IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: EMERGE ENERGY SERVICES LP[1], Reorganized Debtor.	Chapter 11 Case No. 19-11563 (TMH)
SUPERIOR SILICA SANDS LLC, a Texas limited liability company, Plaintiff, v. IRON MOUNTRAIN TRAP ROCK COMPANY, a Missouri Corporation, and FRED WEBER, INC., a Delaware corporation. Defendants.	Adv. Pro. No. 20-51052 (TMH)

MEMORANDUM ORDER

Before the Court are two motions for partial summary judgment filed by Superior Silica Sands LLC ("Superior") and two cross-motions for partial summary judgment filed by Iron Mountain Trap Rock Company ("IMTR") and Fred Weber, Inc. ("FWI") (together, the "Defendants").

Specifically, Superior filed its Motion for Summary Judgment on Second Claim for Relief (the "Superior Summary Judgment Motion Claim Two"),[2] and its

[1] The Reorganized Debtor in this case, along with the last four digits of the Reorganized Debtor's federal tax identification number, is Emerge Energy Services LP (2937). The Reorganized Debtor's address is 6500 West Freeway, Suite 800, Fort Worth, Texas 76116.
[2] D.I. 42.

Supplemental Motion for Partial Summary Judgment on Third Claim for Relief for Breach of Contract (the "Superior Summary Judgment Motion Claim Three").[3]

The Defendants filed their Cross Motion for Summary Judgment (the "Defendants' Cross Motion Claim Two")[4] and Cross-Motion for Partial Summary Judgment (the "Defendants' Cross Motion Claim Three").[5]

In its Summary Judgment Motion Claim Two, Superior seeks declaratory relief regarding Defendants' status and obligations as an "Operator" under the Wisconsin Reclamation Statute, Wis. Admin. Code NR § 135.01 et seq., and Chippewa County Code. In their Cross-Motion Claim Two, Defendants argue that the Wisconsin Reclamation statute does not contain a private right of action for Superior to obtain such relief.

In its Summary Judgment Motion Claim Three, Superior seeks entry of a judgment finding that Defendants breached their contractual duties under the Wet Sands Services Agreement (the "WSSA"), and awarding damages. In the Defendants' Cross Motion Claim Three, Defendants argue, in part, that Superior's claim should be dismissed based on the Defendants' right to offset their claims detailed in their proof of claim.

Also before the Court are two motions to strike filed by the Defendants. The Defendants first seek to strike the Declarations of Scott Waughtal for a lack of personal knowledge, reliance on inadmissible hearsay, untimely filings, and

[3] D.I. 61.
[4] D.I. 48.
[5] D.I. 80.

improper certification under 28 U.S.C. § 1746.[6] The Defendants also seek to strike portions of Superior's omnibus objection to the Defendants' Cross Motion Claim Two and reply brief in support of the Superior Summary Judgment Motion Claim Three.[7]

I. SUMMARY OF FACTS

Superior leases a non-metallic sand quarry (the "Quarry") in Chippewa Falls, Wisconsin.[8] On April 7, 2011, Superior and FWI entered into the WSSA.[9] Wisconsin law governs the WSSA.[10]

The WSSA required Superior to obtain and maintain "all federal, state and local permits and approvals necessary for [FWI] to extract the Mined Sand, construct, install and operate the Wash Plant and otherwise perform its obligations under [the WSSA] . . . ."[11] The WSSA also required Superior to include "all plans and requirements for reclamation of the Quarry Site."[12] On February 9, 2011, Superior submitted a nonmetallic mining permit application to Chippewa County, listing Superior as the "Applicant/Operator."[13] On May 2, 2011, Chippewa County

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[6] Defendants' Motion to Strike the Declarations of Scott Waughtal (the "Motion to Strike Waughtal Declarations") [D.I. 76].
[7] The "Motion to Strike Reply" [D.I. 97]
[8] Statement of Undisputed Facts [D.I. 43] (the "Superior Claim Two SUF") at 2.
[9] Superior First Amended Compl. [D.I. 14] Ex. A (the "WSSA") at 1; Defendants' Counterstatement of Undisputed Fact [D.I. 50] (the "Claim Two Counterstatement") ¶ 1.
[10] WSSA § 14.1; Superior Claim Two SUF ¶ 11; Claim Two Counterstatement ¶ 11.
[11] WSSA § 4.1(a); Superior Claim Two SUF ¶ 8.
[12] WSSA § 4.1(a).
[13] Defs.' Exs. to Response to Superior's Statement of Uncontroverted Facts [D.I. 51] (the "Def. First. Ex.. Index") Ex. 5.

issued a nonmetallic mining reclamation permit (the "2011 Permit") to Superior, identifying Superior as the "Operator."[14]

The 2011 Permit underwent several amendments, most recently on October 5, 2017 ("2017 Permit Amendment").[15] Superior applied for at least two more updated permits in which Superior identified itself as "Applicant/Operator," once on July 17, 2012, and again on August 17, 2017.[16] For both updated applications, Chippewa County issued permits identifying Superior as the "Operator."[17]

Section 1.3(b) of the WSSA obligated FWI to conduct the mining and production of sand from the Quarry, including "the mining of Mined Sand from the Quarry Site, the construction of the Wash Plant, and the operation of the Plant and Equipment."[18] The WSSA required FWI to "commence construction of a [the Wash Plant])" pursuant to the WSSA's schedule.[19] No later than one day after the completion of the construction of the Wash Plant, FWI was required to "commence mining and operations of the Wash Plant and production of the Product Sand."[20] FWI was obligated to mine and operate the Plant and Equipment of the Quarry in

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[14] Id. Ex. 9.
[15] Defendants' Response to Superiors Claim Three Statement of Uncontroverted Facts [D.I. 79] (the "Defendants' Claim Three SUF Response") ¶ 48; Decl. of Scott Waughtal in Support of Superior's Mot. for Summ. J. on Third Claim [D.I. 63] (the "Waughtal Decl. Claim Three") Ex. I.
[16] Def. First Ex. Index Exs. 21, 22.
[17] Id. Ex. 24, Id. Ex. 25.
[18] Superior Claim Two SUF ¶ 13; Claim Two Counterstatement ¶ 13; WSSA § 1.3(b). The WSSA includes in "Plant and Equipment" the Wash Plant, Contractor Equipment, and SSS Equipment. WSSA § 1.1(b). Contractor equipment includes "such other spare parts and equipment to the Quarry Site as are integral to the operation of the Wash Plant or necessary to produce Product Sand as required under this Agreement . . . ." Id. The parties reference a complete list of SSS Equipment as an exhibit to the WSSA. See WSSA § 1.2(h), Ex. D.
[19] WSSA § 1.1(b).
[20] WSSA § 1.2. The WSSA defines "Product Sand" as washed sand adhering to the requirements outlined in Exhibit C of the WSSA. See WSSA Ex. C.

accordance with the terms of the Mine Plan—a plan submitted to FWI by Superior.[21]

Section 5.1(e) of the WSSA addressed FWI's reclamation obligations, requiring FWI to be "responsible for all reclamation required pursuant to contractor's mining activity" while acknowledging that certain permits may require "reclamation of fully mined areas during the Term."[22]

The WSSA contained a take-or-pay pricing model.[23] It originally obligated Superior to purchase a minimum of 300,000 tons of Product Sand per Operational Year or to pay the difference of the minimum Product Sand and the actual amount of Product Sand purchased at a specified price.[24]

On March 17, 2011, engineering firm Short Elliott Hendrickson, Inc. ("SEH"), on behalf of Superior, submitted the first Non-Metallic Mining Reclamation Plan Narrative (the "Reclamation Plan") to Chippewa County.[25] The Reclamation Plan outlined five phases of mining operations, with each phase lasting approximately one year.[26] The Reclamation Plan contemplated "Reclamation Activities During Operations" with "[r]eclamation of the previous year's mine area [] begin[ning] with the next year's mining operations."[27] Final reclamation aimed to return the land "to sustain conventional agricultural crop production."[28] Under the Reclamation Plan,

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[21] WSSA § 5.1(a).
[22] Superior Claim Two SUF ¶ 9; Claim Two Counterstatement ¶ 9; WSSA § 5.1(e). The Term of the WSSA covers the effective date to the expiration of the Operational Period.
[23] WSSA § 6.5(a)
[24] WSSA § 6.5(a), Ex. E.
[25] Waughtal Decl. Claim Three Ex. H at 3; Def. First Ex. Index Ex. 26.
[26] Waughtal Decl. Claim Three Ex. H § 2.2.8.
[27] Id. §§ 2.2.7-9.
[28] Id. § 3.2.5.

structures, including berms, stockpiles, sediment basins, roads, stormwater ponds, and wet plants would be removed, followed by an application of soil at a specified grade and seeding of the land.[29]

On September 21, 2012, SEH prepared the Five Year Mine Site Development Plan (the "Five Year Plan").[30] The Five Year Plan served as a "planning document to assist in determining a sequence of operations on the Superior Silica Mine Site" covering operations from 2013-2017.[31] Further, the Five Year Plan "intended to assist [FWI] and its contractors with planning progressive earthwork and reclamation activities."[32] The Five Year Plan was never provided to Chippewa County.[33]

On December 21, 2012, SEH submitted a revised Non-Metallic Mining Reclamation Plan (the "Revised Reclamation Plan").[34] The Revised Reclamation Plan expanded to thirteen phases of site development and mining, with mining to commence in 2013 and expected to be completed in 2025.[35] Mining proceeded on phase 6, with each mining phase lasting approximately one year.[36] The Revised Reclamation Plan contemplated "Interim Reclamation" in which the "working face for each mining face [was] expected to remain open and unreclaimed until mining

[29] Id. § 3.2.2.
[30] Superior Claim Two SUF ¶ 34; Claim Two Counterstatement ¶ 34; See generally Decl. of Scott Waughtal in Support of Superior's Mot. for Summ. J. on Second Claim (the "Waughtal Decl. Claim Two") [D.I. 44] Ex. C.
[31] Waughtal Decl. Claim Two Ex. C § 1.0.
[32] Id.
[33] Def. First Ex. Index Ex. 110 ¶ 4.
[34] Defs. Ex. Index (the "Defs. Second Ex. Index") [D.I. 83] Ex. 71 § 6.5.
[35] Id. § 6.5.
[36] Id. § 8.0.

activities have been completed for that phase."[37] Interim reclamation included methods of grading, subsoil and topsoil redistribution, and revegetation and erosion control.[38] In part, the 2017 Permit Amendment required reclamation pursuant to the specifications of the Revised Reclamation Plan.[39]

The parties amended the WSSA four times.[40] The WSSA was first amended on April 24, 2011, changing payment dates and the pricing schedule of sand under the WSSA's take-or-pay provision.[41] On January 1, 2015, the parties executed a second amendment to the WSSA, changing the Operational Period and requiring an increase in the minimum purchase of sand from 300,000 tons to 500,000 tons, among other changes.[42] The third amendment to the WSSA, executed on December 23, 2015, suspended mining operations during the 2016 calendar year, to be resumed on January 1, 2017, and similarly suspended Superior's obligation to purchase sand under the take-or-pay provision.[43] The Third Amendment extended the Operational Period of the mine through December 31, 2022.[44] The parties entered into a fourth and final amendment on April 19, 2017 that further amended the pricing under the take-or-pay provision.[45]

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[37] Id.
[38] Id.
[39] Defendants' Claim Three SUF ¶ 49; Waughtal Decl. Claim Three Ex. I at 2.
[40] Claim Two Counterstatement ¶¶ 32, 39, 45, 49.
[41] Waughtal Decl. Claim Two Ex. B; WSSA § 6.5(a); Defendants' Claim Three SUF Response ¶¶ 25-26.
[42] See Waughtal Decl. Claim Two Ex. D.
[43] Waughtal Decl. Claim Two Ex. E; Superior's Statement of Undisputed Facts in Support of Claim Three [D.I. 62] ¶ 32.
[44] Waughtal Decl. Claim Two Ex. E § 1.2.
[45] Waughtal Decl. Claim Two Ex. F; Defendants' Claim Three SUF Response [D.I. 79] ¶ 36.

On December 21, 2016, while mining operations at the Quarry were suspended, Superior's then-President and CEO of Richard J. Shearer sent a notice of default to FWI.[46] Mr. Shearer asserted that FWI "failed to conduct proper reclamation activities" and failed "to comply with [Superior's] Chippewa County mining reclamation permit, [Superior's] approved reclamation plan, Wisconsin Administrative Code NR 135, and Chippewa County's Nonmetallic Reclamation Ordinance."[47] Superior demanded that FWI cure its defaults upon recommencing operations on January 1, 2017.[48] On December 28, 2016, Mr. Shearer sent a follow up letter reasserting the same claims.[49]

On June 6, 2018, FWI assigned certain of its rights, interests, and obligations under the WSSA to IMTR through the Assignment and Assumption Agreement (the "Guaranty").[50] As part of the assignment, FWI provided a guaranty of IMTR's obligations under the Agreement.[51] The Guaranty provided, in part, that "subject to the terms and conditions of the [WSSA], [FWI] hereby assigns, transfers, grants, bargains, delivers and conveys to [IMTR] all of [FWI's] right, title and interest in and to the [WSSA]."[52] In turn, IMTR "assumes [FWI's] liabilities and obligations under the [WSSA] and agrees to perform each and every obligation of [FWI] thereunder."[53]

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[46] Waughtal Decl. Claim Three Ex. K.
[47] Id. at 2.
[48] Id.
[49] Waughtal Decl. Claim Three Ex. L.
[50] Claim Two Counterstatement ¶¶ 52-54.
[51] Id. ¶¶ 55-56.
[52] Waughtal Decl. Claim Two Ex. G § 1.
[53] Id. § 2.

On November 2, 2018, IMTR sent Superior an invoice (the "November 2018 Invoice") for $1,204,506.80 for services provided during October 2018.[54] Superior confirmed receipt of the invoice and promised to pay the amount in full.[55] The WSSA provided Superior with thirty-five days from receipt to pay the invoice; late payments accumulated interest at a rate of twelve percent per annum, or the maximum rate permitted by law.[56] On April 19, 2019, Superior paid IMTR $25,000 on the invoice, which by that point had accumulated $40,095.22 of interest.[57] Leading up to July 15, 2019, the invoice accumulated additional interest.[58]

On July 15, 2019, Superior and its affiliates filed chapter 11 petitions.[59] On July 16, 2019, Superior filed a motion to reject certain executory contracts and unexpired leases and abandon remaining personal property.[60] The motion included the WSSA and the four WSSA amendments among the rejected executory contracts.[61] On August 14, 2019, the Court entered an order authorizing the rejection of the WSSA and its amendments.[62] Superior confirmed a plan of reorganization on December 19, 2019.

On August 16, 2019, IMTR filed Proof of Claim No. 31 (the "IMTR POC") asserting a claim for $32,334,905.00 for the "[m]ining and wet processing of sand."

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[54] Defs. Second Ex. Index Ex. 44; Defs. Add'l Undisputed Facts [D.I. 82] ¶ 148.
[55] Superior's Response to Def.'s Add'l Statement of Undisputed Facts [D.I. 88] ¶¶ 149-50.
[56] WSSA §§ 6.2, 6.7.
[57] Defs. Add'l Undisputed Facts ¶ 151; see Waughtal Decl. Claim Three Ex. R at 89.
[58] See Waughtal Decl. Claim Three, Ex. R at 89.
[59] Superior Claim Two SUF ¶ 57; Claim Two Counterstatement ¶ 57.
[60] Claim Two Counterstatement ¶ 58.
[61] Waughtal Decl. Claim Three Ex. Q; Waughtal Decl. Claim Two Ex. H at 21-20.
[62] Claim Two Counterstatement ¶ 61; Waughtal Decl. Claim Two Ex. I.

II. JURISDICTION AND VENUE

This proceeding is brought pursuant to Rules 7001(2) and 7001(9) of the Federal Rules of Bankruptcy Procedure. The Court has subject matter over this proceeding under 28 U.S.C. §§ 157(b) and 1334(b). This is a core proceeding under 28 U.S.C. 157(b)(2). Venue is proper in this district under 28 U.S.C. § 1409(a).

III. PROCEDURAL HISTORY

On December 23, 2020, Superior commenced this adversary proceeding.

On March 18, 2021, Defendants filed a motion to dismiss the complaint.[63] On August 26, 2021, this Court granted in part and denied in part the Defendants' motion.[64] On August 9, 2022, Superior filed the Motion for Summary Judgment Claim Two. On October 7, 2022, Defendants filed Cross Motion Claim Two.

On April 13, 2023, Superior filed Summary Judgment Motion Claim Three. On August 24, 2023, Defendants filed the Motion to Strike Waughtal Declaration and their Cross Motion Claim Three. Finally, on September 21, 2023, Defendants filed the Motion to Strike Reply. On March 26, 2024, this Court conducted a hearing regarding the pending motions.

IV. LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a court "shall grant summary judgment if [a] movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[65] A

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[63] D.I. 23.
[64] D.I. 31.
[65] Fed. R. Civ. P. 56(a); see Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 620 F.3d 237, 251 (3d Cir. 2010). Federal Rule of Bankruptcy Procedure 7056 applies Rule 56 in adversary proceedings.

material fact is limited to facts that "might affect the outcome of the suit under the governing law. . ."[66] To "demonstrate the existence of a genuine issue of material fact, the nonmovant must supply sufficient evidence (not mere allegations) for a reasonable jury to find for the nonmovant."[67]

Rule 56 "requires the moving party to make a prima facie showing that it is entitled to summary judgment."[68] Any inferences drawn from the facts presented "must be viewed in the light most favorable to the [nonmovant]."[69] The moving party ultimately bears the burden of persuasion to convince the court that a trial is unnecessary.[70]

V. DISCUSSION

a. *Motions to Strike*

1. The Motion to Strike Waughtal Declarations is Denied.

Defendants move to strike the three declarations of Scott Waughtal on three grounds. First, the Defendants argue that the Declaration in Support of the Third Claim[71] lacks the personal knowledge required by Rule 56(c)(4). Second, the Defendants argue that the supplemental declaration[72] is time barred because Superior filed it after Mr. Waughtal's deposition and only two days before Defendants' deadline to respond to Superior's supplemental motion for summary

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[66] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see Forrest v. Parry, 930 F.3d 93, 105 (3d Cir. 2019).
[67] Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996); see Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).
[68] Celotex, 477 U.S. at 331.
[69] United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).
[70] Celotex, 477 U.S. at 331, n.2.
[71] D.I. 63.
[72] D.I. 74.

judgment. Finally, Defendants assert that Mr. Waughtal failed to properly certify any of his declarations as required by 28 U.S.C. § 1746.

A. Mr. Waughtal had personal knowledge under Federal Rule of Civil Procedure 56(c)(4) and the December 2016 Letters constitute admissible hearsay under Federal Rule of Evidence 803(6)

FWI asserts that Scott Waughtal lacks first-hand personal knowledge of the business records discussed in the Declaration in Support of the Third Claim because they were produced before his tenure as CEO.[73] FWI argues that Mr. Waughtal relied on inadmissible evidence to form his views set forth in the Declaration in Support of the Third Claim. Mr. Shearer sent two letters in December 2016 (the "December 2016 Letters") notifying FWI of its default under the WSSA for failure to reclaim the mine.[74] Superior argues that the December 2016 Letters constitute inadmissible hearsay that form the basis of Mr. Waughtal's declaration.

Rule 56(c)(4) requires a declaration to "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[75] Personal knowledge "can come from review of the contents of files and records."[76] Courts infer personal

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[73] Memorandum of Law in Support of Mot. to Strike Waughtal Decls. [D.I. 77] (the "Mot. to Strike Waughtal Decl.") at 6-8.
[74] See Waughtal Decl. Claim Three Ex. K (the "December 21 Default Letter"); Waughtal Decl. Claim Three Ex. L (the "December 28 Default Letter").
[75] Fed. R. Civ. P. 56(c)(4).
[76] Lo Sia v. BAC Home Loans Servicing (In re Lo Sia), Case No. 10-41873, 2013 Bankr. LEXIS 3559, at *14 (Bankr. D.N.J. Aug. 27, 2013) (quoting Wash. Cent. R.R. Co. v. Nat'l Mediation Bd., 830 F. Supp. 1343, 1353 (E.D. Wash. 1993)).

knowledge when the information relied on falls within the "sphere of responsibility" of the declarant.[77]

The review of Superior's business records falls within the sphere of Mr. Waughtal's responsibility, meaning we can infer his personal knowledge of the information. Mr. Waughtal served as Superior's COO starting in December 2019 and became President and CEO of Superior in July 2021 following Superior's reorganization.[78] Mr. Waughtal's review of the books and records as President and CEO demonstrates he possessed the requisite personal knowledge to testify competently to the matters stated in his Declaration in Support of the Third Claim.[79]

Defendants further challenge the Declaration in Support of the Third Claim, arguing that Mr. Waughtal relied on inadmissible hearsay contained in the December 2016 Letters. Under Rule 803(6) of the Federal Rules of Evidence, hearsay[80] is admissible as a record of a regularly conducted activity. This is known colloquially as the "business records exception."[81] A record will be admitted if "(1)

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[77] Hodges v. Exxon Corp., 563 F. Supp. 667, 669 (M.D. La. 1983) (quoting Rutledge v. Liability Ins. Industry, 487 F. Supp. 5 (W.D. La. 1979); accord Insight Equity A.P. X, LP v. Transitions Optical, Inc., Case No. 10-635-RGA, 2016 U.S. Dist. LEXIS 85751, at *49 (D. Del. June 30, 2016) ("As long as the declaration states facts within the declarant's "sphere of responsibility," a court may infer that the declarant has the requisite personal knowledge and is competent to testify."); Giuliano v. RPG Mgmt. (In re NWL Holdings, Inc.), Case No.08-12847, 2013 Bankr. LEXIS 2360, at *15 (Bankr. D. Del. June 4, 2013).

[78] Decl. Scott Waughtal in Support of Supp. Mot. for Partial Summ. J. on Third Claim [D.I. 63] (the "Waughtal Decl. Third Claim") ¶ 1.

[79] See Insight Equity A.P. X, LP, 2016 U.S. Dist. LEXIS 85751, at *49. ("As long as the declaration states facts within the declarant's "sphere of responsibility," a court may infer that the declarant has the requisite personal knowledge and is competent to testify.")

[80] Rule 801 defines hearsay as a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c).

[81] Fed. R. Evid. 803(6).

the record was made in the regular practice of the business, (2) kept in the regular course of the business, (3) made by a person with knowledge, and (4) made at or near the time of the event recorded."[82] Rule 803(6)(D) requires a "custodian or another qualified witness" to show that the records fulfill the requirements.[83] The term "another qualified witness" is construed broadly; "[t]he witness need only have enough familiarity with the record-keeping system of the entity in question to explain how the record came into existence in the course of a regularly conducted activity of the entity."[84] A record is admissible under Rule 803(6) if "the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[85]

Superior's December 2016 letters to FWI constitute admissible hearsay under Rule 803(6). In his Declaration in Support of his Third Claim, Mr. Waughtal states that he located "a true and correct copy" of each letter "in Superior's files, maintained in the ordinary course of business."[86]

Mr. Waughtal is a qualified witness. The Defendants attempt to undermine Mr. Waughtal's personal knowledge by pointing to Mr. Waughtal's deposition testimony. In that testimony, Mr. Waughtal concedes that he did not know exactly

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[82] Hechinger Liquidation Trust v. Rager (In re Hechinger Inv. Co. of Del., Inc.), 298 B.R. 240, 242 (Bankr. D. Del. 2003).
[83] Fed. R. Evid. 803(6)(D).
[84] 5 Weinstein's Federal Evidence § 803.08 (2024); see also Falco v. Alpha Affiliates, Case No. 97-494 MMS, 2000 U.S. Dist. LEXIS 7480, at *50 (D. Del. Feb. 9, 2000) ("Circumstantial evidence of the elements of Rule 803(6) is sufficient to lay a foundation for admissibility.").
[85] Fed. R. Evid. 803(6); see also In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 289 (3d Cir. 1983) ("Given the separate treatment in Rule 803(6) of untrustworthiness, we think the regular practice requirement should be generously construed to favor admission.") rev'd on other grounds, sub nom., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
[86] Waughtal Decl. Claim Three ¶¶ 14, 16.

whether Mr. Shearer wrote the letters, or if someone else prepared the letters.[87] But Mr. Waughtal need not have specific knowledge of who prepared the letter; he only needs to demonstrate sufficient knowledge of the record keeping system to be a "qualified witness."[88]

The Defendants have not demonstrated that the records are not trustworthy. Circumstantial evidence points to the validity of the letters. The letters were sent on official letterhead bearing Superior's logo. As the former COO and now President and CEO, Mr. Waughtal would have sufficient knowledge of correspondence sent out from the President and CEO and the procedures to maintain the correspondence in the books and records of the company. Finally, the letters were produced in discovery, indicating that the letters were maintained among the company's books and records.

Accordingly, the Court determines that Mr. Waughtal has personal knowledge under Rule 56(c)(4), and that the December Letters are admissible under Rule 803(6).

B. Defendants were not prejudiced by a late filing

Defendants argue that Mr. Waughtal's supplemental declaration[89] was filed late. Superior filed Mr. Waughtal's supplemental declaration on August 22, 2023.[90] The Defendants point out that Superior filed the supplemental declaration only two

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[87] Waughtal Testimony Ex. 1 96:11-12, 98:4-15, 106:19-107:2, 147:25-148:14.
[88] Fed. R. Evid. 803(6)(D).
[89] Supp. Decl. of Scott Waughtal in Support of Superior's Supp. Mot. for Summ. J. on Third Claim for Relief (the "Supp. Waughtal Decl.") [D.I. 74].
[90] Mot. to Strike Waughtal Decl. at 11.

days before the Defendants' deadline to reply and, more importantly, after Mr. Waughtal's deposition.[91] The Defendants ask the Court to use its inherent powers to "strike untimely filed pleadings in order to ensure the effective administration of their dockets, prevent undue delay, and guard against prejudice to the opposing party."[92]

"[M]atters of docket control and conduct of discovery are committed to the sound discretion of the district court."[93] The supplemental declaration simply updates the total estimate of damages from Superior's reclamation of the Quarry in the interim period following Mr. Waughtal's first declaration.[94] The Defendants were not prejudiced. The supplemental declaration is not untimely.

C. Mr. Waughtal's Declarations substantially conformed with the requirements of 28 U.S.C. § 1746

The Defendants move to strike all three of Mr. Waughtal's declarations on the grounds that they do not conform to 28 U.S.C. § 1746. Section 1746(2) requires a person to certify a declaration executed within the United States substantially in the form "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)."[95] The Defendants contend that Mr. Waughtal's declarations do not meet the requirements of section 1746 because Mr. Waughtal certified that "to the best of [his] knowledge,

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[91] Id. at 12.
[92] Defs. Memorandum of Law in Support of Mot. to Strike Decls. of Scott Waughtal [D.I. 77] (the "Mot. to Strike Waughtal Decls.") at 12.
[93] In re Fine Paper Antitrust Litig., 685 F.2d 810, 817 (3d Cir. 1982) (citing Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 877 (3d Cir. 1981); Borden Co. v. Sylk, 410 F.2d 843, 845 (3d Cir. 1969)).
[94] Compare Waughtal Decl. Claim Three with the Supp. Waughtal Decl..
[95] 28 U.S.C. § 1746(2).

information, and belief, the foregoing is true and correct."[96] Defendants argue that testifying to the best of his knowledge is not equivalent to testifying to the truth.[97]

Section 1746 requires the declaration be substantially in the form provided in the statute, not exactly in the form required in the statute.[98] Other courts have found Mr. Waughtal's language to be substantially similar to the language provided in section 1746.[99] Mr. Waughtal submitted his declarations under penalty of perjury. Accordingly, the Court determines that Mr. Waughtal's certification of his declaration was substantially similar to the language provided in section 1746. The Defendants' motion to strike Mr. Waughtal's declarations is denied.

2. For the reasons set forth below, infra Section V.c.1.b., the Court does not need to assess the Defendants' motion to strike 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 Its Third Claim for Relief

The Defendants move to strike 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 Its Third Claim for Relief. Defendants argue that Superior asserted new arguments on reply, contrary to Local Rule 7007-2(b)(ii).[100] Specifically, Defendants contend Superior asserts new

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[96] Waughtal Decl. Claim Two at 19, Waughtal Decl. Claim Three at 6.
[97] Mot. to Strike Waughtal Decls. at 14.
[98] See 28 U.S.C. § 1746.
[99] See e.g., Hamilton v. Mayor & City Council of Balt., 807 F. Supp. 2d 331, 353 (D. Md. 2011); Stewart v. Hartford Life & Accident Ins. Co., Case No. 2:17-CV-01423-KOB, 2021 U.S. Dist. LEXIS 87002, at *10-11 (N.D. Al. May 6, 2001); Smith v. Psychiatric Sols., Inc., Case No. 3:08cv3/MCR/EMT, 2009 U.S. Dist. LEXIS 27608, at *14-15 (N.D. Fla. Mar. 31, 2009); Overly v. Keybank Nat'l Ass'n, Case No. 1:08-cv-0662-SEB-TAB, 2010 U.S. Dist. LEXIS 64105, at *12-13 (S.D. Ind. June 23, 2010).
[100] Memorandum of Law in Support of Mot. to Strike Reply Brief (the "Mot. to Strike Reply") at 1-2. [D.I. 98].

arguments that Defendants breached the WSSA in July 2019 by removing personnel and equipment, and asserts a new theory of recovery of damages based on reclamation bond premiums.[101]

As discussed infra Sec. III.c.1.A, those arguments are immaterial to the Court's analysis. Accordingly, the Court denies the motion to strike as moot.

b. Summary Judgment Claim Two: Declaratory Relief Regarding Defendants' Status and Obligations as "Operators" Under the Wisconsin Reclamation Statute and Chippewa County Code; Defendants' Obligations Post-Rejection of the WSSA; and Weber's Guaranty Post-Rejection of the WSSA

Section 2201 of title 28 of the United States Code empowers a court to "declare the rights and other legal relations of any such interested party seeking such declaration."[102]

By its second claim for relief, Superior requests entry of three forms of declaratory judgment. First, Superior seeks entry of a judgment declaring (i) IMTR an "Operator" of the Quarry under the Wisconsin Reclamation Statute and Chippewa County Code, (ii) FWI as a guarantor of IMTR's obligations under the Wisconsin Reclamation Statute and Chippewa County Code, and (iii) IMTR and FWI obligated under the WSSA to perform the role of an "Operator."[103]

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[101] Id.
[102] 28 U.S.C. § 2201.
[103] Superior Mot. for Summ. J. Second Claim [D.I. 42] (the "Superior Mot. Summ. J. Claim Two") at 16.

Second, Superior requests entry of a judgment declaring that rejection of the WSSA does not release IMTR from its obligations as an "Operator" of the mine under the Wisconsin Reclamation Statute.[104]

Finally, Superior requests entry of a judgment declaring that FWI's guaranty of IMTR's obligations remains enforceable.[105]

1. The Wisconsin Reclamation Statute Does Not Provide a Private Right of Action, So Superior Cannot Obtain a Declaratory Judgment that IMTR and FWI are Operators

Superior seeks entry of a judgment declaring IMTR and FWI to be "Operators" under the Wisconsin Reclamation Statute and Chippewa County Code. Both Wisconsin state law and Chippewa County zoning ordinances define an "Operator" as "any person who is engaged in, or who has applied for a permit to engage in, nonmetallic mining, whether individually, jointly or through subsidiaries, agents, employees, contractors or subcontractors."[106] Superior asserts that IMTR's mining activity at the Quarry qualify it as an Operator, and that, as guarantor, FWI is responsible for IMTR's obligations as an Operator.

Superior admits that it is an "Operator" under the Wisconsin Reclamation statute because the WSSA required Superior to apply and obtain the permits for the non-metallic mining activity at the Quarry, but argues this was the extent of its activity.[107] But Superior argues that the terms of the Wisconsin Reclamation Statute allow for multiple "Operators."[108] In conjunction with the person obtaining

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[104] Id. at 24.
[105] Id. at 28.
[106] Wis. Admin. Code NR § 135.03(17); Chippewa County, Wis. Code § 30-38(17).
[107] Superior Mot. Summ. J. Claim Two at 16.
[108] Id. at 18.

permits, any "minimal activities at a mine" make a person an operator.[109] Superior contends that the terms of the WSSA demonstrate the parties intended "to have the Defendants act as the legal operator of the Quarry."[110]

Defendants argue that no private right of action exists under the Wisconsin Reclamation Statute or Chippewa County Code for Superior to obtain a declaratory judgment.[111]

"Whether a statute creates a private cause of action presents a question of statutory interpretation[; the Court's] goal is to 'ascertain and give effect to the legislature's intent.'"[112] Courts may only find a private right of action in Wisconsin statutes when "(1) the language or the form of the statute evinces the legislature's intent to create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the public."[113]

The Wisconsin Reclamation Statute does not create a private right of action. The purpose of the Wisconsin Reclamation Statute "is to require reclamation of nonmetallic mining sites."[114] The statute reserves all enforcement measures to local municipalities in coordination with the Wisconsin Department of Natural Resources and other local and state agencies. Section 135.31 requires counties to "enact and

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[109] Id. at 17.
[110] Id.
[111] Defs. Memorandum in Support of Cross-Mot. for Summ. J.. and in Opp. to Superior's Mot. for Summ. J. [D.I. 49] at 13.
[112] Farr v. Alt. Living Servs., 643 N.W.2d 841, 846 (Wis. Ct. App. 2002) (quoting Hausman v. St. Croix Care Ctr., Inc., 558 N.W.2d 893, 895 (Wis. Ct. App. 1996) rev'd on other grounds, 571 N.W.2d 393 (Wis. 1997)).
[113] Grube v. Duan, 563 N.W.2d 523, 526 (Wis. 1997).
[114] Wis. Admin. Code NR § 135.01.

administer a nonmetallic reclamation ordinance."[115] In the absence of a county regulation, the Wisconsin Department of Natural Resources "shall administer and enforce a nonmetallic mining reclamation program" while municipalities have discretion to enact a nonmetallic mining reclamation ordinance that conforms to the statute.[116] Operators are required to submit annual reports to the relevant regulatory authority, and the regulatory authority may inspect any mining site at will.[117] Only "[t]he regulatory authority that administers a nonmetallic mining reclamation ordinance . . . ." may enforce such an ordinance.[118] The relevant regulatory authority may issue compliance orders, revoke permits, submit abatement orders to relevant law enforcement agencies, and impose financial penalties on violators.[119] The statute evinces no intent to establish private civil liability. The statute merely provides for a general protection of the public.

Superior argues that it seeks to enforce a breach of contract claim, not a right to enforce the provisions of the Wisconsin Reclamation Statute or Chippewa County Code. To that end, the Defendants' status as operators is relevant to the extent that it helps "interpret [the] Court's Rejection Order and the legal implication thereof" and "interpret Wisconsin law and the related meaning and implications of this Court's Rejection Order as they pertain to the rights and obligations of Superior,

[115] Id. § 135.32(1).
[116] Id. § 135.32(2)-(3).
[117] Id. §§ 135.36(1), 135.42.
[118] Id. § 135.43(1).
[119] Id. § 135.43.

[FWI], and [IMTR], under the terms of the [WSSA] and applicable Wisconsin law."[120]

However, courts may not incorporate a statute into a contract if (i) that statute does provide a private right of action and (ii) that statute would serve as the basis for a breach of contract claim.[121]

Superior contends that its "primary right of recovery against Defendants is to recover damages under the [WSSA] for their breach of Section 5.1(e) . . . ."[122] To that end, Superior admits that "only if the Court denies this contract based claim that 'Operator' status will be important to a separate means to recovery, through common law claims for contribution and . . . equitable indemnity."[123] Through this theory, Superior seeks to engraft the definition of "Operator"—and its accompanying duties—onto the Defendants' obligations under the WSSA. That definition, in turn, "provides declaratory relief in aid of common law claims."[124]

Such declaratory relief is impermissible. The Court cannot engraft the terms of the Wisconsin Reclamation Statute onto the WSSA to define the obligations of the Defendants. Rather, it is the terms of the WSSA that define the obligations of the parties. Section 14.1 of the WSSA broadly states that the WSSA "shall be governed

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[120] Superior Reply in Support of Mot. for Summ. J. Claim Two [D.I. 53] (the "Superior Claim Two Reply") at 2.
[121] Frank B. Fuhrer Wholesale Co. v. Millercoors LLC, Case No. 13-1155, 2013 U.S. Dist. LEXIS 155253, at *20 (W.D. Pa. Oct. 30, 2013); see Umland v. PLANCO Fin. Servs., Inc., 542 F.3d 59, 67 (3d Cir. 2008) (dismissing breach of contract claims where the underlying statute relied upon did not create a private right of action).
[122] Superior Claim Two Reply at 3.
[123] Id.
[124] Id.

and construed in accordance with the laws of the state of Wisconsin."[125] But when defining the relationship of the parties, the WSSA merely defines FWI as "an independent contractor" and Superior as the "tenant and landlord[]."[126] Sections 4, 5, 7, and 8 define the obligations of Superior and the Defendants under the WSSA. Many of the Defendants' obligations under the WSSA comport with obligations that would be expected of an "Operator"—namely to conduct mining operations. But to read the term "Operator" into the contract creates additional obligations that the Wisconsin legislature did not intend for Superior to enforce through a private right of action. Based on the record before it, the Court will not declare Defendants to be "Operators" under the Wisconsin Reclamation Statute.

2. The Court will not Enter a Judgment Declaring the Rejections of the WSSA's Effect on IMTR and FWI as Guarantor

Superior seeks entry of a judgment that rejection of the WSSA "has not altered, disrupted, or released the obligations of [Defendants] as 'Operator' of the Quarry under the terms of the Wisconsin Reclamation Statute and the Chippewa Code."[127] In addition, Superior requests entry of a judgment declaring that "[FWI], as Guarantor under the Assignment, is a guarantor of [IMTR's] responsibilities and obligations as the 'Operator' of the Quarry under the terms of the Wisconsin Reclamation Statute and the Chippewa Code."[128] As stated above, in Section V.b.1, Superior seeks impermissible relief. The Court need not answer whether the rejection order affected the obligations of the IMTR under the WSSA or FWI as

[125] WSSA § 14.1.
[126] Id. § 9.
[127] First Amended Compl. ¶ 58(d).
[128] Id. ¶ 58(b).

guarantor because Superior seeks to cabin those obligations within those of the Wisconsin Reclamation Statute. For the foregoing reasons, the Defendants' cross-motion for summary judgment on Claim Two is granted.

c. Summary Judgment Claim Three: Defendants' Breach of Contract

Superior requests summary judgment on its third claim for relief. Superior claims that the WSSA obligated Defendants to carry out all reclamation activities in the Quarry, including final reclamation. Superior asserts that, in 2016, FWI breached its obligation to perform reclamation on the Quarry and that, together, the Defendants continue to breach their reclamation obligations. As a result, Superior claims it has suffered damages totaling $14,257,359 in the form of expenses related to its past and future reclamation activity.

1. Defendants May Not Offset Superior's Claim for Damages Under 11 U.S.C. § 553(a)

The Court must assess the Defendants' predicate issue of setoff in their cross-motion for partial summary judgment. The Defendants assert that they are entitled to set off their total claims, amounting to $32,334,904.87, against Superior's claimed damages of $14,257,359.[129] IMTR filed a proof of claim against Superior,[130]

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[129] Defs. Memorandum of Law in Support of Cross-Mot. for Summ. J. [D.I. 81] (the "Defs. Cross Mot. Third Claim") at 10; Supplemental Waughtal Decl. [D.I. 74] ¶ 15.

[130] The Defendants assert that they both maintain a valid, prepetition claim against Superior. Defs. Cross-Mot. Claim Three at 11-12. The proof of claim lists IMTR as the creditor, though it identifies FWI as an "[o]ther name[] the creditor used with the Debtor." Waughtal Decl. Claim Three Ex. R at 1. The proof of claim also included contact information from an individual from FWI for notices and payments. Id. at 1. After assigning its rights and obligations under the WSSA to IMTR in June 2018, FWI lost all right to receive payment for the November 2018 Invoice and it lost any right to receive the payment for take-or-pay provisions of the WSSA. Waughtal Decl. Claim Two Ex. G § 1 ("[FWI] hereby assigns, transfers, grants, bargains, delivers and conveys to [IMTR] all of [FWI's] right, title and interest in and to the [WSSA]."). The Court proceeds with its analysis assuming IMTR maintains a valid prepetition claim against Superior.

assert[ing] two bases of recovery in their proof of claim to offset against Superior's asserted damages. First, IMTR asserts a $1,244,904.87 claim for an invoice sent to Superior on November 1, 2018 for services provided through October 2018 and subsequently accrued.[131] Second, IMTR asserts a claim totaling $31,090,000 for Superior's alleged failure to pay IMTR.[132]

Bankruptcy Code section 553(a) permit a creditor, under certain circumstances, "to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case. . ."[133] A right to setoff exists when "(1) the creditor holds a 'claim' against the debtor that arose before the commencement of the case; (2) the creditor owes a 'debt' to the debtor that also arose before the commencement of the case; (3) the claim and debt are 'mutual'; and (4) the claim and debt are each valid and enforceable."[134] Mutuality is strictly construed by Courts to limit setoff only to "two parties, specifically those owing from a creditor directly to the debtor and, in turn, owing from the debtor directly to that creditor."[135] A right to setoff is further limited to

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[131] Id. at 8.
[132] See id. at 9-10.
[133] 11 U.S.C. 553(a); Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995) ("The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'") (quoting Studley v. Boylston Nat'l Bank, 229 U.S. 523, 528 (1913)).
[134] Pardo v. Pacificare of Tex., Inc. (In re APF Co.), 264 B.R. 344, 354 (Bankr. D. Del. 2001) (quotations omitted).
[135] In re Orexigen Therapeutics, Inc., 990 F.3d 748, 754 (3d Cir. 2021).

"opposing obligations aris[ing] on the same side of the . . . bankruptcy petition date."[136]

IMTR does not have a right to set off its pre-petition debts against Superior's post-petition damages. IMTR asserts a proof of claim for failure to pay the November 2018 Invoice and liquidated damages from the rejection of the WSSA. Both sets of damages occurred prepetition. However, Superior's asserted damages from reclamation work beginning in 2022 are post-petition damages, disqualifying IMTR from setoff.[137] Accordingly, neither FWI nor IMTR has a right to setoff damages against Superior's post-petition damages.

2. Superior Does not Meet the Standard of Rule 56 Required to Enter Judgment on the Third Claim for Relief

Superior seeks the entry of a judgment declaring that Defendants breached their obligations under the WSSA to carry out all reclamation, including final reclamation. Superior asserts that IMTR, as assignee under the WSSA, and FWI, as Guarantor of IMTR's performance, have an ongoing obligation to carry out final reclamation—an obligation established prepetition. Superior argues that Defendants initially breached this duty beginning as early as December 2016, when Superior notified FWI that it breached the WSSA by failing to commence reclamation on the mine. Superior argues that this breach is an ongoing breach, and that Defendants' continued refusal to engage in final reclamation constitutes a

[136] Off. Comm. of Unsecured Creditors of Quantum Foods, LLC v. Tyson Foods, Inc. (In re Quantum Foods, LLC), 554 B.R. 729, 734 (Bankr. D. Del. 2016) (ellipsis in original).
[137] Waughtal Decl. Claim Three ¶ 23.

prepetition breach of the WSSA. Superior asserts continuous damages regarding the Defendants ongoing breach.

The Defendants assert that the rejection of the WSSA relieved the Defendants from their performance obligations under the WSSA. Second, the Defendants assert that the WSSA only required the Defendants to perform interim reclamation, not final reclamation.

A. The terms of the WSSA are ambiguous

The Court first looks to the WSSA's terms to determine the parties' obligations because courts are to examine the language of the contract to determine the intent of the parties.[138] The Court interprets the language of a contract language according to its ordinary meaning.[139] If the Court determines the contract to be unambiguous, the Court's inquiry into "the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence."[140] If the Court determines that the contract is ambiguous, it considers extrinsic evidence to determine the parties' intent.[141] "A contract provision is ambiguous if it is fairly susceptible of more than one construction."[142]

The WSSA is susceptible to more than one meaning and thus is ambiguous. Section 5.1(e) of the WSSA required FWI to "be responsible for all reclamation required pursuant to the Contractor's mining activity hereunder."[143] The term "all

[138] Town Bank v. City Real Estate Dev., LLC, 793 N.W.2d 476, 484 (Wis. 2010) (citation omitted).
[139] Id. (citing Huml v. Vlazny, 716 N.W.2d 807, 820 (Wis. 2006)).
[140] Huml, 716 N.W.2d at 820.
[141] Cap. Inv., Inc. v. Whitehall Packing Co., 280 N.W.2d 254, 259 (Wis. 1979).
[142] Mgmt. Comput. Servs. v. Hawkins, Ash, Baptie & Co., 557 N.W.2d 67, 75 (Wis. 1996).
[143] WSSA § 5.1(e).

reclamation" could certainly mean that the Defendants would be responsible for both interim and final reclamation. In addition, section 5.1(a) requires the Defendants to mine sand and operate and maintain the Plant and Equipment pursuant to, among other items, the SSS Permits.[144] The SSS Permits require compliance with the Reclamation Plan and Revised Reclamation Plan.[145] The Revised Reclamation Plan contemplates interim and final reclamation.[146] Superior also points to section 4.3(b), titled "Contractor Responsible for Ongoing Conditions," which requires FWI to "comply with the SSS Permits . . . pertaining to the control and regulation of hazardous materials and substances or the protection of the environment."[147]

But the contract terms can be interpreted to mean that Defendants were only obligated to undertake interim reclamation. Section 5.1(a) requires FWI to "mine the Mined Sand and operate and maintain the Plant and Equipment in accordance with" the referenced standards and documents.[148] But Plant and Equipment is limited to the operation and maintenance of the Wash Plant, Superior's equipment, and FWI's equipment—not the Quarry as a whole. Nor does the requirement for FWI to "mine the Mined Sand" explicitly include reclamation activities. As for section 4.3(b), its plain terms "pertain[] to the control and regulation of hazardous

[144] WSSA § 5.1(a).
[145] Waughtal Decl. Third Claim Ex. I at 1.
[146] Defs. Second Ex. Index 71 §§ 8.0, 9.0.
[147] WSSA § 4.3(b). Superior maintains responsibility for remediating pre-existing hazardous materials and substances and environmental protection procedures. WSSA § 4.3(a).
[148] WSSA § 5.1(a).

materials and substances or protection of the environment[,]" a separate obligation from FWI's mining or reclamation obligations.[149]

More importantly, the Court recognizes the limited duration of the WSSA in relation to the expected duration of the Quarry. The WSSA set out an explicit "Operational Period" of five years between the "Operational Period Commencement Date"—that is, the day after FWI constructed the Wash Plant—and the end of the Operational Period.[150] The "Term" of the WSSA lasted from the effective date of the WSSA to the end of the Operational Period.[151] The Third Amendment to the WSSA extended the Operational Period, and thus the Term of the WSSA, to December 31, 2022.[152]

The documents referenced within the WSSA contemplate a longer timeline for mining activities, whether undertaken by FWI or another party. The 2017 Amendment to the SSS Permits required all mining and reclamation to be conducted in compliance with, in part, the Revised Reclamation Plan.[153] The Revised Reclamation permit set forth thirteen phases of development and mining under which "mining would be completed by approximately 2025."[154] The terms of the WSSA, and the documents referenced therein, demonstrate that mining activity very well could have survived the end of the WSSA's Term. A transfer of mining responsibilities was contemplated under the WSSA; upon "natural expiration or

[149] WSSA § 4.3(b).
[150] WSSA § 1.2.
[151] WSSA § 1.5.
[152] WSSA, 3d Amend. § 1.
[153] Waughtal Decl. Third Claim Ex. at 1.
[154] Defs. Second Ex. Index Ex. 71 § 6.5.

termination" of the WSSA, Superior maintained the right to operate the Handover Assets[155] "for purposes of operating and maintaining the Plant and Equipment . . . ."[156] Whether by the natural expiration or termination of the WSSA, operations at the mine could survive the WSSA. Reading section 5.1(e) in this context, any "mining activity hereunder" refers only to mining activity occurring under the WSSA without regard to potential further mining activity under a separate agreement. Such a reading is reinforced by the second sentence of section 5.1(e),[157] but final reclamation is neither guaranteed nor required in the mining activity contemplated by the WSSA.

B. Extrinsic Evidence does not prove the intent of the parties under the standard of Rule 56

Having found ambiguity in the WSSA's terms, the Court now considers extrinsic evidence to determine the intent of the parties. Drawing all inferences in a light most favorable to the Defendants as the nonmoving parties, the Court determines that a reasonable jury could find in favor of the Defendants. Defendants assert that, given the suspension of mining operations in 2016, the mine still had eight years of mining activity left.[158] Superior counters by arguing that "future mining years would hinge primarily on the volume of mining carried out in each future year . . . ."[159] Such an assertion lends credence to FWI's argument that

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[155] Handover assets include "the Wash Plant, SSS Equipment, and all Contractor Equipment other than Non-Permanent Contractor Equipment, . . . the TPS Subcontract . . . [and] all related books and records, any materials, real property interests, warranties, and related assets associated with the Wash Plant and the SSS Equipment." WSSA § 1.4(b).
[156] WSSA § 1.4(d).
[157] WSSA § 5.1(e).
[158] Defs. Add'l Undisputed Facts ¶ 171.
[159] Id. ¶ 171.

mining operations were not tied solely to the WSSA, but instead considered factors such as mining productivity. Indeed, in Superior's 2017 permit application to Chippewa County, dated August 17, 2017, Superior estimated a thirty-five-to-forty-year total life of the Quarry.[160]

Superior asserts that Defendants' own negotiations demonstrate the Defendants' understanding that "all reclamation" constituted interim and final reclamation. In settlement negotiations,[161] Defendants twice revised the reclamation section of the WSSA to limit reclamation to "contemporaneous reclamation activities" while requiring Superior to undertake final reclamation.[162] The second revision came in response to one of Superior's own revisions, which explicitly required FWI to undertake final reclamation.[163] While Superior asserts that the revision demonstrates that Defendants were on notice in 2018 of Superior's contention that Defendants were responsible for final reclamation, Superior's revision amounts to nothing more than an attempt to negotiate terms.

C. Superior is not entitled to additional time for discovery under Rule 56

Superior requests[164] additional time under Rule 56(d) to take depositions of "witnesses whose testimony has expressed views about final reclamation contrary to

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[160] Defs. Second Ex. Index Ex. 10 at 2.

[161] Superior asserts that Defendants waived any protections under Federal Rules of Evidence Rule 408. Defendants do not dispute this assertion in their reply. Notwithstanding, the evidence presented does not alter the Courts findings.

[162] Decl. of Scott Waughtal in Opp. to Cross-Mot. [D.I. 91] (the "Waughtal Decl. Opp.") Ex. SS at 6, 5.1(d); Ex. M at 9.

[163] Waughtal Decl. Opp. Ex. TT 5.1(d).

[164] "[A] formal motion is not required to request discovery under Rule 56 . . . ." Shelton v. Bledsoe, 775 F.3d 554, 567 (3d Cir. 2015).

the evidence, among others."[165] Rule 56(d) authorizes a court to grant additional time for discovery if "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition."[166] Courts generally grant requests for discovery under Rule 56(d) "as a matter of course."[167] To obtain additional discovery under Rule 56(d), the party "should state what particular information is sought, how such information would preclude summary judgment and why it has not been obtained previously."[168]

But Superior is the moving party, while Rule 56(d) only allows for additional time for nonmovants. Defendants filed a cross-motion, but regarding Superior's breach of contract claims. The cross-motion merely addresses the arguments asserted in Defendants' reply. As the moving party, Superior is not entitled to relief under Rule 56(d). Notwithstanding, Superior provides no information regarding what information it seeks, how much information, or how such information would affect Defendants' cross-motion, which the Court has denied. Accordingly, the Defendants' request for additional discovery under Rule 56(d) is denied.

VI. CONCLUSION

For the foregoing reasons, the Court (i) denies the Defendants' Motion to Strike Waughtal Declaration (ii) denies the Defendants' Motion to Strike Reply; (iii) denies the Superior Motion for Summary Judgment Claim Two; (iv) denies the

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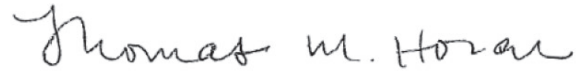
[165] Superior's Omnibus Br. in Opp. to Defs. Cross-Mot. for Summ. J. [D.I. 87] at 11.
[166] Fed. R. Civ. P. 56(d).
[167] In re Avandia Mktg., Sales & Prods. Liab. Litig., 945 F.3d 749, 761 (3d Cir. 2019) (citations omitted).
[168] Deb Shops SDFMC LLC v. 2253 Apparel, Inc. (In re Deb Stores Holding LLC), Case No. 14-12676 (KG), Adv. Pro. No. 16-51003 (KG), 2018 Bankr. LEXIS 903, at *25 (Bankr. D. Del. Mar. 28, 2018).

Superior Motion for Summary Judgment Claim Three; (v) grants the Defendants' Cross Motion Claim Two; and (vi) denies the Defendants' Cross Motion Claim Three.



Dated: November 5, 2024
Wilmington, Delaware

Thomas M. Horan
United States Bankruptcy Judge