

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American
Judges Association

American Judges Association

2014

The Filing and Briefing of Cross-Motions in State and Federal Court

Michael G. Langan

United States District Court for the Northern District of New York

Jason C. Halpin

Northern District of New York

Follow this and additional works at: <https://digitalcommons.unl.edu/ajacourtreview>

Langan, Michael G. and Halpin, Jason C., "The Filing and Briefing of Cross-Motions in State and Federal Court" (2014). *Court Review: The Journal of the American Judges Association*. 487.
<https://digitalcommons.unl.edu/ajacourtreview/487>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

The Filing and Briefing of Cross-Motions in State and Federal Court

Michael G. Langan & Jason C. Halpin

Misunderstandings regarding the definition of a cross-motion often lead to problems during the filing and briefing of cross-motions in state and federal courts. This article focuses on defining and illustrating the elements of a proper cross-motion, identifying and illustrating common problems caused by the filing and briefing of improper cross-motions, and offering solutions to those problems.

As most commonly understood by judges and practitioners, a cross-motion in state or federal court possesses three elements: (1) it is filed against the originally moving party; (2) it is filed by a party against whom the original motion was filed; and (3) it requests an order similar to that requested by the originally moving party against the cross-moving party. Common problems posed by the filing and briefing of improper cross-motions in state and federal court include (1) a violation of the action's motion-filing deadline, (2) a violation of the court's proscription against the filing of replies on cross-motions, (3) a violation of

the court's proscription against the filing of sur-replies on dispositive motions, and (4) a violation of the court's page limitation on memoranda of law. Possible solutions to those common problems include (1) filing a motion before the opposing party files its motion, (2) requesting leave to depart from the action's scheduling order or the court's local rules, (3) moving to strike the improper cross-motion, and (4) in the context of pleading amendments, filing a timely amended complaint rather than a cross-motion for leave to file an amended complaint in response to a motion to dismiss for failure to state a claim.

I. DEFINITION OF A CROSS-MOTION

A. TERM AS COMPARED TO "COUNTER-MOTION"

Sometimes, a motion is referred to as both a "cross-motion" and a "counter-motion."¹ In such cases, either the terms are used interchangeably or the term "counter-motion" refers to a particular type of "cross-motion": specifically, that type of

Footnotes

1. **State Cases:** Luciano v. WMC Mortg. Corp., No. 1 CA-CV 08-0566, 2010 WL 1491952, at *7-8 (Ariz. Ct. App. Apr. 13, 2010) (referring to motion as both a "counter motion" and a "cross motion"); *accord*, Brumgard v. Rios, No. 2 CA-CV 2010-0007, 2010 WL 3489159, at *1 & n.3 (Ariz. Ct. App. Sept. 7, 2010); Leatherby Ins. Co. v. City of Tustin, 143 Cal. Rptr. 153, 156 (Cal. App. 1977); Kootenai Elec. Co-op., Inc. v. Lamar Corp., 219 P.3d 440, 443 (Idaho 2009); Robinson v. Builders Supply & Lumber Co., 586 N.E.2d 316, 319 (Ill. App. Ct. 1991); Lemen v. 21st Century Nat'l Ins. Co., 286 P.3d 240, at *8 (Kan. Ct. App. 2012); Univ. of Cumberland v. Pennybacker, 308 S.W.3d 668, 672 (Ky. 2010); Sci. Drilling Intern., Inc. v. Meche, 29 So.3d 1283, 1284-85 (La. Ct. App. 2010); Salamon v. Progressive Classic Ins. Co., 841 A.2d 858, 861 (Md. 2004); Dept. of Natural Res. v. Leukuma, No. 287802, 2009 WL 5194517, at *1 (Mich. Ct. App. Dec. 17, 2009); Carlton v. Walters, 294 S.W.3d 513, 515-16 (Mo. Ct. App. 2009); Harris v. Vasquez, 288 P.3d 924, 925 (N.M. Ct. App. 2012); Lawrence Twp., Stark Cnty., Ohio, Bd. of Twp. Tr. v. Canal Fulton, No. 2007 CA 00010, 2007 WL 3408448, at *1 (Ohio Ct. App. Nov. 5, 2007); Am. Condo. Ass'n, Inc. v. IDC, Inc., 844 A.2d 117, 125-26 (R.I. 2004); Robertson v. George, No. M2000-02661-COA-R3-CV, 2001 WL 1173270, at *2 (Tenn. Ct. App. Oct. 5, 2001); Salt Lake Cnty. Comm'n v. Salt Lake Co. Atty., 985 P.2d 899, 901 & n.1 (Utah 1999).

State Court Rules and Standing Orders: Eighth Judicial Dist. Ct. of the State of Nev., Rule 2.20(f) ("An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion."); *cf.* Utah Rules of Civ. Proc., Family Law Rule 101(g) ("Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion."); Local Rules of the Super. Ct.

for Pierce Cnty., Wash., Rule 7(b)(1)(D)(ii) ("In the event there is an existing motion and the responding party wishes to file a counter motion to be heard the same date they may do so without leave of the court by electronically filing and scheduling in accordance with PCLR 7(b)(1)(D) a Note for Commissioner's Calendar, as long as the counter motion and all supporting pleadings are filed and served at least fourteen (14) calendar days before the hearing.").

Federal Cases: Brockert v. Skornicka, 711 F.2d 1376, 1382 (7th Cir. 1983) (referring to motion both as a "counter motion" and a "cross motion"); *accord*, White v. Cinemark USA, Inc., 04-CV-0397, 2005 WL 1865495, at *1 (E.D. Cal. Aug. 3, 2005); Parra v. Life Ins. Co. of N. Am., 258 F. Supp. 2d 1058, 1063 & n.3 (N.D. Cal. 2003); Advanced Semiconductor Materials Am., Inc. v. Applied Materials, Inc., 93-CV-20853, 1994 WL 715634, at *1 (N.D. Cal. Dec. 16, 1994); Roberts v. Heim, 130 F.R.D. 430, 433 (N.D. Cal. 1990); George v. United States, 94-CV-2769, 1996 WL 437532, at *1 (D. Colo. June 14, 1996); United States v. Charboneau, 04-CV-0442, 2005 WL 2346947, at *5 (M.D. Fla. Sept. 26, 2005); Ill. Tool Works, Inc. v. Metro Mark Prods., Ltd., 43 F. Supp. 2d 951, 953 & n.1 (N.D. Ill. 1999); Maneikis v. St. Paul Ins. Co. of Ill., 79-CV-3731, 1980 WL 343874, at *1 (N.D. Ill. May 23, 1980); AAR, Inc. v. Century Inv. Group, LLC, 08-CV-0007, 2010 WL 497747, at *1 (E.D. La. Feb. 5, 2010); Wells v. Home Depot USA, Inc., 11-CV-12884, 2012 WL 995206, at *1 & n.1 (E.D. Mich. Mar. 13, 2012); Barrett v. Detroit Heading, LLC, 05-CV-72341, 2006 WL 1662553, at *6 (E.D. Mich. June 8, 2006); St. Louis Trimming, Inc. v. Am. Credit Indem. Co., 924 F. Supp. 99, 100 (E.D. Mo. 1996); Interface Group-Nev., Inc. v. Men's Apparel Guild in Cal. Inc., 04-CV-0351, 2007 WL 923952, at *2 (D. Nev. Mar. 23, 2007); Dehne v. Avano, 219 F. Supp. 2d 1096, 1100 (D. Nev. 2001); Moultrie v.

cross-motion filed responsively as opposed to originally. For example, when a party files a motion and another party files a “counter-motion,” some courts treat that counter-motion as rendering the original motion and counter-motion together as “cross-motions.”²

Other times, however, a nominal distinction is recognized between a “cross-motion” and a “counter-motion.”³ Still other times, a material distinction is recognized between the two terms. For example, sometimes a “counter-motion” refers to a motion filed subsequent, and in opposition, to an initial

motion but based on different grounds as those of the initial motion.⁴ Other times, a “counter-motion” refers to a motion related to the subject matter of the original motion, while a “cross-motion” refers to an independent motion unrelated to the subject matter of the original motion.⁵ Yet other times, a “counter-motion” refers to a motion filed against a moving party seeking relief *dissimilar* to that sought in the original motion (as opposed to a “cross-motion,” which refers to a motion filed against a moving party seeking relief that is *similar* to that sought in the original motion).⁶

S. Carolina Election Com’n, 06-CV-3073, 2007 WL 445383, at *1 (D.S.C. Feb. 6, 2007); *United States v. Hill*, 533 F. Supp. 810, 813 (D. Tenn. 1982).

Federal Court Rules and Standing Orders: E.D. Cal. Civ. L.R. 230(e) (“Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed in the manner and on the date prescribed for the filing of opposition.”); N.D. Cal. Civil L.R. 16-5 (“Defendant must serve and file any opposition or counter-motion within 28 days of service of plaintiff’s motion.”); U.S. Bankr. Ct. Rules N.D. Cal., B.L.R. 7007-1(d) (“Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion.”); E.D. Mich. L.R. Appendix ECF, R5(e) (“[A] response or reply to a motion must not be combined with a counter-motion. Papers filed in violation of this rule will be stricken.”); N.D. Miss. L.R. 7(b)(3)(C) (“A response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response.”).

2. **State Cases:** *Leatherby Ins. Co. v. City of Tustin*, 143 Cal. Rptr. 153, 156 (Cal. Ct. App. 1977); *Kootenai Elec. Co-op., Inc. v. Lamar Corp.*, 219 P.3d 440, 443 (Idaho 2009); *Robinson v. Builders Supply & Lumber Co.*, 586 N.E.2d 316, 319 (Ill. App. Ct. 1991); *Lemen v. 21st Century Nat’l Ins. Co.*, 286 P.3d 240, at *8 (Kan. Ct. App. 2012); *Salamon v. Progressive Classic Ins. Co.*, 841 A.2d 858, 861 (Md. 2004); *Dep’t of Natural Res. v. Leukuma*, No. 287802, 2009 WL 5194517, at *1 (Mich. Ct. App. Dec. 17, 2009); *Carlton v. Walters*, 294 S.W.3d 513, 515-16 (Mo. Ct. App. 2009); *Harris v. Vasquez*, 288 P.3d 924, 925 (N.M. Ct. App. 2012); *Am. Condo. Ass’n, Inc. v. IDC, Inc.*, 844 A.2d 117, 125-26 (R.I. 2004); *Robertson v. George*, No. M2000-02661-COA-R3-CV, 2001 WL 1173270, at *2 (Tenn. Ct. App. Oct. 5, 2001); *Salt Lake County Com’n v. Salt Lake Co. Atty.*, 985 P.2d 899, 901 & n.1 (Utah 1999).

Federal Cases: *Brockert v. Skornicka*, 711 F.2d 1376, 1382 (7th Cir. 1983); *White v. Cinemark USA, Inc.*, 04-CV-0397, 2005 WL 1865495, at *1 (E.D. Cal. Aug. 3, 2005); *Roberts v. Heim*, 130 F.R.D. 430, 433 (N.D. Cal. 1990); *George v. United States*, 94-CV-2769, 1996 WL 437532, at *1 (D. Colo. June 14, 1996); *Maneikis v. St. Paul Ins. Co. of Ill.*, 79-CV-3731, 1980 WL 343874, at *1 (N.D. Ill. May 23, 1980); *AAR, Inc. v. Century Inv. Group, LLC*, 08-CV-0007, 2010 WL 497747, at *1 (E.D. La. Feb. 5, 2010); *Wells v. Home Depot USA, Inc.*, 11-CV-12884, 2012 WL 995206, at *1 & n.1 (E.D. Mich. Mar. 13, 2012); *St. Louis Trimming, Inc. v. Am. Credit Indem. Co.*, 924 F. Supp. 99, 100 (E.D. Mo. 1996); *Moultrie v. S. Carolina Election Com’n*, 06-CV-3073, 2007 WL 445383, at *1 (D.S.C. Feb. 6, 2007); *United States v. Hill*, 533 F. Supp. 810, 813 (D. Tenn. 1982).

3. **State Cases:** *Bohac v. Akbani*, 29 S.W.3d 407, 414, n.6 (Mo. Ct. App. 2000) (“The parties refer to Father’s [motion] as a ‘cross-motion’ to modify, although it should be denominated a ‘counter-motion’ to modify.”); *Vives v. Verzino*, 213 P.3d 823, 825 (N.M. Ct.

App. 2009) (“The parties refer to Respondents’ counter-motion for summary judgment as a cross-motion, a fact this Court does not change for consistency.”); *Tex. v. Rhodes*, No. 04-96-00040-CV, 1997 WL 81257, at *1, n.7 (Tex. App. Feb. 26, 1997) (“Appellant has denominated its motion a cross-motion rather than a counter motion. We will do the same.”).

Federal Cases: *Copas v. E. Bay Mun. Util. Dist.*, 61 F. Supp. 2d 1017, 1041, n.9 (N.D. Cal. 1999) (“The court does not consider a ‘counter-motion’ filed two weeks after the dispositive motions filing deadline to be a cross-motion.”); *Tyler v. Butler*, 06-CV-0861, 2009 WL 2447918, at *6, n.10 (E.D. Cal. July 29, 2009) (“Buried within this exhibit is a putative cross-motion for summary judgment, which plaintiff calls a ‘counter-motion’”); *Stringham v. Lee*, 04-CV-1530 2008 WL 2880406, at *1 (E.D. Cal. July 22, 2008) (“Pending before the court are . . . plaintiff’s cross-motion for summary judgment (denominated by plaintiff a ‘counter motion’)”); *Cook v. Cashler*, 11-CV-0637, 2013 WL 1213678, at *2 (W.D. Mich. Mar. 5, 2013) (“Plaintiff refers to his cross-motions for summary judgment as ‘counter motions’ for summary judgment.”); *Cannon v. City of Phila.*, 86 F. Supp. 2d 460, 462, n.1 (E.D. Pa. 2000) (“Plaintiff refers to her motion as a counter-motion. I will interpret plaintiff’s motion as a cross-motion for summary judgment.”); *cf. PAETEC Commc’ns, Inc. v. Comm-Partners, LLC*, 08-CV-0397, 2010 WL 1767193, at *1 (D.D.C. Feb. 18, 2010) (calling defendant’s motion a “cross motion” even though defendant labeled it a “counter-motion,” which term the court placed in quotation marks).

4. **State Case:** *Zaloudek Grain Co. v. CompSource Okla.*, No. 110,662, 2012 WL 4077382, at *1 (Okla. Sept. 18, 2012) (describing how plaintiff filed a “motion” for summary judgment on a certain ground, then defendant filed a “cross motion” for summary judgment with regard to the same ground, and then plaintiff filed a “counter motion” for summary judgment on a different ground).

Federal Case: *Forkwar v. Empire Fire and Marine Ins. Co.*, 487 F. App’x 775, 777 (4th Cir. June 27, 2012) (“The district court denied Forkwar’s motion for summary judgment, granted Empire’s cross-motion for summary judgment, and denied Forkwar’s counter motion for summary judgment.”).

5. **Federal Case:** *Kowalski v. Mommy Gina Tuna Resources*, 05-CV-00679, 2008 WL 4216267, at *1 (D. Haw. Sept. 15, 2008) (drawing distinction between a counter-motion and a cross-motion, noting that the former refers to a motion raising the same subject matter as an original motion, and the latter refers to an “independent” motion unrelated to the subject matter of the original motion).

Federal Rule: D. Haw. L.R. 7.9 (“Counter Motions. . . . Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party’s opposition. . . .”).

6. **State Cases:** *Berger v. Pubco Corp.*, 976 A.2d 132, 135 (Del. 2009) (describing how defendants filed a “motion to dismiss,” plaintiff filed a “counter-motion for summary judgment,” and defendants filed a “cross-motion for summary judgment”); *Dillon v. Typaldos*,

Because of the different definitions of the term “counter-motion,” the practice of vacillating between “cross-motion” and “counter-motion” to refer to the same motion in the same brief or decision, without explanation, is not recommended. Moreover, because the term “cross-motion” appears to be common and have a generally accepted meaning, while the term “counter-motion” is relatively rare and used in different ways, this article will focus on the term “cross-motion,” as well as the most common meaning of that term.

B. THREE ELEMENTS OF A “CROSS-MOTION”

The definition of a “cross-motion” that is most commonly provided in law dictionaries, and the definition that is most commonly applied in state and federal courts, is a competing request for an order similar to that requested by another party against the cross-moving party. *See infra* notes 7-16. As a result, as the term is most widely understood, a “cross-motion” has three elements.

First, a cross-motion is a motion filed against the originally moving party.⁷ Second, a cross-motion is filed by a party

2006 WL 1381625, at *1, 6, 13 (N.J. Super. Ct. Ch. Div., May 19, 2006) (describing how plaintiff filed a “motion” to reinstate the complaint, defendants filed a “cross-motion to dismiss” the complaint, and plaintiff filed a “counter motion” to add defendants).

Federal Cases: Wang Labs., Inc. v. Ma Labs., Inc., 95-CV-2274, 1995 WL 729298, at *1 (N.D. Cal. Dec. 1, 1995) (“Ma . . . and Wang . . . bring cross motions for summary judgment based on the provisions of a license agreement executed between the parties. Ma also brings a counter motion for summary judgment arguing that certain accused devices fall outside of the licensing agreement.”); Kingdom 5-KR-41, Ltd. v. Star Cruises PLC, 01-CV-2946, 2005 WL 110434, at *1, 3 (S.D.N.Y. Jan. 20, 2005) (referring to NCLs motion to revive a claim under Fed. R. Civ. P. 60[b], filed in response to motion to alter or amend judgment under Fed. R. Civ. P. 59 [e] or 60, as a “countermotion,” and referring to NCLs motion for summary judgment on that claim, filed in response to motion for summary judgment on that claim, as a “cross-motion”); Healthpoint, Ltd. v. Ethex Corp., 273 F. Supp. 2d 817, 826 (W.D. Tex. 2001) (“Beginning March 22, 2001 . . . , the Court held a consolidated evidentiary hearing on Ethex’s motion for preliminary injunction and Healthpoint’s cross motion for preliminary injunction. . . . In addition, this report also addresses Ethex’s related motion to dismiss or to stay and Healthpoint’s counter-motion to partially dismiss”); *cf.* Hawkins v. Sup. Ct. of NJ, 04-CV-1317, 2005 WL 2133588, at *10, n.11 (D.N.J. Aug. 31, 2005) (noting that “Plaintiff’s brief filed in response to the motion to dismiss is entitled a ‘Brief in Opposition to Defendants’ Motion to Dismiss the Complaint and in Support of Plaintiff’s Countermotion to Disqualify the Attorney General’s Office From Representing Itself and Codefendants Herein and In Support of Plaintiff’s Cross Motion for Summary Judgment”).

7. **Law Dictionaries and Encyclopedias:** BLACK’S LAW DICTIONARY 1106 (9th ed. 2009) (defining a “cross-motion” as “a competing request for relief or order similar to that requested by another party against the cross-moving party”); MERRIAM-WEBSTER’S DICTIONARY OF LAW 116 (1996) (defining a “cross-motion” as “[a] motion that attempts to counter a similar motion filed by an opposing party”); MELLINKOFF’S DICTIONARY OF AM. LEGAL USAGE 143 (1992) (defining a “cross-motion” as an “opposing motion, usually requesting a result opposite to original motion”); THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 714 (2011) (defining “cross-motion” as “[a] motion similar to a motion filed earlier by another party. A cross motion is a motion for some ruling or order filed by a party to an action that is similar in its request to another motion already pending. . . . Note: a cross-motion must seek the same order or similar relief or ruling as a prior motion, with the cross-motion seeking an order or rule to the benefit of the cross-movant, while the original movant sought the original order for its own benefit.”); Lawyers.com Legal Dictionary, <http://research.lawyers.com/glossary/cross-motion.html> (defining a “cross-motion” as “a motion that attempts to counter a similar

motion filed by an opposing party”); *cf.* 56 AM. JUR. 2D *Motions, Rules, and Orders* § 29 (2011) (“A cross-motion generally is an improper vehicle for seeking affirmative relief from a non-moving party.”); *accord*, 60 C.J.S. *Motions and Orders* § 33 (2012); 7A FED. PROC. LAWYERS ED. § 19:146 (2011) (“A cross-motion must be contained in the same document as the response to the original motion, and a response to the cross-motion must be contained in the same document as the reply”).

State Cases: Barrett v. Watkins, 860 N.Y.S.2d 246, 248 (N.Y. App. Div. 2008) (“A cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party.”); *accord*, Terio v. Spodek, 809 N.Y.S.2d 145, 149 (N.Y. App. Div. 2006); Mango v. Long Is. Jewish–Hillside Med. Ctr., 507 N.Y.S.2d 456, 458 (N.Y. App. Div. 1986); Barber v. Cornell Univ. Co-op., 37 Misc.3d 1217, 2012 WL 5392228, at *2 (N.Y. Sup. Ct. Sept. 27, 2012); Sandler v. Sophie D. Ltd., 936 N.Y.S.2d 61, 2011 WL 3558224, at *1 (N.Y. Sup. Ct. Aug. 11, 2011); Cardona-Torres v. City of N.Y., 2011 N.Y. Misc. LEXIS 6557, at *10 (N.Y. Sup. Ct. Dec. 9, 2011) (“A cross-motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.”); *accord*, Hisen v. 754 Fifth Ave. Assoc., L.P., 886 N.Y.S.2d 67, 2009 WL 1098985, at *6, n.4 (N.Y. Sup. Ct. 2009); XO Communs., LLC v. Level 3 Communs., Inc., 948 A.2d 1111, 1117 (Del. Ch. 2007) (calling motion filed against moving party a “cross-motion”); *accord*, Shulas v. Estabrook, 385 N.J. Super. 91, 94 (N.J. Super. Ct. App. Div. 2006); Nelson v. Planet Ins. Co., 111 Nev. 1373, 1376 (Nev. 1995).

State Court Rules and Standing Orders: Eighth Judicial Dist. of Nev. Civ. Rule 2.20(f) (“An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion.”); N.J. Rules of Court § 1:6-3(b) (“A cross-motion may be filed and served by the responding party together with that party’s opposition to the motion”); N.Y. C.P.L.R. § 2215(b) (“[A] party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers”); Mass. Super. Ct. Rule 9A(b)(3) (“A cross-motion, accompanied by the other documents specified in Paragraph (a)(1) of this rule, shall be served on the moving party with the opposition to the original motion. A party opposing a cross-motion may serve a memorandum in opposition within (A) 10 days after service of a cross-motion other than a cross-motion for summary judgment, (B) 21 days after service of a cross-motion for summary judgment or (C) such additional time as is allowed by statute or order of the court.”).

Federal Cases: Miller v. Elexco Land Servs., Inc., 09-CV-0038, 2011 WL 4499281, at *1, n.2 (N.D.N.Y. Sept. 27, 2011) (applying definition from *Black’s Law Dictionary*); *accord*, Horton v. Williams, 08-CV-0513, 2010 WL 3338920, at *2 & n.2 (N.D.N.Y. Aug. 24, 2010); Lent v. Fashion Mall Partners, L.P., 243 F.R.D. 97, 100 (S.D.N.Y. 2007); New Hampshire Ins. Co. v. Diller, 678 F. Supp. 2d 288, 292, n.1 (D.N.J. 2009); Oxford v. Anthem Life Ins. Co., 11-

against whom the original motion was filed.⁸

Example 1: Defendant moves for summary judgment against Plaintiff, then Plaintiff moves for summary judgment against Defendant. Plaintiff's motion is a "cross-motion."⁹

Example 2: Defendant 1 moves for summary judgment against Plaintiff, then Defendant 2 moves for

summary judgment against Plaintiff. Defendant 2's motion is *not* a "cross-motion."¹⁰

Third, a cross-motion requests an order that is similar to, or competes with, the order requested by another party.¹¹

Example 1: Plaintiff moves for summary judgment on its first claim (as well as its other claims), then Defendant moves for partial summary judgment on

CV-0507, 2012 U.S. Dist. LEXIS 137050, at *25 (S.D. Ind. Sept. 25, 2012); *S. Md. Equine Veterinary Serv. v. Hartford Cas. Ins. Co.*, 10-CV-1850, 2011 U.S. Dist. LEXIS 60794, at *1-2 (D. Md. June 3, 2011); *Rodriguez v. Astrue*, 09-CV-2668, 2010 U.S. Dist. LEXIS 7049, at *2 (N.D. Cal. Jan. 28, 2010).

Federal Court Rules and Standing Orders: N.D.N.Y. L.R. 7.1(c) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party"); D. Md. Rule 105(2)(c) (defining, in summary-judgment context, a "cross-motion" as a motion filed "[a]fter th[e] [original] motion has been filed" in "a two-party case"); W.D.N.Y. L.R. Civ. P. 7(b)(2)(A) (noting, in summary-judgment context, that a "cross-motion" is against "the moving party"); *cf.* N.D. Cal., B.L.R. 7007-1(d) ("Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion.").

8. **Law Dictionaries and Encyclopedias:** BLACK'S LAW DICTIONARY 1106 (9th ed. 2009) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party . . ."); *cf.* 7A FED. PROC. LAWYERS ED. § 19:146 (2011) ("A cross-motion must be contained in the same document as the response to the original motion, and a response to the cross-motion must be contained in the same document as the reply . . .").

State Cases: *Van Horn v. Van Horn*, 415 N.J. Super. 398, 409-10 (N.J. Super. Ct. App. Div. 2010) (explaining that a properly filed cross-motion must "relate[] to the subject matter of the original motion"); *XO Communs., LLC v. Level 3 Communs., Inc.*, 948 A.2d 1111, 1117 (Del. Ch. 2007) (calling motion filed by responding party a "cross-motion"); *accord*, *Shulas v. Estabrook*, 385 N.J. Super. 91, 94 (N.J. Super. Ct. App. Div. 2006); *Nelson v. Planet Ins. Co.*, 111 Nev. 1373, 1376 (Nev. 1995); *Smaland Beach Ass'n v. Genova*, 2006 Mass. Super. LEXIS 306, at *9 (Mass. May 31, 2006) (noting that a party responding to an original motion may file a "cross-motion or opposition").

State Court Rules and Standing Orders: Eighth Judicial Dist. of Nev. Civ. Rule 2.20(f) ("An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion."); N.J. Rules of Court § 1:6-3(b) ("A cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion."); *cf.* Mont. D.R. Rule 4.41(G) ("Except in CSEA cases, a party served with a motion may file a counter-motion . . ."); Wash. State Pierce Cnty. Super. Ct. PCLR 7(b)(1)(D)(ii) ("In the event there is an existing motion and the responding party wishes to file a counter motion to be heard the same date they may do so without leave of the court . . ."), *accord*, Wash. State Pierce Cnty. Super. Ct. PCLSPR 94.04(c)(2).

Federal Cases: *Miller v. Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1, n.2 (N.D.N.Y. Sept. 27, 2011) (applying definition from *Black's Law Dictionary*); *Horton v. Williams*, 08-CV-0513, 2010 WL 3338920, at *2 & n.2 (N.D.N.Y. Aug. 24, 2010) (apply-

ing definition from *Black's Law Dictionary*); *Lent v. Fashion Mall Partners, L.P.*, 243 F.R.D. 97, 100 (S.D.N.Y. 2007) (applying definition from *Black's Law Dictionary*); *New Hampshire Ins. Co. v. Diller*, 678 F. Supp. 2d 288, 292, n.1 (D.N.J. 2009) (applying definition from *Black's Law Dictionary*); *see also* *Willingam v. Cnty. of Albany*, 593 F. Supp. 2d 446, 451 (N.D.N.Y. 2006).

Federal Court Rules and Standing Orders: N.D. Cal., B.L.R. 7007-1(d) ("Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion."); D. Md. Rule 105(2)(c) (defining, in summary-judgment context, a "cross-motion" as a motion filed "[a]fter th[e] [original] motion has been filed" in "a two-party case," both "opposing the first party's motion and in support of its own cross-motion"); N.D.N.Y. L.R. 7.1(c) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party"); D. Nev. L.R. 7056(e)(1) ("A countermotion for summary judgment that relates to the same claim or partial claim may be filed against the movant(s) . . ."); W.D.N.Y. L.R. Civ. P. 7(b)(2)(A) (noting, in summary-judgment context, that a "cross-motion" is filed by "the party opposing the original motion").

9. *See Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1 & n.2 (finding that, where plaintiff filed motions for partial summary judgment against two defendants on two trespass claims, two defendants' two motions for partial summary judgment on those two trespass claims were each "cross-motions").
10. *See Horton*, 2010 WL 3338920, at *2 ("Defendant Keller's 'cross-motion' for summary judgment, which in no way opposes Defendant Williams's motion to dismiss for failure to state a claim, and requests dismissal of Plaintiff's Complaint on a different basis than does Defendant Williams's motion, is not a *cross-motion* for summary judgment but is instead a motion for summary judgment.") [emphasis in original]; *Lent*, 243 F.R.D. at 100 ("[A] party cannot file a 'cross motion' against a party that has not already moved against it."); *Willingam v. Cnty. of Albany*, 593 F. Supp. 2d 446, 451 (N.D.N.Y. 2006) (finding that, where plaintiff filed a motion for summary judgment against first two defendants, then the third defendant filed a motion for summary judgment against the plaintiff, the third defendant's motion was "improperly cast and filed as a cross-motion rather than as a regular motion"); *cf.* *Diller*, 678 F. Supp. 2d 288, 292 & n.1 (finding that, where plaintiff moved for summary judgment against defendant, third-party defendant's motion for summary judgment against defendant was not a "cross-motion").

11. **Law Dictionaries and Encyclopedias:** BLACK'S LAW DICTIONARY 1106 (9th ed. 2009) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party . . ."); MERRIAM-WEBSTER'S DICTIONARY OF LAW 116 (1996) (defining a "cross-motion" as "[a] motion that attempts to counter a similar motion filed by an opposing party . . ."); MELLINKOFF'S DICTIONARY OF AM. LEGAL USAGE 143 (1992) (defining a "cross-motion" as an "opposing motion, usually requesting a result opposite to original motion"); THE WOLTERS

Plaintiff's first claim. Defendant's motion is a "cross-motion."¹²

Example 2: Defendant moves for partial summary judgment on Claim 2 (which seeks X as relief), then

Plaintiff moves for partial summary judgment on Claim 3 (which seeks Y as relief). Plaintiff's motion is *not* a "cross-motion."¹³

Granted, in some courts, a cross-motion may seek relief that is unresponsive or unrelated to the relief sought in the original

KLUWER BOUVIER LAW DICTIONARY 714 (2011) (defining "cross-motion" as "[a] motion similar to a motion filed earlier by another party. A cross motion is a motion for some ruling or order filed by a party to an action that is similar in its request to another motion already pending. . . . Note: a cross-motion must seek the same order or similar relief or ruling as a prior motion, with the cross-motion seeking an order or rule to the benefit of the cross-movant, while the original movant sought the original order for its own benefit."); Lawyers.com Legal Dictionary, <http://research.lawyers.com/glossary/cross-motion.html> (defining a "cross-motion" as "a motion that attempts to counter a similar motion filed by an opposing party . . ."); WILLIAM C. BURTON, BURTON'S LEGAL THESAURUS 136 (3d ed. 1999) (defining "cross" as to "conflict with . . . contradict, contravene, controvert . . . oppose . . . [and] run counter to . . .," and listing "cross-motions" under the words "Associated Concepts").

State Cases: *Berger v. Pubco Corp.*, 76 A.2d 132, 135 (Del. 2009) (referring to a motion for summary judgment filed in response to a motion to dismiss as a "counter-motion" and a motion for summary judgment filed in response to a motion for summary judgment as a "cross-motion"); *Columbus Steel Castings Co. v. Transp. & Transit Assocs.*, No. 06AP-1247, 2007 WL 4340558, at *2 (Ohio Ct. App. Dec. 13, 2007) ("TTA made a competing request for relief by filing a cross-motion for summary judgment."); *Dillon v. Typaldos*, 2006 WL 1381625, at *1, 6, 13 (N.J. Super. Ct. Ch. Div. May 19, 2006) (referring to a motion to dismiss a complaint filed in response to a motion to reinstate the complaint as a "cross-motion" and a subsequent motion to add defendants as a "counter motion").

State Court Rules and Standing Orders: Eighth Judicial Dist. of Nev. Civ. Rule 2.20(f) ("An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion."); N.J. Rules of Court § 1:6-3(b) ("A cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion.").

Federal Cases: *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *1, n.2 (N.D.N.Y. Sept. 27, 2011) (applying definition from *Black's Law Dictionary*); *Horton v. Williams*, 08-CV-0513, 2010 WL 3338920, at *2 & n.2 (N.D.N.Y. Aug. 24, 2010) (applying definition from *Black's Law Dictionary*); *Lent v. Fashion Mall Partners, L.P.*, 243 F.R.D. 97, 100 (S.D.N.Y. 2007) (applying definition from *Black's Law Dictionary*); *New Hampshire Ins. Co. v. Diller*, 678 F. Supp. 2d 288, 292, n.1 (D.N.J. 2009) (applying definition from *Black's Law Dictionary*); see also *Birmingham v. Mizuno USA, Inc.*, 09-CV-0566, 2011 WL 1299356, at *2 & n.1 (N.D.N.Y. Mar. 31, 2011); *Ramos v. Bonilla*, No. 03-2683, 2006 WL 4452844, at *3 (Bankr. D.N.J. Apr. 12, 2006); *FDIC v. Modular Homes, Inc.*, 859 F. Supp. 117, 125 & n.8 (D.N.J. 1994); *Mulee v. United States*, 648 F. Supp. 1181, 1182 & n.1 (N.D. Ill. 1986).

Federal Court Rules and Standing Orders: D. Haw. L.R. 7.9 ("Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party's opposition A party's memorandum in support of the counter motion must be combined into one document with the party's memorandum in opposition to the original motion . . ."); D. Haw. LBR 9013-1(d)(1)

("A respondent may file, together with the response to the motion, a countermotion raising only the same specific issues, claims, or defenses presented in the original motion."); D.N.J. L.R. 7.1(h) (requiring a "cross-motion" to be "related to the subject-matter of the original motion"); D.N.J. L. Bankr. R. 9013-1(d) ("No motion shall be designated a cross motion unless it is related to the original motion."); N.D.N.Y. L.R. 7.1(c) (defining a "cross-motion" as "a competing request for relief or order similar to that requested by another party against the cross-moving party"); D. Nev. L.R. 7056(e)(1) ("A countermotion for summary judgment that relates to the same claim or partial claim [as the original motion for summary judgment] may be filed against the movant(s) . . ."); cf. N.D. Cal., B.L.R. 7007-1(d) ("Together with an opposition, a party responding to a motion may file a counter-motion related to the subject matter of the original motion."); E.D. Cal. Order 13-0911(e) ("Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed in the manner and on the date prescribed for the filing of opposition."); E.D. Cal. LBR 9014-1(i) ("Any countermotion or other motion related to the general subject matter of the original motion set for hearing pursuant to this Local Rule may be filed and served no later than the time opposition to the original motion is required to be filed.").

12. See *Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1 & n.2 (finding that, where plaintiff filed motions for partial summary judgment against two defendants on two trespass claims, two defendants' two motions for partial summary judgment on those two trespass claims were each "cross-motions").

13. See *Elexco Land Servs., Inc.*, 2011 WL 4499281, at *1 & n.2 (finding that, where plaintiff filed motion for partial summary judgment against first defendant on two trespass claims, first defendant's motion for partial summary judgment on those two trespass claims was a "cross-motion," but first defendant's motion for partial summary judgment on plaintiff's third claim, for conversion, was a "motion"; also finding that, where plaintiff filed motion for partial summary judgment against second defendant on two trespass claims, second defendant's motion for partial summary judgment on those two trespass claims was a "cross-motion," but second defendant's motion for partial summary judgment on plaintiff's third claim, for conversion, was a "motion," as was second defendant's motion to dismiss plaintiff's complaint); *Birmingham v. Mizuno USA, Inc.*, 09-CV-0566, 2011 WL 1299356, at *2 & n.1 (N.D.N.Y. Mar. 31, 2011) ("The reason the Court does not characterize Defendant's motion as a 'cross-motion' is that it seeks relief that appears predominantly dissimilar to that requested by Plaintiffs, who moved for summary judgment on only three of the seven counts of their Complaint."); *Horton*, 2010 WL 3338920, at *2 & n.2 (finding that second defendant's motion for summary judgment against plaintiff, filed after first defendant's motion to dismiss plaintiff's complaint, was not a "cross-motion"); *Diller*, 678 F. Supp. 2d 288, 292 (finding that, where plaintiff moved for summary judgment against defendant, defendant's motion for partial summary judgment against plaintiff was a "cross-motion," but defendant's motion for leave to file sur-reply on its motion for partial summary judgment was not a "cross-motion," nor was third-party defendant's motion for summary judgment against defendant

motion.¹⁴ However, this is the minority view. *Compare* note 14 with notes 11-13.

Note that, while cross-motions must seek relief that competes with the relief sought in the original motion, cross-motions to “deny” or “dismiss” those original motions are superfluous and improper because they request no relief other

than that which may be provided through a decision of the original motions.¹⁵

Note also that a motion to amend a pleading is a cross-motion if, and only if, that motion seeks (through the proposed amendment) to remedy the defects in the original pleading identified in the motion to dismiss.¹⁶

a “cross-motion”); *Ramos v. Bonilla*, No. 03-2683, 2006 WL 4452844, at *3 (Bankr. D.N.J. Apr. 12, 2006) (“Ramos’s cross-motion [seeking to revoke a discharge from bankruptcy, as well as for sanctions and damages] is procedurally improper . . . because it does not relate to the original motion to dismiss filed by Bonilla.”); *FDIC v. Modular Homes, Inc.*, 859 F. Supp. 117, 125 & n.8 (D.N.J. 1994) (“[Modular’s] cross-motion [to dismiss the FDIC’s complaint for failing to comply with discovery] is procedurally improper . . . because it does not relate to the subject matter of the FDIC’s motion to dismiss Modular’s affirmative defenses.”); *Mulee v. United States*, 648 F. Supp. 1181, 1182 & n.1 (N.D. Ill. 1986) (“Although the government has styled its motion as to Mulee’s complaint as one for dismissal, it is more properly a cross-motion for summary judgment in its favor and denial of Mulee’s motion for summary judgment.”).

14. **State Cases:** *Burke Secur., Inc. v. Nat’l Union Fire Ins. Co.*, 184 A.D.2d 1046, 1046 (N.Y. App. Div. 1992) (“Brownyard’s cross motion was proper even though plaintiffs, in making the original motion, did not seek any relief against Brownyard.”); *cf. Van Horn v. Van Horn*, 415 N.J. Super. 398, 409-10 (N.J. Super. Ct. App. Div. 2010) (explaining that a properly filed cross-motion responds to the subject matter of the original motion, but noting that the judge has the discretion to relax the rules, and deeming a non-responsive motion to be a cross-motion).

State Court Rules and Standing Orders: N.J. Rules of Court, § 1:6-3(b) (“[I]n Family Part motions brought under Part V of these Rules . . . [,] a notice of cross-motion may seek relief unrelated to that sought in the original motion.”); N.Y. C.P.L.R. § 2215(b) (McKinney 2010) (“[The] relief [sought in the cross-motion] need not be responsive to that demanded by the moving party.”); Patrick M. Connors, *Practice Commentaries, in MCKINNEY’S CONS. LAWS OF N.Y.*, Book 7B, CPLR C2215:1, at 149 (“A cross-motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion.”); Patrick M. Connors, *Practice Commentaries, in MCKINNEY’S CONS. LAWS OF N.Y.*, Book 7B, CPLR C2215:1D, at 185 (“The relief sought in the cross-motion need not be responsive or even related to the relief sought in the main motion. It can be of an entirely different kind.”).

Federal Case: *Kowalski v. Mommy Gina Tuna Resources*, 05-CV-00679, 2008 WL 4216267, at *1 (D. Haw. Sept. 15, 2008) (drawing distinction between a counter-motion and a cross-motion, noting that the former refers to a motion raising the same subject matter as an original motion, and the latter refers to an “independent” motion unrelated to the subject matter of the original motion).

Federal Rule: U.S. Dist. Ct. for the Dist. of Haw. L.R. 7.9 (“Counter Motions. . . . Any motion raising the same subject matter as an original motion may be filed by the responding party together with the party’s opposition . . .”).

15. **State Cases:** *Linn v. Linn*, 8 So.2d 187, 188 (Alaska 1942); *Kitch v. Moslander*, 50 N.E.2d 933, 937 (Ind. Ct. App. 1943); *Ryan v. City of Emmetsburg*, 293 N.W. 29, 31 (Iowa 1940); *Donovan v. Donovan*, 200 N.E. 884, 886 (Mass. 1936); *State ex rel. McVay v. Dist. Court of Fourth Judicial Dist.*, 251 P.2d 840, 846 (Mont. 1952); *Kress v. Corey*, 189 P.2d 352, 361-62 (Nev. 1948); N.

Laramie Land Co. v. Hoffman, 195 P. 988, 989 (Wyo. 1921).

State Court Rules and Standing Orders: See NY Westchester County Justice Tolbert Rules Doc. 1 (“Cross-motions which seek only the denial of the relief in the original motion will not be recognized as motions with respect to which a reply may be submitted.”).

Federal Cases: *C.H.R.I.S.T., Inc. v. Meyers*, 00-CV-50402, 2002 WL 257814, at *1 (N.D. Ill. Feb. 20, 2002) (“[A] separate motion to deny an opposing party’s motion for summary judgment is obviously unnecessary.”); *Kan.-Neb. Natural Gas Co. v. City of St. Edward, Neb.*, 135 F. Supp. 629, 633 (D. Neb. 1955) (“The defendants in each case served and filed a motion to deny motion of plaintiff for temporary injunction. Such a pleading is of no real service. A motion to deny an antecedent motion already set for hearing accomplishes nothing that could not be done by a simple appearance in resistance to the earlier motion. Reasonable professional case is laudable. When it degenerates into illogical timidity it approaches the status of absurdity.”); *Fox v. Am. Airlines, Inc.*, 00-CV-0368, 2001 WL 1597851, at *1 (N.D. Tex. Dec. 12, 2001) (“Although styled as a Motion to Deny Summary Judgment, Plaintiff’s motion is in essence a response to Defendant’s summary judgment motion. In light of Plaintiff’s response, a separate motion to deny summary judgment is unnecessary, and accordingly Plaintiff’s Motion to Deny Summary Judgment is denied as moot.”); *Jones v. Milwaukee Cnty.*, 74-C-0374, 1979 WL 2035, at *5 (E.D. Wis. May 1, 1979) (“The defendants filed a motion to deny the plaintiffs’ motion for partial summary judgment. To oppose a motion, it is only necessary to file a brief or affidavits in opposition. A motion to deny the motion opposed is unnecessary. The defendants’ motion is superfluous and will therefore be dismissed.”); *cf. Carlwood Dev. Inc. v. United States*, 10-CV-1773, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (characterizing as improper government’s purported “cross-motion” for summary judgment because it did not “address[] any matters even remotely indicative of a motion for summary judgment” but rather merely responded to the matters raised by the petitioners in their opening brief on their motion); *Langley v. AT&T Wireless Servs., Inc.*, 96-CV-3107, 1998 WL 792498, at *1, n.1 (N.D. Tex. Nov. 3, 1998) (“Plaintiff filed on October 23, 1998 a motion to deny defendant’s motion to strike and deny defendant’s motion for summary judgment. These pleadings are improper under the court’s local civil rules. The pertinent rule provides only for the filing of a motion and brief, a response, and a reply.”).

16. **State Cases:** *Dillon v. Typaldos*, 2006 WL 1381625, at *1, 6, 13 (N.J. Super. Ct. Ch. Div. May 19, 2006) (referring to a motion to dismiss a complaint filed in response to a motion to reinstate the complaint as a “cross-motion” and a subsequent motion to add defendants as a “counter motion”).

Federal Cases: *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007) (characterizing plaintiff’s motion to amend, filed in attempt to cure defects identified in defendants’ motion to dismiss under Fed. R. Civ. P. 12[b][6] as a “cross-motion”); *accord, Andre v. Walgreen Co.*, 12-CV-5413, 2013 U.S. Dist. LEXIS 88657, at *1-2 (D.N.J. June 25, 2013); *Lesperance v. Cnty. of St. Lawrence*, 10-CV-1273, 2011 U.S. Dist. LEXIS 92439,

II. PROCEDURAL RULES REGARDING CROSS-MOTIONS

A. COMMON PROCEDURAL RULES REGARDING CROSS-MOTIONS

Sometimes, cross-motions are allowed to be filed after the

expiration of the motion-filing deadline.¹⁷ Other times, however, cross-motions are not allowed to be filed after the expiration of the motion-filing deadline.¹⁸

Sometimes, the brief in support of a cross-motion must be

at *1-2 (N.D.N.Y. Aug. 18, 2011); *Deluca v. AccessIT Group, Inc.*, 695 F. Supp. 2d 54, 57, 64 (S.D.N.Y. 2010); *Coulter v. United States Dept. of Homeland Sec.*, 07-CV-4894, 2008 U.S. Dist. LEXIS 73014, at *1 (D.N.J. Sept. 23, 2008); *Steiert v. Mata Servs.*, 111 F. Supp. 2d 521, 523 (D.N.J. 2000).

17. **State Cases:** *Grande v. Peteroy*, 39 A.D.3d 590, 591-592 (N.Y. App. Div. 2007) (“[A]n untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds [because] the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the untimely motion or cross motion on the merits.”); *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 (N.Y. App. Div. 2006) (“A cross motion for summary judgment made after the expiration of the [deadline for making dispositive motions] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief ‘nearly identical’ to that sought by the cross motion.”).

Federal Cases: *Daly v. Royal Ins. Co. of Am.*, 00-CV-0040, 2002 WL 1768887, at *1 (D. Ariz. July 17, 2002) (permitting plaintiff to file cross-motion for summary judgment after expiration of motion-filing deadline); *Mobley v. Am. Home Assur. Co.*, 11-C-1293, 2012 WL 3028031, at *1 & n.1 (W.D. Okla. July 24, 2012) (“Defendant responded to Plaintiff’s Motion and also filed a counter Motion for Summary Judgment . . . Defendant’s failure to file a separate motion for summary judgment is in violation of the local rules. . . . However, because the deadline for filing dispositive motions has passed . . . , the Court will consider Defendant’s Motion despite this shortcoming.”); *Jones v. Coleman Co.*, 39 F.3d 749, 753 (7th Cir. 1994) (affirming the decision of a magistrate to judge to allow an untimely cross-motion where there was a “change in circumstances whereby the issues involving the only remaining defendant [were] addressed by the motion” that showed “good cause”); *Hahnel v. United States*, 782 F. Supp. 2d 20, 30-31 (W.D.N.Y. 2011) (“This Court has routinely permitted litigants to file a cross-motion in response to a dispositive motion, even though the deadline for filing dispositive motions had passed, provided that such cross-motions were filed by the deadline established for filing opposing papers, as set by the Court’s Motion Scheduling Order. . . . The Court cannot recall an instance, though, where a cross-motion was filed after all filing deadlines had expired, as in this case, and it notes its disapproval of the manner in which Plaintiff’s motion was filed. Nevertheless, the Court will, for its own convenience, and in its discretion, consider Plaintiff’s cross-motion . . .”).

Federal Court Rules and Standing Orders: Rules Ct. Fed. Claims 7.2(c)(1) (“A cross-motion may be filed within the time allowed for responses [to motions].”); E.D. Cal. Local Rule 78-230(e) (“Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed with the Clerk in the manner and on the date prescribed for the filing of opposition.”); N.D.N.Y. L.R. 7.1(c) (“A party may file and serve a cross-motion (meaning a competing request for relief or order similar to that requested by another party against the cross-moving party) at the time it files and serves its opposition papers to the original motion”).

18. **State Cases:** *Schacht v. Ameritrust Co. N.A.*, 1994 Ohio App.

LEXIS 1125, at *15-16 (Ohio Ct. App. 1994) (affirming lower court’s decision to strike cross-motion for summary judgment filed after deadline for all dispositive motions); *Cruickshank v. Fremont Inv. & Loan*, 307 Ga. App. 489, 489-90 (Ga. Ct. App. 2010) (affirming dismissal of untimely filed cross-motion for summary judgment).

Federal Cases: *Baker v. AirServ Corp.*, 08-CV-0913, 2009 WL 1098767, at *1 (D. Colo. Apr. 20, 2009) (“[P]laintiff’s only explanation for filing his motion for partial summary judgment after the dispositive motion deadline amounts to a misreading of Federal Rule of Civil Procedure 56(a). He offers no support for his position that Rule 56(a) permits him to file a cross-motion for summary judgment out of time, nor can I find any.”); *Kelley v. N.Y. Life Ins. & Annuity Corp.*, 07-CV-01702, 2008 WL 5423343, at *4 (D. Colo. Dec. 30, 2008) (“I first note that his Cross-Motion for Partial Summary Judgment was filed on November 11, 2008, after the dispositive motions deadline set by the scheduling order had passed on October 20, 2008. As such, his motion is untimely.”); *Schroer v. United States*, 07-CV-0690, 2008 U.S. Dist. LEXIS 64568, at *1-2 (D. Colo. Aug. 22, 2008) (striking cross-motion for summary judgment that was filed as a response after dispositive motion deadline passed); *United States ex rel. IBM v. Hartford Fire Ins. Co.*, 112 F. Supp. 2d 1023, 1028-29 (D. Haw. 2000) (declining to consider “cross-motion” for summary judgment filed “well after the court imposed deadline[,]” noting that, before the dispositive motion deadline expired, Defendant could have “request[ed] that the court modify its Scheduling Order, []or . . . [sought] relief from the Scheduling Order”); *Embrex, Inc. v. Serv. Eng’g Corp.*, 96-CV-0824, 1998 WL 35235446, at *1 (E.D.N.C. June 23, 1998) (granting motion “to strike plaintiff’s cross motion for summary judgment as untimely . . . under Fed. R. Civ. P. 16(f).”); *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584, 586-87 (M.D. Pa. 2009) (striking “cross-motion” for summary judgment that was filed after the expiration of the dispositive-motion deadline, even though it was filed within the deadline to file a response to the original motion for summary judgment); *Falk v. Wells Fargo Bank*, 09-CV-0678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011) (“Wells Fargo moves to strike Falk’s Cross-Motion for Partial Summary Judgment. The deadline for filing dispositive motions was December 10, 2010. . . . On January 10, 2011, Falk submitted his Cross-Motion as part of his Response to Defendants Motion for Summary Judgment. Falk’s only explanation for failing to file his motion by, or request an extension of, the dispositive motions deadline is that it was the result of ‘inadvertence or because he had not previously thought of filing a Cross-Motion.’ . . . Finding no good cause to extend the dispositive motions deadline, the Court STRIKES Falk’s untimely pleading pursuant to Federal Rule 16(f)(1)(c).”; cf. *Byce v. Pruco Life Ins. Co.*, 09-CV-1912, 2011 WL 233390, at *1 (N.D. Ga. Jan. 21, 2011) (finding that cross-motion for summary judgment filed after expiration of dispositive-motion filing deadline was untimely and had to qualify for exception to be considered); *Wuliger v. Reassure Am. Life Ins. Co.*, 03-CV-7699, 2011 WL 767872, at *3 (N.D. Ohio Feb. 28, 2011) (finding that cross-motion for summary judgment filed after expiration of dispositive-motion filing deadline violated the court’s scheduling order but would be excused under the circumstances); *Seebach v. Seebach Am., Inc.*, 09-CV-0326, 2010 U.S. Dist. LEXIS 107568

combined with the brief in opposition to the original motion.¹⁹ Other times, however, the brief in support of a cross-motion may, or sometimes must, be filed separately from the brief in

opposition to the original motion.²⁰

Sometimes, replies on cross-motions are permitted without prior leave of the court.²¹

(S.D. W. Va. Oct. 7, 2010) (considering arguments raised to the extent they are in response to motion for summary judgment, but deeming “cross-motion” to be untimely, and therefore striking cross motion for summary judgment).

19. **Law Dictionaries and Encyclopedias:** 7A FED. PROC. LAWYERS ED. § 19:146 (2011) (“A cross-motion must be contained in the same document as the response to the original motion, and a response to the cross-motion must be contained in the same document as the reply . . .”).

Federal Cases: *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *6 (N.D.N.Y. Sept. 27, 2011) (“Such a bifurcated motion practice is prohibited by [the court’s local rule on page limitations]. . . . The effect of this motion practice was . . . [to] enlarge[] the number of pages of memoranda of law that Defendant Elexco could submit regarding Plaintiffs’ two trespass claims . . .”); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 375, 377 (U.S. Cl. Ct. 1988) (reciting court rule that “a party filing a cross-motion is required to file its argument in support of the cross-motion and in response to the other parties motion in the same brief”); *Big Lagoon Rancheria v. Cal.*, 09-CV-1471, 2010 U.S. Dist. LEXIS 47109, at *7 (N.D. Cal. Apr. 16, 2010) (“Big Lagoon’s dispositive motion is currently due June 17, 2010; the State’s opposition and any cross-motion, contained in a single brief, are due July 1, 2010; Big Lagoon’s reply and cross-opposition, contained in a single brief, are due July 15, 2010; and the State’s reply on its cross-motion is due July 22, 2010.”); *Love v. Correa*, 07-CV-0436, 2009 U.S. Dist. LEXIS 10544, at *41-42 (D. Haw. Feb. 11, 2009) (noting that “Defendants Fontes and Wu violated Local Rule 7.9 by filing separate oppositions and replies”).

Federal Court Rules and Standing Orders: D. Haw. L.R. 7.9 (“A party’s memorandum in support of the counter motion must be combined into one document with the party’s memorandum in opposition to the original motion . . .”); D. Md. Civ. Rule 105(2)(c) (“After that motion has been filed, the other party shall file a cross-motion accompanied by a single memorandum (both opposing the first party’s motion and in support of its own cross-motion) . . .”); N.D.N.Y. L.R. 7.1(c) (“If a party makes a cross-motion, it must join its cross motion brief with its opposition brief, and this combined brief may not exceed twenty-five (25) pages in length, exclusive of exhibits. A separate brief in opposition to the original motion is not permissible.”); U.S. Dist. Ct. Rules S.D.N.Y., *Berman-Practices 2.C.2.* (“Any cross-motion shall be included in the opposition brief.”); *cf.* D.N.J. L.R. 7.1(h) (“A cross-motion related to the subject matter of the original motion may be filed by the party opposing the motion together with that party’s opposition papers . . .”); U.S. Court of Claims Rule 83.2(e) (stating that a party filing a cross-motion is required to file its argument in support of the cross-motion and in response to the other parties’ motion in the same brief).

20. **State Court Rules and Standing Orders:** N.M. Dist. Ct. Rule 1-007.1(E) (“Responses to motions shall be made separately from any counter-motions or cross-motions.”); N.M. Fourth Judicial Dist. Ct. LR4-304(E) (“The practice of filing cross-motions which operate as both a motion and as a response or reply to the original motion is prohibited.”); N.M. Sixth Judicial Dist. Ct. LR6-204(C) (“The practice of filing cross-motions to operate as both a motion and as a response to the original motion is prohibited.”).

Federal Cases: *World Publ’g Co. v. United States Dep’t of Justice*,

09-CV-0574, 2011 U.S. Dist. LEXIS 32594, at *25 (N.D. Okla. Mar. 28, 2011) (considering defendants’ motion to strike plaintiff’s opposition based on the argument that, “to the extent it purports to be a cross-motion for summary judgment[,] it violates Northern District of Oklahoma Local Civil Rule 7.2(e)[,]” which prohibits a response to a motion to include a cross-motion, and ultimately converting the response into a cross-motion); *Mobley v. Am. Home Assur. Co.*, 11-C-1293, 2012 WL 3028031, at *1 & n.1 (W.D. Okla. July 24, 2012) (“Defendant responded to Plaintiff’s Motion and also filed a counter Motion for Summary Judgment . . . Defendant’s failure to file a separate motion for summary judgment is in violation of the local rules. . . . Combined motions are generally stricken.”); *Tooling, Mfg. & Techs. Ass’n v. Hartford Fire Ins. Co.*, 08-CV-11812, 2010 U.S. Dist. LEXIS 89273, at *8 n.5 (E.D. Mich. Aug. 30, 2010) (“[A] cross-motion must be filed independently of the response brief, though nothing would prohibit using the same brief for the response brief and the brief supporting the cross-motion.”).

Federal Court Rules and Standing Orders: D. Colo. L. Civ. R. 56.1(B) (“A cross motion for summary judgment shall not be included in a response brief.”); E.D. Mich. ECF Rule 5(e) (“[A] response or reply to a motion must not be combined with a counter-motion.”); D. Miss., L.U. Civ. R. 7(b)(3)(C) (“A response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response.”); New Mex. L.R. 1-007.1(E) (“Responses to motions shall be made separately from any counter-motions or cross-motions.”); E.D. Okla. L.R. 7.1(f) (“A response to a motion may not also include a motion or a cross-motion made by the responding party.”); N.D. Okla. L.R. 7.2(e) (“A response to a motion may not also include a motion or a cross-motion made by the responding party.”); W.D. Okla. L. Cv. R. 7.1(c) (“A response to a motion may not also include a motion or a cross-motion made by the responding party. If a party responding to a motion files a cross-motion or other closely-related motion concurrently with the filing of the response, the brief in support of the cross-motion or other closely-related motion may be combined with the responsive brief [or it may be filed separately].”) (emphasis added); U.S. Dist. Ct. Rules N.D. W. Va. 10.1 (“Always file motions and responses separately. For example, never file a cross-motion for summary judgment with a response to a motion for summary judgment. It is critical that the cross motion be filed separately so that it will appear on the Court’s Pending Motions Report and can be properly linked to any subsequent responses, replies, notices and orders.”); U.S. Dist. Ct. Rules S.D. W. Va. 10.1 (“Motions and responses must be filed as separate documents. For example, a cross-motion for summary judgment should never be combined with a response to a motion for summary judgment. It is critical that the cross motion be filed separately so that it can be properly linked to any subsequent responses, replies, notices and orders.”).

21. **State Cases:** *Captain Andy’s Sailing v. Dep’t of Land & Natural Res.*, 113 Haw. 184, 190 (Haw. 2006); *Watson v. YMCA of Greater Boston*, 14 LCR 528, 529 (Mass. Land Ct. 2006).

State Court Rules and Standing Orders: Mass. Land Court Rule 4 (“Responses to motions or cross-motions . . . must be served upon all other parties and filed with the court within thirty (30) days after service of the motion or cross-motion. . . . Reply briefs, affidavits and other materials in support of the reply (if any) must

Other times, however, replies on cross-motions are not permitted without prior leave of the court.²²

B. USEFULNESS OF FEDERAL RULES IN INTERPRETING STATE RULES

State court procedural rules are occasionally patterned after federal court procedural rules.²³ When the state court procedural rules are patterned after federal court procedural rules,

be served on the parties and filed with the court no later than ten (10) days prior to the date the court first set for hearing”); N.Y. C.P.L.R. § 2214(b) (providing that, where answering papers and a cross-motion are required to be served seven days in advance of the return day, “any reply or responding affidavits shall be served at least one day before such time”); Ohio Second District Local Appellate Rule 8(F)(2) (“A reply brief, if any, and/or a response to the cross-motion, if any, shall be filed within twenty (20) days after the filing of the brief in opposition to the motion. No other briefs or memorandum shall be filed except with leave of court, unless a cross-motion has been filed in which event the movant may file a reply within twenty (20) day[s] of the filing of opposing party’s response.”); *accord*, Eleventh District Local Appellate Rule 101(B)(1); Utah Rules of Civ. Proc., Rule 101(g) (“The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing.”).

Federal Cases: *Young v. Thieblot Ryan, P.A.*, 11-CV-1562, 2012 WL 6698632, at *1 & n.3 (D. Md. Dec. 21, 2012); *Small v. Bud-Kworldwide, Inc.*, 895 F. Supp. 2d 438, 442 (E.D.N.Y. 2012); *Taccetta v. Fed. Bureau of Investigation*, 10-CV-6194, 2012 U.S. Dist. LEXIS 90683, at *1 (D.N.J. June 29, 2012); *Cnty. of Inyo v. Dep’t of the Interior*, 06-CV-1502, 2010 U.S. Dist. LEXIS 135831, at *4 (E.D. Cal. Dec. 10, 2010); *Strong v. Horton Plaza, LP*, 09-CV-2901, 2010 U.S. Dist. LEXIS 86885, at *2-3 (S.D. Cal. Apr. 27, 2010); *Nat’l Union Fire Ins. Co. v. U.S. Bank, N.A.*, 07-CV-1958, 2008 U.S. Dist. LEXIS 47413, at *2 n.1 (S.D. Tex. June 11, 2008).

Federal Court Rules and Standing Orders: N.D. Cal. Gen. Order 61 Regarding Immigration Mandamus Cases (“[I]f plaintiff filed a counter-motion, plaintiff may serve and file a reply within 14 days of service of defendant’s opposition.”); N.D. Cal., B.L.R. 7007-1(e) (“Any reply to an opposition, or opposition to a counter-motion, shall be filed and served by the moving party at least 7 days before the hearing.”); D. Haw. L.R. 7.9 (“The movant on a counter motion shall file and serve any reply”); W.D.N.Y. Civ. R. 7(b)(2)(A) (“If the party opposing the original motion files a cross-motion, . . . the party filing the cross-motion shall have fourteen days after service of the responding papers to file and serve reply papers in support of the cross-motion.”); D. Md. Civ. Rule 105(2)(c) (“After that motion has been filed, the other party shall file a cross-motion . . . , the first party shall then file an opposition/reply, and the second party may then file a reply.”).

22. **State Case:** *Rizz Mgt. Inc. v. Kemper Ins. Co.*, 791 N.Y.S.2d 873, at *3-5 (N.Y. App. Div. 2004).

State Court Rules and Standing Orders: N.J. Rules of Court. § 1:6-3(b) (“No reply papers may be served or filed by the cross-movant without leave of court.”); NY Commercial Division Westchester County Alternative Dispute Resolution Rules Doc. 2 (“Sur-reply papers, including reply papers in support of a cross-motion, are not permitted, absent prior permission of the Court.”); Kentucky Rules of Civ. Proc. Rule 76.21 (“No reply to a cross response shall be filed unless requested by the court.”).

Federal Cases: *Cross v. Potter*, 09-CV-1293, 2013 WL 1149525, at *3 (N.D.N.Y. Mar. 19, 2013) (enforcing proscription against fil-

ing replies on cross-motions without prior leave of the court); *accord*, *Cross v. State Farm Ins. Co.*, 10-CV-1179, 2013 WL 665002, at *11 (N.D.N.Y. Feb. 22, 2013); *Werking v. Andrews*, 11-CV-0410, 2012 WL 2885424, at *2, n.5 (N.D.N.Y. July 13, 2012); *Planck v. Schenectady Cnty.*, 12-CV-0336, 2012 WL 1977972, at *2 (N.D.N.Y. June 1, 2012); *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *6 (N.D.N.Y. Sept. 27, 2011); *Valentine v. UNUM Life Ins. Co. of Am.*, 12-CV-0647, 2012 U.S. Dist. LEXIS 83680, at *2-3 (N.D. Cal. June 15, 2012); *Speth v. Goode*, 95-CV-0264, 2013 U.S. Dist. LEXIS 101021, at *42 (D.N.J. July 19, 2013) (stating that “Plaintiff’s reply in support of his cross-motion . . . was filed without permission of the Court in violation of L. Civ. R. 7.1(d)(3)”).

III. COMMON PROBLEMS CAUSED BY MISUNDERSTANDINGS OF A CROSS-MOTION

Misunderstandings regarding the definition of a cross-motion often lead to problems during the filing and briefing of cross-motions, including (1) a violation of the action’s motion-

ing replies on cross-motions without prior leave of the court); *accord*, *Cross v. State Farm Ins. Co.*, 10-CV-1179, 2013 WL 665002, at *11 (N.D.N.Y. Feb. 22, 2013); *Werking v. Andrews*, 11-CV-0410, 2012 WL 2885424, at *2, n.5 (N.D.N.Y. July 13, 2012); *Planck v. Schenectady Cnty.*, 12-CV-0336, 2012 WL 1977972, at *2 (N.D.N.Y. June 1, 2012); *Miller v. Elexco Land Servs., Inc.*, 09-CV-0038, 2011 WL 4499281, at *6 (N.D.N.Y. Sept. 27, 2011); *Valentine v. UNUM Life Ins. Co. of Am.*, 12-CV-0647, 2012 U.S. Dist. LEXIS 83680, at *2-3 (N.D. Cal. June 15, 2012); *Speth v. Goode*, 95-CV-0264, 2013 U.S. Dist. LEXIS 101021, at *42 (D.N.J. July 19, 2013) (stating that “Plaintiff’s reply in support of his cross-motion . . . was filed without permission of the Court in violation of L. Civ. R. 7.1(d)(3)”).

Federal Court Rules and Standing Orders: N.D. Cal. Civ. L.R. 16-5 (“Plaintiff may serve and file a reply within 14 days after service of defendant’s opposition or counter-motion. Unless the Court orders otherwise, . . . [this] . . . conclu[des] . . . [the] briefing schedule”); D.N.J. Civ. R. 7.1(d)(3) (“No reply papers shall be filed, unless permitted by the Court, relating to the following motions: Cross [motions] under L. Civ. R. 7.1(h)”); N.D.N.Y. L.R. 7.1(c) (“The cross-moving party may not reply in further support of its cross-motion without the Court’s prior permission.”); D. Nev. L.R. 7056(d) (“Unless otherwise ordered, there is no reply to a counter-motion [for summary judgment] under subsection (e)(1).”); *cf.* W.D. Wash. L.C.R. 7(k) (“The court may order parties filing cross motions for summary judgment to combine their memoranda and forego reply briefs in exchange for an enlarged response brief.”).

23. **State Cases:** *Ex parte Novaris Pharms. Corp.*, 975 So.2d 297, 300, n.2 (Ala. 2007) (“[T]he Alabama Rules of Civil Procedure . . . were patterned after the Federal Rules of Civil Procedure.”); *Sears v. Doty*, 92 A.2d 604, 604 (Del. 1952) (noting that “Superior Court Rule 30(h) is copied from a local rule adopted by certain Federal District Courts.”); *Fletcher v. Limeco Corp.*, 996 So.2d 773, 779 (Miss. 2008) (“[T]he Mississippi Rules of Civil Procedure, with few exceptions, were developed to comport with the Federal Rules of Civil Procedure.”); *Univ. Underwriters Ins. Co. v. Ferguson*, 471 S.W.2d 28, 36, n.5 (Tex. 1971) (dissent) (noting that the trial court judge’s procedure for dismissing the case was “akin to if not taken from the ‘automatic’ dismissal procedures which have been followed for many years under local rules of federal district courts”). **Federal Case:** *Blue v. Fremont Inv. & Loan*, 562 F. Supp. 2d 33, 41 n.6 (D.D.C. 2008) (“Federal Rule of Civil Procedure [13(a)] is materially identical to Superior Court Rule 13(a)”).

24. **State Cases:** *Ex parte Novaris Pharms. Corp.*, 975 So.2d 297, 300, n.2 (Ala. 2007) (“Federal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure.”); *Fletcher v. Limeco Corp.*, 996 So.2d 773, 779 (Miss. 2008) (finding “highly persuasive” a federal district court’s decisions interpreting Fed. R. Civ. P. 5(d) and an accompanying federal court local rule, given that “the Mississippi Rules of Civil Procedure, with few exceptions, were developed to

filing deadline, (2) a violation of the court's proscription against the filing of replies on cross-motions, (3) a violation of the court's proscription against the filing of sur-replies on dispositive motions, and (4) a violation of the court's page limitation on memoranda of law.

A. VIOLATION OF THE MOTION-FILING DEADLINE

Almost always, courts have (through scheduling orders and/or case-management plans) a deadline on the filing of motions. A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate that motion-filing deadline.

Example: The deadline for filing dispositive motions is February 1. On January 31, Plaintiff moves for summary judgment on Claims 1 and 2 (seeking monetary relief). On February 18, Defendant files a response to Plaintiff's motion, combined with a "cross-motion" to dismiss Claim 3 (seeking injunctive relief) for failure to state a claim upon which relief can be granted. Defendant's motion on Claim 3 is not a "cross-motion" but a motion (because it seeks relief different from that requested by Plaintiff in its original motion). As a result, while Defendant's response is timely, Defendant's motion to dismiss is untimely.²⁵

B. VIOLATION OF THE RULE AGAINST FILING REPLIES ON CROSS-MOTIONS

Often courts have (through a local rule of practice, standing order, and/or case-management plan) a proscription against filing a reply on a cross-motion without prior leave of the court when the cross-motion is non-dispositive in nature, and occasionally even when the cross-motion is dispositive in nature.²⁶ A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate a court's proscription against filing replies on cross-motions.

Example: The court has a local rule proscribing the filing of replies on cross-motions. Plaintiff files a motion for summary judgment on Claims 1 and 2. Defendant files a response and separate "motion" for summary judgment on Claims 1 and 2. Plaintiff files a response to Defendant's "motion" combined with a reply on its own motion. Defendant then attempts to file a reply on its own "motion" without prior leave. Defendant has violated the court's local rule proscribing the filing of replies on cross-motions.

C. VIOLATION OF THE RULE AGAINST FILING SUR-REPLIES ON DISPOSITIVE MOTIONS

Often courts have (through a local rule of practice, standing order, and/or case-management plan) a proscription against the filing of sur-replies on dispositive motions without prior leave of the court.²⁷ A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate a court's proscription against filing sur-replies on dispositive motions.

Example: Plaintiff files a motion to set aside an administrative decision. Defendant files a response to the motion and a "cross-motion" for summary judgment. However, Defendant's "cross-motion" does not address any issues related to a motion for summary judgment but merely responds to the issues raised by Plaintiff in its original motion. Plaintiff files a reply on its original motion and an opposition to the "cross-motion." Defendant then files a reply on its "cross-motion." Plaintiff moves to strike the reply because the "cross-motion" is improper. Plaintiff's motion to strike is granted because Defendant's motion practice is an attempt to evade the proscription against filing sur-replies on dispositive motions.²⁸

comport with the Federal Rules of Civil Procedure"); *Hrehorovich v. Harbor Hosp. Ctr., Inc.*, 93 Md. App. 772, 788 n.5 (1992) ("Maryland courts have frequently stated that when a local rule and a federal rule are similar, federal court decisions interpreting the federal rule are especially persuasive authority in interpreting the local rule.").

Federal Case: *Blue v. Fremont Inv. & Loan*, 562 F. Supp. 2d 33, 41 n.6 (D.D.C. 2008) ("[F]ederal court decisions interpreting the federal rule may be considered 'persuasive authority' in interpreting the local rule.").

25. See *Horton*, 2010 WL 3338920, at *2 & n.2 ("Defendant Keller's 'cross-motion' for summary judgment . . . is not a cross-motion for summary judgment but is instead a motion for summary judgment. As a result, Defendant Keller was required to file this dispositive motion by February 26, 2010. . . . However, Defendant Keller filed his motion April 19, 2010, fifty-two (52) days after the expiration of the disposition-motion filing deadline."); *Serino v. Prudential Ins. Co. of Am.*, 706 F. Supp. 2d 584, 586-87 (M.D. Pa. 2009) (striking "cross-motion" filed after the expiration of the dispositive-motion deadline but within the deadline to file a response to the original motion for summary judgment); *Baker v. AirServ Corp.*, 08-CV-0913, 2009 U.S. Dist. LEXIS 33443, at *1-3 (D. Colo. Apr. 20, 2009); *Kelley v. N. Y. Life Ins. & Annuity Corp.*, 07-CV-01702, 2008 U.S. Dist. LEXIS 104750, at *11 (D. Colo. Dec. 30, 2008); *Schroer v. United States*, 07-CV-0690, 2008 U.S. Dist. LEXIS

64568, at *2 (D. Colo. Aug. 22, 2008).

26. See, e.g., *D.N.H. L.R. 7.1(e)(2)* (prohibiting filing of reply on nondispositive motions), *accord*, *D.N.H. L.B.R. 7102(b)(2)*, *D. Minn. L.R. 7.1(b)(3)*, *N.D.N.Y. L.R. 7.1(b)(2)*; see also *N.D.N.Y. L.R. 7.1(c)* (proscribing filing of reply on cross-motions even when cross-motions are dispositive in nature), *accord*, *D.N.J. Civ. R. 7.1(d)(3)*; *cf. W.D. Wash. L.C.R. 7(k)*; *S.D. Ind. L.R. 56-1*, Advisory Committee Comments.

27. See, e.g., *C.D. Cal. L.R. 7-10*; *D. Del. L.R. 7.1.2(b)*; *S.D. Fla. L.R. 7.1(c)*; *D. Haw. L.B.R. 9013-1(c)(2)*; *D.N.J. L. Civ. R. 7.1(d)(6)*; *D.N.H. 7.1(e)(3)*; *D.N.M. LR-Civ 7.4(b)*; *N.D.N.Y. L.R. 7.1(b)(1)*; *S.D. Ohio L.R. 7.2(a)(2)*; *N.D. W. Va. L.R. Civ. P. 7.02(b)(3)*; *S.D. W. Va. L.R. Civ. P. 7.1(a)(7)*; *D. Utah L.R. 7(b)(3)*.

28. See *Carlwood Dev. Inc. v. United States*, 10-CV-1773, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (denying petitioner's motion to strike government's improper "cross-motion"—which did not "address[] any matters even remotely indicative of a motion for summary judgment" but rather merely responded to the matters raised by the petitioners in their opening brief—because "rather than striking any portion of the ['cross-motion'] itself, the Court will merely construe [it] as only a response to the [petitioner's] opening brief, and not a cross-motion," and strike the government's unauthorized reply on its improper cross-motion as "nothing more than a disingenuous attempt to get the last word").

D. VIOLATION OF PAGE LIMITATIONS ON MEMORANDA OF LAW

Often courts have (through a local rule of practice, standing order, and/or case-management plan) rules setting forth differing page limitations for motions, responses, and replies, if not specifically for cross-motions and responses to cross-motions.²⁹ A litigant's misunderstanding of what a cross-motion is can lead the litigant to violate a court's page limitation on memoranda of law.

Example 1: The court has a local rule setting a limitation of 25 pages on memoranda of law and 10 pages on reply memoranda of law. The dispositive-motion filing deadline is February 1. On January 15, Defendant files a motion for summary judgment on all of Plaintiff's claims. On January 20, with due notice of Defendant's motion, and without filing a response to Defendant's motion, Plaintiff files a separate "motion" for summary judgment on all of its claims. As a result, not only does Plaintiff have an improper opportunity to file a reply on its separate "motion," its motion practice has caused the memoranda of law on the parties' competing requests for relief to number 120 pages (25 + 25 + 10 + 25 + 25 + 10), rather than 60 pages (25 + 25 + 10).³⁰

Example 2: The court has a local rule setting a limitation of 25 pages on memoranda of law. Plaintiff files a motion for summary judgment on Claim 1 under Theory X. Defendant files a 25-page response to Plaintiff's motion on Claim 1 under Theory X. Sepa-

rately, Defendant files a 25-page "motion" for summary judgment on Claim 1 under Theory Y. Both requests for relief were similar (*i.e.*, summary judgment on Claim 1). As a result, Defendant's "motion" was really a "cross-motion," and he was entitled to only 25 pages in total.³¹

IV. POSSIBLE SOLUTIONS TO THOSE PROBLEMS

Several possible solutions exist to the procedural problems caused by misunderstandings of the definition of a cross-motion. Of course, from a court's perspective, these solutions include adopting and publishing rules regarding the definition, timing, and briefing of a "cross-motion."

In addition, it is useful for a court to know of several things practitioners can do to solve procedural problems. These solutions include the following: (1) filing a motion before the opposing party files its motion; (2) requesting leave to depart from the operative scheduling order or the court's local rules; (3) filing a motion to strike the improper cross-motion; and (4) filing a timely amended complaint (rather than a motion to amend) in response to a motion to dismiss for failure to state a claim.

A. FILING A MOTION BEFORE THE OPPOSING PARTY FILES ITS MOTION

Of course, one solution to the problems often caused by a party's violation of the rules regarding cross-motions is for the party to file its motion (which would otherwise be a "cross-motion") before the opposing party files its motion.

29. See, *e.g.*, S.D. Ala. L.R. 7.1(b), (c); D. Ark. L.R. 10.1(m)(2); D.C. L.Cv.R. 7(e); M.D. Ga. Civ. Rule 7.4; D. Maine Rule 7(e); D. Md. L.R. 105(2)(c), (3); D. Nev. L.R. 7-4; D.N.J. Civ. R. 7.2(b); N.D.N.Y. L.R. 7.1(a)(1), (b)(1), (c); D.N.D. Civ. L.R. 7.1(A)(1); E.D. Okla. L.Cv.R. 7.1(k); N.D. Okla. L.Cv.R. 7(h); W.D.N.Y. Civ. Rule 7(a)(2)(C); E.D. Tex. L.R. CV. 7(1); W.D. Tex. L.R. CV. 7(f); D. Utah Civ. R. 7-1(b)(3); D. Vt. L.R. 7(a)(5).

30. See *Elexco Land Servs., Inc.*, 2011 WL 4499281, at *6 ("Such a bifurcated motion practice is prohibited by [the court's local rule on page limitations]. . . . The effect of this motion practice was three-fold: (1) it enlarged the number of pages of memoranda of law that Defendant Elexco could submit regarding Plaintiffs' two trespass claims . . . ; (2) it gave Defendant Elexco the last word regarding Plaintiffs' two trespass claims (by permitting Defendant Elexco to file a reply with regard to those claims, . . .) . . . ; and (3) it confused the Court (and no doubt Plaintiffs) by simultaneously (a) commingling Defendant Elexco's arguments regarding Plaintiffs' conversion claim with Defendant Elexco's arguments regarding Plaintiffs' two trespass claims, and (b) multiplying Defendant Elexco's arguments regarding Plaintiffs' two trespass claims.").

31. See *IP Innovation LLC v. Vizio, Inc.*, 08-CV-0393, 2010 WL 2696110, at *1 (N.D. Ill. July 1, 2010) ("Federal Rule of Civil Procedure 56 does not provide a party with the opportunity to file a separate motion for summary judgment for each argument a party desires to present."); *DeSena v. Beekley Corp.*, 09-CV-0352, 2010 WL 1049873, at *1 (D. Me. Mar. 17, 2010) ("Although, as the plaintiffs maintain, they may well have intended in filing six separate summary judgment motions to present segregable issues in an

efficient manner rather than to skirt the page limitation of Local Rule 7(e), their approach violates the spirit, if not the substance, of that rule."); *BPI Energy, Inc. v. IEC (Montgomery), LLC*, 07-CV-0186, 2009 WL 3518154, at *1 (S.D. Ill. Oct. 28, 2009) ("Local Rule 7.1(d) allows a twenty double-spaced typewritten page limit for all briefs. Although a literal reading of the local rule does not specifically prohibit a party from filing more than one summary judgment motion, the rule also does not lend itself to the interpretation that a party may file one supporting brief per issue raised at the summary judgment stage of the proceedings."); *Baker v. AirServ Corp.*, 08-CV-0913, 2009 U.S. Dist. LEXIS 33443, at *1-3 (D. Col. Apr. 20, 2009) (striking plaintiff's cross-motion for summary judgment, noting that the motion was untimely and exceeded the imposed page limitations when added to the pages in plaintiff's separately filed response to defendants' motion); *Walburn v. City of Naples, Fla.*, 04-CV-0194, 2005 WL 2322002, at *1, n.3 (M.D. Fla. Sept. 22, 2005) ("This Court agrees with Plaintiff's statement in his response to Defendant's dual motions for summary judgment that the unusual bifurcated approach to summary judgment is confusing, and it manages to sidestep Rule 3.01(c) of the Local Rules of this District, which would limit a single memorandum to a length of twenty pages.") [internal quotation marks omitted]; *Paper, Allied Indus., Chem. and Energy Workers*, 03-CV-0225, 2004 WL 1484995, at *5, n.9 (D. Me. June 4, 2004) ("I also observe that by filing two motions instead of one, the Union has also violated, in spirit if not in substance, the 20-page limitation imposed by Local Rule 7."); *recommendation rejected in part on other grounds*, 2004 WL 2536811 (D. Me. Nov. 10, 2004).

B. REQUESTING LEAVE TO DEPART FROM A SCHEDULING ORDER OR LOCAL RULES

A second solution is for a party to request leave to depart from any (1) scheduling order establishing a motion-filing deadline or (2) local rules of practice proscribing the filing of (a) replies on non-dispositive motions and cross-motions, (b) sur-replies on any motions, and (c) memoranda of law exceeding the applicable page limitation.³²

In support of such a request, it is helpful for the party to advise the court of the following, if applicable: (i) the good-faith need for such a departure; (ii) the lack of undue delay in making the request; (iii) the lack of prejudice to (and preferably the lack of opposition by) the opposing party; and (iv) the fact that it is the first such request.³³

C. FILING A MOTION TO STRIKE AN IMPROPER CROSS-MOTION

A third solution is for a party to move to strike the improper cross-motion or deny the cross-motion on procedural grounds.

It is important to note that, in federal court, a motion to strike a cross-motion is not properly made pursuant to Fed. R. Civ. P. 12(f) because that rule regards the striking of “pleadings,” and a cross-motion is not a “pleading” under Fed. R. Civ. P. 7(a).³⁴ Rather, a motion to strike a cross-motion may be properly made pursuant to the Court’s authority to impose sanctions against a party for failing to obey a scheduling or other pretrial order under Fed. R. Civ. P. 16(f)(1)(C).³⁵ In addition, a motion to strike a cross-motion may be properly made pursuant to the court’s inherent authority to enforce its local rules of practice.³⁶

32. See *Ass’n of Irrigated Residents v. C & R*, 05-CV-1593, 2007 WL 2815038, at *28 (E.D. Cal. Sept. 25, 2007) (“At the May 21, 2007 hearing, Defendants’ request to file a supplemental brief on the sole issue of whether Rule 2010 applied to them was granted. Defendants were notified by minute order on May 21, 2007 that upon filing the supplemental briefs the matter would be deemed submitted. Defendants were not given leave to file [their untimely] cross motion for summary judgment at the hearing on May 21, 2007.”); *United States ex rel. IBM v. Hartford Fire Ins. Co.*, 112 F. Supp. 2d 1023, 1028-29 (D. Haw. 2000) (declining to consider “cross-motion” for summary judgment filed “well after the court imposed deadline[.]” noting that, before the dispositive motion deadline expired, Defendant could have “request[ed] that the court modify its Scheduling Order, [for . . . [sought] relief from the Scheduling Order”).

33. See *Spoooner v. Jackson*, 251 F. App’x 919, 924 (5th Cir. Oct. 24, 2007) (finding that defendant “had demonstrated good cause for filing his motion for summary judgment after the deadline for filing dispositive motions based on evidence that [defendant]’s counsel did not receive electronic notice of the scheduling order because of a computer virus”); *Wynn v. Cate*, 10-CV-0546, 2012 U.S. Dist. LEXIS 6228, at *1-2 (E.D. Cal. Jan. 19, 2012) (“Th[e] [scheduling order] deadline may only be modified upon a showing of good cause, which exists when the moving party demonstrates he cannot meet the deadline. . . . Plaintiff’s comparison of his resources with those of defense counsel does not speak to plaintiff’s diligence in preparing his own dispositive motion prior to the court-imposed deadline. Because plaintiff fails to demonstrate good cause for further extending the deadline for filing dispositive motions in this case, his request to modify the scheduling order is denied, and his cross-motion for summary judgment must therefore be denied as untimely.”).

34. See *Fisherman’s Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 690 (Fed. Cl. 2006) (“Plaintiffs’ motion to strike does not comport with RCFC 12(f) [which is identical to Fed. R. Civ. P. 12(f)] because Weeks Marine’s Motion for Leave to Join as Parties and to Join Claims Against Bertucci and Luhr does not constitute a ‘pleading’ under the rule.”); *Sharpe v. MCI Telecomm. Corp.*, 19 F. Supp. 2d 483, 487 (E.D.N.C. 1998) (finding motion to strike cross-motion for summary judgment as improper and therefore construing the motion to strike as a response to the motion); *but see Ass’n of Irrigated Residents v. C & R*, 05-CV-1593, 2007 WL 2815038, at *27 (E.D. Cal. Sept. 25, 2007) (recognizing that plaintiff’s motion to strike defendants’ cross-motion for summary judgment was not technically proper under Fed. R. Civ. P. 12[f] but liberally construing

that motion to strike “as an invitation by the movant to consider whether [material proffered in support of the cross-motion] may properly be relied upon.”) [internal quotation marks omitted].

35. See *Spoooner*, 251 F. App’x at 924 (“Spoooner asserts that the district court erred by striking his cross-motion for summary judgment. He contends that it was unfair for the court to strike his cross-motion on the ground that it was untimely after the court allowed Jackson to file his motion for summary judgment after the deadline for filing dispositive motions established in the scheduling order. Spoooner’s contentions are without merit. The court found that Jackson had demonstrated good cause for filing his motion for summary judgment after the deadline for filing dispositive motions based on evidence that Jackson’s counsel did not receive electronic notice of the scheduling order because of a computer virus. Spoooner did not offer any excuse for the untimely filing his cross-motion for summary judgment.”); *Wells Fargo Bank*, 09-CV-0678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011) (“Wells Fargo moves to strike Falk’s Cross-Motion for Partial Summary Judgment. The deadline for filing dispositive motions was December 10, 2010. . . . On January 10, 2011, Falk submitted his Cross-Motion as part of his Response to Defendants Motion for Summary Judgment. Falk’s only explanation for failing to file his motion by, or request an extension of, the dispositive motions deadline is that it was the result of ‘inadvertence or because he had not previously thought of filing a Cross-Motion.’ . . . Finding no good cause to extend the dispositive motions deadline, the Court STRIKES Falk’s untimely pleading pursuant to Federal Rule 16(f)(1)(c).”); *Wuliger v. Reassure Am. Life Ins. Co.*, 03-CV-7699, 2011 WL 767872, at *3 (N.D. Ohio Feb. 28, 2011) (explaining, in ruling on motion to strike untimely cross-motion, that “[t]he Court has broad discretion in imposing sanctions for violations of its scheduling orders”); *Lo v. United States Dep’t of Justice*, 03-CV-5055, 2005 WL 1388680, at *1, n.1 (E.D. Cal. June 10, 2005) (“The United States moves the court to strike plaintiff’s cross-motion or requests that plaintiff’s cross-motion otherwise be dismissed. Rule 16(f), Federal Rules of Civil Procedure, allows the court to impose such sanctions”); *Embrex, Inc. v. Serv. Eng’g Corp.*, 96-CV-0824, 1998 WL 35235446, at *1 (E.D.N.C. June 23, 1998) (granting motion “to strike plaintiff’s cross motion for summary judgment as untimely . . . under Fed. R. Civ. P. 16(f).”).

36. *Cf. Paliotta v. Nev.*, 11-CV-0121, 2012 WL 553131, at *2-3 (D. Nev. Jan. 5, 2012) (granting in part and denying in part defendants’ motion to strike plaintiff’s cross-motion for summary judgment, striking his sur-reply, filed as part of his reply on his cross-motion

The legal standard governing a motion to strike a cross-motion varies somewhat by jurisdiction; however, generally, that standard involves a determination of such issues as (1) prejudice to the party opposing the cross-motion, (2) bad faith by the cross-movant through merely attempting to get in the last word through a reply, and/or (3) undue delay by the cross-movant through waiting until the expiration of the motion-filing deadline to file its cross-motion.³⁷ If the court denies the motion to strike a cross-motion, the court generally possesses the discretion to construe the motion to strike the cross-motion as an opposition to the cross-motion based on procedural grounds.³⁸

D. FILING A TIMELY AMENDED COMPLAINT (RATHER THAN A CROSS-MOTION FOR LEAVE TO AMEND) IN RESPONSE TO A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A fourth solution, in federal court, is to avoid the need for a cross-motion altogether in cases in which a motion to dismiss for failure to state a claim has been filed pursuant to Fed. R. Civ. P. 12(b)(6). This can be done by filing a timely amended complaint as a matter of right, rather than filing a cross-motion for leave to file an amended complaint.³⁹ Such an amended complaint is “timely” if it is filed within 21 days of service of such a motion.⁴⁰ Note, however, that if the motion challenging the pleading sufficiency of the complaint is one for “judgment on the pleadings” pursuant to Fed. R. Civ. P. 12(c), filed after the filing of an answer, then the amended complaint may be filed as a matter of right only within 21 days of the service of the answer.⁴¹



Michael G. Langan has been the career law clerk to a federal court judge (first a United States magistrate judge and then a United States district judge) for ten years in the United States District Court for the Northern District of New York. Before that, he practiced federal litigation in Washington, D.C., and Syracuse, N.Y., for six years.



Jason C. Halpin is an associate in the litigation practice of the law firm of Hiscock & Barclay LLP in Syracuse, N.Y., and was previously a term law clerk for three years to a United States district judge in the Northern District of New York.

for summary judgment, because it was in violation of the court's local rules of practice, and warning him that his “failure to abide by the Local Rules, including page limitations, in the future, will result in an order striking noncompliant documents”); *World Publ'g Co. v. United States Dep't of Justice*, 09-CV-0574, 2011 U.S. Dist. LEXIS 32594, at *25 (N.D. Okla. Mar. 28, 2011) (considering defendants' motion to strike plaintiff's opposition based on the argument that, “to the extent it purports to be a cross-motion for summary judgment[,] it violates Northern District of Oklahoma Local Civil Rule 7.2(e)[,]” which prohibits a response to a motion to include a cross-motion, and ultimately converting the response into a cross-motion).

37. See *Bell v. Bowman, Heintz, Boscia & Vician, P.C.*, 370 F. Supp. 2d 805, 806, n.1 (S.D. Ind. 2005) (denying motion to strike cross-motion because no prejudice was shown); cf. *Carlwood Dev. Inc. v. United States*, 10-CV-1773, 2011 WL 69374, at *1 (D. Nev. Jan. 10, 2011) (striking the government's unauthorized reply on its improper cross-motion as “nothing more than a disingenuous attempt to get the last word”); *Byce v. Pruco Life Ins. Co.*, 09-CV-1912, 2011 U.S. Dist. LEXIS 6816, at *3-6 (N.D. Ga. Jan. 21, 2011) (considering plaintiff's “excusable neglect” and prejudice to defendant in deciding whether to grant defendant's motion to strike plaintiff's untimely filed cross-motion for summary judgment); *Daly v. Royal Ins. Co. of Am.*, 00-CV-0040, 2002 U.S. Dist. LEXIS 16183, at *4 (D. Ariz. July 16, 2002) (considering prejudice to defendant, finding none, and accordingly denying defendant's motion to strike plaintiff's untimely filed cross-motion for summary judgment).

38. See *Fisherman's Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 690 (Fed. Cl. 2006) (“Instead, courts may regard a motion to strike a motion simply as a response to that motion.”); *Falk v. Wells Fargo Bank*, 09-CV-0678, 2011 WL 3702666, at *3 (N.D. Tex. Aug. 19, 2011) (“[T]he Court finds that despite being styled as a cross-motion, Falk's arguments are more appropriately addressed as a response to Wells Fargo's Motion for Summary Judgment. Accordingly, the Court will address the arguments made in Falk's Cross-Motion along with the arguments made in Falk's Response.”); *Sharpe v. MCI Telecomm. Corp.*, 19 F. Supp. 2d 483, 487 (E.D.N.C. 1998) (“Because MCI has not filed a proper motion to strike under Rule 12(f), the Court must interpret MCI's motion as a response to Sharpe's motion which challenges the motion on procedural grounds.”).

39. See, e.g., *Williams v. BASF Catalysts LLC*, 11-CV-1754, 2012 WL 6204182, at *5 (D.N.J. Dec. 12, 2012); *Patrick v. Teays Valley Tr., LLC*, 12-CV-0039, 2012 WL 5993163, at *1 (N.D. W.Va. Nov. 30, 2012); *Leal v. McHugh*, 11-CV-0249, 2011 WL 6372820, at *1 (S.D. Tex. Dec. 20, 2011); *J.S. ex rel. Simpson v. Thorsen*, 766 F. Supp. 2d 695, 700 (E.D. Va. 2011).

40. Rule 15 of the Federal Rules of Civil Procedure provides, in pertinent part, that “[a] party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” Fed. R. Civ. P. 15(a)(2).

41. See *infra* note 40.