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 REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE PORTIONS OF SUPERIOR SILICA SANDS LLC'S REPLY BRIEF

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INTRODUCTION

In Superior's ever-evolving theory of this case, its Supplemental MSJ Reply is but the most recent iteration of its claims. Superior has changed its tune on the "ripeness" of Defendants' alleged reclamation obligations as of confirmation [*compare* Adv. D.I. 25, at 6 ("As of confirmation, many of Defendants' reclamation obligations had not yet ripened"), *with* Adv. D.I. 53 at 6 ("Defendants' obligation to perform all remaining reclamation accrued prepetition")]; on the nature of relief requested by its motions [*compare* Adv. D.I. 42, at 26 ("This Motion does not ask the Court to make any ruling concerning the existence of a prepetition breach by Defendants"), *with* Adv. D.I. 53, at 8 (Reply) ("Defendants' prepetition breaches of contract relieved Superior of its obligations long before the Petition Date")]; and, in its Supplemental MSJ on breach of contract, even on whether it needs to establish a ***breach*** of contract. [*Compare* Adv. D.I. 61, at 17–18 ("Under Wisconsin law, a breach of contract claim requires proof of three elements: '(1) a contract between the plaintiff and the defendant that creates obligations flowing from the defendant to the plaintiff; (2) failure of the defendant to do what it undertook to do; and (3) damages'"), *with* Adv. D.I. 71, at 1 ("Plaintiff's MSJ does not ask this Court to find whether there was *any* breach under the parties' 'twelve-year contract,' or to examine 'the eight years of performance under that highly technical agreement and determine whether there was a material breach.'").] Superior's latest pivot abandons its initial and *exclusive* reliance on a 2016 dispute regarding topsoil management and stormwater runoff to establish a breach [*see* Adv. D.I. 61, at 11–12, 24–25; Adv. D.I. 62 ¶¶ 50–56], to instead rely on a so-called "abandonment" of the Quarry in 2019 as the breach. [Adv. D.I. 87, at 17.]

But litigation of a $14 million claim (or a claim of any value, for that matter) is not a game of whack-a-mole. Indeed, when Defendants have not been at the Quarry for the last ***five***

years—meaning that the facts underlying any alleged breach have been established for ***at least*** five years—there is simply no reason why Superior cannot clearly identify (and stick to) its theory of recovery and the factual basis supporting its theory. The ***only*** reason for the continued evolution is because every time Superior asserts a theory, Defendants show with admissible evidence and on-point case law why Superior is not entitled to relief.

Superior has now filed two separate motions for summary judgment, where the basis for summary judgment has changed drastically from its opening motion to its reply. That is not how litigation works, and just because Superior's Supplemental MSJ lacks merit does not mean it gets to create new theories of liability until it lands on a viable claim. Superior should be limited to its original theory of breach, and its new theory, asserted for the first time on reply, must be ignored in considering Superior's entitlement to summary judgment.

ARGUMENT

I. Superior's New Repudiation Argument, Expressly Made to Support its Summary Judgment Motion for $14 Million, Is Improper.

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *In re Maxus Energy Corp.*, 641 B.R. 467, 499 (Bankr. D. Del. 2022) (citation omitted). When Superior initially moved for summary judgment on its contract claim seeking over $14 million, the only identified "basis for its motion" and purported evidence supporting breach was set forth in Paragraphs 50–56 of its Statement of "Facts." [*See* Adv. D.I. 62.] As noted in Defendants' Opposition to the Supplemental MSJ, those few paragraphs, which provided the sole basis of alleged "breach" upon which Superior premised its Supplemental MSJ, were supported only by

Exhibits K and L, which are correspondence from Superior to FWI in October and December of 2016, and by Scott Waughtal's declaration, even though he admits he has no personal knowledge to support his statements about the 2016 correspondence or the actual condition of the Quarry at that time. [Adv. D.I. 92-1, at 96:11–12, 98:4–15, 98:25–99:11, 106:19–107:2, 147:25–148:14.]

The 2016 Hearsay Letters and Scott Waughtal's declaration (admittedly not based on personal knowledge) were the sole and exclusive "evidence" upon which Superior based its claim that Defendants breached the WSSA—a necessary *prima facie* element to a breach of contract claim. *E.g.*, *Pagoudis v. Keidl*, 988 N.W.2d 606, 612 (Wis. 2023) ("The elements of any breach of contract claim are (1) the existence of a contract between the plaintiff and the defendant; (2) ***breach of that contract***; and (3) damages.") (emphasis added). In the 161 Statements of "Fact," Superior does not identify Defendants' removal of certain of its own equipment in July 2019 as a basis for its breach of contract claim (or otherwise mention it whatsoever). [*See* Adv. D.I. 62.] That was simply *not* a basis for breach on which it moved, and Superior has not cited a single paragraph in its Statement of Facts *or* its Supplemental MSJ showing that it had identified Defendants' 2019 activities as a basis for breach or that it previously asserted such activity as a repudiation of the WSSA.[1] [*See generally* Adv. D.I. 101.]

[1] Superior instead attempts to downplay the critical nature of its new theory of breach by suggesting it is just "background information" rather than evidence necessary to establish a *prima facie* element of its breach of contract claim—namely, breach. Superior reframes such evidence as "background information" by suggesting that Defendants have not addressed Superior's argument re *In re Taylor*—notwithstanding the pages Defendants have devoted to discussing that single case. [*E.g.*, Adv. D.I. 26, at 8, 12; Adv. D.I. 55, at 19, 21; Adv. D.I. 78, at 1, 14–15, 18; Adv. D.I. 81, at 2.] What *Taylor* makes clear, and what Superior continues to ignore, is that when a contract is rejected, there is a distinction between executory portions and non-executory portions of a contract. *In re Taylor*, 913 F.2d 102, 106 (3d Cir. 1990). It is black letter law that if performance remains due on both sides—even if part of the contract has been fully performed (*i.e.*, is fully executed or non-executory)—the portion with performance remaining on both sides is ***executory*** (and subject to rejection). *In re Holly's, Inc.*, 140 B.R. 643, 672 (Bankr. W.D. Mich. 1992). While Superior continues to ask this Court to ignore its own

Critically, in responding to a summary judgment motion, "[t]he nonmovant is not required to present evidence on an issue not raised by the movant." *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011); *see also Anderson v. Olson*, No. 13-CV-561-WMC, 2015 WL 3521572, at *9 (W.D. Wis. June 4, 2015) ("[T]he moving party . . . had the initial burden of identifying their bases for seeking summary judgment" and "non-movant . . . was not required to present evidence on an issue—or claim—not raised by the movants.") (citations omitted); *United States v. King-Vassel*, 728 F.3d 707, 711–12 (7th Cir. 2013) ("As a general matter, if the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving

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payment obligation that is ***expressly tied to Defendants' reclamation obligations under the WSSA*** and which Superior ***admits*** it did not fulfill, neither the case law nor the contract allow the Court to ignore that term of the WSSA. *E.g.*, *In re Executive Tech. Data Sys.*, 79 B.R. 276, 282 (Bankr. E.D. Mich. 1987) ("[A]n executory contract may not be assumed in part and rejected in part, and if a debtor elects to reject an executory contract, he rejects the benefits as well as the burdens.").

As Defendants have previously briefed:

> The *Taylor* court's holding simply meant that, in rejecting a services contract that was partially performed, future performance was excused on both sides, while those portions already performed were not impacted by rejection. *Id.* at 106. There, the debtor (Taylor) was obligated to record ***eight*** record albums but had only recorded ***one***. *Id.* at 105. The debtor was apparently owed money for the single album he ***did*** record prior to bankruptcy, and so his claim to recover money for that album was not impacted by rejection. *Id.* at 105–06. However, the rejection excused his obligation to record another seven albums. *Id.* What the *Taylor* court did ***not*** hold (and what Superior is asking this Court to do) was that the debtor was excused from recording those additional albums while the creditor was obligated to pay for those additional albums. Rather, ***both*** parties' future obligations were excused. *Id.* at 106–07.

[Adv. D.I. 78, at 15 n.5.] Superior admits that it failed to pay Defendants for work Defendants had already performed. [Adv. D.I. 88, at ¶¶ 148–51 (undisputed).] That portion of the contract was thus ***non***-executory because one side (Defendants) had performed while the other (Superior) had not. Superior also admits that it failed to pay Defendants the minimum amounts due to compensate them for future work, including future reclamation work. [*Id.* ¶ 189 (undisputed).] That portion of the contract therefore was executory—Superior still had an obligation to pay for reclamation work that was admittedly due in the future and Defendants had not yet performed that (interim) reclamation work. Performance still being due on both sides, it was executory, and ***both parties' obligations*** were excused by rejection.

party is not required to present evidence on that point, and the district court should not rely on that ground in its decision.") (quoting *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 736 (7th Cir. 2006)). Nor is a nonmovant required to seek leave to file a sur-reply when an argument is improperly raised for the first time on reply. *Costello*, 651 F.3d at 635.

Thus, in *Beaty v. Kansas Athletics, Inc.*, the court declined to consider a new theory of breach that had not been raised in the plaintiffs' opening memorandum. 454 F. Supp. 3d 1096, 1108 (D. Kan. 2020). In that case, the plaintiffs moved for partial summary judgment on their breach of contract claim and, on the element of breach, asserted defendant had breached the agreement when it terminated plaintiff without cause and then retroactively terminated him for cause and refused to make required payments. *Id.* On reply, however, plaintiffs sought "summary judgment on an alternative theory of defendant's breach"—namely that "defendant did not follow the procedures required for a for-cause termination." *Id.* at 1108 n.9. The court disagreed with the plaintiffs that this was a mere "reframing" of the issue and instead held plaintiffs were attempting "to seek summary judgment on an issue that they did not present in their opening memorandum." *Id.* As such, the court refused to address the alternative theory of breach raised on reply. *Id.*

Beaty is directly applicable here, as Superior has similarly changed its theory of breach on reply. In its Supplemental MSJ, Superior claimed Defendants breached the WSSA based on allegedly buried topsoil and stormwater runoff/erosion issues in 2016. Defendants responded, ***thoroughly***, to those allegations of breach, showing how none of those alleged breaches bore on the final reclamation damages Superior now seeks, none of the "evidence" relied upon was admissible, all such evidence was, and is, heavily disputed, and, in any event, the 2016 issues were resolved prior to Superior's rejection of the WSSA. [Adv. D.I. 78 § III.] Superior had no

response to Defendants' exhaustive rebuttal to its original theory of breach, so it expressly pivoted to a new theory on reply stating: "***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.] Again, Superior has not pointed, and cannot point, to a ***single mention*** of the 2019 "abandonment" or any argument suggesting "repudiation" in its Supplemental MSJ. Instead, it suggests that because its First Amended Complaint (which also does not mention the 2019 removal of equipment *or* contain any facts supporting repudiation) contains a blanket allegation that Defendants "repeatedly" breached the WSSA that, somehow, places all conduct and performance under the WSSA over the years of the parties' relationship at issue in its Supplemental MSJ. [*See* Adv. D.I. 101, at 4.]

Beaty expressly refutes such an argument, and *none* of the cases cited by Superior suggest that a court can properly grant summary judgment based on a new theory raised for the first time in a summary judgment reply. Indeed, in the *EMC Corp.* case Superior cites, the court did not consider a motion to strike a new argument on reply, but whether to allow a sur-reply, ***which the court granted*** to address the "legal argument that EMC did not have an opportunity to rebut" and address the "case law not cited in Pure's opening brief." *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 103 (D. Del. 2016). *Defillipis* is even more inapposite as there were no new theories asserted like there are here. Rather, the defendant moved for summary judgment using a declaration to support its motion to show that the plaintiff had agreed to certain terms and conditions as part of an application for an account. *Defillipis v. Dell Fin. Servs.*, No. 3:14-CV-00115, 2016 WL 394003, at *5 (M.D. Pa. Jan. 29, 2016). The plaintiff did not dispute those facts but only objected that, instead of relying on a declaration, the business records themselves should have been relied upon. *Id.* at *6. In reply, the defendant attached those records that

merely provided additional support to the prior asserted statement of fact. *Id.* The court noted it needed to be mindful of new evidence on reply, but since the records merely provided *additional* support for a previously asserted fact, and since the plaintiff failed to dispute that fact in any way, it found the documents within the scope of the original motion. *Id.* at *7–8. Here, Superior cannot claim that it is merely bolstering a previously asserted fact with additional admissible evidence. Instead, pivoting from the prior question of "[w]hether or not Defendants breached in 2016," it focused on previously unaddressed conduct in 2019 (abandoning the Quarry) to assert a new theory of repudiation. [Adv. D.I. 87, at 17.] Finally, the last case Superior cites, *Cornell Univ. v. Illumina, Inc.*, did not even involve a summary judgment motion and, as such, did not address a party's attempt to present a new theory for seeking judgment as a matter of law on reply. No. 10-433-LPS-MPT, 2018 U.S. Dist. LEXIS 246371 (D. Del. Feb. 5, 2018) (considering scope of arguments in motion to rescind settlement documents).

In short, Superior is trying to affirmatively recover $14 million based on a theory of repudiation that it had never raised prior to its Reply and was not even ***mentioned*** in its Supplemental MSJ. The case law (and this Court's Rules) expressly state that such new arguments on reply are wholly improper and cannot be considered in determining Superior's entitlement to summary judgment.

II. Defendants Did not Have a Right to File a Sur-Reply, Nor Did They File One.

Superior next mistakenly argues that Defendants had "a right of sur-reply" in an attempt to distinguish the many cases Defendants cited showing that new evidence *or* argument on reply cannot be considered. *E.g.*, *Alston v. Forsyth*, 379 F. App'x 126, 129 (3d Cir. 2010).

In arguing that Defendants somehow had a right to file a sur-reply to respond to Superior's new arguments to support its own Supplemental MSJ, Superior wholly ignores Local Rule 7007-1(b) which states that following a reply,

> ***No additional briefs, affidavits or other papers in support of or in opposition to the motion shall be filed without prior approval of the Court***, except that a party may call to the Court's attention and briefly discuss pertinent cases decided after a party's final brief is filed or after oral argument.

(Emphasis added). Contrary to Superior's suggestion that Defendants could do an end-run around this Rule by inserting sur-reply arguments in their Reply in Support of their Cross-Motion, Defendants, in compliance with the Rule, limited their Reply to the arguments raised in their Cross-Motion—***not*** those raised in Superior's Supplemental MSJ. As Defendants did *not* cross-move on the issue of breach (due to the extensive factual disputes on that issue), they did not have an opportunity to address Superior's new theory of breach.

The simple fact is that Superior raised this new theory of repudiation based on conduct in 2019 in two ways: (1) as a ***new*** basis to support its breach of contract summary judgment motion seeking over $14 million (improper); and (2) as a retort to Defendant's affirmative defense of offset. While Defendants were able to provide a limited response in their Reply to support their Cross-Motion, they could not, and did not, respond to the new argument as it relates to Superior's affirmative request for $14 million based on this new theory regarding a 2019 repudiation.

While the distinction might seem technical, the repercussions of the distinction are practically important. *If* Superior had disclosed its new repudiation theory in its opening memorandum, that would have allowed Defendants an opportunity to conduct discovery on that topic in the time the parties had agreed to limited discovery necessary to respond to Superior's Supplemental MSJ. As it was, because that theory was not a basis for Superior's Supplemental MSJ, nor had it been previously raised ***at all*** in this litigation, Defendants focused their questioning of Mr. Waughtal and their written discovery requests at the purported breaches actually raised—those in 2016. When Superior then raises a new argument on reply, Defendants

are no longer able to file a Rule 56(d) Motion to allow additional time to respond (as there is no additional response allowed by the Court's Rules)—the only relief that can be sought is to strike such new arguments and evidence.

III. Superior's Statutory Argument Regarding Bonds is New and Frivolous.

Once again, prior to its Reply, Superior never once ***mentioned*** Wisconsin Statute 814.05, let alone suggested that it believed this statute entitled it to recover ***one and half million dollars***. Superior has not pointed, and cannot point, to a single reference in its opening brief (or anywhere else) to this statute. It would be truly absurd to suggest that Defendants should have anticipated in their opposition briefing Superior's late assertion of a totally inapplicable statute never previously identified. This statute was raised for the first time on reply because, like Superior's initial breach argument, Defendants laid bare the insufficiency of Superior's evidence to support such recovery under the WSSA.

Superior's arguments as to the statute's applicability are equally frivolous, but instead of admitting as much, Superior doubles down on its argument despite all cited authority proving the inapplicability of that section. As Superior admits, the "plainly obvious legislative history" expressly states that this provision "***deals solely with the proper taxing of* costs *in legal proceedings***." (L.1977, c. 339, §§ 12, 41, eff. May 17, 1978). Superior then re-cites to the *DeChant* case, ***which reinforces that the statute is limited to litigation bonds***. *DeChant v. Monarch Life Ins. Co.*, 547 N.W.2d 592, 594 (Wis. 1996) (finding bond costs recoverable where plaintiff "sought a preliminary injunction to require Monarch to resume the disability payments" and "[t]he injunction was granted, but DeChant was required to post a bond of $24,000 to secure payment of the benefits.").

Incomprehensibly, Superior then cites the *Allied Processors* case to suggest that it "affirmed an award of statutory costs where the 'plaintiff had to post a bond to secure payment

of disability benefits during the action.'" [Adv. D.I. 101 at 10.] However, the quoted portion of the *Allied Processors* decision was discussing the *DeChant* case—***not*** the facts of the *Allied Processors* case. *Allied Processors, Inc. v. W. Nat. Mut. Ins. Co.*, 629 N.W.2d 329, 340 & n.10 (Wis. Ct. App. 2001). Indeed, there were no bond premiums at issue ***whatsoever*** in that case, which was instead considering the propriety of an attorneys' fees award and recoverability of expert witness fees (as litigation costs). *Id.* at 331, 340–45. The only reason the statute was even mentioned was in the context of the *DeChant* case because the *Allied Processors* case did not involve bond premiums. *See generally id.*

Tellingly, the only other cases that deal with Section 814.05 or its predecessor (containing the same statutory language) likewise deal with ***litigation bonds*** as recoverable ***costs*** by the prevailing party. *See Confidential Loan & Mortg. Co. v. Hardgrove*, 48 N.W.2d 466, 469 (Wis. 1951) (involving surety bond to secure replevin action); *Skelly Oil Co. v. Peterson*, 43 N.W.2d 449, 453 (1950) ("In its bill of costs the plaintiff listed as a disbursement the premium paid upon a surety bond filed in connection with the issuance of the temporary restraining order.").

There is zero authority that would suggest this statute, entitled "Bond premium as ***costs***" contained within the chapter on the recovery of costs by prevailing parties in civil litigation, in any way permits recovery of premiums for a *reclamation bond* that Superior was required to pay *regardless of this litigation*.

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

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 truth is that this is a pure creation of Superior's counsel in a last-minute attempt to survive Defendants' own Cross-Motion that would fully resolve this case.

Superior knows this is a new theory, but, unwilling to admit as much, tries to use the word "repeatedly" as an umbrella under which it can bring any new theory of breach within the scope of its First Amended Complaint. [Adv. D.I. 101, at 10.] However, federal pleading standards require enough factual allegations that a defendant has the "fair notice" of the basis of the plaintiff's claims:

> [W]ithout some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only "fair notice," ***but also the "grounds" on which the claim rests***. Therefore, " 'stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element.

Dalton v. City of Wilmington, No. CIV. 08-581-SLR, 2008 WL 4642935, at *1 (D. Del. Oct. 20, 2008) (citations omitted) (emphasis added); *see also Herman v. Carbon Cnty.*, 248 F. App'x 442, 444 (3d Cir. 2007) ("But to satisfy fair notice, a plaintiff must at minimum state the operative facts underlying the claim."). Central to this standard is the principle that "***conclusory statements***" and "***threadbare recitals of a cause of action's elements***"—such as Superior's bare allegation of "repeated[]" breaches of contract—are not well-pleaded facts that state a claim to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009) (emphasis added) ("While legal conclusions can provide the complaint's framework, they must be supported by factual allegations.")).

A primary reason for the "fair notice" requirement—similar to the restriction on raising new grounds at the summary judgment stage that are not articulated in the four corners of the operative pleading—is that "[t]he defendant otherwise lacks fair notice of the need to defend

against these potential liabilities." *Mastrella v. DeJoy*, No. 1:20-CV-1037, 2023 WL 5352305, at *3 (M.D. Pa. Aug. 21, 2023) (citing *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 499 n.1 (3d Cir. 1997)) ("A plaintiff cannot raise claims at the summary-judgment stage that are not encompassed within the four corners of the operative pleading. If a plaintiff uncovers a new potential claim during the course of discovery, the proper course is to seek leave to amend their pleading. The defendant otherwise lacks fair notice of the need to defend against these potential liabilities.") (citation omitted). Thus, in *Mastrella*, the court refused to consider a retaliation claim based on "conduct in 2016 or 2018" when the complaint "only plausibly advance[d] a retaliation claim based on the [unrelated] 2018 hiring freeze." *Id.* Although the plaintiff's new claims at summary judgment "concern[ed] similar effect"—namely denying the plaintiff increased pay—they "involve[d] different conduct by different people years apart from the retaliatory action (the Storey memo) undergirding his 2018 retaliation claim." *Id.* As such, consideration of those different facts would prejudice the defendant "which [] had not had a fair opportunity to explore [plaintiff's] alleged retaliation by omission." *Id.* The court thus refused to "consider these late-raised claims." *Id.*

The same is true here, where Superior only pleaded breach based on the 2016 disputes about topsoil and stormwater concerns, yet now seeks to shift the focus to 2019 conduct which was never previously raised as a breach or challenged in any way. It is not as if, when Defendants sent notice that they were removing their equipment, that Superior told them to stop or suggested that such conduct was a breach or repudiation. To the contrary, ***Superior wanted out of the WSSA that it could no longer afford***, so it responded to Defendants' notice by letting them know what ***additional*** materials Defendants could remove from the Quarry. (*E.g.*, SSS0004764 ("We have decided against renting the tractor/reel/hose and the office trailer").)

Superior's present claim, that leaving the Quarry in 2019 was a separate breach, is truly out of the blue, having not been mentioned in the Complaint, the Amended Complaint, discovery, or even informal correspondence between the parties at the time. The whole point of notice pleading is to give a defendant notice of the conduct at issue so it can develop evidence during discovery to mount a defense. Defendants did that, focusing on the 2016 conduct raised in both the Amended Complaint and the Supplemental MSJ and completely rebutted Superior's claims of breach. In fact, so thoroughly did Defendants show that there was simply no way Superior could recover based on the 2016 conduct, Superior did not even attempt to rehabilitate its argument regarding that conduct in its Reply. Superior cannot, however, drop one theory and pick up another undisclosed theory *after* Defendants filed their opposition and *after* Defendants deposed Superior's sole witness. Like in *Mastrella*, that would prejudice Defendants who have not had a fair opportunity to explore such alleged repudiation in discovery.

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).

CONCLUSION

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: October 9, 2023

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