UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., and VETERAN PETROLEUM LTD.,	)	Case No. 1:14-cv-01996-BAH
Petitioners,	)	
v.	)	
THE RUSSIAN FEDERATION,	)	
Respondent.	)	

PETITIONERS' OPPOSITION TO
RESPONDENT'S MOTION FOR LEAVE TO FILE A SURREPLY

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PRELIMINARY STATEMENT

Petitioners moved to strike the Russian Federation's Supplemental Motion on the ground that it was nothing but a mislabeled and prohibited surreply. Taking things to the outer limits, the Russian Federation now wants to file yet another surreply, this time to oppose the motion to strike its earlier unauthorized surreply. Further, that new, 23-page surreply is quite clearly just an effort to rehabilitate the Russian Federation's opposition to the motion to strike, as every issue addressed was previously addressed in Petitioners' motion or in the Russian Federation's opposition. This endless cycle should terminate, and the new surreply should be refused by the Court.

For example, in its June opposition brief the Russian Federation argued that its Supplemental Motion was proper because it was based on "newly discovered evidence" that was critical to this Court's subject matter jurisdiction. In their reply, Petitioners established that this position was false, as 125 of the 135 supposedly "new exhibits" were not new (amazingly, many had actually been used in the underlying arbitrations). *The Russian Federation does not dispute in its proposed surreply that this is the case.* Unable to defend its argument that it had filed 135 "new" documents, the Russian Federation abandons it and now attempts to assert a series of different arguments. The Russian Federation should not be afforded endless "do-overs."

Likewise, the Russian Federation proffered numerous cases in its opposition to the motion to strike, each of which Petitioners demonstrated in reply were irrelevant. Now, the Russian Federation wants to tender a long list of different cases. Again, the Russian Federation is not entitled to a do-over.

Similarly, the Russian Federation argues that it needs a surreply to address the import of the Court's October 22, 2015 Minute Order, mockingly suggesting that Petitioners had a "sudden epiphany" and came up with a new interpretation of that order – that it bars the parties from

briefing the factual issues raised in the Supplemental Motion and reflects the Court's understanding that those factual issues are not relevant to jurisdiction. But that Minute Order has been on the table from the outset, and for the longest time the parties shared a common understanding of what it meant. Now the Russian Federation wants to argue it means something different. Again, that is not the proper subject of a surreply.

Surreplies are disfavored, and leave should be granted only where the moving party improperly raises new issues in its reply. That has not happened here.

ARGUMENT

The Russian Federation's motion for leave to file a surreply in further opposition to Petitioners' Motion to Strike should be denied. "[S]urreplies are generally disfavored." *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012) (citations omitted). "A surreply may be filed . . . only to address new matters raised in a reply"; "[t]he matter must be truly new." *U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc.*, 238 F. Supp. 2d 270, 276-77 (D.D.C. 2002). Moreover, "[a]s Courts consistently observe, when arguments raised for the first time in reply fall 'within the scope of the matters [the opposing party] raised in opposition,' and the reply 'does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate.'" *Banner Health*, 905 F. Supp. 2d at 188 (citations omitted).

I. Petitioners' Reply Raised No New Matters and Accordingly the Russian Federation's Motion for Leave to File a Surreply Should Be Denied

It is well established that a reply does not raise a "truly new" matter, and thus a motion for leave to file a surreply will be denied, where the reply is "directly responsive" to arguments made in the opposition brief. *Kim v. United States*, 840 F. Supp. 2d 180, 191 (D.D.C. 2012); *see, e.g.*, *Baptist Mem'l Hosp. v. Sebelius*, 765 F. Supp. 2d 20, 31 (D.D.C. 2011) (surreply improper where the reply "merely expands on previously-made arguments or responds to arguments raised

by [the opposition]"); *Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc.*, 68 F. Supp. 3d 917, 922 (N.D. Ill. 2014) ("[T]here simply is no need for a surreply when '[e]ach brief in the sequence on the motion fairly responded to the arguments in the brief that preceded it.'") (citation omitted); *Banner Health*, 905 F. Supp. 2d at 188 ("the [movant] was well within the bounds of a proper reply brief in raising this [purportedly new] argument in response").

The Russian Federation claims that Petitioners made *five* separate arguments in their reply that warrant a surreply. (ECF No. 136 ("Surreply Mot.") at 2-4.) Specifically, the Russian Federation cites Petitioners' arguments that: (1) Rule 12(f) is inapplicable; (2) "successive motion" cases cited by the Russian Federation are inapplicable; (3) the Supplemental Motion exhibits are not "new"; (4) the Supplemental Motion exhibits are not relevant; and (5) the Court's October 22, 2015 Minute Order, which the Supplemental Motion violates, demonstrates those exhibits are not relevant. (Surreply Mot. at 2-4.) The claim that each of these arguments warrants a surreply is inherently unbelievable given that they account for virtually every argument Petitioners made in their reply. In fact, as shown below, none of the three sections of Petitioners' reply raised any new matter that could warrant a surreply.

Point I of Petitioners' reply (ECF No. 134 ("Strike Reply") at 3-8) rebutted the Russian Federation's arguments (*see* ECF No. 126 ("Strike Opp.") at 3-6) that case law supported the filing of its Supplemental Motion and denial of the Strike Motion. This involved Petitioners explaining the inapplicability of cases cited in the Russian Federation's opposition relating to Rule 12(f) and successive motions. (Strike Reply at 3-8.) The Russian Federation's claims that a surreply is appropriate to address this case analysis (Surreply Mot. at 2-3) are frivolous.

The Russian Federation tries to justify its surreply by arguing that Petitioners "newly assert" that Rule 12(f) is inapplicable and that "Petitioners' original Motion to Strike did not

contain *any mention* of Rule 12(f)." (*Id*. at 2 (emphasis in original).) This argument is absurd; Petitioners did not mention Rule 12(f) precisely because it is irrelevant. The Russian Federation first argued for the applicability of Rule 12(f) in its opposition, and Petitioners countered – in a footnote that relied on a treatise cited by the Russian Federation – that it was not relevant. (Strike Reply at 8 n.6.) Similarly, the Russian Federation argues that Petitioners' analysis of successive motion cases warrants a surreply (Surreply Mot. at 2-3); but Petitioners had merely analyzed cases cited by the Russian Federation in its opposition (Strike Reply at 5-6). That is how briefing works; it is not justification for a surreply.

If a compulsion to have the last word on case law justified a surreply, surreplies would be the rule, not the "disfavored" exception. *See, e.g., Crummey v. Soc. Sec. Admin*., 794 F. Supp. 2d 46, 62-63 (D.D.C. 2011) ("Simply put, a surreply is not a vehicle for rehashing arguments that have already been raised and briefed by the parties. Were that not true, briefing would become an endless pursuit."); *Pogue*, 238 F. Supp. 2d at 277 ("[T]he Court doubts that the existence of statutory or case law can ever be 'new matter' so as to permit the filing of a surreply."); *see also United States v. Ormat Indus., Ltd*, No. 3:14-cv-00325, 2016 WL 1298119, at *6 (D. Nev. Apr. 1, 2016) ("[A]n alleged misapplication or mischaracterization of the law alone surely cannot be a sufficient basis for a surreply; otherwise, litigants would constantly seek to have the last word in brief filing by claiming the other side presented the law in an unfavorable manner."); *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 154 (D.D.C. 2015) (denying leave where the "sur-reply improperly attempts to bolster arguments already made in his opposition brief").

Point II of Petitioners' reply (Strike Reply at 8-17) rebutted the Russian Federation's argument (*see, e.g.*, Strike Opp. at 1-3, 5-6, 10) that its Supplemental Motion was based on new and newly discovered evidence by proving that virtually all of its evidence was actually old – a

point now conceded. That argument was based entirely on facts well-known to the Russian Federation, such as the dates documents were produced or exhibited in the arbitrations and the fact that the Russian Federation recently filed many such documents in a German court, while deceptively citing that filing as proof that its exhibits were "new." (*See* Strike Reply at 11-12.) A surreply is not appropriate in such circumstances. *See, e.g.*, *Bigwood*, 132 F. Supp. 3d at 154 (denying leave in part because "[defendant]'s argument in its reply that plaintiff wishes to address in his proposed sur-reply . . . was neither novel nor unexpected"); *Gilbert v. Bangs*, 813 F. Supp. 2d 669, 678 (D. Md. 2011) (denying leave because "Gilbert had the opportunity to support his position in his opposition brief; a surreply would not provide Gilbert with his first chance to address this issue"); *Saunders v. District of Columbia*, 711 F. Supp. 2d 42, 60 (D.D.C. 2010) ("[I]t is clear that Plaintiff's attempt to use the Surreply as a vehicle to advance untimely arguments is wholly inappropriate.").[1]

The Russian Federation made the strategic choice to argue misleadingly that its exhibits were new when they clearly were not. Petitioners proved it wrong, so much so that the Russian Federation has now abandoned that argument. The Russian Federation clearly understands that the gamble it took in making a false argument failed to pay off, but that is not grounds for a surreply. *See, e.g.*, *United States v. Baroid Corp.*, 346 F. Supp. 2d 138, 144 (D.D.C. 2004) ("That Anchor failed to put forth its best case in its opposition is not grounds for permitting a surreply. . . . Anchor 'took a litigation gamble,' by not fully addressing the separate agreements in its opposition brief, and it lost. Anchor's motion for leave to file a surreply must be denied.") (citation omitted); *Pogue*, 238 F. Supp. 2d at 277 ("The fact is, [the parties seeking leave to file a

[1] Petitioners' reply also explained that the handful of exhibits that could arguably be said to be new were plainly immaterial. (Strike Reply at 14.) This argument was based on the content of the exhibits and thus similarly "was neither novel nor unexpected." *Bigwood*, 132 F. Supp. 3d at 154.

surreply] took a litigation gamble by failing to address the merits of Relator's subpoenas duces tecum against them in their responses to the motions to compel. They lost. The Court will not grant leave to file a surreply to put them back in the game.").

Point III of Petitioners' reply (Strike Reply at 17-20) further rebutted the Russian Federation's argument that its 135 exhibits justified its filing of the Supplemental Motion by reiterating that such evidence is not relevant to the subject matter jurisdiction inquiry here. Petitioners raised no new matter in advancing this argument. Rather, Petitioners relied on (and cited to) the analysis in their prior briefs with regard to the nature and scope of the subject matter jurisdiction dispute. (*See id*. at 17 (citing subject matter jurisdiction submissions Petitioners made on November 23, 2015 and April 27, 2016, ECF Nos. 63 and 104).)

Petitioners also reiterated that the Court had issued a Minute Order on October 22, 2015 directing that briefing on the Russian Federation's factual allegations not take place until after subject matter jurisdiction is decided, which reflected the Court's recognition that those allegations were not relevant to jurisdiction. (Strike Reply at 2-3, 19-20; *see also id*. at 20 n.26 (showing that the factual allegations in the Supplemental Motion that the Russian Federation had claimed were supported by "new" evidence were the same factual allegations made in the Russian Federation's initial subject matter jurisdiction motion that the Court had ordered not be addressed); Strike Mot. ¶ 4.) The Russian Federation was well aware of this order and simply elected for strategic reasons not to address its obvious implications in its opposition.[2] As noted, the failure of such a litigation gamble to pay off does not justify a surreply.

[2] As shown below, prior briefs submitted by the Russian Federation prove that it knew that briefing, or submitting evidence in support of, its factual allegations at this stage would violate the October 22, 2015 Minute Order, yet it did both in connection with its Supplemental Motion. (*See infra*, Section II.D.)

* * *

In short, the Russian Federation's motion to file a surreply should be denied because Petitioners' reply "merely expands on previously-made arguments or responds to arguments raised by" the Russian Federation. *Sebelius*, 765 F. Supp. 2d at 31; *see, e.g., High Point SARL v. Sprint Nextel Corp*., No. 09-2269, 2012 WL 1580634, at *4 (D. Kan. May 4, 2012) ("Sprint improperly characterizes its surreply as a response to a purportedly 'new' argument in [the opposing parties'] reply briefs, but in reality, the surreply . . . relies entirely on information that was available to Sprint before it responded to [the parties'] motions, rehashes arguments that Sprint has repeatedly made to this Court . . ., and is nothing more than a transparent attempt to have the last word."); *Lightfoot v. District of Columbia*, No. 04-1280, 2006 WL 54430, at *1 n.2 (D.D.C. Jan. 10, 2006) (denying leave where "the defendants' reply does not raise any new matters; rather, the defendants merely respond to the plaintiff's arguments contained in his opposition").

II. The Russian Federation's Proposed Surreply Raises New and Meritless Arguments and Accordingly its Motion for Leave to File a Surreply Should Be Denied

The Russian Federation's proposed surreply is also improper because it makes new arguments and because it is meritless and thus not "helpful." *See, e.g.*, *Thermal Dynamic Int'l, Inc. v. Safe Haven Enterprises, LLC*, No. 1:13-cv-00721, 2016 WL 3023983, at *3 (D.D.C. May 25, 2016) (denying leave to file a surreply where it "would not be helpful to the resolution of the pending motions"); *Pogue*, 238 F. Supp. 2d at 276 (a surreply may be granted "only to address new matters raised in a reply"); *Lightfoot*, 2006 WL 54430 at *1 n.2 (denying leave after noting "plaintiff's surreply raises facts and legal issues not previously addressed").

A. Federal Rule 12(f) Does Not Apply to Petitioners' Motion to Strike

The Russian Federation argues in its proposed surreply, as it argued in its opposition, that Rule 12(f) applies to Petitioners' Motion to Strike. (Proposed Surreply at 4-5; Strike Opp. at 4.) Petitioners cited authority in their reply establishing that this is not true. (Strike Reply at 8.) Nothing in the Russian Federation's proposed surreply alters that conclusion.

Rule 12(f) authorizes a court to "strike from a *pleading* an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f) (emphasis added). As courts have repeatedly recognized, the standard set forth in Rule 12(f) applies only to motions to strike "pleadings" as defined in Rule 7(a), such as complaints and answers. *See, e.g.*, *Baloch v. Norton,* 517 F. Supp. 2d 345, 348 n.2 (D.D.C. 2007) ("[A] motion to strike pursuant to [Rule] 12(f) is limited to pleadings.").[3] Rule 12(f) imposes a tough standard on motions to strike "pleadings" because pleadings are foundational documents, setting out the contours of each party's positions, and "courts will generally 'not tamper with pleadings.'" *Nwachukwu v. Rooney*, 362 F. Supp. 2d 183, 190 (D.D.C. 2005) (citation omitted). "[R]ule [12(f)] does not, however, apply to motions or memoranda of law," such as the Supplemental Motion to Dismiss. *Hamilton v. Paulson*, No. 07-1365, 2008 WL 4531781, at *1 n.1 (D.D.C. Oct. 10, 2008).[4]

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[3] *See also Fox v. Michigan State Police Dep't*, 173 F. App'x 372, 375 (6th Cir. 2006) ("Under Fed.R.Civ.P. 12(f), a court may strike only material that is contained in the pleadings."); *Henok v. Chase Home Fin., LLC*, 925 F. Supp. 2d 46, 53 (D.D.C. 2013) ("[A]n opposition is not a pleading under Rule 7(a) and is not subject to being stricken under Rule 12(f)."); 5C Fed. Prac. & Proc. Civ. § 1380 (3d ed.) ("Rule 12(f) motions only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f).").

[4] *See also Gonzalez-Vera v. Townley*, 83 F. Supp. 3d 306, 315 (D.D.C. 2015) ("Motions and related memoranda are not pleadings under the Federal Rules."); *James v. Experian Info. Sols., Inc.*, No. 3:12CV902, 2014 WL 29041, at *6 (E.D. Va. Jan. 2, 2014) ("By virtue of Rule 7(a), the defendant's reply brief is not a 'pleading' that is subject to the Rule 12(f) motion to strike."); *White v. Stephens*, No. 13-cv-2173, 2014 WL 726991, at *6 (W.D. Tenn. Jan. 14, 2014) ("[E]xhibits attached to motions are not pleadings and are outside the scope of Rule 12(f).").

Neither party has identified even one decision that applied Rule 12(f) to a motion to strike an unauthorized surreply. This, of course, makes perfect sense: the rule that surreplies "may be filed only by leave of Court"[5] would be meaningless if courts were forced to accept unauthorized surreplies unless the opposing party satisfied the heightened requirements of Rule 12(f). Accordingly, the authority to strike unauthorized submissions does not arise from Rule 12(f), but rather from the inherent power "necessarily vested in courts to manage their own affairs." *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991); *see, e.g.*, *Mazzeo v. Gibbons*, No. 2:08-cv-01387, 2010 WL 3910072, at *3 (D. Nev. Sept. 30, 2010) ("Although [plaintiff] argues that the Court lacked the authority to [strike a non-pleading] under Rule 12(f), the Court had inherent authority to strike the fugitive document. Any other result would render the Court's orders completely ineffective and cripple the Court's ability to manage its docket or regulate insubordinate attorney conduct.").[6]

The Russian Federation cites two new cases in support of its position that Rule 12(f) applies here. (Proposed Surreply at 4-5 (citing *U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 456 F. Supp. 2d 46, 51 & n.4 (D.D.C. 2006); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 224 F.R.D. 261, 263 & n.1 (D.D.C. 2004)).) While the materials subject to the motions to strike in *Judicial Watch* and *Mass. Hous. Fin. Agency* included affidavits and other materials submitted in support of briefs, rather than pleadings, the question of whether Rule 12(f) applies beyond pleadings was not raised by the parties in those cases or addressed in the decisions. Moreover, neither case involved a motion to strike a surreply or other submission that

[5] *Wada v. U.S. Secret Serv.*, 525 F. Supp. 2d 1, 10 (D.D.C. 2007).

[6] *See also GFL Advantage Fund, Ltd. v. Colkitt*, 216 F.R.D. 189, 197 (D.D.C. 2003) ("[A] court surely possesses the power to correct an imbalance when one party has raised a new matter in a brief or memorandum of points and authorities."); *Goltz v. Univ. of Notre Dame du Lac*, 177 F.R.D. 638, 641 (N.D. Ind. 1997) ("[U]nauthorized submissions could properly be excluded from consideration.").

requires court authorization to file. As the case law cited above reflects, decisions that actually consider the reach of Rule 12(f) hold that it applies only to pleadings as defined in Rule 7(a) and accompanying materials. *See, e.g.*, *Henok*, 925 F. Supp. 2d at 52-53, 53 n.2 ("In this district, 'affidavits and declarations filed in support of technical pleadings' may also be struck under Rule 12(f)."") (citing *Judicial Watch*, 224 F.R.D. at 263 n.1).

The Russian Federation's argument that Rule 12(f) must apply because Petitioners "do not identify any alternative standard which *should* be applied" is also baseless. (Proposed Surreply at 4.) As the cases Petitioners cited reflect, if a submission is in essence a surreply (regardless of how it is labeled) and if court permission had not been sought to file it, the submission is stricken. (Strike Reply at 4-5 (citing *United States v. Tailwind Sports Corp.*, No. 10-cv-00976, 2014 WL 24235, at *1 (D.D.C. Jan. 2, 2014); *Marbury Law Grp., PLLC v. Carl*, 729 F. Supp. 2d 78, 82 (D.D.C. 2010); *Wada v. U.S. Secret Serv.*, 525 F. Supp. 2d 1, 10 (D.D.C. 2007)); Strike Mot. ¶¶ 14-15.) This straightforward approach follows from, and is necessary to ensure compliance with, the rule that court permission must be sought to file a surreply.[7]

B. No Case Law Supports Filing an Unauthorized Successive Motion that Seeks the Same Relief, on the Same Grounds, Sought in a Pending Motion

The Russian Federation argues in its surreply, as it argued in its opposition, that a party may file a successive motion seeking the same relief, on the same grounds, sought in a pending, fully briefed motion. (Proposed Surreply at 6-9; Strike Opp. at 4-10.) Petitioners established in their reply that the cases the Russian Federation had cited in its opposition did not support that

[7] Under the Russian Federation's mixed-up view of the law, a party who wishes to file a surreply would be better off *not* seeking court permission since, according to the Russian Federation, a court cannot strike such an unauthorized surreply unless the heightened standard in Rule 12(f) is satisfied (whereas a party who properly asks for permission would have to contend with an inquiry that treats surreplies as "disfavored"). Notably, even if Rule 12(f) applied here, Petitioners' Motion to Strike would still be appropriate since the Supplemental Motion is indeed both "redundant" and "immaterial." (*See* Strike Mot. ¶¶ 5-6; Strike Reply at 3-6, 17-20.)

proposition. (Strike Reply at 5-7.) Implicitly accepting that Petitioners were right, the Russian Federation's surreply does not attempt to rehabilitate those cases; rather, it cites *ten new cases* – not cited in any of the prior briefs – that it claims support its position. (Proposed Surreply at 6-9.)

None of the Russian Federation's ten new cases provides a basis for concluding that its Supplemental Motion to Dismiss was a proper filing, and they are not relevant to the present circumstances. The Russian Federation claims its Supplemental Motion should be allowed because it is "based on different evidence" (Proposed Surreply at 6), but none of the authorities the Russian Federation cites involved an unauthorized successive motion that merely presented "different evidence" in support of the same grounds for dismissal asserted in a pending motion.[8]

All ten of these cases fall into one of the following two categories: (i) the court had given leave to file an additional motion following an amended complaint or had specifically requested supplemental briefing;[9] or (ii) the successive motion had asserted *new grounds* for dismissal. Indeed, all but one of the cases in the latter category concerned a successive motion that sought dismissal *under an entirely different provision of Rule 12(b)* than had been raised in the prior

[8] Indeed, in five of the ten cases it cites, there was no motion pending when the successive motion was filed, as the prior motion had already been decided. *Donnelli v. Peters Secs. Co.*, No. 02 C 0691, 2002 U.S. Dist. LEXIS 16305, at *8-10 (N.D. Ill. Aug. 29, 2002); *Fed. Express Corp. v. U.S. Postal Serv.*, 40 F. Supp. 2d 943, 948 (W.D. Tenn. 1999); *Strandell v. Jackson Cty.*, 648 F. Supp. 126, 129 (S.D. Ill. 1986); *Thorn v. N.Y. Dep't. of Soc. Servs.*, 523 F. Supp. 1193, 1196 n.1 (S.D.N.Y. 1981); *Sharma v. Skaarup Ship Mgmt. Corp.*, 699 F. Supp. 440, 444 (S.D.N.Y. 1988).

[9] *Strandell*, 648 F. Supp. at 129 (successive motion submitted pursuant to Order "allow[ing] defendants to file another motion 'as to any part of the amended complaint that raises new issues'"); *Sharma*, 699 F. Supp. at 444 (renewed motion "specifically contemplated" since original motion had been dismissed "with leave to renew after the filing of an amended complaint"); *Stoffels ex rel. SBC Concession Plan v. SBC Commc'ns, Inc.*, 430 F. Supp. 2d 642, 648 (W.D. Tex. 2006) (renewed motion made after prior motion denied as moot, thus "mak[ing] clear that the Court considered Plaintiffs' Amended Complaint to wipe the slate clean, and to provide Defendants a new, unobstructed opportunity to submit a 12(b)(6) motion"); *Cooper v. Farmers New Century Ins. Co.*, 607 F. Supp. 2d 175, 178 (D.D.C. 2009) ("the supplemental briefing was specifically requested by the Court").

motion.[10] In the one other case, a second Rule 12(b)(6) motion to dismiss was filed after a new development (a class action settlement), which gave rise to a new ground for dismissal (that the claims were foreclosed by that settlement). *Butler v. Fairbanks Capital*, No. 04-0367, 2005 U.S. Dist. LEXIS 44537, at *5-9 (D.D.C. Jan. 3, 2005). The Court allowed the second motion "[b]ecause the events giving rise to the second motion did not occur until [defendant] filed the first motion, and because the second motion does not address any of the issues [defendant] raised in the first motion." *Id*. at *9-10.

These cases are inapplicable here. The Court did not give the Russian Federation leave to file the Supplemental Motion, nor does the Russian Federation point to any new development after its first motion that gives rise to a new ground for dismissal. Rather, it claims only that "different evidence" supports the grounds for dismissal it asserted before. Not a single case cited by the Russian Federation permitted an unauthorized successive motion to be filed that sought dismissal on the same grounds already raised in a pending motion.[11]

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[10] *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 382 (D. Md. 2009) (prior motion brought under Rules 12(b)(7) and 19; new motion brought under Rule 12(b)(6)); *Donnelli v. Peters Secs. Co.*, 2002 U.S. Dist. LEXIS 16305, at *8-10 (prior motion brought under Rules 12(b)(2) and 12(b)(3); new motion brought under Rule 12(b)(6)); *Fed. Express Corp.*, 40 F. Supp. 2d at 948 (prior motion brought under Rule 12(b)(1); new motion brought under Rule 12(b)(6)); *Thorn*, 523 F. Supp. at 1196 n.1 (prior motion brought under Rule 12(b)(3); new motion brought under Rule 12(b)(6)); *Lindsey v. United States*, 448 F. Supp. 2d 37, 42 (D.D.C. 2006) (prior motion brought under Rule 12(b)(5); new motion brought under Rules 12(b)(1) and 12(b)(6)).

[11] There is no question that the Russian Federation is asserting the same grounds for dismissal now that it had asserted before. Indeed, the Russian Federation's proposed surreply specifically identifies the six jurisdictional grounds for dismissal raised in its Supplemental Motion, all of which match grounds that it had already raised in its initial subject matter jurisdiction motion. *Compare* Proposed Surreply at 2 n.4, ground (1) ("[T]he Russian Federation never ratified the [ECT] and thus *never offered* to arbitrate with Petitioners under Articles 26 and 45") *with* Respondent's Initial Subject Matter Jurisdiction Motion, ECF No. 24 ("SMJ Br.") at 28-31 ("never ratified"; "pursuant to Article 45(1) [and] Article 26 . . . no offer was ever made"); *compare* Proposed Surreply at 2 n.4, ground (2) ("Petitioners were *not eligible offerees* . . . because they are 'controlled in fact' by Russian nationals") *with* SMJ Br. at 34-36 ("Russian nationals . . . could not accept any such offer"); *compare* Proposed Surreply at 2 n.4, ground (3) ("[U]nder . . . the veil-piercing doctrine, the Petitioners are *not eligible offerees* because their purported corporate nationality . . . should be disregarded as a result of . . . fraud[]") *with* SMJ Br. at 31-34 ("[T]he corporate form will 'not

C. The Russian Federation's New "New Evidence" Argument is Baseless

In its opposition, the Russian Federation had opposed Petitioners' strike motion on the ground that its Supplemental Motion was based on 135 exhibits that were "new" and material to this Court's subject matter jurisdiction. (*See, e.g.*, Strike Opp. at 1-3, 5-6, 10.) Petitioners proved in their reply that this position was a gross falsehood. (Strike Reply at 8-17.) Specifically, Petitioners established that 125 of the 135 exhibits were indisputably not new,[12] and that scores of these documents were produced or exhibited in the underlying arbitrations. (*Id*.)

Having been found out, the Russian Federation seeks comfort in specious wordplay, arguing that it cannot be criticized because Petitioners had themselves previously referred to these exhibits as "new." (Proposed Surreply at 9.) However, it is clear that when Petitioners referred to "new" exhibits, they were using the term to refer to the fact that these exhibits were

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be regarded when to do so would work fraud.'"); *compare* Proposed Surreply at 2 n.4, ground (4) ("Petitioners also were *not eligible offerees* . . . because the Oligarchs illegally acquired the shares") *with* SMJ Br. at 31-34 ("The Russian Federation's offer contains the implicit and inherent condition that . . . Petitioners' shareholdings of Yukos had not been obtained and perpetuated by fraud and unlawful conduct"); *compare* Proposed Surreply at 2 n.4, ground (5) ("Petitioners *failed to accept* any purported offer of arbitration by failing to refer their tax claims to the competent tax authorities under Article 21") *with* SMJ Br. at 36-38 ("Petitioners failed to use the mandatory tax-dispute referral mechanism under Article 21(5)"); *compare* Proposed Surreply at 2 n.4, ground (6) ("Petitioners' arbitration awards do not arise out of a commercial legal relationship") *with* SMJ. Br. at 38-39, 43-44 ("the subject matter of the dispute and award is not 'commercial'").

[12] Petitioners demonstrated this in part by providing a corrected version of an exhibit annex that the Russian Federation had filed. (ECF No. 134-1, "Corrected Annex B.") For example, there were many exhibits listed in the Russian Federation's Annex B that had been produced or made an exhibit in the underlying arbitrations between the parties years ago; Petitioners' Corrected Annex B added annotations to each such exhibit providing the Court with this missing information, which demonstrated that each such exhibit was in no sense "new." (*See id*.) The Russian Federation does not challenge the accuracy of any of the annotations or corrections in Petitioners' Corrected Annex B. The Russian Federation instead provides a "Supplemented Annex B," which adds new notes to each entry that purport to show the relevance of its exhibits. (ECF No. 136-2.) Its notes show no such thing. They only further demonstrate that the Russian Federation is seeking to improperly rehash before this Court argument that it made unsuccessfully in the arbitrations. (See, for example, entries for R-617, R-620, R-626, R-627, R-629, among many others, which the Russian Federation *had submitted as exhibits in the arbitrations*; all of its arguments as to the relevance of those exhibits were, or could have been, presented to the tribunal.)

newly filed in this action. (*See, e.g.,* Strike Mot. ¶ 2 ("the Russian Federation has filed a *new* 45-page brief, along with more than 3,000 pages of *new* declarations, expert reports, and exhibits") (emphasis added).) But when the Russian Federation used the term "new," it plainly meant that its exhibits post-dated, or had not been discovered until after, its initial subject matter jurisdiction motion. (*See, e.g.*, Strike Opp. at 1 ("newly discovered evidence"); *id*. at 5 ("138 [sic] new documents"); *id*. at 6 ("the majority of the Russian Federation's new evidence has only recently become available–in large part due to the discovery of new documents"); *see also* Supplemental Brief, ECF No. 108 at 1 ("The subject matter of this Supplemental Motion to Dismiss consists of new and newly discovered evidence and new rulings from related foreign proceedings during the seven months since the Russian Federation filed its initial Motion").) Petitioners' reply demonstrated that this claim was false. (Strike Reply at 8-17.)

In any event, the Russian Federation's proposed surreply is most notable for its silence: the Russian Federation has not denied that 125 of the 135 exhibits that it repeatedly claimed to be "new" were no such thing.[13] Nor does the Russian Federation deny that it used deceptive argument to convey the false impression that its old documents were "new." For example, Petitioners had shown that the Russian Federation had cited purported "new documents" filed in a German court "on April 20, 2016" – it repeatedly highlighted that date – as proving that it had "new" documents to submit here. (Strike Reply at 11-12.) But, in fact, *the Russian Federation itself* had made that German filing (a fact it neglected to disclose), and the filing consisted almost entirely of old documents. (*Id*.) The Russian Federation does not respond, and the German filing is nowhere mentioned in its proposed surreply.

[13] The Russian Federation also does not meaningfully contest that the remaining ten arguably new documents are immaterial for reasons explained in Petitioners' reply. (Strike Reply at 15-20.)

Instead of arguing that the Court should consider its Supplemental Motion because it was based on 135 "new" documents, the Russian Federation substitutes the argument that "even one" relevant exhibit can justify its Supplemental Motion. (Proposed Surreply at 10.) This new argument has no more merit than its prior argument. As a threshold matter, the argument that "even one" new document can justify a successive motion is based on inapposite case law. Specifically, it is based on language from *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 251 (D.C. Cir. 1987). This is one of several cases the Russian Federation had cited in its opposition (Strike Opp. at 3), and which Petitioners had explained in their reply were irrelevant here. (Strike Reply at 5-6.) *Williamsburg* and other cases the Russian Federation had cited involved a successive motion for summary judgment made after a prior motion had been denied. (*Id*.) And *Williamsburg* found that one document could warrant a successive motion for summary judgment under those circumstances where it was "highly material to the antitrust issues presented." 810 F.2d at 251. Neither *Williamsburg* nor any other decision cited by the Russian Federation (either in its opposition or proposed surreply) held that an unauthorized successive motion of any kind was appropriate where a prior motion seeking the same relief on the same grounds was pending.

The Russian Federation is left to argue that just one document (out of 135) is significant, and then spends eight tedious pages addressing it.[14] (Proposed Surreply at 11-18 (discussing Exhibit R-672).) It is fundamentally absurd to suggest that a single, one-page document can justify a 45-page surreply (mislabeled as a "Supplemental Motion to Dismiss") filed with over

[14] Notably, this is not even a "new" document, and was available to the Russian Federation at the time it filed its initial subject matter jurisdiction challenge. It has been available since at least July 21, 2015 (months before the Russian Federation filed its initial subject matter jurisdiction motion) when it was filed publicly on an S.D.N.Y. docket. (*See* Corrected Annex B.) And it was a document discussed in an Amsterdam decision issued on November 5, 2015, prior to the conclusion of briefing on the Russian Federation's initial subject matter jurisdiction motion. (*See* Strike Reply at 13-14.)

3,000 pages of declarations and exhibits. In any event, the Russian Federation does not come close to demonstrating that this exhibit is even relevant, much less "highly material" to any issue before this Court. It argues that this one exhibit – a 2011 letter from GML (shareholder of two of the three Petitioners) described by the Russian Federation as a "GML agreement" – shows that Petitioners are controlled by Russian nationals, which it claims to be relevant on the ground that companies that are controlled by Russian nationals have no right to arbitrate with the Russian Federation under the Energy Charter Treaty. (Proposed Surreply at 11-12.) The Russian Federation made, and lost, this argument – *i.e.*, that companies controlled by Russian nationals cannot arbitrate against the Russian Federation under the ECT and that Petitioners are so-controlled – in the underlying arbitrations. (*See, e.g.,* ECF No. 63 at 28-30.) The Russian Federation's claim that this argument is relevant here starts from the erroneous premise that determining subject matter jurisdiction in this case depends on a fact-intensive, *de novo* review of arbitrability. Petitioners explained in their reply that this is not true, and that the limited nature of the subject matter jurisdiction inquiry here renders all of the Russian Federation's evidence irrelevant. (Strike Reply at 17-20.) That analysis alone forecloses the Russian Federation's argument as to the materiality of this exhibit.

Even if it were the job of this Court to conduct a *de novo* re-do of Russian Federation arbitrability challenges that were rejected in the arbitrations, this document would still have no relevance.[15] The Russian Federation's confused argument as to the relevance of this exhibit

[15] As Petitioners pointed out in their reply, the Russian Federation had claimed that a November 5, 2015 Amsterdam judgment confirmed the impropriety of this document. (Strike Reply at 13-14.) But, Petitioners noted, that Amsterdam judgment had *rejected* allegations that the document was in any way improper. (*See id*.) Ever flexible, the Russian Federation responds in its proposed surreply that the Amsterdam judgment is irrelevant because it dealt with different issues. (Proposed Surreply at 13 ("governed by different issues of law, address different issues of fact, and even involve different parties").) This is entirely inconsistent with its prior position, including the ten-page section of its Supplemental Motion argued under the heading: "*The Amsterdam Judgment Demonstrates* that 'Control

involves a chain of logic that is missing more than a few links. Indeed, the Russian Federation's claim that this document is critically important to veil-piercing appears to be based entirely on a reference to a beneficiary of the trusts owning GML having been included in "discussions" with the letter's author and recipient. (Proposed Surreply at 11, 14.) A beneficiary being involved in "discussions" with respect to actions taken by a company in which he has an interest is obviously not, as the Russian Federation claims, proof that the corporate form should be disregarded; quite to the contrary, such discussions are unremarkable and consistent with principles of good corporate governance and the observation of corporate formalities.[16]

Even putting all of that aside, the Russian Federation's claim that this document is relevant to whether the Petitioners are eligible offerees under the terms of the ECT is also plainly wrong as a matter of law. It is well established that issues of ownership and control are entirely

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in Fact' Is Exercised with Respect to Petitioners and Their Yukos Shares by Six Russian Oligarchs–Not by Cypriot or U.K. Nationals." (Supplemental Brief at 23-33 (emphasis added).) Indeed, it had previously cited the Amsterdam judgment as a critical "new" development warranting its Supplemental Motion. (*See, e.g.*, *id*. at 2 ("the District Court of Amsterdam . . . issued a judgment on November 5, 2015 (the 'Amsterdam Judgment'), further revealing Petitioners' ineligibility to accept any purported offer to arbitrate").) The Russian Federation just cannot keep it straight: the Amsterdam judgment went from critical to irrelevant in the course of a few briefs.

[16] The Russian Federation's claim that Petitioners improperly failed to produce this document in the arbitrations is false. (Proposed Surreply at 15-16.) Relying on language from document requests 7.5(b) and 7.5(c) from the underlying arbitrations, the Russian Federation asserts that Petitioners were obligated "to disclose all '[d]ocuments concerning any transaction or contemplated transaction related to Yukos shares' entailing 'the disbursement, payment, or receipt of dividends, loans or other sums' involving . . . the two Dutch foundations." (Supplemental Motion at 32.) Even a cursory review of the document request cited by the Russian Federation shows that the GML letter is not responsive to it, as it does not concern a transaction related to Yukos shares (request 7.5(b)), and is not a financial or bank statement (request 7.5(c)). Indeed, the Russian Federation's claim to the contrary is based on deceptively splicing together language from these different requests. Request 7.5(b) requests "Documents concerning any transaction or contemplated transaction related to Yukos shares or any direct or indirect interest therein, including sale and purchase agreements, swap agreements, option agreements, pledges or other collateral agreements," while request 7.5(c) separately requests "financial statements, bank statements concerning the disbursement, payment or receipt of dividends, loans or other sums." (Request for Documents, ECF No. 87-15.) The Russian Federation's "quote" from the Request is a misleading merger of these two separate requests designed to make this document appear responsive, when in fact it was plainly not.

irrelevant to whether a company qualifies as an "Investor" under Article 1 of the ECT and thus to the jurisdiction of an arbitral tribunal constituted pursuant to the ECT – as Petitioners already explained in their opposition to the Russian Federation's initial subject matter jurisdiction motion. (ECF No. 63 at 27-33.) Indeed, the Tribunal considered precisely this question and held that "in order to qualify as a protected Investor under Article 1(7) of the ECT, a company is merely required to be organized under the laws of a Contracting Party." (Interim Awards ¶ 411; *see also id*. ¶¶ 412-413.) As the Tribunal found, Petitioners qualify as "Investors" entitled to arbitrate under the ECT, and issues of ownership and control are simply not relevant. (ECF No. 63 at 29-33.)[17] Control over Petitioners is simply not a "core jurisdictional issue" as the Russian Federation now asserts, and so can have no impact on the arbitration agreement between Petitioners and the Russian Federation.

D. The Court's October 22, 2015 Minute Order Forecloses Briefing on the Russian Federation's Factual Allegations at the Subject Matter Jurisdiction Stage – as the Russian Federation Has Acknowledged

The Russian Federation has launched a meritless attack against this Court's October 22, 2015 Minute Order. Repeatedly stressing that it was "Judge Amy Berman Jackson's" order – as if that makes the order any less binding – the Russian Federation makes two inconsistent arguments: (1) Petitioners are interpreting the Minute Order in an "implausible, contorted manner" by asserting that it bars briefing on, and the submission of evidence relating to, the Russian Federation's factual allegations at this stage; and (2) Judge Jackson was wrong to order that the Russian Federation's factual allegations were not to be addressed at the jurisdiction stage. Neither argument has merit. Not only are Petitioners interpreting the Minute Order in a

[17] The ECT addresses issues of a company's ownership and control only at Article 17(1), which "cannot determine whether the Tribunal has jurisdiction to entertain the claims of [Petitioners]." (Interim Awards ¶ 440; *see also* ECF No. 63 at 29-30 (explaining why Article 17(1) is irrelevant to jurisdiction).)

straightforward manner according to its plain language, but *the Russian Federation interpreted it in exactly the same way*, as shown below. And Judge Jackson was correct: as Petitioners demonstrated in their opposition to the initial subject matter jurisdiction motion (and reiterated in their recent strike reply), none of the Russian Federation's factual allegations are relevant to subject matter jurisdiction. (ECF No. 63 at 10-21; Strike Reply at 17-20.)

The Russian Federation accuses Petitioners of "eight months of silence" about this order, and of having a "sudden epiphany" regarding its "actual meaning." (Proposed Surreply at 19.) But there had been no need for Petitioners to speak before because the parties had been in agreement about the meaning of the Minute Order, which is quite clear. The Court plainly ordered the parties to address only the "legal" issues raised in the initial subject matter jurisdiction motion, and not to address the "factual allegations" made in the "first 23 pages" of that motion, such as the Russian Federation's allegations that Petitioners or their beneficial owners had engaged in wrongdoing. The order also was quite clear that those factual allegations were to be addressed only after the Court ruled on subject matter jurisdiction, unambiguously reflecting the Court's understanding that those allegations were not relevant to jurisdiction. That is exactly how the Russian Federation understood the Minute Order, and its reply brief in support of its initial subject matter jurisdiction motion proves that:

> In accordance with this Court's October 22, 2015 Minute Order, Respondent addresses only the legal issues raised on pages 25-44 of the Motion to Dismiss, and Petitioners' Opposition to the same. *Respondent emphasizes that it has further factual information* concerning the investors' fraudulent and illegal activities, *and reserves all rights to submit additional factual evidence after this Court has ruled upon the questions of law now before it*.

(December 11, 2015 SMJ Reply, ECF No. 64 at 1 n.5 (emphasis added); *see also id.* at 1 ("*When given the opportunity*, the Russian Federation will submit further documentary evidence and testimony as to the Oligarchs' illegal acts") (emphasis added).)[18]

The Russian Federation thus knew full well that the Court had ordered the parties not to address – much less submit "additional factual evidence" in relation to – its factual allegations until the Court ruled "upon the questions of law now before it" relating to subject matter jurisdiction. Accordingly, the Russian Federation knowingly defied the Minute Order when it filed its Supplemental Motion to Dismiss accompanied with 135 "new" documents claimed to support the very allegations that the Court had ordered not be briefed. (*See* Strike Reply 19-20.)

The Russian Federation has not explained what led it to decide that it could now proceed in a manner that it recognized would violate an order of this Court. Nor has it addressed Petitioners' contention that the Supplemental Motion "is nothing more than an attempted end-run around the Court's October 22, 2015 order that [its] allegations not be addressed at this time." (Strike Reply at 20.) Instead, the Russian Federation reiterates its already-briefed position that, for jurisdiction to exist under the FSIA, the Court must conduct a *de novo* inquiry into the arbitrability of the dispute, re-doing the work of the arbitrators. (Proposed Surreply at 20-23.)

Petitioners have repeatedly explained that subject matter jurisdiction here does not depend on such an inquiry. (*See, e.g.*, ECF No. 63 at 10-21; Strike Reply at 17-20.) Moreover,

[18] Another brief filed recently by the Russian Federation (prior to Petitioners' Strike Reply) also demonstrates that it understood the relevance of the Court's October 22, 2015 order. (Opposition to Motion to Suspend, ECF No. 132.) Specifically, the Russian Federation argued that briefing on its factual allegations should proceed because "Petitioners previously announced that they would '*welcome* th[e] opportunity' to address the Russian Federation's factual contentions." (*Id*. at 8.) The language cited is from a footnote in Petitioners' opposition to the initial subject matter jurisdiction motion, in which Petitioners had noted they would not address the Russian Federation's factual allegations at that time *in compliance with the Court's October 22, 2015 order*. (ECF No. 63 at 2, n.1 ("Petitioners are sensitive to the Court's order and will not address these allegations in detail now").)

the Russian Federation's argument that Judge Jackson got the law wrong in this Minute Order further demonstrates the impropriety of the Supplemental Motion: rather than filing a motion known to be in direct violation of a Court order with which the Russian Federation disagreed, the proper course of action would have been for the Russian Federation to seek relief from that order. Instead, it decided to knowingly flaunt the order, while falsely representing that it did not know it was doing so. The Court should not tolerate such behavior.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court deny the Russian Federation's Motion for Leave to File a Surreply.

Dated: August 5, 2016

Respectfully Submitted,

/s/ Christopher Ryan

Christopher Ryan (D.C. Bar No. 476661)
Keith R. Palfin (D.C. Bar No. 492618)
SHEARMAN & STERLING LLP
401 9th St., N.W., Suite 800
Washington, D.C. 20004-2128
Telephone: (202) 508-8000
E-mail: christopher.ryan@shearman.com
kpalfin@shearman.com

Henry S. Weisburg (admitted *pro hac vice*)
Richard F. Schwed (admitted *pro hac vice*)
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, New York 10022-6069
Telephone: (212) 848-4000
E-mail: hweisburg@shearman.com
rschwed@shearman.com

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., and VETERAN PETROLEUM LTD.,	)	Case No. 1:14-cv-01996-BAH
Petitioners,	)	
v.	)	
THE RUSSIAN FEDERATION,	)	
Respondent.	)	

[PROPOSED] ORDER

Upon consideration of Respondent's Motion for Leave to File a Surreply Opposing Petitioners' Motion to Strike, the papers accompanying the motion, Petitioners' Opposition, and any Reply papers, it is hereby

ORDERED, that Respondent's Motion for Leave to File a Surreply Opposing Petitioners' Motion to Strike is DENIED; it is further

ORDERED, that the Russian Federation's Proposed Surreply and accompanying materials (ECF Nos. 136-1, 136-2, 136-3, 136-4) be stricken from the record.

SO ORDERED, this ____ day of _____, 20____.

Honorable Beryl A. Howell
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., and VETERAN PETROLEUM LTD.,	)	
Petitioners,	)	Case No. 1:14-cv-01996-BAH
v.	)	
THE RUSSIAN FEDERATION,	)	
Respondent	)	

APPENDIX TO PROPOSED ORDER

Pursuant to Rule 7(k) of the Civil Rules of the United States District Court for the District of Columbia, below are the names and addresses of all attorneys entitled to be notified of the order's entry.

Carolyn B. Lamm (D.C. Bar No. 221325)
Francis A. Vasquez, Jr. (D.C. Bar No. 442161)
Frank Panopoulos (D.C. Bar No. 459365)
Eckhard Robert Hellbeck (D.C. Bar No. 437619)
Chauncey Bratt (D.C. Bar No. 1018133)
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, D.C. 20005
Phone: (202) 626-3600 clamm@whitecase.com
fvasquez@whitecase.com
fpanopoulos@whitecase.com
ehellbeck@whitecase.com
chauncey.bratt@whitecase.com

Counsel for Respondent

Christopher M. Ryan (D.C. Bar No. 476661)
Keith R. Palfin (D.C. Bar No. 492618)
SHEARMAN & STERLING LLP
401 9th Street, N.W., Suite 800
Washington, D.C. 20004-2128
Phone: (202) 508-8000
christopher.ryan@shearman.com
kpalfin@shearman.com

Henry S. Weisburg (admitted *pro hac vice*)
Richard F. Schwed (admitted *pro hac vice*)
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022-6069
Phone: (212) 848-4000
hweisburg@shearman.com
rschwed@shearman.com

Counsel for Petitioners