

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)	
THE PEOPLE OF BIKINI, BY AND)	
THROUGH THE KILI/BIKINI/EJIT)	
LOCAL GOVERNMENT COUNCIL,)	
ELDON NOTE, ET AL.)	
)	
Plaintiffs,)	
)	
v.)	No. 06-288C
)	(Judge Block)
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

**PLAINTIFFS’ MOTION TO FILE A SURREPLY MEMORANDUM IN
OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

Pursuant to Rule 1 of the Rules of the U.S. Court of Federal Claims, plaintiffs, The People of Bikini et al., respectfully request the Court for leave to file the attached 5-page surreply memorandum in opposition to defendant’s motion to dismiss.

Defendant’s counsel has advised that the United States does not consent to this motion.

Plaintiffs’ motion is based on two points. First, defendant’s reply brief raises for the first time the issue of release as a ground for dismissal. It is procedurally improper for the government to argue release as a basis for dismissal now in a reply pleading after declining to do so in its moving papers, because it denies plaintiffs the opportunity to respond. Second, it is casebook law that release is an affirmative defense and the facts necessary to prove it generally must be demonstrated by matters outside the complaint, so

the issue cannot be raised on a motion to dismiss under Rule 12 of the Rule of the U.S. Court of Federal Claims.

Accordingly, plaintiffs respectfully request that the Court grant this motion for leave to file the attached 5-page surreply brief in response to defendant's reply brief.

Respectfully submitted,

s/Jonathan M. Weisgall
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February 16, 2007

Certificate of Filing

I hereby certify that on February 16, 2007, a copy of the foregoing “Plaintiffs’ Motion to File a Surreply Memorandum in Opposition to Defendant’s Motion to Dismiss” was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

s/ Jonathan M. Weisgall