UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA INDIAN NATION,

Plaintiff,

v.

MELVIN L. PHILLIPS, SR., individually and as trustee, and MELVIN L. PHILLIPS, SR. / ORCHARD PARTY TRUST,

Defendants.

Civil Case No. 5:17-cv-1035 (GTS/ATB)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE SECTION C OF PLAINTIFF'S REPLY BRIEF

Eric N. Whitney
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836 8000
eric.whitney@arnoldporter.com

Attorneys for Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Defendants Melvin L. Phillips, Sr., and Melvin L. Phillips, Sr. / Orchard Party Trust (together, "Defendants"), by and through undersigned counsel, hereby submit this Memorandum of Law in support of their Rule 12(f) Motion to Strike Section C of Plaintiff's Reply Brief.

Plaintiff in its November 26 opening brief failed to establish its entitlement to judgment on the pleadings as a matter of law. Plaintiff's opening brief not only failed to carry its ultimate burden of persuasion, but outright did not address necessary issues, including by failing to offer any arguments against Defendants' affirmative defenses, any of which would preclude judgment in Plaintiff's favor. Plaintiff's failure to even address the affirmative defenses was discussed at length in Defendants' brief in opposition to Plaintiff's motion. In its January 28, 2019 reply brief, Plaintiff attempted to patch the deficiencies of its opening brief by improperly offering numerous arguments for the first time regarding Defendants' affirmative defenses.

PROCEDURAL HISTORY

On November 26, 2018, Plaintiff filed a Motion for Judgment on the Pleadings ("Opening Brief"), with an initial return date of January 3, 2019. To allow time for a detailed brief in opposition ("Opposition Brief"), Defendants on December 11, 2018 requested an adjournment of the return date to February 7, 2019. The Court granted Defendants' request that day, setting February 7, 2019 as the new return date for the Motion, with briefs in opposition and reply due on January 14 and January 28, respectively.

Following receipt of Plaintiff's brief in reply ("Reply Brief"), Defendants now ask the Court to strike Section C of the Reply Brief for improperly presenting new arguments and attempting too late to correct deficiencies in Plaintiff's Motion. Defendants held a meet-and-confer with Plaintiff on February 7, 2019 prior to filing this motion, but the parties were unable

to resolve the dispute. Defendants ask the Court to hold the return date of the motion for judgment in abeyance, pending resolution of this motion to strike.

LEGAL STANDARD

Rule 12(f) allows the court to strike improper material offered by either party in litigation, such as "any redundant, immaterial, impertinent, or scandalous matter." Courts commonly implement this rule to strike or ignore "evidence presented for the first time in reply" in support of a motion, "and do[] not consider it for purposes of ruling on the motion." *Wolters Kluwer Financial Servs. v. Scivantage*, 2007 WL 1098714, *1 (S.D.N.Y. Apr. 12, 2007). While a movant is permitted to respond to arguments raised in opposition briefs, a reply brief includes improper new arguments if those arguments should have been raised in the opening brief. *Rowley v. City of New York*, 2005 U.S. Dist. LEXIS 22241, *14 (S.D.N.Y. Sep. 30, 2005) ("This Circuit has made clear it disfavors new issues being raised in reply papers."); *Dukes v. City of Albany*, 289 F. Supp. 3d 387, 395-96 (N.D.N.Y. 2018) (recognizing it as "procedurally improper" to raise new arguments in reply briefing).

ARGUMENT

I. Plaintiff Failed to Address Defendants' Affirmative Defenses in its Opening Brief

Plaintiff's Opening Brief, asserting that there were no material facts in dispute and that Plaintiff was thus entitled to judgment on the pleadings, included only four pages of argument. Plaintiff's Opening Brief summarily characterized Defendants' Answer as "assert[ing] the same legal position that was asserted in Defendants Counterclaim" with only a very short articulation of (Plaintiff's interpretation of) that position. The Reply Brief addressed only two paragraphs from the entire 18-page Answer and Counterclaim—paragraph 60 and the Prayer for Relief, both of which appeared in the now-dismissed Counterclaim.

Rather than discuss specific denials, assertions, and defenses from Defendants' Answer, Plaintiff's Opening Brief relied nearly exclusively on reference to the Court's Order dismissing Defendants' counterclaim, and its own briefs that had argued for that dismissal. But none of the papers in that prior motion practice addressed, or even referred to, Defendants' affirmative defenses. Thus, contrary to Plaintiff's bare assertion in the Reply Brief, the Opening Brief neither made nor incorporated any argument that addressed the merits of any of Defendants' affirmative defenses.

Plaintiff makes only a token assertion that it had previously addressed Defendants' affirmative defenses, relying on a sentence in its Opening Brief that "nothing in Defendants' Answer stands in the way of judgment." (Reply Brief at 6.) Critically, this quotation is not part of any detailed breakdown of Defendants' Answer. Rather, it appears in a section of the Opening Brief titled "Application of the Court's Prior Rulings." Specifically, the quotation represents the conclusion of that section, which Plaintiff asserted "follows" from the Court's order dismissing the counterclaims. (Opening Brief at 6.) Plaintiff cannot seriously argue that this sentence reflects or represents substantive arguments regarding the merits of each of Defendants' affirmative defenses. *See Murphy v. Vill. of Hoffman Estates*, 1999 WL 160305, at *2-3 (N.D. Ill. Mar. 17, 1999), aff'd, 234 F.3d 1273 (7th Cir. 2000) ("Raising an argument generally in a motion or objections does not give a litigant license to be vague in its original submissions and provide the necessary detail in his reply.").

II. Plaintiff Was Obligated to Address Defendants' Affirmative Defenses in its Opening Brief to Demonstrate Entitlement to Relief, and Cannot Now Correct that Mistake

Plaintiff bore the burden to demonstrate its entitlement to relief in its Opening Brief, and may not use its Reply Brief to add new arguments that it simply neglected or chose not to include. *See Jaquish v. Comm'r of Soc. Sec.*, 2017 U.S. Dist. LEXIS 144161, *5-6 n.2

(N.D.N.Y. Sep. 6, 2017) (where "Plaintiff did not raise these arguments in his initial brief," raising them later is improper and may represent gamesmanship). "'A reply brief is for replying,' not for raising essentially new matter that could have been advanced in the opening brief." *Tellabs Operations, Inc. v. Fujitsu, Ltd.*, 283 F.R.D. 374, 379 (N.D. Ill. 2012) (quoting *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 360 (7th Cir. 1987)).

In failing to raise any arguments against Defendants' affirmative defenses in the Opening Brief, Plaintiff has waived them for the purposes of the motion for judgment, and cannot now raise them in reply. *Id.* (Tellabs) ("Arguments and evidence that could have been raised in the opening brief but are first raised in a reply brief are waived."); *see also Ditullio v. Village of Massena*, 81 F. Supp. 2d 397, 408-09 (N.D.N.Y. 2000) (where movant "did not advance any arguments in its initial moving papers regarding" some of opposing party's claims, the movant "may not first raise arguments with respect to those [claims] in its reply papers"). Plaintiff, importantly, cannot justify these new arguments as being responsive to Defendants' Opposition Brief—which addressed affirmative defenses not to bolster their merits, but to explain that Plaintiff "fails to even mention 'affirmative defenses' in its motion." (Opposition Brief at 7.)

Plaintiff could, in theory, have argued in its Reply Brief that—as a procedural matter—its failure to offer any arguments against the affirmative defenses should not be fatal to its motion. Plaintiff could have attempted to persuade the Court that affirmative defenses are simply not relevant to such a motion. Plaintiff could even have cited to its previous briefing to insist that Plaintiff in fact *had* already addressed affirmative defenses, contradicting the premise of Defendants' Opposition Brief. Such arguments, while unlikely to be convincing, would have genuinely been responsive to Defendants' Opposition Brief and would not have invited this motion to strike. But what Plaintiff cannot do is "attempt to cure deficiencies in its moving

papers by including new evidence in its reply to opposition papers." *See Burroughs v. County of Nassau*, 2014 WL 2587580, *4 (E.D.N.Y. Jun. 9, 2014) (where movant failed to make a showing of a required element in opening brief, "providing such detail in a reply is too late").

Allowing Plaintiff to belatedly raise these new arguments would effectively short-circuit the motion process, using Defendants' Opposition Brief identifying deficiencies as a roadmap for the arguments that Plaintiff should have made. Courts routinely strike or otherwise disregard such new arguments, recognizing that a new argument in reply "deprives the opposing party of an opportunity to respond to them." *See Performance Contr., Inc. v. Rapid Response Constr., Inc.*, 267 F.R.D. 422, 425 (D.D.C. 2010) (disregarding new arguments even where opposition brief referred to issue). Allowing Plaintiff's approach would preclude any meaningful response regarding the affirmative defenses, improperly allowing Plaintiff to "sandbag" Defendants. *Murphy v. Vill. of Hoffman Estates*, 1999 WL 160305, at *2-3 (N.D. Ill. Mar. 17, 1999), aff'd, 234 F.3d 1273 (7th Cir. 2000). Given the deficiencies in the sparse Opening Brief, Defendants already experienced difficulty crafting meaningful responses in the Opposition Brief, (*see* Opposition Brief at 16-17 n.9), which would only be compounded by allowing Plaintiff to now make its arguments belatedly.

Several circumstances here weigh particularly strongly against allowing leeway for Plaintiff's new arguments, from the perspectives of fairness, reasonableness, and judicial economy. First, as noted above, Defendants' Opposition Brief extensively highlighted the various arguments that Plaintiff failed to include in the Opening Brief, and Defendants would be prejudiced if Plaintiff were allowed to effectively change the nature of their motion in reply. While Defendants had concerns that Plaintiff might attempt to offer new arguments, they cannot possibly have anticipated which specific arguments Plaintiff would make. Defendants were thus

totally prevented from (preemptively) marshalling appropriate counter-arguments[1], while Plaintiff was able to see Defendants' arguments before deciding which of its own to make.

Second, Plaintiff can have no explanation for failing to fully support its motion at the proper time. Plaintiff initially intended to file its 12(c) motion for judgment at the same time as its 12(b) motion to dismiss the counterclaim, nearly a full year ago, and so this was presumably a carefully-considered motion. (D.I. 20). Plaintiff had more than enough time to draft its motion for judgment, and yet ultimately filed an Opening Brief of just over six pages[2] rather than utilizing the full 25 pages available to it. Plaintiff was under neither time pressure nor a harsh page limit, and so clearly could have raised its arguments at the proper time.

Third, Plaintiff was clearly on notice of Defendants' affirmative defenses prior to filing its Opening Brief, as they were prominently included in Defendants' Answer—the very same pleading that is ostensibly the subject of Plaintiff's motion. The affirmative defenses were clearly not a new issue "raised in opposition papers" for which Plaintiff could conceivably argue that it was merely responding to the Opposition Brief. *See Rowley v. City of New York,* 2005

[1] Plaintiff's new arguments are also quite flawed. While addressing their substance is not the purpose of this motion, doing so briefly may help demonstrate the prejudice caused by raising them only in reply. Most prominently, Plaintiff asserts, without citation, that Defendants were required to move for dismissal before raising two of its defenses. (Reply Brief at 7 (Failure to join an indispensable party), 9 (failure to state a claim).) This is based purely on a misreading of FRCP 12. While other litigants have occasionally made the same mistaken argument, it has repeatedly and overwhelmingly been explained that the defenses of FRCP 12(b) can be raised either in an answer or in a pre-answer motion, and are only waived if raised in *neither* of those filings. *See, e.g.*, *Dell Mktg. L.P. v. InCompass IT, Inc.,* 771 F. Supp. 2d 648, 652-53 (W.D. Tex. 2011) (argument would require a "bizarre" reading of Rule 12 under which this defense could only be resolved *sua sponte* or at trial, and would have "no apparent justification"); *Stearman v. Comm'r*, 436 F.3d 533, 536 n.6 (5th Cir. 2006) ("argument lacks merit," as defense "may be made in any pleading permitted or ordered" under FRCP 7(a)). By raising it only in reply, Plaintiff put an extra burden on Defendants to seek special, urgent relief from the Court to avoid allowing this misleading argument to stand on the record. Plaintiff also asserts that Defendants failed to "say a thing about" its defense of failure to state a claim and only "bother[ed] to mention" the defense of abandonment in the Opposition Brief, though in actuality "failure to state a claim" was identified as a strong barrier to judgment. (*Compare* Reply Brief at 9, 10 *with* Opposition Brief at 9-10.)

[2] Strikingly, while Plaintiff's Opening Brief was only six pages, containing only four pages of actual argument, the Reply Brief used the full ten pages available, with four pages (belatedly) dedicated to the *affirmative defenses alone*. Plaintiff spent as many pages attempting to correct its earlier oversight in reply as were spent on the Opening Brief's entire argument.

U.S. Dist. LEXIS 22241, at *16 (S.D.N.Y. Sep. 30, 2005) (arguments first raised in original pleadings were "not a new material issue raised in opposition papers" and thus would not be considered if addressed only in reply brief)

Fourth, Plaintiff's motion for judgment was filed very early in the case, and the instant motion for judgment will not be Plaintiff's only opportunity to address the merits of the case. This motion to strike does not foreclose any argument that Plaintiff wishes to make at trial, or even in the context of motions for summary judgment, when the record will contain much more information as the result of discovery.[3] As motions for judgment are generally disfavored, *see L.C. Eldridge Sales Co. v. Azen Mfg. PTE, Ltd.*, 2012 U.S. Dist. LEXIS 196631, at *5 (E.D. Tex. Dec. 10, 2012) ("disfavored and rarely granted"), Plaintiff will not be unduly prejudiced by having arguments struck from an already-unlikely motion, and any such prejudice is of its own making. By contrast, allowing late additions to Plaintiff's motion significantly prejudices Defendants[4]—especially in the context of a dispositive motion for judgment, which threatens to terminate the case at such an early stage, with so under-developed a record.

[3] In the Opposition Brief, Defendants emphasized the potential for discovery to shed light on various claims and defenses in this case, and in the Reply Brief, Plaintiff challenged the value of discovery. While the parties disagree on the merits of this point, Defendants believe that the challenges to discovery outside of Section C are properly responsive to the Opposition Brief. Thus, while the value of discovery is related to the affirmative defenses, Defendants move to strike only Section C, and not discussion of discovery elsewhere in the Reply Brief. Because Plaintiff criticizes Defendants' suggested discovery, however, Defendants must note that if Plaintiff had properly addressed the affirmative defenses in its Opening Brief, then Defendants would have been on notice of Plaintiff's legal theories earlier. Defendants' could have then included suggestions for discovery that were more targeted to the pressure points of Plaintiff's theories. For example, the Reply Brief is the first time that Plaintiff challenged (or addressed at all) Defendants' "abandonment" defense. Plaintiff novelly relies on the usage by the Orchard Party Oneida to support *Plaintiff*'s continuity of occupation against those same Orchard Party Oneida members. Defendants thus had no opportunity to propose discovery into discontinuities between the historical Oneida tribe and Plaintiff's modern Oneida Indian Nation, though any possible disconnect between the historical and modern "Oneida" entities would clearly threaten Plaintiff's attempt to establish its title through reliance on the Orchard Party's own presence on the land.

[4] Despite Plaintiff's failure to make its arguments in the Opening Brief, Defendants tried to minimize this prejudice by, as best they could, attempting to anticipate arguments that Plaintiff might improperly raise in reply or that the Court might consider in evaluating the motion. (*See* Opposition Brief at 18 (noting possession requirements of CPLR § 212(a)), 20 (noting unbroken chain of succession by Orchard Party under Treaty of Buffalo Creek), 20 n.11 (noting the applicability of equitable defenses under *Cayuga* and *Sherrill*). But no amount of prediction regarding

Lastly, while courts sometimes opt to require a sur-reply rather than striking the new arguments, even that would just further delay this case. *See Burroughs v. County of Nassau*, 2014 WL 2587580, *4 (declining to consider new arguments that would "only prolong this preliminary stage in a case that should move forward with discovery at expeditiously as possible"). Plaintiff's motion paused the case's schedule, and is currently postponing discovery. (*See* D.I. 34 (deferring deadlines pending disposition of motion for judgment).) This motion should be resolved as soon as possible so that the case can proceed to discovery, and a sur-reply is thus only an inferior, alternative remedy.

CONCLUSION

For the reasons stated above, the Court should strike Section C of Plaintiff Oneida Indian Nation's Reply in Response to Defendant's Opposition to Motion for Judgment on the Pleadings, or in the alternative, the Court should permit Defendants an opportunity to file a sur-reply.

February 7, 2019
Respectfully submitted:

__/s/ *Eric N. Whitney*_____

Eric N. Whitney
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Eric.whitney@arnoldporter.com

Counsel for Melvin L. Phillips, Sr. and Melvin L. Phillips, Sr. / Orchard Party Trust

---

the arguments that Plaintiff *might* offer can replace a meaningful opportunity to respond, or cure the prejudice of having those arguments omitted from the Opening Brief and only included, belatedly, in the Reply Brief.