

**IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**ROSALIE SIMON, *et al.*,  
Individually, for themselves and for all  
others similarly situated,**

**Plaintiffs,**

**v.**

**THE REPUBLIC OF HUNGARY, *et al.*,**

**Defendants.**

**Case No. 1:10-cv-01770-BAH**

\* \* \* \* \*

**PLAINTIFFS’ MOTION FOR LEAVE TO FILE SUR-REPLY MEMORANDUM**

Plaintiffs Rosalie Simon, *et al.*, by their counsel, in accordance with Fed.R.Civ. P. 7(b) and Local Rule LCvR 7, respectfully move the Court for entry of an Order granting them leave to file a Sur-reply Memorandum addressing several arguments made by Defendants The Republic of Hungary (“Hungary”) and Magyar Államvasutak Zrt. (“MÁV) in their Reply Memorandum in Support of Motion to Dismiss, filed on May 27, 2011 (ECF 27). Plaintiffs’ proposed Sur-reply Memorandum (“Sur-reply”) is attached to this Motion as **Exhibit 1**. A proposed Order authorizing filing of the Sur-reply is also submitted herewith. Defense counsel have advised that Defendants Hungary and MÁV oppose this Motion.

The grounds for this Motion are:

1. Defendants, in their Reply, discussed a new argument that they alluded to only in passing, without elaboration or discussion, in a footnote in their Motion to Dismiss (ECF 22, 22-1). *See* Sur-reply, Ex. 1 hereto, at 1-3. The standard in this Court for granting leave to file a sur-reply is “whether the party making the motion [for leave to file sur-reply] would be unable to

contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). *See also Flynn v. Veazey Constr. Corp.*, 310 F. Supp. 2d 186, 189 (D.D.C. 2004), (holding that if it denies the motion to file sur-reply, the court should ignore the arguments made for the first time in the reply) (collecting cases). Plaintiffs should be permitted to address the new argument;

2. Courts that have considered the issue have held that a party may file a sur-reply to discuss new authority that post-dates the filing of that party's opposition memorandum. *Colbert v. Kemna*, 2010 U.S. Dist. LEXIS 90184 at \*2 (W.D. Mo. Aug. 31, 2010); *Levine v. First Am. Title Ins. Co.*, 2010 U.S. Dist. LEXIS 60632 at \*2, 20 (E.D. Pa. June 18, 2010); *Bilezikjian v. Unum Life Ins. Co. of Am.*, 692 F. Supp. 2d 1203, 1204 (C.D. Cal. 2010); *Century Theaters, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2006 U.S. Dist. LEXIS 15766 at \*14-15 (N.D. Cal. Mar. 20, 2006). Here, the United States District Court for the Northern District of Illinois, in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, et al.*, Case No. 10-1884, 2011 U.S. Dist. LEXIS 54293 (N.D. Ill. May 18, 2011), decided twelve days after Plaintiffs filed their Opposition to Defendants' Motion to Dismiss (ECF 24), denied the defendants' motion to dismiss in an opinion that addresses several of the issues that arise in this case. ECF 26-1. Plaintiffs immediately filed a Notice of Supplemental Authority, without commentary or argument, advising the Court of the *Holocaust Victims* decision, ECF 26 and 26-1. Hungary and MÁV, in their Reply, have sought to distinguish the *Holocaust Victims* ruling from the instant case. Plaintiffs, however, have had no opportunity as yet to demonstrate the applicability of the *Holocaust Victims* decision to this case. The proposed Sur-reply, Ex. 1 hereto, addresses this issue at 11-13. Following the guidance of the cases cited above, the Plaintiffs should be granted leave to make this argument;

3. Defendants, in their Reply, make one material misquotation that alters its meaning, and take another quotation out of context and thereby distorts its meaning. These are discussed at Sur-reply, Ex. 1 hereto, at 9-11 and 12, n.14. While the District of Columbia has been silent on the issue, at least one other court has suggested that such misstatements in a reply brief could be grounds for filing a sur-reply, *see Aslani v. Sparrow Health Sys.*, 2009 U.S. Dist. LEXIS 102142, at \*72-74 (W.D. Mich. Nov. 3, 2009). Plaintiffs should be given leave to address these matters;

4. The threshold issues framed in this lawsuit are exceedingly complex, and the stakes are significant for all parties. Defendants have had ample opportunity to brief all issues that concern them, both in their Memorandum in Support of Motion to Dismiss and in their Reply. Plaintiffs' Opposition Memorandum exceeded the Rules' allowance by only a few pages (with Defendants' consent and the Court's permission – and a reciprocal agreement that allowed the Defendants to do the same in their Reply). Plaintiffs submit that Defendants' extensive Reply – which greatly expands arguments well beyond the contours of their initial Memorandum – warrants a Sur-reply that can only assist in the Court's assessment of Defendants' arguments, which Plaintiffs maintain are erroneous. *See especially* Sur-reply, Ex. 1 hereto, at 3-9.

While the rationale for authorizing a sur-reply under these circumstances seems self-evident, Plaintiffs could locate only one D.C. opinion that speaks to this issue, *Al-Bihani v. Obama*, 662 F. Supp. 2d 9, 14 (D.D.C. 2009). There, the Court accepted a sur-reply that was filed without seeking leave of Court (unlike the instant case). The Court based its acceptance of the sur-reply on “the unique circumstances of the case” and the fact that the government, in oral argument, failed to object.

Likewise, courts in sister jurisdictions have authorized the filing of a sur-reply where the complexity of a case warrants it. *See, e.g., Johnson Controls, Inc. v. American Motorists Ins. Co.*, 719 F. Supp. 1459, 1461 (E.D. Wis. 1989) (in granting the motion to file a sur-reply, the court stated, “In a complex action such as this, any supplemental information helps this Court reach a decision. Especially helpful is any information that keeps this Court aware of the posture of the California declaratory action.”); *Satyam Computer Servs. v. Venture Global Eng’g, LLC*, 2007 U.S. Dist. LEXIS 44934, at \*5 (E.D. Mich. June 21, 2007) (“Because of the complex facts and issues involved in this dispute, the court both allowed Satyam to file a lengthy reply brief and permitted VGE to file a sur-reply.”); *Diamond Sawblades Mfrs. Colaition v. United States*, 31 CIT 1249, 1252 (Ct. Int’l Trade 2007) (granting motion to file a sur-reply “so as to assist the court with the complexity of the issues”).

WHEREFORE, for the reasons stated above, Plaintiffs respectfully move the Court for entry of an Order granting them leave to file a Sur-reply Memorandum, attached as Ex. 1 hereto.

Respectfully submitted,

/s/Charles S. Fax

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