

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NPR INVESTMENTS, L.L.C.,)	
)	
Plaintiff – Appellee-Cross-Appellant)	
)	
HAROLD W. NIX; CHARLES C. PATTERSON,)	
)	
Intervenor Plaintiffs – Appellees)	
)	
v.)	No. 10-41219
)	
UNITED STATES OF AMERICA,)	
)	
Defendant – Appellant-Cross-Appellee)	

MOTION OF THE UNITED STATES TO STRIKE
CROSS-APPELLANT’S REPLY BRIEF IN PART

The United States, appellant-cross-appellee herein, respectfully moves this Court to strike part IV of the reply brief filed by the cross-appellant (NPR) in the above-entitled case because it constitutes an impermissible sur-reply to the reply portion of the Government’s combined response and reply brief.

STATEMENT

This case involves a notice of final partnership administrative adjustment (FPAA) issued by the Internal Revenue Service in respect

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of NPR's 2001 tax year. The District Court ruled in the Government's favor regarding the procedural validity of the FPAA, but it ruled in NPR's favor regarding, *inter alia*, the Government's motion to dismiss, for lack of jurisdiction, the NPR partners' reasonable-cause defenses to asserted penalties. The Government appealed, and NPR cross-appealed.

On July 29, 2011, the Government filed its combined response and reply brief, responding to NPR's principal brief and replying to NPR's response to the Government's principal brief. On August 15, 2011, NPR filed its reply to the Government's response to NPR's principal brief. In part IV of its reply brief (pp. 23-26), however, NPR expressly responds to a portion of the Government's reply brief – specifically, the portion addressing the jurisdictional issue raised in the Government's appeal. For the reasons discussed below, the Court should strike part IV of NPR's reply brief as an impermissible sur-reply.

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DISCUSSION

1. The Federal Rules of Appellate Procedure specifically provide that a cross-appellant's reply brief "must be limited to the issues presented by the cross-appeal." Fed. R. App. P. 28.1(c)(4). As this Court has recognized, this rule "does not allow the cross-appellant to use his [reply]¹ brief to discuss issues outside the scope of the cross-appeal." *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 526 (5th Cir. 2002) (citing former Rule 28(c), recodified as Rule 28.1 in 2005); *see also USX Corp. v. Liberty Mut. Ins. Co.*, 444 F.3d 192, 201-02 (3d Cir. 2006) ("Rule 28[.1](c)[(4)] does not allow the cross-appellant to use its reply brief as a sur-reply to the appellant's opening brief") (citing, *inter alia*, *Casas*); *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1091-92 (10th Cir. 2001) ("If the latter portion of Echo's 'Reply Brief' had been submitted to the Clerk of Court under the correct title, 'Appellee's Sur-Reply Brief,' it would not have been accepted for filing.").

¹ The Court mistakenly referred to the offending reply brief as a "reply and response" brief. *See* docket for No. 00-41137, entry for Oct. 15, 2001.

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In *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1361 (Fed. Cir. 2005), the court “note[d] a troubling trend for the counsel of cross-appellants to disregard the rule limiting their reply brief to issues concerning the cross-appeal.” The court continued:

The filing of improper sur-reply arguments is unfair to appellants who bear the burden of demonstrating prejudicial error in the decision being appealed and, therefore, are entitled to the last word in both the briefs and at oral argument on their appeal.

... We further urge counsel for appellants to file timely motions to strike improper sur-reply arguments because the prejudice from improper sur-reply arguments is difficult to eliminate once such arguments have been read by the court. [*Id.*]

The court’s observation is fully applicable here where NPR has used its reply brief to file a sur-reply to the Government’s reply brief on the jurisdictional issue.

2. NPR attempts to justify its sur-reply by claiming that “[t]he government raised a new argument in the reply portion of its brief regarding its penalty claims.” NPR Reply Br. 23. Even if this claim

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had any merit, which it does not,² the proper course of action for NPR would have been to file a motion for leave to file a sur-reply. *See, e.g., Martinez v. Caldwell*, 644 F.3d 238, 244 n.4 (5th Cir. 2011) (granting motion for leave to file sur-reply); *see also USX*, 444 F.3d at 202 n.17 (“if USX wanted to submit a brief not in accordance with Fed. R. App. P. 28[.1](c)[(4)], its appropriate course would have been to seek leave of this court”).

3. Pursuant to 5th Cir. R. 27.4, the undersigned has contacted counsel for the cross-appellant, Thomas A. Cullinan, regarding this motion. Mr. Cullinan advised the undersigned that the cross-appellant opposes the motion.

²The purported “new argument” is nothing of the sort, but, instead, is in direct response to an NPR argument regarding the valuation misstatement penalty – an argument that is nowhere to be found in NPR’s filings below (Docs. 58, 63) in support of its motion for partial summary judgment on that issue. *See* Gov’t Resp. and Reply Br. 40. The impropriety of NPR’s sur-reply is further highlighted by NPR’s use of its “new argument” claim as a pretext for further argument on a different issue as to which it is also the appellee (*i.e.*, the jurisdictional issue).

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CONCLUSION

For the foregoing reasons, this Court should strike part IV of the cross-appellant's reply brief as an impermissible sur-reply.

Respectfully submitted,

GILBERT S. ROTHENBERG
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/s/ Arthur T. Catterall

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Dated: August 16, 2011

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DECLARATION

Arthur T. Catterall, of the Department of Justice, Tax Division,
Appellate Section, Washington, D.C., states as follows:

The facts in support of, and the reasons for, the United States’
motion to strike are true and correct to the best of my knowledge.

I declare under penalty of perjury, pursuant to 28 U.S.C.
§ 1746, that the foregoing is true and correct. Executed this 16th day of
August, 2011, in Washington, D.C.

/s/ Arthur T. Catterall
ARTHUR T. CATTERALL
Attorney for Appellant-
Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2011, I electronically filed the foregoing motion to strike with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF user:

Thomas A. Cullinan, Esquire
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Atlanta, GA 30309

/s/ Arthur T. Catterall
ARTHUR T. CATTERALL
Attorney for Appellant-
Cross-Appellee

ECF CERTIFICATIONS

Pursuant to Fifth Circuit Rule 25.2.1, I hereby certify that (i) any required privacy redactions have been made, (ii) the electronic submission is an exact copy of the paper document, and (iii) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: August 16, 2011

/s/Arthur T. Catterall
ARTHUR T. CATTERALL
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