

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

Godo Kaisha IP Bridge 1

Plaintiff,

vs.

Intel Corporation

Defendant.

Civil Action No. 2:17-cv-00676-RWS-RSP

**INTEL CORPORATION'S MOTION FOR LEAVE TO FILE A SUR-SUR REPLY  
IN SUPPORT OF ITS MOTION TO DISMISS FOR IMPROPER VENUE  
OR, IN THE ALTERNATIVE, TO TRANSFER TO THE DISTRICT OF OREGON**

Defendant Intel Corporation (“Intel”) hereby moves for leave to file a short sur-sur-reply solely to address a new argument concerning the McAfee facility raised for the first time in Plaintiff Godo Kaisha IP Bridge 1’s (“Godo Kaisha”) sur-reply. That argument could, and should, have been raised in Godo Kaisha’s Opposition. To the extent the Court considers this new argument, Intel respectfully requests leave to respond. Intel’s proposed sur-sur-reply responding to that new argument will be filed separately and immediately after this motion. L.R. CV-7(k).

In its Opposition brief, Godo Kaisha exclusively argued that the McAfee location should be deemed an Intel location due to Intel’s alleged “partnership” with McAfee at the time the Complaint was filed. D.I. 52 at 1, 13–15 (referencing the “sole dispute” and analyzing the Plano facility “after Intel spun-out McAfee,” “[a]s of the time of filing this suit” and “[w]hen this suit was filed”). Faced with numerous agreements and other evidence establishing that there is no partnership, Godo Kaisha’s sur-reply offered a new, alternative theory: that prior to Intel’s divestment of McAfee in April 2017—over five months before Godo Kaisha filed its complaint—the McAfee location was a regular and established location for Intel, making venue in this District proper. D.I. 64 at 4. This is an argument that Godo Kaisha had ample opportunity to properly raise in its Opposition, but did not. D.I. 21 at 1, 5 (Intel’s Motion addressing Intel’s April 2017 divestiture of McAfee). Indeed, Godo Kaisha’s Plano-based arguments were expressly limited to “[a]s of the time of filing this suit” and “[w]hen this suit was filed.” D.I. 52 at 1, 13–15. Similarly, Godo Kaisha submits new evidence for the first time on sur-reply, well in hand as of the time of its Opposition, to support this new argument. E.g., D.I. 64-10.

“It is a basic tenet of civil procedure that [sur-]reply briefing may only respond to the allegations raised in the [movant’s reply].” *Z-Tel Commc’ns, Inc. v. SBC Commc’ns, Inc.*, 331 F. Supp. 2d 513, 539 (E.D. Tex. 2004). It is improper for Plaintiffs to lay in wait and spring a new

argument on the moving Defendants in a sur-reply. “To hold otherwise would countenance litigation by ambush.” *Id.*; *see also United States v. Brown*, 305 F.3d 304, 308 n.4 (5th Cir. 2002) (“This Court will not consider a claim raised for the first time in a reply brief.”); *United States v. Bonilla-Mungia*, 422 F.3d 316, 319 (5th Cir. 2005) (“Just as we will not entertain issues first raised by an appellant in his reply brief, . . . we will not consider new arguments first raised by an appellee in supplemental briefing on unrelated issues.”) (internal citation omitted).

Where a new sur-reply argument is not struck, sur-sur-reply briefs generally are permitted. *See Lewis v. Rumsfeld*, 1 54 F. Supp. 2d 56, 61 (D.D.C. 2001); *see also St. Clair Intellectual Property Consultants, Inc. v. Samsung Electronics Co. Ltd.*, 291 F.R.D. 75 (D. Del. 2013) (court may grant leave to file a sur-reply that responds to new evidence, facts, or arguments). In determining whether to permit a sur-sur-reply, a court should generally consider whether a sur-sur-reply would be helpful to the resolution of the pending motion, and whether the non-movant was actually unable to address the issue previously. *See Glass v. Lahood*, 786 F. Supp. 2d 189, 231 (D.D.C. May 20, 2011).

The standards for allowing a sur-sur-reply are easily satisfied here. IP Bridge’s sur-reply raised an entirely new argument that could and should have been raised in its Opposition brief. Although (as Intel argues in the attached sur-sur-reply) that untimely argument is waived, to the extent the Court considers it, Intel respectfully requests an opportunity to respond. Specifically, Intel respectfully requests that the Court grant its Motion for Leave to File a Sur-Sur-Reply Supporting its Motion to Dismiss or Transfer.

Dated: April 4, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3) on this 4th day of April, 2018

*/s/ Michael E. Jones*

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Michael E. Jones

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