

No's. 09-3282/09-3299

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**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**CITY OF EUDORA, KANSAS,**

**Defendant/Appellant,**

**v.**

**RURAL WATER DISTRICT #4 OF DOUGLAS COUNTY, KANSAS,**

**Plaintiff/Appellee.**

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**Appeal from the United States District Court for the District of Kansas  
The Honorable Judge Julie A. Robinson**

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**PLAINTIFF/APPELLEE'S MOTION TO STRIKE PORTIONS OF THE  
APPELLANT'S REPLY/RESPONSE BRIEF, OR ALTERNATIVELY FOR  
LEAVE TO FILE SUR-REPLY**

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**Dated: July 2, 2010**

COMES NOW the Plaintiff/Appellee Rural Water District No. 4 of Douglas County, Kansas (“Douglas-4”) and hereby moves the Court to strike certain portions of the City’s Reply/Response Brief, or alternatively, to grant Douglas-4 leave to file a sur-reply to certain issues and arguments made in Appellant’s Response/Reply Brief.

Specifically, Douglas-4 seeks to strike, or alternatively file a sur-reply on the following issues:

1. **CITY’S REPLY ARGUMENT IV(D) - WERE THE CITY ATTORNEY’S LETTERS ADMITTED IN EVIDENCE PART OF SETTLEMENT NEGOTIATIONS?**

This issue is raised solely by the City’s appeal, thus any argument here would be a sur-reply. Douglas-4 responded to the City’s argument on this issue at Argument IIC of Douglas-4’s Principal/Response Brief.

However, because the City references material in its Reply that is not part of the record, the City’s Argument IVD should be stricken, i.e., the City at p. 40 references two (2) letters which the City fails to identify in the record. The reason the City does not identify where in the record these letters can be found is because those letters are not part of the record. The two (2) letters referenced are the September 14, 2007 letter and the September 20, 2007 letter. Arguments raised for the first time in a Reply are waived.<sup>1</sup>

Furthermore, this Court has held that it “...will not consider material outside the record before the district court” and that it is appropriate to strike those portions of the parties brief that cite to a supplemental appendix containing documents outside the record

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<sup>1</sup> *United States v. Wayne*, 591 F.3d 1326, 1332 (10<sup>th</sup> Cir. 2010)

before the District Court.<sup>2</sup> Therefore, the City's "Reply" Argument IVD should be stricken.

Alternatively, Douglas-4 should be allowed an opportunity to submit a sur-reply on the issue of whether the attorney letters were settlement negotiations under Rule 408.

**2. CITY'S REPLY ARGUMENT VI - HAS THERE BEEN A FINAL JUDGMENT IN THIS CASE?**

In its Reply, the City presented the argument for the first time that it was not required to file a Rule 50(b) motion to preserve the right to appeal the denial of summary judgment because no final order has been entered. City's Response/Reply Brief at p. 45, Argument VI. The City's argument on this issue should be stricken because it is raised for the first time in its Reply and because it refers to a letter that is not part of the record. See Footnotes 1 and 2 herein. The City sought to supplement the record with the referenced letter, but said relief was denied. See Exhibits 1 and 2 attached.

The City's argument is also moot because to the extent the September 2, 2009 Order was not a final judgment, due to the separate document rule, the Order became a final judgment herein after the passage of one hundred fifty (150) days. Rule 58(c)(2)(B). The judgment thus became final at the latest on or about January 31, 2010, making the City's Rule 50(b) motion due on or about February 28, 2010. Rule 50(b). The City filed no such motion within the time allowed.

The City passed on the opportunity to file its motions, so while the City even suggests that this Court "could accept the briefing as complete in present case (once

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<sup>2</sup> *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1111 (10<sup>th</sup> Cir. 2010).

Douglas-4 files a cross-appeal reply brief), delay oral argument, and remand the matter to the District Court for the sole purpose of considering the City's Rule 50(b) motions" (City's Response/Reply Brief at p. 50), there are no Rule 50(b) motions for the District Court to consider.

Alternatively, Douglas-4 should be allowed to respond to these new arguments that the City introduced in the "Reply" section of its Reply/Response Brief at Argument VI, pp. 45-50.

**OPPOSING PARTY'S POSITION**

The City objects to the relief requested herein.

**PRAYER**

WHEREFORE, Douglas-4 prays the Court will strike City's "Reply" Arguments IV(D) and VI, or alternatively. grant Douglas-4 leave to file a Sur-Reply to these arguments.

Respectfully Submitted,

/s/ Michael D. Davis

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### **CERTIFICATE OF DIGITAL SUBMISSIONS**

I hereby certify, in accordance with this Court's March 18, 2009 General Order regarding electronic submission of Documents at Section V-B, I hereby certify that: (1) all required privacy redactions have been made, (2) the electronically-submitted documents are identical to those written documents filed with the Clerk, and (3) that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Norton Antivirus Version most recently updated on April 12, 2010) and, according to the scanning program, are free from viruses.

/s/ Michael D. Davis

Michael D. Davis

### CERTIFICATE OF SERVICE

I, hereby certify that I electronically filed the foregoing with the Clerk of the court for the United States of Appeals for the Tenth Circuit by using the appellate CM/ECF system on July 2, 2010.

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I hereby certify that on July 2, 2010 the following addressee was sent a filed copy of the foregoing by U.S. Mail.

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