum that the argument in the footnote is addressing. And, in that footnote, the Department concedes the precise point that CIN is making, *i.e*., that "[the Department's] decision to adopt the 2015 Part 83 amendments without adopting the proposed modification of the re-petitioning rule is reviewable under the APA . . ." *Id*. However, as stated in the footnote, the Department disagrees with the legal reasoning by which CIN arrives at that conclusion. *Id*. In any event, CIN's attempt to make much of this footnote neither justifies their improper surreply nor is otherwise substantively significant to the motions before this Court.

Third, the Department's pointing out that CIN blatantly and deceptively misquoted the Congressional Record in its continuing failed effort to prove that the Department officially admitted that the Part 83 process was "broken" was not a "new argument." CIN raised this argument in its opposition memorandum and the Department rebutted CIN's argument in its reply memorandum.

Fourth, the Department advanced no "new arguments" in its reply memorandum concerning *Califano v. Webster*, 430 U.S. 313 (1977). Indeed, the Department asserted the *Califano* case in support of its arguments in its principal memorandum. *See* Dkt. # 93, p. 22, *ll*. 6-7. The Department's citation to the *Califano* case in the Department's reply was on the same point for which that decision was cited by the Department in its principal memorandum, and not in any sense "new argument."

Finally, it bears repetition that surreplys are not permitted in this District absent leave of the Court. Thus, if CIN genuinely believed that the Department had violated the rules by introducing new arguments in its reply memorandum instead of simply rebutting arguments raised by CIN in its opposition memorandum, it still was not acceptable for CIN to take matters into its own hands. Rather, it was incumbent upon CIN to seek leave of Court to file a surreply in accordance with the

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local rules. Not only did CIN fail to seek leave of the Court for its surreply but, as demonstrated above, grounds for such relief simply did not exist.

The fact that CIN wishes to be heard further on a particular issue is a familiar place for many litigants who find themselves opposing a motion for summary judgment. However, in most cases, those litigants do not attempt to circumvent the local rules to accomplish that purpose, as CIN did here. Accordingly, CIN's mislabeled surreply should be stricken as the Department has requested.

IV. CIN'S LITANY OF EXCUSES ARE INADEQUATE

The remainder of CIN's memorandum, dkt # 106, p. 7, *l.* 22 – p. 10, *l.* 3, and the Declaration of Thane W. Tienson, contain a litany of weak excuses for CIN's clear effort to game the local rules while denying, unconvincingly, that it had any such purpose. Mistaken beliefs about local practice, unfamiliarity with the FRCP, personal and professional challenges of CIN's counsel, and CIN's professed desire to have the last word on the issues before the Court all do not justify CIN's clear departure from the local rules. Also, CIN's effort to shift blame to the Department's counsel fails.[6]

It is neither the custom nor the practice in this District for lawyers to "preclear" the filing of motions with opposing counsel to account for their busy schedule or personal needs. In any event, when CIN's counsel requested an extension of time from the Department, the Department fully assented to CIN's request and entered into a stipulation affording CIN an additional twenty days (38 days total) to respond to the Department's motion for summary judgment. *See* Dkt. # 95. This was more than sufficient time for CIN to draft and file a proper cross-motion for summary judgment.

6 Mr. Tienson testifies that he was "led . . . to conclude that in filing the summary judgment motion first without prior notice to me Defendants hoped to obtain a ruling on their motion before any cross-motion by Plaintiffs could be considered." *Id.* at ¶ 9. No evidence supports Mr. Tienson's belief, and it is belied by the course of dealings between Mr. Tienson and the Department's counsel. After the Department filed its motion for summary judgment, the Department negotiated a scheduling stipulation for cross-motions for summary judgment with CIN and prepared a draft stipulation to carry out the agreement. Only when CIN's counsel, Mr. Tienson, tried to alter the agreement by trying to increase page lengths and to expand the subject matter did this effort fail. Nevertheless, the Department still gave CIN a generous extension of time to respond to its motion. If the Department was scheming to prevent CIN from filing a cross-motion, this was a funny way of going about it.

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CONCLUSION

For the foregoing reasons, and for the reasons stated in their principal memorandum, defendants David Bernhardt, the U.S. Department of the Interior, and Tara Katuk Mac Lean Sweeney, hereby request that the Court grant this motion and enter an order striking the Motion For Partial Summary Judgment Re: Claims II-V (Dkt. # 101) filed herein by plaintiffs Chinook Indian Nation, Anthony A. Johnson Confederated Lower Chinook Tribes and Bands, including the memorandum filed in support thereof, and give them no consideration.

DATED this 20th day of December 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on December 20, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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DATED this 20th day of December, 2019.

s/ Crissy Leininger
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