IN THE UNITED STATES DISTRICT COURT DISTRICT OF MAINE

FRIENDS OF MERRYMEETING BAY, DOUGLAS WATTS, and KATHLEEN McGEE,)))
Plaintiffs,) C.A. No. 1:11-cv-00167-JAW
v.)
PATRICK KELIHER and CHANDLER WOODCOCK, in their official capacities,)))
Defendants.)))

PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Plaintiffs Friends of Merrymeeting Bay, Douglas Watts and Kathleen McGee ("Plaintiffs') respectfully seek leave to file a surreply of no more than 4 pages in order to respond to certain new arguments and related exhibits raised by Defendants in their Reply In Support Of Motion To Dismiss First Amended Complaint filed on August 12, 2011 ("Reply," Docket No. 22). Defendants' failure to include these arguments in their motion to dismiss and incorporated memorandum of law have deprived Plaintiffs of an opportunity to refute them.

In this district, surreplies may be filed with leave of court. See *Villeneuve v. State of Connecticut*, Civil No. 09-13-P-S, 2009 WL 2022009, at *5 n.4 (D. Me. July 13, 2009). Where the Defendant's Reply introduces new arguments a surreply is appropriate. *See Animal Welfare Institute v. Martin*, 588 F. Supp. 2d 70, 81 (D. Me. 2008) (stating a surreply is appropriate where a party has not had the opportunity to contest matters introduced for the first time in the opposing party's reply). In its surreply brief, Plaintiffs anticipate addressing the following issues:

- Defendants' Reply makes new arguments based on two electronic mails from an Assistant Regional Counsel in the U.S. Environmental Protection Agency's Region 1 office. Reply at 1-2, 7.
- 2. Defendant's Reply introduces three new exhibits, which are unauthenticated, hearsay, and of limited relevance. Reply at 1-2, 4 n. 4, 7; Exhibits A-C.
- 3. Defendant's Reply relies upon events that occurred after Plaintiffs' filed their Opposition making further briefing desirable. Reply at 1 n. 1 (referencing Exhibit B, an electronic email from U.S. EPA Assistant Regional Counsel dated August 10, 2011).

Plaintiff's also object to Defendants' introduction of these new arguments and exhibits on the grounds that they are not confined to replying to new matters raised in Plaintiff's opposing memorandum as required by Local Rule 7(c), and present matters outside the pleadings that should be excluded from consideration by the court pursuant to Fed. R. Civ. P. 12(d).

Alternatively, with the introduction of these new matters, pursuant to Fed. R. Civ. P. 12(d)

Defendants' Motion to Dismiss should be treated as one for summary judgment under Rule 56, and judgment should be entered for Plaintiffs.

Plaintiffs' surreply will assist the Court in its analysis of these issues raised in Defendant's Reply, and the instant motion is not interposed for delay or improper purpose. No party will be prejudiced if this motion is allowed as no hearing date has been set and the parties have not engaged in discovery. On August 18, 2011, counsel for Plaintiffs conferred Defendants counsel who indicated they do not assent to this motion.

The proposed surreply is attached hereto as Exhibit A. Should the Court grant Plaintiffs leave to file, Plaintiff propose to file its surreply within five days of the Court's grant.

WHEREFORE, Plaintiff's respectfully seek leave to file this surreply to Defendants

Reply of no more than 4 pages.

Respectfully submitted this 18th day of August, 2011

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Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this, the 18th day of August, 2011, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorneys of record in this matter. To my knowledge, there are no non-registered parties or attorneys participating in this case.

/s/ Roger Fleming ROGER FLEMING Maine Bar No. 8905 EARTHJUSTICE 1625 Massachusetts Avenue, N.W. Washington, D.C. 20036-2212 Telephone: (202) 667-4500

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