

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA**

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JASON HANSON, et al.,	)	
	)	
<i>Plaintiffs,</i>	)	Civ. Action No. 3:22-00174
	)	
v.	)	<b>TRIBAL DEFENDANTS’ MEMORANDUM</b>
	)	<b>IN SUPPORT OF THEIR</b>
	)	<b>MOTION TO STRIKE SURREPLY</b>
	)	
JAMES PARISIEN, et al.,	)	The Honorable Peter D. Welte, Chief Judge
	)	
	)	
<i>Defendants.</i>	)	

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**MEMORANDUM IN SUPPORT OF MOTION TO STRIKE SURREPLY**

**I. Introduction and Relevant Procedural History**

On November 21, 2022, Defendants James Parisien of the Turtle Mountain Band of Chippewa Indians’ Tribal Employment Rights Office, the Tribal Employment Rights Office (the “TERO Office”), the Turtle Mountain Tribal Court, the Turtle Mountain Appellate Court, and the Turtle Mountain Band of Chippewa Indians (the “Tribe”) (collectively, “Defendants”), timely filed a Motion to Dismiss Plaintiffs’ Complaint, arguing that this Court lacks jurisdiction

over Defendants under Federal Rule of Civil Procedure 12(b)(1) and that Plaintiffs' Complaint fails to state a claim for relief under Rule 12(b)(6). ECF Nos. 3, 3-1. On December 7, 2022, Plaintiffs filed a Response to Defendants' Motion to Dismiss. ECF No. 6. On December 21, 2022, Defendants filed their Reply, ECF No. 9, at which point, Defendants' motion was fully briefed.

On January 4, 2023, Plaintiffs filed a Motion for Leave to File Surreply and Proposed Surreply. ECF Nos. 14, 14-1. The Motion stated only that "Defendants raised several issues for the first time after Plaintiffs submitted their Response to Motion to Dismiss." ECF No. 14 at 2. The motion did not describe which "issues" in Defendants' Reply were raised for the "first time," nor does the Surreply itself describe these allegedly new issues. *See* ECF No. 17. Defendants' Reply in support of its Motion to Dismiss does not raise any new issues or facts for the first time. Instead, as the Surreply makes clear, Plaintiffs are using the Surreply to get the last word on issues that Defendants first raised in their Motion to Dismiss, ECF Nos. 3, 3-1. Therefore, Defendants respectfully request that this Court strike the Surreply.<sup>1</sup>

## II. Argument

Surreplies are highly disfavored in federal court because they "usually are a strategic effort by the nonmoving party to have the last word on a matter." *In re Enron Corp. Secs.*, 465 F. Supp. 2d 687,691 n.4 (S.D. Tex. 2006); *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 659 (D. Kan. 1999) (stating that leave to file a sur-reply is granted only in

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<sup>1</sup> Defendants were preparing to oppose the Motion for Leave to File Surreply when this Court granted the motion in a text entry on the day following filing and service of Plaintiffs' Motion for Leave. ECF No. 15. Therefore, Defendants were not provided an opportunity to respond to the Motion for Leave. Civ. L. R. 7-1(B) (providing opposing party 14 days to respond to a non-dispositive motion). Had the Court not immediately granted the Motion, Defendants would have filed an Opposition to the Motion for Leave to File Surreply instead of the instant Motion to Strike.

“extraordinary circumstances”); *Fuller v. Lion Oil Trading & Transportation, LLC*, No. 1:19-CV-1020, 2020 WL 3057392, at \*6 (W.D. Ark. June 9, 2020), *aff’d*, 848 F. App’x 223 (8th Cir. 2021) (citing *Fleshner v. Tiedt*, No. 15-CV-2033-CJW, 2019 WL 271619, at \*2 (N.D. Iowa Jan. 18, 2019)). While this Court has discretion to allow surreplies when justice so requires, *Fleshner*, 2019 WL 271619, at \*2, a surreply is not appropriate unless the reply “contained new information for which the opportunity to respond is needed,” *Fuller* at \*8 (internal quotation marks omitted). In other words, a surreply is unwarranted when the preceding reply does not raise new arguments. *See also Fleshner*, 2019 WL 271619, at \*2.

Here, Defendants’ Reply, ECF No. 9, did not raise new arguments. And because Defendants’ Reply does not raise new arguments, Plaintiffs’ Motion for Leave to File Surreply does not—and cannot—provide the Court with any examples of “new issues” for which Plaintiffs need an opportunity to respond. *Fuller*, 2020 WL 3057392, at \*6 (The motion contains “no discussion of any new information contained in Defendants’ reply brief that Plaintiffs ... ought to be allowed to respond to.”). Plaintiffs’ motion is lacking *any* explanation as to why “a sur-reply is necessary” here. *Id.*

To be sure, Defendants’ Memorandum in Support of their Motion to Dismiss, ECF No. 3-1, and their Reply, ECF No. 9, argue identical issues:

- The Turtle Mountain Band of Chippewa Indians, the TERO Commission, and the Tribal Courts Are Immune from Suit. *Compare* ECF No. 3-1 at 7 *with* ECF No. 9 at 1-3.
- James Parisien is immune from suit. *Compare* ECF No. 3-1 at 8-9 *with* ECF No. 9 at 3-5.
- Plaintiffs fail to allege an ongoing violation of federal law. *Compare* ECF No. 3-1 at 8-9 *with* ECF No. 9 at 5-6.
- Defendants have authority to tax under the exclusion doctrine. *Compare* ECF No. 3-1 at

10-15 *with* ECF No. 9 at 6-8.

Instead of opposing the arguments that Defendants made in their Motion to Dismiss and Memorandum in Support, Plaintiffs used their Response to primarily argue a separate issue, that the framework in *Montana v. U.S.*, 450 U.S. 544 (1981) applies to this case. *See, e.g.*, ECF No. 6 at 4 (“The issue is not sovereign immunity, but whether the tribe can regulate non-Indians when the tribe is not a party to the activity between the non-Indians.”). Defendants’ Reply responds to Plaintiffs’ arguments in the resistance, but it does not raise new arguments. *See, e.g., Sec. & Exch. Comm’n v. Watkins*, 317 F. Supp. 3d 1244, 1249 (N.D. Ga. 2018) (A surreply is unwarranted where the reply responds to the arguments in the resistance and does not raise new arguments). Plaintiffs had the opportunity to address each of Defendants’ arguments in their Response. Defendants’ Reply supports the arguments Defendants made in their Motion to Dismiss and replies to Plaintiffs’ opposition. It raises no arguments that were not already raised in either ECF No. 3-1 or ECF No. 6. Thus, a surreply is unwarranted.<sup>2</sup>

Defendants did not raise any novel argument in their Reply. Nor did Defendants raise any other consideration in support of Plaintiffs’ unsubstantiated assertion that their Surreply is necessary. *Nidec Motor Corp. v. Broad Ocean Motor, LLC*, No. 4:13-CV-01895-SEP, 2022 WL 4482431, at \*7 (E.D. Mo. Sept. 27, 2022). Instead, Plaintiffs’ Surreply is an improper reiteration and expansion of their Response arguments.

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<sup>2</sup> Ironically, Plaintiffs use the Surreply as a platform to amend their Complaint, arguing for the first time in their Surreply that “Defendants have been discriminating against Plaintiffs on an ongoing basis in violation of the Civil Rights Act, and the Indian Civil Rights Act.” ECF No. 14-1 at 4. Plaintiffs’ Complaint does not raise a claim under the Civil Rights Act or the Indian Civil Rights. If Plaintiffs wish to add allegations or claims to their Complaint, a surreply is not the procedural vehicle in which to do so.

Plaintiffs' Surreply, which itself raises new claims and issues for the first time, puts the Court "in the position of refereeing an endless volley of briefs." *Sec. & Exch. Comm'n v. Watkins*, 317 F. Supp. 3d at 1249. Therefore, Defendants request that this Court grant this Motion to Strike Surreply, strike Plaintiffs' Surreply, and determine the merits of Defendants' Motion to Dismiss solely on the Motion, Response, and Reply.

January 11, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, which will send notification of the filing of this document to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Service List.

Dated: January 11, 2023

Respectfully submitted,

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