

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

JOSHUA J. ANGEL

Plaintiff,

v.

FEDERAL HOME LOAN MORTGAGE
CORPORATION, et al.,

Defendants.

Case No. 1:18-cv-01142

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE SURREPLY**

Defendants oppose Plaintiff's motion (ECF No. 21) for leave to file a surreply brief in connection with Defendants' motion to dismiss.

Surreplies are "generally disfavored." *DL v. Dist. of Col.*, 109 F. Supp. 3d 12, 34 (D.D.C. 2015); see *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 277 (D.D.C. 2002) (matters in reply must be "truly new" and typically "factual" in nature to justify surreply). Plaintiff contends that Defendants' reply makes "characterizations" of certain materials that "are, at best, incomplete." Mot. at 3. That is incorrect. Indeed, two of the four items that Plaintiff accuses Defendants of "mischaracterizing"—a 2017 amendment to the preferred stock purchase agreements, and a motion to dismiss filed in a litigation in the Court of Federal Claims—are not even mentioned in Defendants' reply. Another one of those four items is Defendants' reply brief itself; it strains logic to argue that Defendants' reply mischaracterized itself. In any case, "alleged mischaracterization[s]" are generally not a basis for surreply, *Pogue*, 238 F. Supp. 2d at 277, and Plaintiff's motion does not show otherwise.

In substance and fact, Plaintiff's filing is not really a surreply at all, but rather a motion for leave to amend. *See* Mot. at 4 (requesting "leave to amend the Complaint to, *inter alia*, (1) omit Count III, (2) pursue this lawsuit as a class action, and (3) rename the GSEs as nominal defendants such that the only defendants in interest would be the Directors"). However, Plaintiff failed to comply with the requirements governing motions for leave to amend, including that the proposed amended complaint be attached to it. *See* Local Civil Rule 15.1 ("A motion for leave to file an amended pleading shall be accompanied by an original of the proposed pleading as amended"); *Babb v. Chertoff*, 2006 WL 1371679, at *2 (D.D.C. May 16, 2006) (denying even an accurately denominated motion for leave to amend because it "violate[d] Local Rule 15.1" by not attaching the proposed amended pleading). Moreover, amendments of the nature Plaintiff describes would be non-responsive to and would not cure the many defects identified by Defendants' pending motion, making them futile.

Plaintiff's request that "this Court exercise its power to convert the Motion to Dismiss into a motion for partial summary judgment" (Mot. at 3-4 & n.3) is just as procedurally flawed. As Plaintiff's own quotation makes clear, Rule 12(d) authorizes such conversion "[w]hen a *moving party* introduces matters outside the pleadings." Mot. at 4 n.3 (quoting *Hurd v. Dist. of Col.*, 864 F.3d 671, 686 (D.C. Cir. 2017)) (emphasis added). Here, Defendants were the moving parties, so the fact that "Plaintiff cited authorities in his Opposition Brief that were 'outside the pleadings'" (Mot. at 4 n.3) is irrelevant and cannot convert Defendants' Rule 12 motion into a motion for summary judgment for Defendants—much less a motion for partial summary judgment in favor of *Plaintiff*, as Plaintiff appears to envision.

Defendants would be prejudiced by allowing the proposed filing. Defendants have a fully briefed motion to dismiss pending, to which Plaintiff had a full and fair opportunity to

respond. This is not a time for expanding the litigation or injecting new issues that are irrelevant to the grounds Defendants advanced in their motion. Defendants have already been prejudiced by Plaintiff's shifting theories (*e.g.*, Plaintiff raised for the first time in his opposition a tortious interference theory that was absent from his complaint, requiring Defendants to expend resources and marshal arguments to address it, and now wishes to withdraw that claim on the ground that it was mooted by an event predating this lawsuit). The Court should now decide the pending motion to dismiss, after which the parties will be in a position to efficiently address any issues that may remain.

Finally, Plaintiff misrepresented his compliance with Local Civil Rule 7(m); he did not confer with counsel for Defendants before filing his motion. That, by itself, is sufficient to warrant denying the motion.

Dated: October 30, 2018

Respectfully submitted,

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