

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ML LIQUIDATING TRUST, as
successor-in-interest to
Mortgages Ltd.,

Plaintiff,

vs.

MAYER HOFFMAN MCCANN P.C., a
Missouri professional
corporation; CBIZ, INC., a
Delaware corporation; CBIZ
MHM, LLC, an Ohio limited
liability company,

Defendants.

Case No. 2:10-cv-02019-RRB

**ORDER DENYING MOTION FOR
LEAVE TO FILE SUR-REPLY**

I. INTRODUCTION

Before the Court are Defendants Mayer Hoffman McCann, P.C., CBIZ, Inc., and CBIZ MHM, L.L.C., with a Motion for Leave to File Sur-Reply at Docket 43. Defendants argue that because Plaintiff ML Liquidating Trust ("ML") raised an argument regarding the citizenship of trusts for purposes of diversity jurisdiction for the first time in its Reply in Support of its Motion to Remand,

"Defendants should be granted an opportunity to respond."¹ Plaintiff opposes at Docket 47 and contends that the instant matter has "been fully briefed" and that Defendants are merely seeking to "improperly supplement arguments which already have been made by Defendants in their repose [sic] to the Remand Motion."²

Inasmuch as the Court has determined that Plaintiff's Reply raises no new issues or evidence that would warrant a sur-reply, and that no extraordinary circumstances exist at present, a sur-reply would not be appropriate at this time. Therefore, Defendants' Motion For Leave to File Sur-Reply at **Docket 43** is hereby **DENIED**.

II. STANDARD OF REVIEW

The Ninth Circuit has held that "[w]here new evidence is presented in a reply to a motion . . . the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond."³ Courts, however, will only allow for sur-replies "in the most extraordinary circumstances."⁴

¹ Docket 43 at 2.

² Docket 47 at 1.

³ Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (quoting Black v. TIC Inv. Corp., 900 F.2d 112, 116 (7th Cir. 1990)).

⁴ Sims v. Paramount Gold and Silver Corp., No. 2010 WL 5364783, slip op. at 8 (D. Ariz. Dec. 21, 2010).

III. DISCUSSION

Defendants contend that they should be granted leave to file a sur-reply to address the argument raised by ML in its Reply at Docket 41 concerning the citizenship determination of a trust based on the citizenship of the trust beneficiaries for purposes of diversity jurisdiction.⁵ Defendants argue that since ML did not include in its Motion to Remand any argument pertaining to the effect of the trust beneficiaries' citizenship on the citizenship of the trust, ML should be given an opportunity to address this particular argument. This Court does not, however, perceive anything in ML's Reply that would warrant a sur-reply.

A sur-reply is appropriate when a party raises new issues⁶ or new evidence⁷ in a reply brief. Sur-replies, however, are generally discouraged "as they usually are a strategic effort by the nonmoving party to have the last word on a matter."⁸ In Defendants' Response to Motion to Remand at Docket 35, Defendants argued that

⁵ Docket 43 at 2.

⁶ See Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 (9th Cir. 2003) (citing Thompson v. Comm'r, 631 F.2d 642, 649 (9th Cir. 1980)).

⁷ Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996).

⁸ Sims, 2010 WL 5364783, at *8.

"The Trust takes the citizenship of its trustee."⁹ In its Reply to such Response, ML countered by arguing that "[T]he trust beneficiaries will govern . . . the citizenship of the trust for diversity purposes."¹⁰ It is clear to the Court that by arguing that a trust's citizenship for diversity purposes stems, in whole or in part, from the citizenship of the trust beneficiaries and not solely from the citizenship of the trustee, ML was neither raising a novel issue nor introducing new evidence. Quite simply, ML was responding to Defendants' contentions concerning the citizenship of the trust and nothing more. Defendants cite numerous cases in defense of their proposition that ML advanced an additional argument that necessitates an opportunity to respond, but all of the cases are distinguishable from the current case. In both Lentini v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004), and Burlington N. & Santa Fe Ry. Co. v. Vaughan, 509 F.3d 1085, 1093 (9th Cir. 2007), entirely new *issues* were raised in the reply brief, not merely a responsive argument, as is the case here. In MJG Enters., Inc. v. Cloyd, No. 2010 WL 3842222, slip op. at 6 (D. Ariz. Sep. 27, 2010), *new evidence* was introduced

⁹ Docket 35 at 11.

¹⁰ Docket 41 at 11.

in the reply, unlike in ML's Reply brief, which did not present any new evidence.

Therefore, the Court finds that ML's argument in its Reply did not raise any new issues or any new evidence that would warrant granting Defendants leave to file a sur-reply. Furthermore, no extraordinary circumstances exist that would justify the granting of Defendants' request.

IV. CONCLUSION

For the foregoing reasons, this Court does not grant Defendants leave to file a sur-reply to Plaintiff's Reply at Docket 41. Accordingly, Defendants' Motion For Leave to File Sur-Reply at **Docket 43** is hereby **DENIED**.

ENTERED this 11th day of March, 2011.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE