

and (h) because Defendants failed to provide the Receiver with a brief stating their legal authorities and contentions.

3. Instead, Defendants waited until their Reply to provide a “supplemental” brief that, for the first time, explained the case law on which their Motion to Dismiss was based. Not only is this a direct violation of Local Civil Rules (and, therefore, a proper basis for denying the Motion to Dismiss) but it also prejudiced the Receiver. In effect, the Defendants withheld stating their legal contentions for the first time until the Receiver no longer had a chance to respond.

4. Receiver now brings this Motion so that it may respond to Defendants’ new legal and factual arguments. The proposed surreply is attached to this motion as Exhibit “A.”

ARGUMENTS AND AUTHORITIES

In the interests of fairness, the Court should allow the Receiver to file a surreply responding to Defendants’ new legal arguments. The decision whether to grant a surreply lies in the sound discretion of the District Court. *See Williams v. Aviall Services Inc.*, 76 Fed.Appx. 534, 535, 2003 WL 22078583 (5th Cir. Sept. 8, 2003); *see also Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1163-64 (10th Cir. 1998). In this Circuit, a request to file a surreply is appropriately denied when previous briefs “already presented everything” and the surreply includes “no new arguments or evidence.” *Williams*, 76 Fed.Appx. at 535. This is not such a case.

Defendants waited until their Reply—the final round of briefing—to provide any legal authority for their Motion to Dismiss. This tactic deprived Receiver of “notice and a fair opportunity to present arguments and evidence in response.” *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605 (7th Cir. 1999) (new factual allegations raised for first time in a Reply brief). In order to avoid being “ambushed” by such a tactic, Receiver should be allowed to file a surreply. *See id*; *Hayes v. Norfolk*

Southern Corp., 25 Fed. Appx. 308, 314-15, 2001 WL 1631430 (6th Cir. Dec. 18, 2001) (holding it was Plaintiff's duty to seek a surreply when Defendant "submitted [a] hospital record for the first time in its reply brief").

WHEREFORE, PREMISES CONSIDERED, Michael J. Quilling, Receiver, respectfully requests that this Court grant him leave to file a Surreply to *Defendants' Supplemental Brief in Support of Defendants' Motion to Dismiss Under FRCP 12(b)(2), 12(b)(6), and 9(b), and Reply to Plaintiff's Response to Motion to Dismiss* and, in the alternative, for such other and further relief to which he is justly and equitably entitled.

Respectfully submitted,

QUILLING SELANDER CUMMISKEY & LOWNDS, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
Telephone (214) 871-2100
Facsimile (214) 871-2111

By: /s/ Michael J. Quilling

Michael J. Quilling
State Bar No. 16432300
Michael D. Clark
State Bar No. 00798108
Brent J. Rodine
State Bar No. 24048770

ATTORNEYS FOR RECEIVER

CERTIFICATE OF CONFERENCE

I hereby certify that, in accordance with Local Civil Rule 7.1, conference was held on February 22, 2006, by telephone between Brent J. Rodine, attorney for the Receiver, and Mark Castillo, attorney for Defendants. *Plaintiff's Motion for Leave to File Surreply* is unopposed, but Defendants have asked to reserve all rights to object to that motion on the merits.

/s/ Brent J. Rodine