

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

Civil Action No. 14-cv-00245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

RESPONSE IN OPPOSITION TO PLAINTIFF’S MOTION TO STRIKE (DOC. 202)

Mr. Hale’s motion to strike the BOP’s Fact Exhibit (Doc. 199-1) is really a surreply to the BOP’s motion for summary judgment. The Court should deny the motion and decline to countenance his improper surreply.

The 68-page “motion to strike” consists of some 62 pages of argument related to the BOP’s motion for summary judgment. Doc. 202 at 6-68. The Court’s Local Rules do not provide for this extra briefing in connection with a summary judgment motion.

D.C.COLO.LCivR 7.1(d) (full briefing on a motion consists of the motion, response, and reply); *see also* C.J. Krieger Civ. Practice Standard 7.6.2(c) (discussing motion for summary judgment, response, and reply); *Partminer Worldwide Inc. v. Silconexpert Technologies Inc.*, No. 09-cv-00586-MSK-MJW, 2011 WL 587971, at *6 (D. Colo. Feb. 9, 2011) (recognizing that, “when a party believes that the contentions in the opponent’s reply brief require a response, the proper approach is for the party to seek leave to file a surreply,” and finding that a party’s “objections to

misstatements in [a] reply brief . . . were an improper surreply”) (citing *Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186, 1192 (10th Cir. 2006)).

Nor has Mr. Hale shown good cause for the Court to accept his extra brief. *See Sterling Const. Management, LLC v. Steadfast Ins. Co.*, No. 09-cv-2224-MSK-MJW, 2011 WL 3903074, at *n.13 (D. Colo. Sept. 6, 2011) (observing that the Court found no good cause to permit a surreply where the party “does not contend that the arguments it intends to proffer in the supplement/surreply are based on newly-discovered facts or new law, nor otherwise explain why [the party] did not raise those arguments in its initial response to the motion”), *reconsideration denied*, 280 F.R.D. 576 (D. Colo. Dec. 19, 2011). The motion to strike makes plain that Mr. Hale’s purpose is to make arguments he could have raised in his response to the motion for summary judgment, but did not, and to try to counter the points the BOP properly raised in its reply brief. Neither constitutes good cause for a surreply.

Mr. Hale has also not shown good cause to strike the BOP’s Fact Exhibit, which simply collects in a single place all facts, responses to facts, and replies to facts. The BOP assembled the Fact Exhibit because Mr. Hale’s response to the motion for summary judgment created a confusing situation by not following the Court’s rules. He did not explicitly set forth his position on the burden of proof and elements or follow that statement with separately numbered paragraphs describing the factual and legal basis for his challenge to each element. *See* C.J. Krieger Civ. Practice Standard 7.6.2(c) (setting forth the requirements for formatting motions for summary judgment and replies). Instead, he interspersed numerous “sworn statements” throughout his arguments, forcing the BOP to correlate those statements with the related facts in the motion for summary judgment.

The end product—the Fact Exhibit—simply set forth the BOP’s facts, the related facts from Mr. Hale and the BOP’s reply to those facts, as well as the BOP’s response to Mr. Hale’s new facts. The BOP could have integrated the information in the Fact Exhibit into the reply brief itself, but because Mr. Hale’s response used a totally new fact numbering system and did not follow the Court’s format for responses to motions for summary judgment, it made sense to segregate all facts, responses, and replies and to place them in a separate, easily searchable document. *Cf.* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”). The Fact Exhibit also explained why Mr. Hale’s attempted factual disputes are unsuccessful, based on established Supreme Court and Tenth Circuit precedent. Mr. Hale objects to this approach, *see* Doc. 202 *passim*, but using a reply to point out the legal deficiencies in a response’s attempts to create a factual dispute is part and parcel of summary judgment briefing. C.J. Krieger Civ. Practice Standard 7.6.2(c) (Sample Summary Judgment Motion and Sample Summary Judgment Response include references to relevant legal authority in separately numbered paragraphs discussing factual assertions.); *see also* Fed. R. Civ. P. 56(e).

The information contained in the Fact Exhibit is not subject to striking under the standards set forth in the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(f) (“The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”). The information is neither “redundant” nor “immaterial,” but goes to the very essence of the matter. The Fact Exhibit provides assurance to the Court that the BOP has addressed each of Mr. Hale’s responses to the BOP’s facts and all new facts contained in his

response brief. And it demonstrates that there is no genuine dispute about any material fact. *See* Fed. R. Civ. P. 56(a).

Neither is the information contained in the Fact Exhibit “impertinent” or “scandalous.” *See* Rule 12(f). Rather, the Fact Exhibit fully exposes the essence of the ideology of the Creativity Movement using its core, unabridged texts and its undisputed maxims. If there is anything impertinent or scandalous in that, the ideology itself is to blame. Similarly, every single one of the BOP’s other facts is supported by a proper reference to documents, sworn testimony, or both. There is no good cause for striking this highly relevant information. *See, e.g., Crumpton v. Finnin*, No. 05-cv-0065-MSK-PAC, 2007 WL 2697461, at *10 (D. Colo. Sept. 11, 2007) (“No good cause having been shown, this motion to strike is denied.”).

In sum, the Court should deny the motion to strike and decline to accept Mr. Hale’s improper surreply. If the Court chooses to countenance Mr. Hale’s surreply, the BOP respectfully requests an opportunity to submit a separate, full response to the surreply.

Respectfully submitted on December 27, 2017.

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on December 27, 2017, I served the foregoing document and unpublished cases cited therein on the following non-CM/ECF participant by United States mail addressed as follows:

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s/ Susan Prose
Susan Prose
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