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.	**Re: Adv. D.I. 109**
IRON MOUNTAIN TRAP ROCK COMPANY, a Missouri corporation, and FRED WEBER, INC., a Delaware corporation.	
Defendants.	

IRON MOUNTAIN TRAP ROCK COMPANY AND FRED WEBER, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL DECLARATION OF SCOTT WAUGHTAL

1911563240322000000000001

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

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. [Adv. D.I. 14.] On August 9, 2022, Superior moved for summary judgment on its Second Claim for Relief ("Initial MSJ"), seeking a declaration that Defendants were "Operators" under Wisconsin law. [Adv. D.I. 42.] Defendants opposed that motion and cross-moved on the same count. [Adv. D.I. 48–49.]

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"). [Adv. D.I. 61.] In support of the Supplemental MSJ, Superior submitted two declarations from its current President and CEO, Scott Waughtal: the first on April 13, 2023, filed concurrently with the Supplemental MSJ [Adv. D.I. 64, the "First Declaration"] and the second on August 22, 2023, filed two days before Defendants' deadline to respond to the Supplemental MSJ [Adv. D.I. 74, the "Second Declaration"]. On August 24, 2023, Defendants moved to strike both declarations. [Adv. D.I. 76, 92.]

On March 4, 2024, twenty-two days before oral argument on the Initial MSJ and the Supplemental MSJ is scheduled to take place, Superior moved for leave to file yet another declaration from Mr. Waughtal ("Motion for Leave"), which it contends is necessary to "update" the Court on its claimed damages. [Adv. D.I. 109 at 2.] To date, Superior has not provided a copy of Mr. Waughtal's latest proposed declaration to either the Court or Defendants.

INTRODUCTION

Superior chose to file its Supplemental MSJ in April 2023, asking the Court to enter judgment in its favor on its breach of contract claim as a matter of law as to both liability and

damages. It did so despite the facts that (1) no dispositive motion deadline has been set in this case and (2) after the filing, both Mr. Waughtal and Superior's contractor, Doug Nesja, admitted in deposition testimony that whole categories of damages are "up in the air." [Adv. D.I. 78 at 45.] To be entitled to summary judgment on a breach of contract claim, however, damages must be proven with "reasonable certainty." For this reason (and many others), Defendants argued in their opposition brief, filed in August 2023, that Superior's Supplemental MSJ should be denied.

In seeking leave to file yet another declaration from Mr. Waughtal nearly one year after filing the Supplemental MSJ, Superior continues to treat its alleged damages as the nebulous, moving target that they are, further underscoring the impropriety of its premature Supplemental MSJ. Indeed, even today, Superior admits its claimed damages ***still*** remain uncertain, as it represents in its Motion for Leave that it has carried out "***most*** of the ***estimated*** costs for Phase I" and now has a "firm ***estimate*** for the cost of Phase II reclamation to be performed in 2024" but is still "finalizing testing that will confirm the scope of Phase II reclamation" and, as such, is not able to provide the revised ***estimate*** until shortly before the scheduled hearing. [Adv. D.I. 109 at 3 (emphasis added).] As such, Defendants are now forced to respond to a motion for leave to file a declaration that has not been provided to either the Court or Defendants.

As an initial matter, it would be profoundly prejudicial to Defendants to allow Superior to "update" the summary judgment record without giving Defendants an opportunity to meaningfully respond, including by conducting discovery and introducing their own rebuttal damages evidence. Further, even if Defendants were given the opportunity to respond to this yet-to-be-disclosed supplemental declaration, such an opportunity would be a waste of time and resources, as the declaration still only purports to provide an "estimate" of Superior's alleged damages, no doubt subject to further "updates" at some undisclosed future date. And, importantly, there are a number

of arguments and claims contained in Defendants' Opposition and cross-motion set to be argued eight days from this filing that would render Superior's current request moot. For these reasons, the Motion for Leave should be denied.

SUMMARY OF ARGUMENT

1. Allowing Superior to "update" the summary judgment record with a revised damages estimate (which has yet to be disclosed to Defendants) just days before oral argument, and months after summary judgment briefing concluded, without giving Defendants the opportunity to evaluate the work plan and test the accuracy of such figures would be fundamentally unfair and prejudicial to Defendants.

2. As Superior's alleged damages still remain an "estimate," it would be futile and a waste of time and resources to allow Superior leave to file yet another declaration attesting to these estimated figures, which still remain subject to change.

STATEMENT OF FACTS

On April 13, 2023, concurrently with the Supplemental MSJ, Superior submitted the First Declaration, in which Mr. Waughtal claimed Superior's damages totaled $13,356,432. [Adv. D.I. 64 at 18.] Included in this figure were costs associated with the purchase of additional topsoil and "blasting and shaping high wall area." [*Id.*; *see also* Adv. D.I. 64-6 at 42.] Superior's contractor (Mr. Nesja), however, admitted in deposition testimony that it was uncertain whether ***any*** additional topsoil would be required and further admitted that no blasting would occur at the high wall. [Adv. D.I. 82 at ¶¶ 196–97.] The damages total in the First Declaration also included a $1.4 million line item for "bond premiums and collateral," which figure was based on nothing more than Mr. Waughtal's "guess" that 65 percent of the Quarry should have been reclaimed (by some undefined point in time). [Adv. D.I. 64 at 18; Adv. D.I. 82 at ¶¶ 206–07.]

On August 22, 2023, just two days before Defendants' opposition to the Supplemental MSJ was due, Superior submitted the Second Declaration. This Second Declaration purported to increase Superior's claimed damages by nearly one million dollars, from $13,356,432 to $14,257,359. [Adv. D.I. 74 at 5.] On August 24, 2023, Defendants moved to strike both declarations on the grounds that (1) Mr. Waughtal, who was not employed by Superior in any capacity when the relevant events took place and never set foot on the Quarry site until years after Defendants allegedly breached the WSSA, lacks the personal knowledge required by Fed. R. Civ. P. 56(c)(4); (2) the Second Declaration was untimely filed without leave; and (3) Mr. Waughtal conditioned the statements in the declarations as true and correct only "to the best of [his] knowledge, information, and belief," which fails to meet the requirements of 28 U.S.C. § 1746. [Adv. D.I. 76, 92.]

On March 4, 2024, Superior moved for leave to file yet another declaration from Mr. Waughtal to "update" the Court on Superior's alleged damages. [Adv. D.I. 109 at 2.] Superior did not attach a copy of the proposed declaration and has not otherwise provided a copy to Defendants.

LEGAL STANDARD

"A court has discretion to grant leave to supplement the record of a case." *Peninsula Advisors, LLC v. Fairstar Res. Ltd.*, No. CV 10-489-LPS, 2014 WL 491671, at *3 n.3 (D. Del. Feb. 5, 2014). However, where "the proposed supplementary information does not provide any new evidence or create any new questions of material fact that impact ruling on the pending Motion for Summary Judgment[,]" the motion for leave should be denied. *Jackson v. Ivens*, No. CIV.A. 01-559-JJF, 2010 WL 2802279, at *1 (D. Del. July 13, 2010) (citing *Edwards v. Pa. Turnpike*

Comm'n, 80 F. App'x 261, 265 (3d Cir. 2003)); *see also Hinkle v. City of Wilmington*, 205 F. Supp. 3d 558, 579 (D. Del. 2016) (same).

ARGUMENT

I. Granting Superior Leave to Revise its Alleged Damages Would be Unfairly Prejudicial.

Superior's Motion appears to rest on the faulty premise that, if it wins its Supplemental MSJ, it can simply tell the Court what its damages are and judgment will promptly be entered in that amount. It is, however, axiomatic that a defendant is entitled to rebut evidence presented by the plaintiff regarding any alleged damages; a plaintiff may not unilaterally "update" the Court with revised damages figures and not give the defendant an opportunity to challenge the evidence.

In suggesting a contrary conclusion, Superior cites just one case, *United States Bank N.A. v. B-R Penn Realty Owner, LP*, claiming it stands for the proposition that a court has "broad" discretion "to accept updated damages information." [Adv. D.I. 109 at 2.] In *B-R Penn*, the plaintiff alleged the defendant defaulted on its mortgage note, which note included a "lender expenses clause," requiring the defendant to pay all expenses and costs incurred by the plaintiff in the event of default. No. CV 21-0502, 2023 WL 4216091, at *1 (E.D. Pa. June 27, 2023). On March 2, 2023, ten months after the May 2022 bench trial, the court entered an order finding the defendant did, in fact, default on the mortgage. *Id.* In entering its order, the court requested that the plaintiff provide evidence of any expenses and costs it incurred between the bench trial and the entry of judgment (***not*** post-judgment) so that such damages could be properly awarded under the lender expenses clause. *Id.* The defendant objected to the court's decision to allow the plaintiff to supplement the record with evidence of expenses incurred between the bench trial and the entry of judgment, arguing that the court lacked the authority to request an updated damages calculation *sua sponte*. *Id.* In rejecting the defendant's objections, the court explained that the defendant "was

not prejudiced by [the] submission of updated lending expenses" because the court told the parties during the trial that "damages would be calculated as of the date of its Order entering judgment and updated documentation of damages might be requested" and—critically—the defendant "***had—and took—the opportunity to object to these revised calculations***." *Id.* at *2 (emphasis added).

Here, by contrast, Superior does not suggest Defendants should be given an opportunity to conduct discovery or otherwise respond to Superior's "updated" damages figures, which will be based on work at the Quarry not yet disclosed to Defendants. As the court in *B-R Penn* recognized, it would be fundamentally unfair to allow Superior to "update" the summary judgment record with revised, yet-to-be-disclosed claimed damages figures, including the bases for such calculations, just days before oral argument and without giving Defendants the opportunity to evaluate the work plan or test the accuracy of such figures, including by taking depositions and reviewing the yet-to-be-produced documents (if any) that serve as the basis of such calculations. This fundamental unfairness militates against granting Superior leave to file any supplemental declaration.[1]

II. Granting Superior Leave to File Yet Another Declaration, Which Still Only Purports to Provide an "Estimate" of Superior's Alleged Damages, Would be Futile and a Waste of Time and Resources.

Even if the Court gave Defendants an opportunity to respond to Superior's "updated" damages calculations in a meaningful way, including by engaging in fact and expert witness discovery, such an exercise would be a complete waste of time, as Superior admits that even the forthcoming "updated" damages figures remain subject to change, referring to them as a "firm

[1] The fact that Superior represents in its Motion for Leave that Phase II damages will be reduced is of no moment. [Adv. D.I. 109 at 3.] This representation only underscores how wildly inflated and unsupported Superior's claimed damages were when it filed the Supplemental MSJ. This does not change the fact that Defendants have the right to challenge any and all purported damages.

estimate." [Adv. D.I. 109 at 3.] As explained in Defendants' Memorandum of Law opposing the Supplemental MSJ, Superior carries the burden of proving its damages with reasonable certainty and, given the admittedly speculative nature of Superior's alleged damages, it failed to meet this burden. [Adv. D.I. 78 at 42–46.] Even now, nearly one year after the Supplemental MSJ was filed, this argument holds true, as Superior has already materially changed its damages calculation from its initial submission, admits in its Motion for Leave that its alleged damages still remain uncertain, and will only be able to provide the Court with an "estimate." [Adv. D.I. 109 at 3.] Indeed, Superior's failure to provide the Court with a copy of the declaration it seeks leave to file, or any documents in support, is because it is still "finalizing testing that will confirm the scope of Phase II reclamation," meaning its alleged damages still remain uncertain and subject to change.

In truth, Superior's *latest* attempted declaration only disproves its own statement of purportedly undisputed facts. [*E.g.*, Adv. D.I. 62 ¶¶ 125–26, 133.] Stated another way, while Superior has asked this Court to award it over ***thirteen million dollars*** at the summary judgment stage, it now seems to concede that it is not entitled to even close to that amount and its damages request then (and now) was uncertain and speculative, requiring denial of its Supplemental MSJ. *See, e.g.*, *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 634 (Wis. 1999) ("In Wisconsin a claimant cannot recover for speculative or conjectural damages."); *Plywood Oshkosh, Inc. v. Van's Realty & Const. of Appleton, Inc.*, 257 N.W.2d 847, 849 (Wis. 1977) (holding that an injured party must present "sufficient data" to allow the trial court or jury to "properly estimate the amount" of damages and that "a claimant's mere statement or assumption that he has been damaged to a certain extent without stating any facts on which the estimate is made is too uncertain.").

It would be futile and a waste of the Court's and the parties' time and resources to allow Superior leave to file yet another "supplemental" declaration that still does not even attempt to provide the Court or Defendants with Superior's actual alleged damages. Because the information Superior seeks to belatedly inject into the summary judgment record "does not provide any new evidence or create any new questions of material fact," *Jackson*, 2010 WL 2802279, at *1, the Court should not allow Superior to engage in this wasteful exercise.[2]

CONCLUSION

Superior could have waited to file its Supplemental MSJ once its alleged damages were reasonably certain and after Defendants have had a full opportunity to respond. It did not do so, instead choosing to move for summary judgment and asking the Court to award over thirteen to fourteen million dollars of damages that its own corporate declarant will now apparently concede were inflated at the time of filing. The Supplemental MSJ was premature when filed in April 2023 and remains premature today. Superior's Motion for Leave should be denied.

[2] Moreover, because there is the distinct possibility that the Court's ruling(s) on the pending summary judgment motions could moot this issue, it would be a further waste of time and resources to permit this filing.

Dated: March 18, 2024

/s/ Zhao Liu

Scott J. Leonhardt (DE 4885)
Zhao (Ruby) Liu (DE 6436)
THE ROSNER LAW GROUP LLC
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, MO 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.