Docket #0098 Date Filed: 9/21/2023

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:	)	Chapter 11
EMERGE ENERGY SERVICES LP, et al.,	)	Case No. 19-11563 (KBO)
	)	Jointly Administered
Debtors.	)	
SUPERIOR SILICA SANDS LLC, a Texas limited liability company,	)	Adv. Proc. No. 20-51052 (TMH)
Plaintiff,	)	
vs.	)	
IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware corporation.	)	**Re: Adv. D.I. 97**
Defendants.	)	

IRON MOUNTAIN TRAP ROCK COMPANY AND FRED WEBER, INC.'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE PORTIONS OF SUPERIOR SILICA SANDS LLC'S REPLY BRIEF

1911563230928000000000005

TABLE OF CONTENTS

Page

NATURE AND STAGE OF THE PROCEEDINGS 1
SUMMARY OF ARGUMENT 1
STATEMENT OF FACTS 2
LEGAL STANDARD 4
ARGUMENT 5
I. Superior Cannot Raise New Arguments on Reply. 5
A. Superior's New Theory of Breach. 5
B. Superior's New Argument Regarding Bonds. 9
II. Superior Cannot Amend its Complaint via a Summary Judgment Reply. 10
CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Alston v. Forsyth, No. 10-1180, 379 F. App'x 126 (3d Cir. May 13, 2010) 8
Cohen v. Cohen, No. CV 19-1219-MN, 2022 WL 952842 (D. Del. Mar. 30, 2022) 4
Cornell Univ. v. Illumina, Inc., No. CV 10-433-LPS-MPT, 2018 WL 11427960 (D. Del. Feb. 23, 2018) 4
DeChant v. Monarch Life Ins. Co., 547 N.W.2d 592 (1996) 10
Gucciardi v. Bonide Prod., Inc., 28 F. Supp. 3d 383 (E.D. Pa. 2014) 6
Harmon v. Sussex Cnty., 810 F. App'x 139 (3d Cir. 2020) 12
In re Live Well Fin., Inc., 652 B.R. 699 (Bankr. D. Del. 2023) 4
Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375 (3d Cir. 1994) 4
Laurie v. Nat'l Passenger R.R. Corp., 105 F. App'x 387 (3d Cir. 2004) 13
Socket Mobile, Inc. v. Cognex Corp., No. CV 17-156-VAC-MPT, 2017 WL 3575582 (D. Del. Aug. 18, 2017) 5
Spriggs v. City of Harrisburg, No. 1:22-CV-01474, 2023 WL 4278671 (M.D. Pa. June 29, 2023) 5
Thomas v. Colvin, No. CV 11-449-RGA, 2016 WL 4163546 (D. Del. Aug. 4, 2016) 12
Ventech Sols., Inc. v. Certain Underwriters at Lloyd's of London Subscribing to Pol'y No. ESG02319546, No. 20-CV-912-RGA, 2020 WL 6384243 (D. Del. Oct. 30, 2020) 5

Statutes

Wis. Stat. § 814.05 10

NATURE AND STAGE OF THE PROCEEDINGS

On December 23, 2020, Plaintiff Superior Silica Sands LLC ("Superior") filed a Complaint in the above adversary proceeding against Defendants Fred Weber, Inc. ("FWI") and Iron Mountain Trap Rock Company ("IMTR") (together, "Defendants"). [Adv. D.I. 1.] Superior thereafter filed a First Amended Complaint on February 25, 2021 providing additional detail regarding its specific allegations of breach of contract. [Adv. D.I. 14.] Discovery is ongoing. [Adv. D.I. 47.]

On April 13, 2023, Superior moved for partial summary judgment on its contract claim (Third Claim for Relief), alleging breach of the Wet Sand Services Agreement ("WSSA") between the parties ("Supplemental MSJ") based on allegedly deficient performance in ***2016***. [Adv. D.I. 61.] On August 24, 2023, Defendants opposed that motion and cross-moved on Defendants' affirmative defense of offset, as well as certain legal issues relating to the interpretation of the WSSA. [Adv. D.I. 78–84.] On September 14, 2023, Superior filed its Omnibus Opposition to Defendants' Cross-Motion for Summary Judgment and Reply Brief in Support of Its Supplemental Motion for Partial Summary Judgment on Third Claim for Relief for Breach of Contract ("Supplemental MSJ Reply"), largely changing its theory of breach supporting its Supplemental MSJ. [Adv. D.I. 87.]

SUMMARY OF ARGUMENT

1. In its opening brief in support of its Supplemental MSJ, Superior's claim for breach of contract was based exclusively on conduct from 2016 allegedly described in inadmissible Hearsay Letters. Neither Superior's Supplemental MSJ nor ***any pleading filed prior to its Supplemental MSJ Reply*** asserted breach of the WSSA based on Defendants' removal of equipment from the Quarry in July 2019. Superior

cannot, for the first time on reply, change its theory of breach, and as such, its new theory should be stricken and disregarded.

2. Similarly, Superior's new, previously undisclosed theory to support its claim for recovery of over a million dollars of ***reclamation bond*** premiums based on an inapplicable Wisconsin statute that only applies to ***litigation bonds*** is both frivolous and improper and must be stricken.
3. Finally, a party may not use summary judgment briefing, particularly summary judgment ***reply*** briefing, to raise new theories of liability that should have been raised in an amended complaint. The new theory of breach of contract must be stricken to prevent substantial prejudice to Defendants as a result of Superior's eleventh-hour substitution of a new theory of liability supporting Superior's claim for over $14 million in purported damages.

STATEMENT OF FACTS

Superior filed its Original Complaint on December 23, 2020 and thereafter amended it on February 25, 2021 to provide more detailed allegations regarding its theory that Defendants breached the WSSA. [Adv. D.I. 1 & 14.] According to those more detailed allegations, Defendants' purported breach stemmed from a failure to carry out certain reclamation and/or improperly performed reclamation that was discovered in ***2016***. [Adv. D.I. 14 ¶ 20.] While all parties were aware that Defendants had removed some of their equipment from the Quarry a few days before Superior filed for Chapter 11 bankruptcy on July 15, 2019, the Amended Complaint did not allege such removal was a breach or otherwise take issue with such conduct, instead specifically alleging that, at the time the Court entered the Rejection Order in bankruptcy only a month later, Defendants "***were <u>not permitted</u> onsite at the Quarry because of their prior and***

ongoing breaches of contract." [Adv. D.I. 14 ¶ 38 (emphasis added).]

On April 13, 2023, Superior filed its Supplemental MSJ on its contract claim, again proceeding with the theory that Defendants breached the WSSA based on allegedly deficient performance of reclamation in 2016. [Adv. D.I. 61.] Again, Superior did not identify Defendants' removal of equipment in July 2019 as a claimed breach. [*Id.*] Additionally, as part of its claim for damages, Superior sought $1,413,455 representing 65% of the amounts Superior paid in ***reclamation*** bond premiums and collateral costs based on Scott Waughtal's "estimates" of what additional reclamation should have been completed by 2019. [*Id.* at 27.]

Defendants conducted discovery regarding Superior's allegations of breach and fully responded to these arguments in their Memorandum of Law in Opposition to the Supplemental MSJ filed on August 24, 2023, arguing, among other things, that: Superior's allegations of breach were based on inadmissible hearsay; there were extensive factual disputes; admissible evidence showed cure of any breaches; and there was a complete disconnect between the issues raised in 2016 from the relief sought in Superior's Supplemental MSJ. [Adv. D.I. 78 at 33–42.] Defendants likewise responded to Superior's request to recover the bond premiums, showing that: Mr. Waughtal's estimate that 65% of the Quarry should have been reclaimed was pure speculation and a physical impossibility; Superior's claim for bond premiums constitutes an improper attempt to recover consequential damages expressly barred by the WSSA; and the County's control of bond amounts makes Superior's assumption of reduction wholly speculative.

Apparently recognizing the weakness of its original theory of breach, Superior introduces a new theory on reply: that Defendants "materially breached the agreement when they removed all remaining equipment and employees, and rendered the Quarry incapable of operation, subject to contract negotiations over a draft Termination Agreement." [Adv. D.I. 87 at 18.] The only

logical conclusion that can be drawn from Superior's total failure to respond to Defendants' arguments regarding its 2016 breach claim is that Superior has chosen to abandon it. Superior likewise asserts a new (albeit wholly inapplicable) statutory scheme to support its claim for recovery of reclamation bond premiums.

As set forth herein, Superior's newfound theories, introduced for the very first time as arguments in a reply brief, are improper and should be stricken.

LEGAL STANDARD

Local Rule 7007-2(b)(ii) expressly provides that a moving party:

> shall not reserve material for the reply brief which should have been included in a full and fair opening brief. "This provision exists, in part, to prevent litigants from engaging in impermissible 'sandbagging,' reserving crucial arguments for a reply brief to which an opponent cannot respond." Arguments and evidence submitted in violation of this rule may be excluded.

Cornell Univ. v. Illumina, Inc., No. CV 10-433-LPS-MPT, 2018 WL 11427960, at *2 (D. Del. Feb. 23, 2018).

Even without this local rule, it is well-settled law that "a reply brief 'is not the appropriate time to raise a new argument.'" *In re Live Well Fin., Inc.*, 652 B.R. 699, 708 (Bankr. D. Del. 2023) (quoting *Cohen v. Cohen*, No. CV 19-1219-MN, 2022 WL 952842, at *4 (D. Del. Mar. 30, 2022)). *See also Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief."); *Socket Mobile, Inc. v. Cognex Corp.*, No. CV 17-156-VAC-MPT, 2017 WL 3575582, at *5 (D. Del. Aug. 18, 2017) ("[T]he Third Circuit has consistently held new arguments in reply briefs are prejudicial and unfair, because a party cannot respond. Positions asserted for the first time in a reply brief are deemed to be waived.").

> The purpose of a reply brief is to respond to arguments raised in an opposition brief, ***not to raise new arguments***. Thus, a moving party cannot support its

> motion with a sparse argument, wait for the non-moving party to note the sparseness of the argument, then respond with a reply brief that sets forth the full argument that should have been made in the original supporting brief.

Spriggs v. City of Harrisburg, No. 1:22-CV-01474, 2023 WL 4278671, at *7 (M.D. Pa. June 29, 2023) (internal citation omitted) (emphasis added). Even in this case, the Court has previously refused to consider arguments it determined were raised for the first time in reply briefing. [Adv. D.I. 31 at 10.]

As such, federal courts in Delaware have consistently struck and ignored new arguments raised on reply. *See, e.g.*, *Socket Mobile, Inc.*, 2017 WL 3575582, at *5 ("Allowing these arguments would be prejudicial, and defendant's motion to strike new arguments in plaintiff's reply brief is granted."); *Ventech Sols., Inc. v. Certain Underwriters at Lloyd's of London Subscribing to Pol'y No. ESG02319546*, No. 20-CV-912-RGA, 2020 WL 6384243, at *5 (D. Del. Oct. 30, 2020) ("Plaintiff makes that argument for the first time in its reply brief, which is not permitted by the local rules."); *see also Gucciardi v. Bonide Prod., Inc.*, 28 F. Supp. 3d 383, 393 (E.D. Pa. 2014) ("Where a reply brief raises new arguments in support of a motion for summary judgment, the district court is justified in disregarding them.").

ARGUMENT

I. Superior Cannot Raise New Arguments on Reply.

A. Superior's New Theory of Breach.

In its opening brief for the Supplemental MSJ seeking over $14 million in alleged breach of contract damages, Superior based its breach of contract claim on alleged breaches it claims to have discovered in ***2016***:

- "Superior delivered a notice of default to Weber in late 2016 declaring that Weber had breached its reclamation obligations. This dispute remained pending when Superior rejected the Services Agreement in bankruptcy in July 2019." [Adv. D.I. 61 at 4.]

- "On October 12, 2016, Superior wrote to Weber to outline a variety of reclamation failures on the part of Weber raised by both Chippewa County and landowners." [*Id.*at 11.]

- "On December 21, 2016, Superior wrote to Weber further to its letter of October 12, 2016, to expand upon Weber's reclamation failures and to provide Weber with an express "Notice of Default under the April 7, 2011 Wet Sand Services Agreement.""[1] [*Id.*]

- "On December 29, 2016, Superior wrote further to its 2016 NOD: (i) to confirm that Superior had "not received a satisfactory response" from Weber to its earlier letters and 2016 NOD; (ii) to reassert that Weber remained in default under the Services Agreement; (iii) to note that Weber was scheduled "to recommence operations at the Quarry Site on January 1, 2017; (iv) to demand that Weber "take all necessary and appropriate actions to timely cure its defaults" under the Services Agreement's reclamation provisions; and (v) to confirm that no rights were waived against Weber." [*Id.*]

Nowhere in the thirty pages of Superior's brief does it ***mention*** Defendants' removal of equipment in July of 2019 (days before it filed for bankruptcy and months after it had already breached the WSSA by failing to timely pay an overdue invoice) let alone suggest that such removal of equipment constituted a breach of the WSSA and justified its recovery of over $14 million. [*See generally id.*]

Based on the theory of breach that Superior raised in its Supplemental MSJ (and Amended Complaint, as discussed further below), Defendants (1) deposed Superior's declarant, Scott Waughtal, spending hours exploring his lack of personal knowledge in the 2016 timeframe;[2] (2) drafted a 55-page brief, devoting ***ten pages*** of argument to Superior's "breach" argument [Adv. D.I. 78 at 33–42]; and (3) moved to strike Mr. Waughtal's declaration on the

[1] Since filing the Supplemental MSJ, Superior has been forced to admit that it has no record in its files demonstrating this letter was ever actually sent. [Adv. D.I. 85 at 12.]

[2] In addition to the wasted time and expense of exploring Superior's now abandoned theory of breach, Superior's untimely disclosure of this new theory also prevented Defendants' counsel from exploring this alleged breach with Mr. Waughtal during his deposition as it had not been disclosed.

basis that he lacked personal knowledge regarding Superior's allegations of breach from 2016 as they predated his tenure at Superior. [Adv. D.I. 76–77.]

All of that work apparently convinced Superior that its claim for breach based on the 2016 Hearsay Letters was going to fail because in its Reply brief, Superior does not even try to argue breach based on the 2016 Hearsay Letters (or any admissible evidence from that time period). Instead, it presents a ***completely new theory of breach***: "Whether or not Defendants breached in 2016, their 2019 abandonment of the Quarry and repudiation of their obligations was a material breach of contract." [Adv. D.I. 87 at 17.]

That argument was not raised ***anywhere*** before Superior's Supplemental MSJ Reply—not in its Supplemental MSJ, nor in its Amended Complaint. In fact, Superior knew it was inserting a new argument on reply, so it included a footnote trying to justify its pivot in two sentences:

> This is not an argument that relies on "new evidence," as the Higginbotham Notice was put into evidence by Defendants, and as this argument merely focuses the Defendants' prepetition default on uncontroverted evidence. Further, Defendants have an opportunity to reply. *See Alston v. Forsyth*, No. 10-1180, 379 F. App'x 126, 129 (3d Cir. May 13, 2010) (troubled by new evidence submitted with reply, where opposing party had no right of sur-reply).

[Adv. D.I. 87 at 16 n.7.] Superior's two-sentence attempted justification is woefully inadequate. Indeed, in *Alston*, the Third Circuit ***vacated*** the district court's grant of summary judgment to the defendant on an issue that was raised for the first time in the defendant's summary judgment reply briefing and noted that "[t]here is cause for concern where a movant presents new arguments ***or*** evidence for the first time in a summary judgment reply brief, particularly if the District Court intends to rely upon that new information in granting summary judgment to the movant." *Alston v. Forsyth*, 379 F. App'x 126, 129 (3d Cir. 2010). The Third Circuit did not state that ***both*** new arguments ***and*** new evidence were required to raise such concerns but that

either would trigger alarm—and, indeed, in that case the appellee only raised a new *argument* in its reply brief. *Id.* That holding is entirely consistent with this Court's local rule prohibiting new argument on reply and the extensive case law cited above striking new arguments in a reply brief.

Additionally, Superior's assertion that "Defendants have an opportunity to reply" is only half-correct. While it is true that Superior has raised Defendants' removal of the equipment as a defense to Defendants' affirmative defense of offset based on the Take-or-Pay clause (permitting a response in that respect), ***it is also using that new theory to support its own breach of contract claim seeking over $14 million.*** Defendants did ***not*** cross-move on the element of "breach" due to the undeniable disputes of fact on that issue which preclude summary judgment[3]—thereby precluding Defendants from having an opportunity to respond to the new argument in its Reply. Even if the Court considers Superior's new theory when assessing Defendants' offset argument, it certainly should not consider it in determining whether Superior has met its *prima facie* burden to establish breach of contract based on undisputed facts.

In short, the Court should not allow Superior to change course on its theory of breach of contract at this late juncture in the litigation, particularly after extensive discovery and briefing has taken place based on Superior's ***original*** (but now backseated) theory of breach of contract. Defendants would suffer extreme prejudice if Superior were able to abandon its prior theory of breach of contract in favor a new of a new theory for a purportedly $14 million claim.

[3] Instead, Defendants only moved on offset, interpretation of the WSSA, and the legal impact of rejection on the WSSA and the Guaranty. As such, Defendants' reply only addresses those limited issues.

B. Superior's New Argument Regarding Bonds.

In its opening brief, Superior sought over $1.4 million in "bond premiums and collateral" based on nothing more than Mr. Waughtal's *ipse dixit* that Defendants should have reclaimed 65% of the Quarry by 2019. According to Mr. Waughtal's declaration, had 65% of the Quarry been fully reclaimed, the bond premiums ***required for Superior to maintain its reclamation permit*** would have been reduced by 65%. [Adv. D.I. 63 ¶ 42.] In response, Defendants not only pointed out—with ***expert*** testimony and an actual analysis of the amount of reclamation that was physically possible while still allowing ongoing mining—that Mr. Waughtal's 65% "estimate" was physically impossible, but also cited to testimony from Mr. Waughtal himself that bond reduction was always "at the whim of the county" with ***no*** assurance of being reduced even if additional reclamation had been performed. [Adv. D.I. 82 ¶ 208.] Defendants further, and perhaps most importantly, cited to the WSSA and Superior's own documents recognizing that the WSSA does not require Defendants to help pay for the reclamation bond, which was Superior's responsibility under that agreement. [*Id.* ¶ 210.]

Conceding the weakness of its own arguments, Superior again pivots in reply, citing to a completely irrelevant Wisconsin Statute. Specifically, Superior argues for the first time that it is entitled to 100% of its bond premium ***required to maintain its reclamation permit*** under Wis. Stat. § 814.05, which provides: "Any party ***entitled to recover costs or disbursements in an action*** or special proceeding may include in such disbursements the lawful premium paid to an authorized insurer for a suretyship obligation." (emphasis added). If the text of the statute, or its location in Chapter 814, Subchapter I regarding "Costs in Civil Actions and special Proceedings," are not sufficiently clear that this only applies to bond premiums required for

litigation purposes (e.g., bonds required when an injunction or other equitable relief is granted), the Legislative Council Notes from 1977 moving the text to this Chapter make that clear:

> This provision is currently the 2nd sentence of s. 204.11. It has nothing to do with the law of insurance but ***deals solely with the proper taxing of costs in legal proceedings***. As such it belongs in ch. 814 and is transferred there without change of meaning. The language is very slightly edited.

(L.1977, c. 339, §§ 12, 41, eff. May 17, 1978 (emphasis added).)[4] The single case Superior cites demonstrates its limited applicability as the bond premiums sought there were for the bond the plaintiff was required to post when it was granted an injunction. *DeChant v. Monarch Life Ins. Co.*, 547 N.W.2d 592, 594 (1996).

Superior has not had to post a bond in this litigation and Section 814.05 is wholly inapplicable. The fact that Superior has made such a frivolous argument, for the first time on reply, regarding a statute that has *zero* applicability to this case is telling not only of the weakness of Superior's claims, but also the untrustworthiness of its legal argument throughout.

II. Superior Cannot Amend its Complaint via a Summary Judgment Reply.

Superior previously amended its Complaint, over two and a half years ago, to add specific allegations to support its claim of breach of contract. [*See* Adv. D.I. 1 & 14.] When it did so, Superior added the following detail regarding Defendants' alleged breaches:

> 20. ***In 2016***, while all mining operations at the Quarry were suspended, Superior discovered that Weber had failed to carry out certain Reclamation Obligations that it was required to carry out commensurate with mining operations under the Services Agreement, and had improperly or negligently carried out certain other Reclamation Obligations. Superior demanded that Weber cure its breaches.
>
> 21. Without waiving its rights to demand full performance of Defendants' Reclamation Obligations, Superior permitted Weber, and then Iron Mountain, to return to the Quarry in 2017 for the dual purpose of carrying out limited mining as market conditions permitted, and performing required Reclamation Obligations,

[4] These Legislative Council Notes appear on page 2 of Plaintiff's Appendix 1. [Adv. D.I. 87-1, at 2.]

> both to cure existing breaches and to carry out reclamation required with new mining activities. However, over the ensuing two years, Defendants continued to fail to fully and properly perform their Reclamation Obligations under the Services Agreement.
>
> 22. In late 2018, Superior and Defendants began negotiating a termination of the Services Agreement to address Defendants' ongoing breaches, but such breaches were not resolved or cured prior to the Petition Date. In early 2019, Chippewa County informed Superior that a financial assurance, which Superior had been required to post to secure the performance of reclamation of the Quarry, was being increased from approx. $2.9 million to approx. $4.65 million, most of which was a direct result of Defendants' operation of the Quarry without fulfilling their Reclamation Obligations under the Services Agreement. Prior to the Petition Date, Defendants acknowledged their breaches of their Reclamation Obligations by agreeing to provide a financial assurance that would address the increase required by Chippewa County, and acknowledged their ongoing obligations for interim and post-mining reclamation. But as of the Petition Date, and at all times since, Defendants failed and continue to fail to provide such financial assurance, and failed and continue to commence curing their breaches of the Services Agreement. . . .
>
> 61. Beginning in 2016, and continuing through to the Petition Date, Defendants repeatedly breached the Reclamation Obligations they were bound to fulfill under the terms of the Services Agreement. Prior to the Petition Date, Superior repeatedly demanded that Defendants cure their breaches, and fulfill their Reclamation Obligations, without waiving such breaches, but Defendants failed to cure such breaches, and have continued to fail to cure such breaches.

[Adv. D.I. 14, ¶¶ 20–22, 61 (emphasis added).] Notably absent from those paragraphs ***or the remainder of the Amended Complaint***, is ***any*** allegation that Defendants breached the WSSA by removing their equipment from the Quarry in July of 2019, days before Superior filed for bankruptcy. To the contrary, Superior's Amended Complaint instead included an allegation that, at the time the Court entered the Rejection Order in bankruptcy Defendants "***were <u>not permitted</u> onsite at the Quarry because of their prior and ongoing breaches of contract.***" [Adv. D.I. 14 ¶ 38 (emphasis added).]

Now, Superior wants to rewrite its Amended Complaint to not only add previously undisclosed allegations of breach for Defendants' removal of equipment, but also to tacitly

remove its express allegation that Defendants "***were <u>not permitted</u> onsite***" so that it can now, after the fact, use Defendants' absence as a breach of the WSSA.

Superior should not be permitted to change its theory of liability for its breach of contract claim through a summary judgment reply brief as it is well accepted that "[a] plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Thomas v. Colvin*, No. CV 11-449-RGA, 2016 WL 4163546, at *2 (D. Del. Aug. 4, 2016) (citation omitted); *see also Harmon v. Sussex Cnty.*, 810 F. App'x 139, 142 (3d Cir. 2020) (district court properly disregarded theory of liability raised for the first time in summary judgment briefing); *Laurie v. Nat'l Passenger R.R. Corp.*, 105 F. App'x 387, 392–93 (3d Cir. 2004) (same). Indeed, prior to its reply, Superior had never before argued or otherwise *suggested* that Defendants' notice that it would be removing equipment from the Quarry (which was provided three days before Superior filed for bankruptcy and seven months after Superior became delinquent on its payments to Defendants) was a breach of the WSSA—not at the time Superior received the notice, not throughout the administration of the bankruptcy proceeding, and certainly not at any time during the nearly three years that the parties have been litigating this case. The Court, therefore, should disregard Superior's argument that Defendants repudiated or breached the WSSA in 2019 when they provided notice of their intent to remove equipment from the Quarry, as such theory of liability was never raised in the operative Complaint (or at any other point in this litigation).

<u>CONCLUSION</u>

For the reasons set forth herein, the Court should enter an Order striking the new arguments raised in Superior's Supplemental MSJ Reply or, alternatively, simply decline to consider the improperly raised arguments.

Dated: September 21, 2023

THE ROSNER LAW GROUP LLC

/s/ Scott J. Leonhardt

Scott J. Leonhardt (DE 4885)
Zhao (Ruby) Liu (DE 6436)
824 N. Market Street, Suite 810
Wilmington, Delaware 19801
Tel.: (302) 777-1111
Email: leonhardt@teamrosner.com
liu@teamrosner.com

and

Robert J. Golterman (admitted *pro hac vice*)
John J. Hall (admitted *pro hac vice*)
Oliver H. Thomas (admitted *pro hac vice*)
Sarah A. Milunski (admitted *pro hac vice*)
LEWIS RICE LLC
600 Washington Ave., Suite 2500
St. Louis, Missouri 63101
Phone: (314) 444-7600
Fax: (314) 612-7822
E-Mail: rgolterman@lewisrice.com
jhall@lewisrice.com
othomas@lewisrice.com
smilunski@lewisrice.com

Attorneys for Iron Mountain Trap Rock Company and Fred Weber, Inc.