ZUCKERMAN SPAEDER

Michael R. Smith
Zuckerman Spaeder LLP
msmith@zuckerman.com
(202) 778-1832

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Honorable Glenn T. Suddaby
United States District Court
United States Courthouse
100 South Clinton Street
Syracuse, NY 13261

Re: Oneida Indian Nation v. Phillips, No. 5:17-cv-1035 (GTS/ATB)

Dear Judge Suddaby:

This is the Oneida Indian Nation's response to defendants' motion to strike section C of the Nation's reply to defendants' opposition to entry of judgment on the pleadings. Defendants argue that section C contains new "arguments" made by the Nation for the first time in reply and, thus, that the Court should strike them under the authority of Rule 12(f), which concerns the striking of "redundant, immaterial, impertinent, or scandalous matter" from pleadings. The Nation's arguments in section C of the reply, however, were not new. And whether they were new or not is a red herring because they were responsive to defendants' opposition and were proper for that reason.[1]

Arguments Not New

The Nation's moving papers argued that the Court's prior rulings entitle the Nation to judgment, emphasizing (1) defendants' admissions that the land in issue was part of the federally-recognized Oneida reservation and was never conveyed by the Nation to the State; (2) the rule in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), that tribal title to land cannot be extinguished without federal consent; (3) that Orchard Party Oneidas are not a separate tribe, and, citing *Cohen's Handbook on Indian Law*, that tribal members cannot claim rights to tribal land as against the tribe, and (4) that the Supreme Court's *Sherrill* and the Second

[1]Defendants move under Rule 12(f), which applies to "redundant, immaterial, impertinent, or scandalous matter," not new arguments. Rule 12(f) also applies only to a "pleading" as defined in Rule 7(a), not motion papers. *Bridgeforth v. Popovics*, 2011 U.S. Dist. Lexis 56904, *1 at n.2 (N.D.N.Y. 2011); Wright & Miller, *Fed'l Practice & Proc.* § 1380 at 189 (2018 Supp.). When asked to disregard new arguments in replies, courts exercise an inherent, discretionary power to consider or disregard the arguments, not a Rule 12(f) power to strike pleadings. *Dixon v. NBCUniversal Media, LLC.*, 947 F. Supp.2d 390, 396 (S.D.N.Y. 2013).

Circuit's *Cayuga* decisions regarding equitable principles did not affect the Nation's rights in the land in issue. ECF 32-1 at 4-5.

The Nation then argued: "[i]t follows from the foregoing that nothing in Defendant's Answer stands in the way of a judgment." ECF 32-1 at 6. Nothing meant nothing, including the list of affirmative defenses in the answer. Moreover, defendants have argued that the ten pages of allegations preceding the listing of their affirmative defenses constituted the factual basis for those defenses, ECF 37 at 6, and the Nation's moving papers showed that the Nation was entitled to judgment notwithstanding those factual allegations, ECF32-1 at 3-6. Defendants acknowledged their understanding that the Nation had challenged the entirety of their answer, including affirmative defenses: "*Plaintiff insists that it is entitled to judgment over the remainder of Defendants' Answer, including both denials and affirmative defenses.*" ECF 37 at 5 (emphasis added). Consequently, defendants' argument that their affirmative defenses were not challenged in the Nation's moving papers, but were first challenged in the Nation's reply, is wrong.

Nor were the particular legal arguments in section C of the reply new. The Nation relied on the Supreme Court's *Oneida Indian Nation v. County of Oneida* decision, defendants' admissions that the Nation had not ceded the land at issue to the State, the absence of any federal approval of a cession of the Nation's land by Congressional act or otherwise, the inapplicability of equitable defenses identified in the Second Circuit's *Cayuga* decision, defendants' status as part of the Nation and not a separate tribe, and the principle explained in *Cohen's Handbook* that members do not have individual rights in tribal land. ECF 38 at 6-10. All of these arguments had been made in the Nation's moving papers. ECF 32-1 at 4-5.

Responsive Arguments

"[R]eply papers may properly address new material issues raised in the opposition so as to avoid giving unfair advantage to the answering party." *Bonnie & Co. Fashions v. Bankers Trust Co.*, 945 F. Supp. 693, 708 (S.D.N.Y. 1996); *Bravia Capital Partners, Inc. v. Fike*, 296 F.R.D. 136, 144 (S.D.N.Y. 2013) (same). Section C in the Nation's reply properly responded to arguments made in defendants' opposition.

First, defendants argued that "the assertion of affirmative defenses is often held to preclude judgment" and – relying on the argument that merely asserting a defense is sufficient – made no effort to explain the legal viability of any defense. ECF 37 at 6 & 9-10. Section C in the Nation's reply was a rebuttal to that argument that the mere allegation of a defense suffices: "That is not so when defenses fail as a matter of law." ECF 38 at 6. The remainder of section C explained that the defenses all fail as a matter of law, a direct response to defendants' argument that merely alleging a defense is enough. That was a correct and substantively meaningful response to defendants' strategic and formalistic decision to rely on the mere assertion of

defenses without any effort to sustain their legal viability – a failure by defendants that itself justifies entry of judgment on the grounds asserted in the Nation's moving papers.[2]

Second, defendants argued that the "allegation" of abandonment "in its affirmative defenses" created a disputed fact issue. ECF 37 at 18. Section C in the Nation's reply addressed the opposition's discussion of abandonment. ECF 38 at 10. Moreover, the reply responded to an admission first made by defendants in the opposition – that Orchard Party Oneidas are not a separate Indian tribe – and showed how it defeated the abandonment defense. ECF 38 at 10. The reply was the right place to make these responsive arguments.

Third, given defendants' strategy not to justify the legal viability of any defense, the reply pointed this out as to each affirmative defense that defendants' opposition "does not address this defense," has "not bothered to explain the defense," "does not try to sustain" the defense, et cetera. ECF 38 at 6-10. A classic function of reply briefing is to point out what an adversary has failed to address or argue.

Absence of Prejudice

Replies should not surface new arguments because an adverse party may be prejudiced by the inability to respond. Yet defendants only weakly try to show prejudice, mostly in footnotes, because there is nothing that they were actually prevented from arguing. ECF 39-1 at 5-7 & nn. 1, 3 & 5. To the extent that they have anything to argue, defendants include it in footnotes 1 and 3 of their moving papers to rebut the supposedly "quite flawed" points made in the Nation's reply. Thus, any prejudice that could have existed (and there was none) has been cured. *See Dixon v. NBCUniversal Media, LLC.*, 947 F. Supp.2d 390, 396-97 (S.D.N.Y. 2013) (prejudice from new arguments can be cured by material offered in connection with motion to strike or surreply (and, even if reply arguments are new, court has "broad discretion" to consider them, quoting Second Circuit)); *Toure v. Cent. Parking Sys.*, 2007 U.S. Dist. Lexis 74056, at *4

[2]Defendants' affirmative defenses were presented in the answer as a kitchen-sink checklist, without any explanation. ECF 17 at 11. Yet defendants have acknowledged, ECF 37 at 3, this Court's *Optigen* holding that defenses must allege sufficient detail to make them plausible under *Twombly/Iqbal* standards. A shotgun statement, barebones assertion, or summary listing of defenses is properly struck under Rule 12(f) as an "insufficient defense." *Schmitz v. Four D Trucking, Inc.*, 2014 WL 309190 (N.D. Ind. 2014); *Willis v. Arp*, 165 F. Supp.3d 1357, 1359 (N.D. Ga. 2016) (quoting Wright & Miller); *Sutton v. Chanceford Twp.*, 2017 WL 770586, *3 (M.D. Pa. 2017). There is thus an irony in defendants' argument that the Nation's substantive showing of the invalidity of affirmative defenses should be stricken when defendants' answer offered only a barebones checklist of defenses that defendants have strategically chosen not to support by substantive argument in their briefing. The Nation is entitled to judgment on the unsupported defenses for the substantive legal reasons argued in the Nation's moving papers.

(S.D.N.Y. 2007) (prejudice cured); *Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp.3d 281, 317 n.7 (D.D.C. 2018) (same).[3]

Conclusion

Section C in the Nation's reply properly refocused legal arguments already presented in the Nation's moving papers and properly responded to defendants' opposition. Defendants' motion to strike should be denied.

Respectfully submitted,

/s/ Michael R. Smith

Michael R. Smith

cc: Eric N. Whitney, Esq.

[3]In footnote 3, defendants vaguely assert that they could have "propose[d] discovery" on "any possible disconnect" or "discontinuities" concerning the Nation's historical status if they had known of the Nation's argument that the presence of Orchard Party Oneidas on the disputed land confirmed the Nation's continued possession of the land. But the Nation's moving papers clearly relied on the legal rule described in *Cohen's Handbook* – that tribal members do not gain rights in tribal land by living it. The argument that possession of land by Nation members amounted to possession of land by the Nation was simply a further explanation of the significance of the previously-argued legal rule to the abandonment issue.