Docket #0101 Date Filed: 10/2/2023

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EMERGE ENERGY SERVICES LP, *et al.*, Debtors.[1]	Chapter 11 Case No. 19-11563 (KBO) Jointly Administered
SUPERIOR SILICA SANDS LLC, a Texas limited liability company, Plaintiff, vs. IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware corporation. Defendants.	Adv. Proc. No. 20-51052 (TMH)

PLAINTIFF'S OPPOSITION TO IRON TRAP ROCK COMPANY AND FRED WEBER, INC.'S MOTION TO STRIKE PORTIONS OF SUPERIOR SILICA SANDS LLC'S REPLY BRIEF

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Dated: October 2, 2023
Wilmington, Delaware

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Emerge Energy Services LP (2937), Emerge Energy Services GP LLC (4683), Emerge Energy Services Operating LLC (2511), Superior Silica Sands LLC (9889), and Emerge Energy Services Finance Corporation (9875). The Debtors' address is 5600 Clearfork Main Street, Suite 400, Fort Worth, Texas 76109.

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Plaintiff and reorganized debtor Superior Silica Sands LLC ("Superior") files this opposition to *Iron Mountain Trap Rock Company and Fred Weber, Inc.'s Motion to Strike Portions of Superior Silica Sands LLC's Reply Brief* (the "Motion to Strike"), filed by Fred Weber, Inc. and Iron Mountain Trap Rock Company (collectively, "Defendants"), which asks this Court to strike certain arguments from Superior's *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* (the "Opposition/Reply").

I. INTRODUCTION

There are no "new" breach of contract arguments in the combined Opposition/Reply Brief. From the outset of this litigation, Superior has alleged that the parties "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," [Dkt. 14 at p. 7, ¶ 22], and that during those negotiations the Defendants "acknowledged their ongoing obligations for interim and post-mining reclamation," but "as of the Petition Date, and at all times since … failed and continue to fail to commence curing their breaches of the Services Agreement" [*id.* at p. 8, ¶ 22]. And Superior has consistently argued that Defendants' failure to carry out their reclamation obligations has forced Superior to undertake reclamation at its own expense. None of that has changed.

Defendants' own introduction of Exhibit 53 – the "Higginbotham Notice" – as evidence confirming the nature of that ongoing breach on one particular day in July 2019, and Superior's responsive briefing on the meaning of Exhibit 53, is not a "new" argument. It is just a timely admission by Defendants, and a response by Superior.

Superior's arguments pertaining to Defendants' Exhibit 53 are two-fold: (i) it confirms the ongoing nature of Defendants' breach of their reclamation obligations through to the Petition Date, as repeatedly alleged in Superior's complaint; and (ii) it confirms that Defendants' Cross-Motion

argument for recoupment of take-or-pay payments fails under their own evidence, as it confirms that they cannot seek to enforce contract terms that they breached. None of these are "new," and the latter is not even a "reply" argument, but an opposition to the Cross-Motion.

Despite Defendants' concerns, all briefing concerning Defendants' breaches of contract prior to the Petition Date has turned out to be background information for Superior's MSJ, as briefing is now complete and Defendants have not challenged the Third Circuit's plain language in *Taylor*, *infra*, holding that an accrued and non-executory prepetition contractual obligation remains enforceable post-rejection. Defendants' reclamation obligations were a property interest of Superior's that accrued when mining began. And under the authority of *Taylor* and its progeny, this accrued property right remains enforceable, post-rejection, whether or not it was breached prepetition, and whether or not notice of that breach was delivered.

Nevertheless, as it would be premature to declare an argument "moot" until a hearing has taken place, Superior will fully address the arguments raised in Defendants' Motion to Strike.

Every "new" argument challenged by Defendants is a direct response to an argument raised by Defendants in their Cross-Motion for Summary Judgment or their Opposition to Superior's MSJ. Even if any of the arguments could be deemed "new" arguments filed in a reply brief, the Third Circuit's concern with "new" arguments in a reply brief is addressed where the opposing party has a sur-reply opportunity. Defendants have had that opportunity, with four extra pages, and they took full advantage of it. The Motion to Strike should be denied.

II. FACTUAL BACKGROUND

A. Superior's Breach of Contract Arguments Addressing Exhibit 53 Are Not "New"

Superior's Opposition/Reply does not raise "new" arguments concerning Defendants' ongoing failure to fulfill their reclamation obligations. Superior alleges in its First Amended Complaint [Dkt. 14] (the "FAC") that Defendants' breaches of contract have been repeated and

ongoing, that Defendants acknowledged their reclamation obligations during negotiations in 2018 and 2019, and then continued to fail to carry them out prior to July 15, 2019 (the "Petition Date"):

- Post-2017, "Defendants continued to fail to fully and properly perform their Reclamation Obligations under the Services Agreement." FAC at ¶ 21.

- "**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**." *Id.* at ¶ 22 (emphasis added).

- "**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 fail to commence curing their breaches** of the Services Agreement." *Id.* at ¶ 22 (emphasis added).

- "At the time that this Court entered the Rejection Order, Defendants remained in breach of the Services Agreement, **having failed to cure multiple prepetition breaches.**" *Id.* at ¶ 38 (emphasis added).

- [for declaratory relief that] "Weber and/or Iron Mountain, had breached, and remained in breach, of certain of their Reclamation Obligations due under the Services Agreement prior to, and on, the Petition Date." *Id.* at ¶ 58(c).

- "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." *Id.* at ¶ 61 (emphasis added).

Superior's Motion for Summary Judgment [Dkt. 61] (the "MSJ") provides detail of the *beginning* of Defendants' breaches, when notices of default were first delivered in 2016 – consistent with the allegations in ¶ 61 of the FAC addressing the breaches "[b]eginning in 2016." *Id*. *See* MSJ at pp. 11-12. SUF ¶¶ 50-53. The MSJ then repeatedly explains that Defendants' breaches were, and remain, ongoing through to the Petition Date and thereafter:

- "the parties did not reach a resolution of their disputes prior to July 15, 2019." *Id.* at p. 12; SUF ¶ 56;
- "Defendants' failure to fulfill their reclamation obligations, including the obligation to complete "all reclamation" related to their physical operation of the Quarry, has continued through to the Petition Date." *Id.* at p. 24; SUF ¶ 56;
- "Defendants' breaches were not a single, material breach, but an ongoing breach of their obligations to carry out reclamation in relation to their operations, including the reclamation required for closure of the Quarry." *Id.* at pp. 24-25; and
- "such breaches remained unresolved prior to the Petition Date." *Id*.

Nothing presented in the MSJ was "abandoned" or "changed" in the Opposition/Reply, as repeatedly claimed by Defendants. Rather, Superior acknowledges that Defendants have identified one disputed issue of fact (though ultimately not material) – which is whether or not the December 21, 2016 NOD (Exhibit K) was delivered during the in-person meeting that took place on that date. But there is no dispute that the December 29, 2021 letter giving notice that "Fred Weber is in default" under the Services Agreement was delivered to Defendants, as it was produced by Defendants in discovery and bears their "FWI_IMTR" Bates label. *See* Exhibit L.

The start of the parties' dispute in 2016 was just the start, which is why the FAC alleges that Defendants "repeatedly" breached the Services Agreement through to the Petition Date and thereafter by failing to fulfill their reclamation obligations. FAC at ¶ 61. And it is why the MSJ briefed that Defendants' "breaches were not a single, material breach, but an ongoing breach of their obligation … [that] remained unresolved prior to the Petition Date." MSJ at p. 24. Superior's case has not changed, and Superior continues to seek summary judgment on its claim for Defendants' "ongoing breach of their obligations to carry out reclamation in relation to their operations, including the reclamation required for closure of the Quarry." *Id*.

Defendants' introduction of Exhibit 53 merely demonstrates that, no matter how much the parties disagree about the *beginning* of their dispute, the status of that dispute prior to the Petition Date is remarkably simple and is addressed with Defendants' own evidence. It was the Defendants

– not Superior – who argued in their Opposition that "in July 2019, when contract discussions stalled, Defendants removed their equipment from the Quarry," and argued in their Cross-Motion that "in July 2019, when contract discussions stalled, Defendants removed their equipment from the Quarry and never returned." *See* Opposition at p. 12, Cross-Motion at pp. 6-7. Both of these statements cite to their SAMF ¶ 168, which in turn cites to Exhibit 53. And both of these statements are consistent with Superior's allegations that Defendants "repeatedly" breached the Services Agreement through to the Petition Date, including by failing to perform reclamation obligations that they "acknowledged" in negotiations that began in 2018. FAC at ¶¶ 22, 61.

This is not a "new" argument, but directly responds to the arguments and evidence put forward by the Defendants in their Cross-Motion and Opposition brief. *See Cornell Univ. v. Illumina, Inc*., No. 10-433-LPS-MPT, 2018 U.S. Dist. LEXIS 246371, at *25-27 (D. Del. Feb. 5, 2018) (refusing to strike "new" evidence and testimony in reply declaration that "specifically respond to arguments raised by [the opposition] or amplify statements in her first declaration," and refusing to strike declaration with new arguments going to the "credibility" of positions taken in opposition brief); *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 103 (D. Del. 2016) (finding that "reply did not contain 'new' argument to the extent it responded to the new argument [plaintiff] raised in its opposition to [defendant's] motion for summary judgment"); *Defillipis v. Dell Fin. Servs.*, No. 3:14-CV-00115, 2016 U.S. Dist. LEXIS 11271, at *22 (M.D. Pa. Jan. 29, 2016) (denying motion to strike new arguments in reply brief that were "responsive" to arguments raised in opposition brief or were "merely a clarification" of earlier evidence).

Defendants may not have intended for Exhibit 53 to draw attention to the details of their ongoing breaches of contract that continued through to the Petition Date and thereafter. But by putting Exhibit 53 into evidence, they opened the door for Superior to properly interpret the document and present argument as to its legal import. Defendants' Motion to Strike essentially

asks this Court to find that Defendants can place new documents into evidence with their Opposition and Cross-Motion, but Superior is unable to present arguments interpreting and applying that evidence in a manner consistent with the allegations in its FAC and the arguments in its MSJ. No case law supports that position.

The parties have devoted many pages of briefing to the question of when Defendants first breached their reclamation obligations, and whether and when notice of those breaches was delivered. It may all be irrelevant, as Defendants have not raised an argument that Superior had expected, given some past positions taken by Defendants in this litigation. Defendants have not asked this Court to re-interpret *Delightful Music Ltd. v. Taylor (In re Taylor)*, 913 F.2d 102, 106 (3d Cir. 1990) to mean that an accrued property interest that arises under a contract is only enforceable post-rejection if the debtor gave prepetition notice of a breach of that obligation.

Much of the evidence put forward in support of the MSJ was in anticipation of this argument, but Defendants have not advanced it. Instead, Defendants admit in their Opposition brief that *Taylor* held that royalties remained due for a prepetition recording despite contract rejection, and Defendants do not address *Taylor* at all in their Reply. Opposition at p. 15, n. 5. Thus, the entire question of when and how Defendants first refused to carry out their reclamation obligations, and what notice of this default was given, is now background information in the MSJ, and the case is far simpler. Superior had an accrued property interest as of the Petition Date in Defendants' obligation to carry out all reclamation arising from their mining activities, and Superior's right to recover damages for Defendants' breach and failure to perform that obligation has not been impacted by contract rejection. *See In re Taylor*, 913 F.2d at 106 ("To the extent that money is due the debtor for pre-petition services under a personal services contract, the debtor's claim for those sums is undoubtedly an asset of the estate which passes to the trustee/debtor-in-possession. And this is so regardless of whether the trustee later affirms or rejects the contract.");

Music Royalty Consulting, Inc. v. Reservoir Media Mgmt., No. 18 Civ. 9480 (CM), 2022 U.S. Dist. LEXIS 79392 at *35 (S.D.N.Y. April 20, 2022) (right to future royalties for prepetition work was not impacted by contract rejection); *In re Tomer*, 128 B.R. 746, 756 (Bankr. S.D. Ill. 1991) (following *Taylor*, "property rights acquired under the contracts prior to filing" remained enforceable post-rejection), *aff'd*, 147 B.R. 461 (S.D. Ill. 1992).

Unless the Court were to permit Defendants to make a new argument at a hearing, Superior's MSJ is far simpler than the pages and pages of briefing would make it appear.

B. Superior's Arguments Concerning Exhibit 53 Are a Direct Response to the Cross-Motion

In their Cross-Motion, Defendants ask for recoupment of take-of-pay payments described in the Services Agreement. Superior's Opposition/Reply opposes this request for summary judgment by pointing out that Defendants' own evidence shows that they breached the contract prepetition in a manner that bars their request for enforcement of its terms. Opposition/Reply at pp. 26-27 (arguing that Defendants' breach deprived Superior of the benefit of its bargain).

This is not "new." Superior alleges in the FAC that:

> By reason of Defendants' multiple prepetition breaches of the Services Agreement, which remained uncured as of the Petition Date, Defendants had no right to demand enforcement of the Services Agreement, nor to demand any damages for a rejection of the contract by Superior pursuant to Section 365 of the Bankruptcy Code, or for amounts allegedly due under the Services Agreement.

FAC at ¶ 77. Defendants' failure to fulfill their reclamation obligations bars them from attempting to enforce terms of the Services Agreement against Superior, whether that failure was an ongoing refusal to perform, or a specific abandonment of the Quarry.

Superior's argument is not new, and it is not an amendment of the FAC. It is a reason why Defendants' Cross-Motion must be denied.

C. New Arguments In a Reply Are Not Prejudicial Where There Is a Sur-Reply Opportunity

Defendants' entire legal argument is based upon case law that solely addresses new arguments raised in a reply, where the opposing party did not have a further opportunity to respond. None of their cases address allegedly "new" arguments raised in opposition to a cross-motion, or where the opposing party has a right of sur-reply – as is the case here.

The Third Circuit's decision in *Alston v. Forsyth*, 379 F. App'x 126 (3rd Cir. May 13, 2010) involved a new argument in a reply brief, where the opposing party had no right to a sur-reply, and therefore "had no meaningful opportunity to present arguments or evidence in opposition to the decisive issue." *Id.* at p. 129. The Third Circuit raised this critical distinction:

> There 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. *See, e.g., Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) ("[W]hen a moving party advances in a reply new reasons and evidence in support of its motion for summary judgment, **the nonmoving party should be granted an opportunity to respond**."); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (a District Court should not consider new evidence raised in the reply to a motion for summary judgment **without giving the nonmoving party an opportunity to respond**); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985) ("**[T]he nonmoving party . . . should have had an opportunity to examine and reply** to the moving party's papers before the court considered them in its decision process.").

Alston v. Forsyth, 379 F. A'ppx at 129 (emphasis added). *See also Cornerstone Residencem Inc. v. City of Clairton, Pa.*, No. 17-706, 2018 U.S. Dist. LEXIS 2068, at *12-13 (W.D. Pa. Jan. 5, 2018) ("a party is not prejudiced by new arguments set forth in a Reply if it is provided the opportunity to file a Sur-Reply to address any such issues"); *Kabbaj v. Simpson*, No. 12-1322-RGA/MPT, 2013 U.S. Dist. LEXIS 55582, at *23-24 (D. Del. March 7, 2013) ("The purpose of a sur-reply is 'to address any new issues or legal bases which are asserted for the first time in a reply brief'") (citation omitted).

Defendants had the right to file a sur-reply with four additional pages. They have not been prejudiced by any "new" arguments, even if any of Superior's arguments could be deemed "new."

D. Superior's Bond Argument Is a Direct Response to Defendants' Argument that They Are Not "Responsible" for Bond Costs

Defendants argue that Superior's briefing of Wisconsin Statute 814.05 is another "new" argument, because their Opposition attacked Mr. Waughtal's testimony claiming that he believes that 65% of Superior's ongoing bond costs arise as a result of Defendants' breaches. But in so arguing, Defendants incorrectly narrow the argument they actually made.

In their Opposition, and in addition to attacking Mr. Waughtal's estimate, Defendants argue that "under the WSSA, Defendants were not responsible for the bond—Superior was." Opposition at p. 45. And they went on to argue that the bond costs are "consequential" damages because Mr. Waughtal used the word "consequence" when describing the cause of the damages. *Id*.

In the Opposition/Reply, Superior responded to that argument disclaiming contractual responsibility by briefing the Wisconsin statute providing that the costs of bond premiums are statutory costs that do not hinge on contract rights. Contrary to Defendants' argument, Wisconsin Statute 814.05 is not limited to bonds for injunctive relief or other such "litigation purposes." Motion to Strike at pp 9-10. Defendants presume such meaning, but cite no authority for their claim other than the plainly obvious legislative history explaining that the provision belongs in the Civil Procedure chapters of the Wisconsin Code because it pertains to the "taxing of costs in legal proceedings." L.1977, c. 339, §§ 12, 41, eff. May 17, 1978.

The right to recover bond costs is a statutory right, and Superior cited to the statute and to *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 573 n.5, 547 N.W.2d 592 (1996) as a response to Defendants' argument claiming that the issue is decided by contract language. Case law on Section 814.05 may be sparse, but it does not limit the section to injunction bonds simply because

that is the fact pattern of the cited case. In *DeChant*, the court awarded "attorney's fees and bond premiums" for an injunction bond under Section 814.05 by finding that the defendant was "liable to the insured in tort for **any damages which are the proximate result** of that conduct." 200 Wis.2d at 571 (emphasis added). And in *Allied Processors v. W. Nat'l Mut. Ins. Co.*, 246 Wis. 2d 579, 629 N.W.2d 329 (Ct. App. 2001), the court followed *DeChant* and affirmed an award of statutory costs where the "plaintiff had to post a bond to secure payment of disability benefits during the action," describing *DeChant* as involving a "bond premium [that] was an expense the plaintiff incurred in the litigation." 246 Wis.2d at 611-13 and n.10.

Superior's briefing of Section 814.05 is a direct response to Defendants' insistence that this issue of costs is determined by contract rights. It is a statutory right, and – with or without Mr. Waughtal's concession – it represents a measure of damages that are proper under Wisconsin law for the Defendants' failure to carry out reclamation that should have begun four years ago.

E. The Opposition/Reply Does Not Amend Superior's Complaint

Defendants' final argument is the claim that, by briefing the factual and legal meaning of Exhibit 53, and its role in Defendants' ongoing and repetitive breaches of contract, Superior has amended the FAC in a summary judgment brief.

As addressed in Section A, above, the FAC fully alleges that Defendants "repeatedly" breached the Services Agreement by failing to fulfill their reclamation obligations. The failure to fulfill their reclamation obligations began in 2016, and continued through to the Petition Date, despite Defendants having "acknowledged" their obligations in negotiations that began in 2018. FAC at ¶¶ 22, 61. Defendants did not claim in their motion to dismiss the FAC in 2021 that these allegations were vague or lacked sufficient detail. *See* Dkt. 24.

The FAC also alleges, in the context of its objection to Defendants' take-or-pay proof of

claim, that Defendants' have "no right to demand enforcement of the Services Agreement" as a result of their "multiple prepetition breaches." FAC at ¶ 77. Superior's arguments in the Opposition/Reply concerning Exhibit 53 do not create a new claim for different damages arising from Defendants' abandonment of the Quarry. Rather, they elaborate on the allegations in the FAC, using Defendants' own evidence to show why their Cross-Motion must fail.

Instead of acknowledging that their actions in July 2019 documented by Exhibit 53 were part of their ongoing and repetitive breach of their reclamation obligations, Defendants instead suggest that they somehow could not have actually removed equipment from the Quarry because the FAC alleges that Defendants were "not permitted" onsite at the Quarry as a result of their breaches of the Services Agreement. Motion to Strike at p. 38. But the FAC's references to the Defendants being barred from the Quarry is in a sentence discussing the payment demands made by Defendants following rejection of the contract. FAC at ¶ 38. Defendants know this, because they came before this Court a few weeks after the Petition Date with their *Motion of Iron Mountain Trap Rock Company to Confirm Automatic Stay Does Not Apply to Nondebtor Property, or, in The Alternative, for Relief From, or Annulment of, the Automatic Stay* [Dkt. 349], filed on September 10, 2019, and attached to the Waughtal Decl. as Exhibit S, in which they stated:

> IMTR brings this motion because SSS has taken **postpetition action** to bar and preclude IMTR from recovering personal property … SSS has locked IMTR's property behind a gate and is refusing to allow IMTR access to its own property.

See Exhibit S at p. 2, ¶ 3 (emphasis added). Defendants went on to explain that:

> **after the Petition Date**, [Superior] unilaterally locked IMTR out of the Quarry Site and has physically prohibited IMTR from retrieving IMTR's property, primarily the Plant, from the Quarry Site, including not only locking the sole access gate but blocking all access with vehicles and other items.

Id. at p. 7, ¶ 17. This is the same paragraph in which Defendants argued to the Court that they, and they alone, had maintained and "ran all operations" of the Quarry. *Id.*

Defendants' efforts to twist this language into a suggestion that they were locked out prepetition, and therefore their actual and documented repudiation of the Services Agreement should be ignored, is absurd and suspect.

Defendants' case law on the concept of amending a complaint by motion practice is neither accurately cited, nor relevant, as nothing presented in the Opposition/Reply is contrary to, or seeks to amend, the FAC. In *Thomas v. Colvin, C.A.* No. 11-449-RGA, 2016 U.S. Dist. LEXIS 102368 (D. Del. Aug. 4, 2016), the court held that the plaintiff could not use summary judgment "to assert a new claim" that had not been pleaded in the complaint. *Id*. at *3. In *Harmon v. Sussex Cnty.*, 810 F. App'x 139 (3d Cir. 2020), the plaintiff raised a new and separate theory of wrongdoing, rather than one instance of an ongoing and repetitive pattern of contract breaches. *Id*. at 142. And in *Laurie v. Nat'l Passenger R.R. Corp.*, 105 F. App'x 387 (3d Cir. 2004), the challenged new theory of liability was raised post-discovery, which "would result in additional discovery, cost, and preparation to defend against the new theory of engineer negligence." *Id*. at 393.

The FAC does not list out every action or inaction that Defendants took over a three-year period while they "repeatedly" failed to fulfill their reclamation obligations. Some days it would simply be failing to commence reclamation. Other days, like July 12, 2019, it was a complete abandonment of the Quarry. To focus on one of those days as evidence of the ongoing breach of contract does not change the FAC's breach of contract claim. It is the same claim alleging repetitive breaches of Defendants' reclamation obligations since 2016. *See Micro Focus (US) Inc. v. Ins. Servs. Office*, No. 15-252-RGA, 2018 U.S. Dist. LEXIS 26559, at *5 (D. Del. Feb. 20, 2018) (overruling defendant's claim that plaintiff's argument was an improper amendment of complaint where plaintiff's "breach of contract theory … has not changed").

If Defendants were correct, it would mean that a new rule of specificity applies to a claim for breach of contract. Any claim involving ongoing patterns of breaches over a long period of

time would require specific pleading of each breach, and each omission or variance in the pattern, or they will be waived.

Moreover, the MSJ does not hinge in the slightest on the concept that Defendants' many breaches of contract necessarily included actions taken on July 12, 2019, unless this Court reinterprets *Taylor* to require notice of a prepetition breach, and unless this Court disregards the uncontested December 29, 2016 correspondence that expressly put Defendants on notice of their default at the beginning of a breach that has continued, repetitively. *See* Exhibit L.

Defendants' obligation to perform all reclamation arising from their mining operations accrued in 2011 when they commenced mining, and it was a property right of Superior's chapter 11 estate as of the Petition Date. Defendants began to breach their reclamation obligations in 2016, and they have continued to refuse to properly fulfill their obligations ever since. The specifics of those refusals are not particularly material, as it remains uncontroverted that Defendants did not carry out the reclamation of the Quarry that Superior began on their behalf in 2023. And by failing to fulfill those obligations, Defendants breached the Services Agreement. That is the simplicity that Defendants are struggling to confuse with their many, many pages of briefing.

III. CONCLUSION

For all of the reasons briefed herein, Superior respectfully requests that this Court deny Defendants' Motion to Strike.

Dated: October 2, 2023

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