

1-1-2010

Squandering the Last Word: The Misuse of Reply Affidavits in Summary Judgment Proceedings

Michael D. Moberly

John M. Fry
Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

15 Suffolk J. Trial & App. Advoc. 43 (2010)

This Article is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

SQUANDERING THE LAST WORD: THE MISUSE OF REPLY AFFIDAVITS IN SUMMARY JUDGMENT PROCEEDINGS

Michael D. Moberly & John M. Fry***

*“This who-has-the-last-word problem . . . is inherent
in the litigation process; the party who replies has the last
word.”¹*

I. INTRODUCTION	44
II. PROCEDURAL RULES THAT MAY BE INVOKED WHEN SUBMITTING REPLY AFFIDAVITS IN SUPPORT OF SUMMARY JUDGMENT	48
A. Federal Rule 56(c) and Corresponding Local Rules	48
B. The Requirements for Affidavit Submission under FED. R. CIV. P. 6(c)(2).....	53
1. Rule 6(c)(2) Requires That Supporting Affidavits Be Served “With” a Motion	53
2. Rejecting Litigation by Ambush: <i>Tishcon Corp. v. Soundview Communications, Inc.</i>	54
3. Replying To Factual Matters Initiated by the Nonmovant: Not Ambush, But Still Not Within the Contemplation of Rule 6(c)(2)	55
C. Other Potential Mechanisms for Submitting Reply Affidavits	57
1. Standards for Amendment Embodied in Federal Rule 6(b)	57
2. Curing Deficiencies Through Rule 56(e)	60
III. AVOIDABLE CONSEQUENCES: EFFECTIVE DISCOVERY AS A MEANS OF AVOIDING THE NEED FOR REPLY AFFIDAVITS	63
IV. BE CAREFUL WHAT YOU WISH FOR: A MOVANT PERMITTED TO SUBMIT REPLY AFFIDAVITS RARELY SHOULD DO SO.....	66
A. Reply Affidavits and the Absence of a Genuine Issue of Material Fact Are Almost Always Mutually Exclusive	66
1. Genuine Factual Disputes and Sham Affidavits	67
B. In Attempting to Demonstrate the Absence of Material Factual	

* B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona.

** B.S., J.D., Arizona State University; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona.

¹ *Lebda v. Charles Schwab & Co.*, No. 89 C 7840, 1990 WL 43531, at *4 (N.D. Ill. Mar. 30, 1990).

Disputes, Reply Affidavits Are Distinctly Immaterial	71
V. REPLY AFFIDAVITS: THE KEY TO PERPETUAL BRIEFING AND ENEMY OF THE LAST WORD.....	73
VI. CONCLUSION	78

I. INTRODUCTION

Rule 56 of the Federal Rules of Civil Procedure (“Federal Rules”) governs summary judgment proceedings in federal courts.² In a federal civil action, either party may move for summary judgment with or without supporting affidavits under Rule 56.³ The other party then has an opportunity to respond to the motion with or without affidavits to establish the existence of a genuinely disputed issue of fact for trial.⁴ Summary judgment is appropriate only if the evidence submitted by the parties or otherwise on file with the court establishes that there is no such triable issue and that the moving party is entitled to judgment as a matter of law.⁵

² FED. R. CIV. P. 56. The Federal Rules of Civil Procedure were amended effective December 1, 2007, “to make them more easily understood and to make style and terminology consistent throughout the rules.” FED. R. CIV. P. 56 advisory committee’s note (2007 amendments). Although this article discusses the amended rules whenever possible, many of the cited cases arose under the prior rules. See *Bodley v. Plaza Mgmt. Corp.*, 550 F. Supp. 2d 1085, 1087 n.2 (D. Ariz. 2008) (stating amended rule may be interpreted “by applying precedent for the prior version” because 2007 amendments intended as “stylistic only”); *Sweitzer v. Am. Express Centurion Bank*, 554 F. Supp. 2d 788, 794 n.1 (S.D. Ohio 2008) (noting 2007 amendments reflect “stylistic changes” and do not “have any effect on . . . the [c]ourt’s analysis”). Effective December 1, 2009, Rule 56 again was amended, this time to update “outmoded” timing provisions. FED. R. CIV. P. 56 advisory committee’s note (2009 amendments).

³ See FED. R. CIV. P. 56(a)-(b); *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 318 (7th Cir. 2003) (discussing importance of Rule 56(a) in refusal to strike affidavit for summary judgment); see also *Kistner v. Califano*, 579 F.2d 1004, 1006 (6th Cir. 1978) (reversing lower court’s sua sponte granting of summary judgment). In motion practice, affidavits are typically used in lieu of live testimony to present facts to the court. See, e.g., *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 383 (S.D. Tex. 1969) (“[A]ffidavits are vehicles for the presentation of facts to the Court . . .”).

⁴ See FED. R. CIV. P. 56(e)(2); *SI Handling Sys., Inc. v. Heisley*, 658 F. Supp. 362, 365 (E.D. Pa. 1986) (noting counter affidavits unnecessary if opposing party shows genuine issues of material fact without them). Until December 1, 2009, Rule 56 did not specifically provide for the filing of a responsive brief or memorandum of law. See *Denton v. Mr. Swiss of Mo., Inc.*, 564 F.2d 236, 242 (8th Cir. 1977) (“Fed. R. Civ. P. 56 provides for service of a motion for summary judgment, an opportunity for service of opposing affidavits, and a hearing.” (emphasis added)). Nevertheless, many federal district courts have permitted, and some purport to require, the submission of responsive briefs under local rules or practices. E.g., *Kistner*, 579 F.2d at 1006 (stating supporting memoranda of law normally accompany both motion and response).

⁵ See *Carmona v. Toledo*, 215 F.3d 124, 132 (1st Cir. 2000) (describing moving party’s obligation to show non-moving party cannot carry its burden at trial); *McLaughlin v. Liu*, 849 F.2d 1205, 1206 n.3 (9th Cir. 1988) (“[I]t is well-established that a party opposing summary judgment may rely on material already on file in the case.”). A nonmoving party may avoid

In outlining the procedure to be followed in summary judgment proceedings, Rule 56 recently was amended, effective December 1, 2009, to provide for the first time for the moving party's submission of a reply brief.⁶ Local rules of practice in a number of jurisdictions were, and remain, similarly silent with respect to reply briefs.⁷ On the other hand, many courts routinely permit the submission of reply briefs, often under a local rule authorizing such submissions.⁸ The opportunity to reply enables the moving party to respond to the arguments asserted in opposition to its motion.⁹ The moving party may also provide clarification of its own arguments in its reply.¹⁰ Allowing the moving party to have the final word

summary judgment without disputing the moving party's evidence if, for example, reasonable minds could differ on the inferences to be drawn from that evidence. *See Rommell v. Auto. Racing Club of Am., Inc.*, 964 F.2d 1090, 1093 (11th Cir. 1992) (“[I]f reasonable minds might differ on the inferences arising from undisputed facts, then summary judgment would be improper.”). Nevertheless, a nonmoving party rarely will elect to run “the risk of a grant of summary judgment by failing to disclose the evidentiary basis for its claim.” *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

⁶ *See* FED. R. CIV. P. 56(c)(1)(C) (effective Dec. 1, 2009). Prior to the 2009 amendments, Rule 56 did not provide for the moving party's submission of a reply brief. *See Beard v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (“Rule 56 neither authorizes nor forbids a reply brief by the party moving for summary judgment.”); *Int'l Union, United Auto. Workers of Am. v. Keystone Consol. Indus., Inc.*, 782 F.2d 1400, 1408 (7th Cir. 1986), *withdrawn on reh'g*, 793 F.2d 810 (7th Cir. 1986) (Coffey, J., dissenting) (observing that Rule 56 “fails to mention . . . reply briefs”).

⁷ *See, e.g.*, *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 477 (6th Cir. 2007) (“Western District of Tennessee Local Rule 7.2 does not provide for a reply brief when filing motions in civil cases . . .”); *Pigott v. Sanibel Dev., LLC*, No. 07-0083-WS-C, 2008 WL 2937804, at *5 (S.D. Ala. July 23, 2008) (observing that no local or federal rules create an “absolute right to submit a reply brief”).

⁸ *See, e.g.*, *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 714 (6th Cir. 2006) (“The decision to grant a motion for leave to file a reply brief relies on the interpretation and application of local rules and local practice.”); *see also Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1192 n.6 (10th Cir. 2006) (“[T]he [local] Rule says . . . ‘[t]he moving party may file a written reply memorandum.’” (quoting D.N.M. R. 56.1(b))); *Glass v. Crimmins Transfer Co.*, 299 F. Supp. 2d 878, 881 (C.D. Ill. 2004) (“[T]he Local Rules of this court do solicit reply briefs as part of the briefing schedule in summary judgment motions.” (referring to CDIL-LR 7.1(D)(3)); *Podger v. Gulfstream Aerospace Corp.*, 212 F.R.D. 609, 609 n.3 (S.D. Ga. 2003) (“Permitting reply briefs . . . is not a new idea.”); *Gen. Star Indem. Co. v. Sherry Brooke Revocable Trust*, 243 F. Supp. 2d 605, 621 (W.D. Tex. 2001) (referring to reply briefs as “permissive documents” and asserting that court's practice is to “consider reply briefs, if timely filed, but not to await the filing of a reply before ruling”).

⁹ *See Millage v. City of Sioux City*, 258 F. Supp. 2d 976, 983 n.2 (N.D. Iowa 2003) (“[T]he purpose of a reply is . . . to address ‘newly-decided authority or to respond to new and unanticipated arguments made in the resistance.’” (quoting N.D. IOWA CIV. R. 7.1(g))); *Travelers Ins. Co. v. Buffalo Reinsurance Co.*, 735 F. Supp. 492, 495 (S.D.N.Y. 1990), *vacated on other grounds*, 739 F. Supp. 209 (S.D.N.Y. 1990) (allowing moving party to submit reply papers “to avoid giving an unfair advantage to the answering party who . . . argue[d] . . . previously unforeseen issues”).

¹⁰ *See, e.g.*, *Healthpoint, Ltd. v. Stratus Pharms., Inc.*, 273 F. Supp. 2d 871, 880 (W.D. Tex.

on these matters may facilitate the in-depth consideration of the motion arguably inherent to summary judgment.¹¹

However, in the past, not all courts permitted reply briefs.¹² Even when a reply brief is allowed, the court might not permit the moving party to include additional evidence in support of its motion for summary judgment.¹³ Regardless, the submission of reply affidavits is relatively common in summary judgment proceedings.¹⁴ Notably, nothing in the

2001) (summarizing that moving party filed reply to clarify its arguments on summary judgment); *Soler v. G & U, Inc.*, 138 F.R.D. 47, 49 n.2 (S.D.N.Y. 1991) (finding defendants should have clarified their position in reply brief after reading opposing briefs).

¹¹ See, e.g., *In re Large Scale Biology Corp.*, No. 06-20046-A-11, 2007 WL 2859782, at *1 (Bankr. E.D. Cal. Sept. 25, 2007) (“[T]he rules of this court, indeed, the law and motion rules of most courts, permit the moving party, not the respondent, to have the last word.”); *Providence v. Hartford Life & Accident Ins. Co.*, 357 F. Supp. 2d 1341, 1345 n.4 (M.D. Fla. 2005) (noting that reply brief helped court analyze dispute); *Kirkpatrick v. Gen. Elec.*, 969 F. Supp. 457, 459 n.1 (E.D. Mich. 1997), *aff’d*, 172 F.3d 873 (6th Cir. 1999) (“[I]t is this court’s practice to allow the moving party to ‘have the last word.’”); see also *Glass*, 299 F. Supp. 2d at 881 (stating reply brief’s purpose is to “assist the court in ruling on motions based on the merits.”). See generally *Viero v. Bufano*, 925 F. Supp. 1374, 1380 (N.D. Ill. 1996). The *Viero* court described the interplay between local motion rules and Rule 56 as follows:

Implicit in Rule 56 . . . is the notion that the movant gets to take its best shot at showing that there is no genuine issue of material fact, and the nonmovant then gets its best shot to show that genuine issues of material fact do indeed exist. Movant then gets one last chance to respond to what the nonmovants have added.

Id.

¹² See, e.g., *La Reunion Francaise, S.A. v. Christy*, 122 F. Supp. 2d 1325, 1326 (M.D. Fla. 1999) (noting Middle District of Florida does not allow reply briefs without specific permission from court); *Shaw v. R.J. Reynolds Tobacco Co.*, 818 F. Supp. 1539, 1541 (M.D. Fla. 1993), *aff’d*, 15 F.3d 1097 (11th Cir. 1994) (denying defendant’s request for leave to file a reply because “it would be unfair for [d]efendant to get a ‘second bite at the apple’”). The discretion vested in the district courts in this regard is not altered by the December 1, 2009 amendment to Rule 56. See FED. R. CIV. P. 56(c)(1) (providing that the Rule’s provision for a reply brief applies “unless . . . the court orders otherwise”). Indeed, “[t]he presumptive timing rules are default provisions that may be altered by an order in the case or by local rule Scheduling orders tailored to the needs of the specific case, perhaps adjusted as it progresses, are likely to work better than default rules.” FED. R. CIV. P. 56 advisory committee’s note (2009 amendments).

¹³ Compare *Pimentel & Sons Guitar Makers, Inc. v. Pimentel*, 229 F.R.D. 208, 210 (D.N.M. 2005) (observing that courts generally disfavor the inclusion of new evidence in reply briefs), with *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1456 (E.D. Wis. 1993), *aff’d*, 41 F.3d 1510 (7th Cir. 1994) (“It seems absurd to say that reply briefs are allowed but that a party is proscribed from backing up its arguments in reply with the necessary evidentiary material.”).

¹⁴ See, e.g., *Krause v. Buffalo and Erie County Workforce Dev. Consortium, Inc.*, 426 F. Supp. 2d 68, 91 (W.D.N.Y. 2005) (noting defendants’ submission of a reply affidavit disputing “statements made in opposition to summary judgment”); *Thornton v. Mercantile Stores Co.*, 13 F. Supp. 2d 1282, 1284 n.1 (M.D. Ala. 1998) (noting defendant’s argument that “attaching evidence to reply briefs is a routine practice in federal courts”); *McCulley v. Allstates Technical Services*, No. Civ.A. 04-0115-WS-B, 2005 WL 1475314, at *9 n. 24 (S.D. Ala. June 21, 2005) (referring to party’s submission of affidavit with its reply brief).

Federal Rules expressly authorizes or prohibits the submission of such evidentiary material.¹⁵

Rule 83 authorizes a district court to “adopt and amend rules governing its practice” in accordance with the federal rules.¹⁶ While some federal district courts have attempted to fill the void in the Federal Rules through the enactment of local rules, others lack rules addressing the issue.¹⁷ Moreover, the local rules that do exist are not consistent in their treatment of the issue.¹⁸ As a result, there is considerable uncertainty among the courts – not to mention litigants – concerning the propriety of reply affidavits in summary judgment proceedings.¹⁹ This uncertainty has generated considerable litigation over the propriety of reply affidavits.²⁰

¹⁵ Rule 56 “discusses only affidavits in support of or in opposition to a motion for summary judgment,” and does “not provide for reply affidavits.” *Baugh*, 823 F. Supp. at 1456; *see also* *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 604-05 (7th Cir. 2000) (“Rule 56 merely provides for the submission of affidavits in support of or opposition to a motion for summary judgment.”); *Atchley v. Pepperidge Farm, Inc.*, No. CV-04-0452-FVS, 2008 WL 2074035, at *7 (E.D. Wash. May 14, 2008) (“Rule 56 does not specifically address the propriety of evidence submitted for the first time with reply briefs”); *Cont’l Tire N. Am., Inc. v. Transp. Solutions, Inc.*, No. 3:05cv231, 2007 WL 4287520, at *7 (W.D.N.C. Dec. 4, 2007) (asserting that Rule 56 “contemplates only . . . ‘supporting’ and ‘opposing’ affidavits”); *In re Lake Country Invs.*, No. 99-20287, 2001 WL 267475, at *4 (Bankr. Idaho Mar. 19, 2001) (observing that Rule 56(c) “does not address a movant’s reply affidavits”).

¹⁶ FED. R. CIV. P. 83(a)(1). “[A] district court . . . may adopt and amend rules governing its practice. A local rule must be consistent with – but not duplicate – federal statutes and rules” *Id.*

¹⁷ *Compare* *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 n.8 (11th Cir. 1987) (“[T]he local rule clearly allows a movant to file a reply brief and supplemental affidavits.”), *and* *Pike v. Caldera*, 188 F.R.D. 519, 530 (S.D. Ind. 1999) (explaining local rule explicitly allows “for the submission of additional evidence accompanying a movant’s reply brief”), *with* *Parkes v. County of San Diego*, 345 F. Supp. 2d 1071, 1080 (S.D. Cal. 2004) (noting local rules do not specifically address the filing of “exhibits and declarations in support of a reply”), *and* *Baugh*, 823 F. Supp. at 1456 (“Although the local rule provides for briefing . . . nothing at all is said about reply affidavits.”).

¹⁸ *Compare* *Dracz v. Am. Gen. Life Ins. Co.*, 427 F. Supp. 2d 1165, 1168 n.4 (M.D. Ga. 2006) (“Local Rule 7.3 allows a summary judgment movant to file ‘any desired reply brief, argument or affidavit’”), *with* *Westar Energy, Inc. v. Lake*, 493 F. Supp. 2d 1126, 1130 n.2 (D. Kan. 2007) (“[R]ecitation of additional facts on reply does not comply with D. Kan. Rule 56.1 and the Court thus does not consider them.”).

¹⁹ *See* *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004) (“[W]e have not comprehensively identified all the circumstances under which a district court may rely on . . . evidence presented for the first time in a reply brief”); *Parks v. Hillsdale Cmty. Health Ctr.*, No. 1:98-CV-204, 1999 WL 893852, at *2 (W.D. Mich. May 20, 1999) (choosing not to consider new reply brief evidence without determining whether such evidence is allowed); *United States v. Int’l Bus. Machs. Corp.*, 66 F.R.D. 383, 384 (S.D.N.Y. 1975) (noting silence of Federal Rules on reply papers leading to “a great deal of confusion”).

²⁰ *See, e.g.,* *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 n.* (7th Cir. 1996) (stating issue on appeal was consideration of an affidavit submitted with summary judgment reply); *Smith v. Burns Clinic Med. Ctr., P.C.*, 779 F.2d 1173, 1175 n.6 (6th Cir. 1985) (noting plaintiff’s “vigorous[] challenge” of lower court’s consideration of affidavits attached to reply

This article seeks to illuminate the intricacies of reply affidavit rule variations.²¹ The article begins with a discussion of the federal procedural rules that bear most directly upon the propriety of reply affidavits.²² The article then explores methods for avoiding the need to submit reply affidavits.²³ Next, the authors address the potential strategic pitfalls of reply affidavits, regardless of the procedural propriety of submitting them.²⁴ Finally, the article discusses the effect of reply affidavits upon the Rule 56 objective of promoting the prompt and efficient resolution of cases.²⁵ The authors ultimately conclude that affidavits should rarely, if ever, be submitted with a reply brief in support of a motion for summary judgment.²⁶ The moving party instead should use its reply to call to the court's attention any shortcomings in the opposing party's factual submissions and to refine the legal arguments supporting its motion.²⁷

II. PROCEDURAL RULES THAT MAY BE INVOKED WHEN SUBMITTING REPLY AFFIDAVITS IN SUPPORT OF SUMMARY JUDGMENT

A. Federal Rule 56(c) and Corresponding Local Rules

Rule 56 of the Federal Rules establishes the general structure for summary judgment proceedings.²⁸ However, until the amendment to the

brief): *Shepard v. Courtoise*, 115 F. Supp. 2d 1142, 1145 (E.D. Mo. 2000) (describing plaintiff's argument that court should strike defendant's reply affidavits).

²¹ There appears to have been no prior academic consideration of this particular issue. For a strategic discussion of the right to reply generally, see Jason Vail, *To Reply or Not to Reply: When Having the Last Word Doesn't Cut It*, 61 OR. ST. B. BULL. 33 (Dec. 2000). Several other scholars have addressed the use of affidavits in summary judgment proceedings. See Jeff Ramin, *Attacking Errors in Affidavits Used as Summary Judgment Proof*, 46 BAYLOR L. REV. 789, 791 (1994) (recounting case law history of use of reply affidavits); Gwen B. Tromley, *Pittman v. Atlantic Realty: Affidavits and the Search for the Genuine Dispute of Material Fact*, 31 U. BALT. L.F. 30, 33-34 (2000) (observing inconsistencies in courts' treatment of reply affidavits in support of summary judgment).

²² See *infra* Part II and accompanying text (discussing procedural rules supporting summary judgment motions).

²³ See *infra* Part III and accompanying text (exploring consequences of reply affidavit avoidance).

²⁴ See *infra* Part IV and accompanying text (emphasizing strategic risks in submitting reply affidavits).

²⁵ See *infra* Part V and accompanying text (recommending limited use of reply affidavits).

²⁶ See *infra* Part VI and accompanying text (summarizing caveats accompanying reply affidavits).

²⁷ See *infra* Part VI and accompanying text (outlining advantages and risks of reply affidavits).

²⁸ See FED. R. CIV. P. 56 (2009); see also *Hughes v. United States*, 953 F.2d 531, 541-42 (9th

rule that became effective December 1, 2009, the rule did not address the opposing party's submission of briefs or memoranda in opposition to the motion, or the moving party's submission of reply papers.²⁹ Instead, the submission of responsive and reply memoranda was, and largely remains, governed by local court rules enacted pursuant to the district courts' authority under Rule 83.³⁰ Some of these local rules require the filing of responsive briefs well in advance of any hearing on the motion.³¹ In addition, a number of district courts purport to require the opposing party to submit its controverting affidavits at the same time it files its opposing brief.³² These requirements presumably ensure that the moving party has an opportunity to formulate a reply to the opposing party's legal and factual assertions before the court rules on the motion.³³

Cir. 1992) (relying on Rule 56 in deciding summary judgment motion). Some district courts have adopted local procedural rules to supplement Rule 56. See *Robertson v. Am. Airlines, Inc.*, 239 F. Supp. 2d 5, 7 (D.D.C. 2002) (stating “[l]ocal Civil Rule 56.1 supplements Rule 56 by setting forth specific procedures for the parties to follow in moving for or opposing summary judgment”); *supra* notes 7-8 and accompanying text (noting inconsistencies in local reply brief filing rules).

²⁹ See *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 409 (1st Cir. 1985) (“Rule 56 does not create an explicit timetable for replies”); *Boon Partners v. Advanced Fin. Concepts, Inc.*, 917 F. Supp. 392, 394 (E.D.N.C. 1996) (“FED. R. CIV. P. 56(c) establishes a time for filing responsive affidavits, not the response to the motion itself.”); *cf.* FED. R. CIV. P. 56 (2009) (“[A] movant may file a reply within 14 days after the response is served.”).

³⁰ See *supra* notes 17-18 and accompanying text; see also, e.g., *Taylor v. Lifetouch Nat'l Sch. Studios, Inc.*, 490 F. Supp. 2d 944, 950 (N.D. Ind. 2007) (discussing local rules' time frames and page limits applicable to response and reply briefs). The December 1, 2009, amendment to Rule 56(c) expressly preserves the authority of the district courts to implement local rules applicable to summary judgment proceedings by providing times for response and reply briefs “unless a different time is set by local rule or the court orders otherwise.” FED. R. CIV. P. 56(c)(1).

³¹ E.g., *Burch v. Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1118 (E.D. Cal. 2006) (“[T]he Local Rule[] [78-230(c)] of this court, similar to most others . . . require the non-moving party to file its opposition to the motion fourteen days before, and the moving party's reply seven days before, the date of the hearing on the motion.”).

³² See, e.g., *Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991) (observing that affidavits accompanying a summary judgment response must be filed with a “memorandum of law” (discussing S.D. FLA. R. 10C, J)); *Day v. N. Ind. Pub. Serv. Co.*, 987 F. Supp. 1105, 1108 (N.D. Ind. 1997), *aff'd*, 164 F.3d 382 (7th Cir. 1999) (interpreting Local Rule 56.1 as allowing non-moving party to file affidavits with reply brief); *Shealy v. UNUM Life Ins. Co. of Am.*, 979 F. Supp. 395, 400 (D.S.C. 1997) (“The local rules of this district require that responses to motions be filed within fifteen days of the filing of a motion. Absent extenuating circumstances, any supporting materials should be filed at that time.” (citations omitted)).

³³ E.g., *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1023 n.3 (N.D. Cal. 2006) (noting local rule requires opposing papers be submitted “21 days before a scheduled hearing . . . to allow the moving party [time] to respond”). See generally *Pfeil v. Rogers*, 757 F.2d 850, 857-58 (7th Cir. 1985) (indicating local rule filing deadlines allow “moving party to respond to all of the resisting party's arguments in its reply brief”); *Burch*, 433 F. Supp. 2d at 1118 (requiring submission of reply brief fourteen days before the summary judgment hearing date).

However, local summary judgment rules are enforceable only to the extent that they do not conflict with Rule 56.³⁴ Until recently, Rule 56 provided that any affidavits submitted in opposition to a summary judgment motion need only be served before the day of the hearing.³⁵ The analysis in *Wilson v. Sysco Food Services of Dallas, Inc.*,³⁶ suggests that this aspect of Rule 56 may supersede local rules purporting to require nonmovants to submit the opposing affidavits sufficiently in advance of the hearing to enable the moving party to reply to that evidence.³⁷

The plaintiff in *Wilson* submitted an affidavit in opposition to the defendants' summary judgment motion approximately two months after the court-established deadline for submitting her opposing brief.³⁸ Rather than attempting to reply to the plaintiff's affidavit, the defendants moved to strike the affidavit on the grounds that it was untimely.³⁹ The defendants argued that the local rule required that the plaintiff file the affidavit concurrently with, or at least by the deadline for submitting, the plaintiff's opposing brief.⁴⁰ Many federal district courts follow this practice.⁴¹

The court in *Wilson* refused to strike the plaintiff's affidavit,

³⁴ FED. R. CIV. P. 83(a)(1) only permits the adoption of local rules that are consistent with the federal rules. "A local rule must be consistent with – but not duplicate – federal statutes and rules . . ." FED. R. CIV. P. 83(a)(1) (2007). See generally *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 949 (9th Cir. 1993) ("Federal Rule of Civil Procedure 83 invites the district courts to formulate local rules, but only insofar as they are not inconsistent with the federal rules themselves." (emphasis added)).

³⁵ FED. R. CIV. P. 56(c) (2007) ("An opposing party may serve opposing affidavits before the hearing day."). Although this deadline for the service of opposing affidavits is eliminated from the version of Rule 56(c) effective December 1, 2009, the amended version of Rule 6(c), also effective December 1, 2009, still permits an opposing affidavit to be served as little as seven days before a hearing. See FED. R. CIV. P. 6(c)(2), 56(c).

³⁶ 940 F. Supp. 1003 (N.D. Tex. 1996).

³⁷ See *id.* at 1008 ("opposing affidavits maybe be filed up until one day before the hearing").

³⁸ *Id.* at 1008. Although it is not clear whether the briefing deadline in *Wilson* was established by a local rule or a case-specific court order, the Rule 83 analysis is the same in either situation. See *Old Time Enters., Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) ("Rule 83 provides for promulgation of local court rules and orders that regulate local practice in any manner not inconsistent with the federal or local rules." (emphasis added)).

³⁹ *Wilson*, 940 F. Supp. at 1008. The affidavit constituted the plaintiff's "sole response" to the defendants' motion. *Id.* at 1006 n.1. Although unusual, a nonmoving party's failure to submit a legal brief in opposition to a summary judgment motion does not necessarily guarantee success of the motion. See *Kinder v. Carson*, 127 F.R.D. 543, 545 (S.D. Fla. 1989) ("[S]ummary judgment may not be appropriate even if a non-movant fails to file an opposing memorandum.").

⁴⁰ *Wilson*, 940 F. Supp. at 1008.

⁴¹ See *Krouse v. Am. Sterilizer Co.*, 984 F. Supp. 891, 913-15 (W.D. Pa. 1996), *aff'd*, 126 F.3d 494 (3d Cir. 1997) (striking an opposing affidavit submitted four weeks after deadline for response brief); *Christian Methodist Episcopal Church v. Montgomery*, No. 4:04-CV-22322-RBH, 2007 WL 172496, at *5 n.6 (D.S.C. Jan. 18, 2007) (observing "customary practice" to file affidavits simultaneously with response to motion for summary judgment).

holding that under the federal rules, opposing affidavits need not be filed with a responsive brief.⁴² Rather, the *Wilson* court held that Rule 56(c) permitted the nonmoving party to submit its affidavits in opposition to the motion up until the day before the hearing.⁴³ Because no hearing on the defendants' summary judgment motion had been scheduled when the plaintiff submitted her affidavit, the court held that the affidavit was timely and could be considered in deciding the motion.⁴⁴

The *Wilson* court also recognized that Rule 56 did not contain a comparable provision permitting the moving party to submit affidavits supporting its motion up until the day before the hearing.⁴⁵ Instead, Rule 56 required that the opposing party be given notice of the filing of the motion and, by implication, any supporting affidavits, at least ten days in advance of the hearing.⁴⁶ The purpose of this requirement is to give the opposing party an opportunity to submit its own controverting affidavits or other responsive evidence in order to demonstrate the existence of a

⁴² See *Wilson*, 940 F. Supp. at 1008 (citing FED. R. CIV. P. 6(d) [current version at 6(c)(2) (2009)] and FED. R. CIV. P. 56(c)); cf. *Myers v. Bennett Law Offices*, 238 F. Supp. 2d 1196, 1205 (D. Nev. 2002) (noting Rule's allowance of opposition affidavits to be filed up until the day before the hearing); *Friends of the Wild Swan, Inc. v. U.S. Envtl. Prot. Agency*, 130 F. Supp. 2d 1184, 1197 (D. Mont. 1999) (refusing to strike affidavits "filed several months after the deadline for submitting summary judgment briefs").

⁴³ See *Wilson*, 940 F. Supp. at 1008 (citing FED. R. CIV. P. 6(d) [current version at FED. R. CIV. P. 6(c)(2) (2009)]; FED. R. CIV. P. 56(c)); see also *United States v. Brandt*, 8 F.R.D. 163, 164 (D. Mont. 1948) ("Rules 6(d) and 56(c) require opposing affidavits to be served not later than one day before the hearing . . .").

⁴⁴ *Wilson*, 940 F. Supp. at 1008; cf. *Advest, Inc. v. Rader*, 743 F. Supp. 851, 855 n.15 (S.D. Fla. 1990) (denying motion to strike affidavits in opposition in lieu of response brief day before hearing). However, a nonmoving party that withholds its affidavits until a hearing is scheduled risks not being heard at all if the court rules on the motion without holding a hearing. See, e.g., *Jetton v. McDonnell Douglas Corp.*, 121 F.3d 423, 425 (8th Cir. 1997) (observing counsel "caught off guard" when lower court granted summary judgment without scheduling oral argument); *Birdsong v. Olson*, 708 F. Supp. 792, 794 (W.D. Tex. 1989) (noting court need not hold a hearing).

⁴⁵ See *Wilson*, 940 F. Supp. at 1008 (asserting "an affidavit supporting a motion for summary judgment must be filed with the motion" (citing FED. R. CIV. P. 6(d) [current version at FED. R. CIV. P. 6(c)(2) (2009)])); see also *Cheung v. Hamilton*, 298 F.2d 459, 460 (1st Cir. 1962) (noting new evidence may not be introduced "at the last minute when there is no opportunity to rebut"); *Cont'l Tire N. Am., Inc. v. Transp. Solutions, Inc.*, No. 3:05cv231, 2007 WL 4287520, at *7 (W.D.N.C. Dec. 4, 2007) (noting only opposing affidavits are allowed to be filed after the motion for summary judgment).

⁴⁶ See FED. R. CIV. P. 56(c) (2007) ("The motion must be served at least 10 days before the day set for the hearing."). While the rule "does not speak in terms of notice," courts have recognized that "the ten day service requirement is actually a notice provision." *McDonnell v. Estelle*, 666 F.2d 246, 252 (5th Cir. 1982); see also *Osbakken v. Venable*, 931 F.2d 36, 37 (10th Cir. 1991) (recognizing court cannot grant summary judgment because motion and affidavits served eight days before hearing); *Alghanim v. Boeing Co.*, 477 F.2d 143, 148-49 (9th Cir. 1973) (holding moving party violated ten day notice requirement by failing to file timely affidavits).

genuine issue of material fact for trial.⁴⁷ Thus, the opposing party cannot take full advantage of this opportunity unless it receives notice of the evidence supporting the motion that it is required to refute when it submits its controverting evidence.⁴⁸

The fact that the opposing party was entitled to at least ten days (and now has twenty-one days) to prepare and file its controverting affidavits and may withhold the affidavits until just days before the hearing, suggests that the rules' drafters did not contemplate the routine submission of reply affidavits.⁴⁹ Indeed, by waiting until shortly before the hearing to submit its affidavits and mailing copies to the moving party in accordance with Rule 5(b), the opposing party may actually prevent the moving party's reply.⁵⁰ Federal courts are not particularly receptive to such a tactic.⁵¹ Nevertheless, the fact that it was, until very recently, permitted by the applicable rules is a persuasive indication that the drafters intended the opposing party to be the last party to submit evidence in connection with a summary judgment motion.⁵²

⁴⁷ See generally *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980) (discussing fairness concerns behind notice requirement).

⁴⁸ See *Hooks v. Hooks*, 771 F.2d 935, 946 (6th Cir. 1985) (explaining that supporting affidavits give nonmoving party notice of "what facts she need[s] to controvert"); cf. *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003) ("The purpose of Rule 56(c) is to afford the nonmoving party notice and a reasonable opportunity to respond to the moving party's summary judgment motion *and supporting evidence.*" (emphasis added)).

⁴⁹ See FED. R. CIV. P. 56(c) (2009); FED. R. CIV. P. 56(c) (2007); FED. R. CIV. P. 6(d) (2009); see also *Fed. Refinance Co. v. Klock*, 352 F.3d 16, 32 (1st Cir. 2003) ("Rule 56(a) anticipates that a party opposing summary judgment will have a ten-day window within which to prepare and present evidence in opposition.").

⁵⁰ See FED. R. CIV. P. 5(b)(2) (2007) (providing acceptable methods of service). In *Marshall v. Gates*, 812 F. Supp. 1050 (C.D. Cal. 1993), *rev'd*, 44 F.3d 722 (9th Cir. 1995), for example, the plaintiff served its opposition via mail shortly before the summary judgment hearing. *Id.* at 1056 n.18. As a result, the defendants "had not even viewed or received any of plaintiff's opposing papers by the hearing date," and thus "were left wholly unprepared to argue against plaintiff's position." *Id.* at 1056; see also *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 980 (3d Cir. 1981) (allowing last minute submission of opposing affidavit); Paul Yowell, Note, *Through Rain, Snow, Heat, or Dark of Night: Does Private Express Delivery Constitute Service by Mail Under Federal Rule of Civil Procedure 5?*, 46 BAYLOR L. REV. 1147, 1150 (1994) (pointing out strategic reasons for service by mail).

⁵¹ See, e.g., *Liberty Mut. Ins. Co. v. Star Indus., Inc.*, No. 96-CV-0644 JG, 1997 WL 1068692, at *4 n.4 (E.D.N.Y. Oct. 10, 1997) ("[D]efendant's submission in opposition to plaintiff's motion was not served or filed until the evening prior to oral argument. Accordingly . . . plaintiff should be afforded the opportunity to submit a reply before the motion for summary judgment is finally decided."). See generally *Marshall*, 812 F. Supp. at 1056 ("Respect for the judicial process is certainly a casualty of calculated delay.").

⁵² See *supra* notes 42–51; see also *Viero v. Bufano*, 925 F. Supp. 1374, 1380 (N.D. Ill. 1996) (finding moving party disregarded underlying purpose of Rule 56 by attempting to add new facts in reply). The court in *Viero* noted that the moving party's reply included facts that could have been included in the initial filing. *Id.* This tactic left the nonmoving party with "no ability to

B. The Requirements for Affidavit Submission under FED. R. CIV. P. 6(c)(2)

1. Rule 6(c)(2) Requires That Supporting Affidavits Be Served
“With” a Motion

Reading Rule 56 in conjunction with Rule 6(c)(2) bolsters the view that the rules’ drafters did not contemplate reply affidavits.⁵³ Like Rule 56, Rule 6(c)(2) confirms the moving party’s right to submit affidavits in support of a summary judgment motion.⁵⁴ Rule 6(c)(2) does not expressly prohibit parties from submitting reply affidavits.⁵⁵ However, Rule 6(c)(2) does state that “any” affidavits supporting the motion, which presumably would include those that otherwise might be submitted with a reply, are to be served “with” the motion.⁵⁶

This aspect of Rule 6(c)(2) indicates that the drafters “intended to provide the nonmovant with a reasonable and meaningful opportunity to respond to the legal theories *and facts* as asserted by the party moving for summary judgment.”⁵⁷ In particular, Rule 6(c)(2) contemplates that the moving party will present both the essence of its legal arguments and any evidence supporting those arguments at the time it makes its motion.⁵⁸ This rule assures that the opposing party will have sufficient opportunity to

respond” to those additional facts. *Id.*; see also *Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc.*, 477 S.E.2d 166, 171 (N.C. 1996) (discussing N.C. R. Civ. P. 5(b)). See generally *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985) (“The rules are structured to provide the nonmovant with substantially more time for filing affidavits than moving parties.”).

⁵³ See FED. R. CIV. P. 6(c)(2) (“Any affidavit supporting a motion must be served with the motion.”); see also *Woods v. Allied Concord Fin. Corp.*, 373 F.2d 733, 734 (5th Cir. 1967) (indicating Rule 6(c)(2)’s predecessor, former Rule 6(d), “should be read in conjunction with Rule 56(c)”).

⁵⁴ See FED. R. CIV. P. 6(c)(2) (“Any affidavit supporting a motion must be served with the motion.”); FED. R. CIV. P. 56 (outlining procedure for submitting briefs and affidavits in support of summary judgment).

⁵⁵ See FED. R. CIV. P. 6(c)(2); see also *Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.*, 328 F.3d 309, 318 (7th Cir. 2003) (noting absence of a “blanket prohibition” of reply affidavits); *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 767 F. Supp. 1220, 1235 (S.D.N.Y. 1991), *rev’d on other grounds*, 967 F.2d 742 (2d Cir. 1992) (“[Former] Rule 6(d) addresses supporting and opposing affidavits, and is silent as to the submission of reply affidavits.”).

⁵⁶ See FED. R. CIV. P. 6(c)(2).

⁵⁷ *Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1517 (11th Cir. 1990) (emphasis added); see also *McGinnis v. Se. Anesthesia Assocs.*, 161 F.R.D. 41, 42 (W.D.N.C. 1995) (explaining purpose behind requirement of filing supporting affidavits simultaneously with motion).

⁵⁸ See *Burns*, 908 F.2d at 1517 (noting movant will present legal theories and assertions of fact at time it submits motion).

respond to the moving party's arguments and evidence before the court rules on the motion.⁵⁹

2. Rejecting Litigation by Ambush: *Tishcon Corp. v. Soundview Communications, Inc.*

*Tishcon Corp. v. Soundview Communications, Inc.*⁶⁰ discussed in some detail the impact of Rule 6(c)(2)'s predecessor, former Rule 6(d).⁶¹ The plaintiff in *Tishcon* moved for partial summary judgment and submitted supporting declarations with its motions.⁶² The defendants objected to these submissions on the grounds that the declarations contained factual information beyond the declarant's personal knowledge.⁶³ In response to this objection, the plaintiff submitted additional declarations with its replies in an effort to remedy the alleged deficiencies in its original evidence.⁶⁴

The defendants then moved to strike the plaintiff's reply declarations, arguing that they were untimely because any affidavits supporting a summary judgment motion must be served with the motion itself.⁶⁵ The defendants contended that because the reply declarations were submitted after they had responded to the plaintiff's motion, they would be

⁵⁹ See *id.* The court explained that the conjunction of former Rule 56(c) and former Rule 6(d) assured the non-moving party ten days to respond before the court takes the motion under advisement. *Id.* See also *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985) (noting affidavits must be served with motion for summary judgment at least ten days before hearing). Now, Rule 56(c) provides the non-moving party twenty-one days to respond to the motion. See FED. R. CIV. P. 56(c)(1)(B) (2009).

⁶⁰ No. 1:04-CV-524-JEC, 2005 WL 6038743 (N.D. Ga. Feb. 15, 2005).

⁶¹ See *id.* at *7-9.

⁶² *Id.* at *2. The plaintiff submitted two motions, one addressing the defendants' potential liability to the plaintiff, and the other addressing the merits of the defendants' counterclaims. *Id.* The plaintiff also submitted supporting declarations instead of affidavits. *Id.* Pursuant to 28 U.S.C. § 1746, a "declaration" made under penalty of perjury can be submitted in lieu of an affidavit in federal summary judgment proceedings. See *Ceja v. United States*, 710 F.2d 812, 813 n.* (Fed. Cir. 1983) (equating unsworn declaration with affidavit).

⁶³ See *Tishcon Corp.*, 2005 WL 6038743, at *3; see also FED. R. CIV. P. 56(e)(1) ("A supporting or opposing affidavit must be made on personal knowledge.").

⁶⁴ *Tishcon Corp.*, 2005 WL 6038743, at *2 ("Apparently perceiv[ing] some merit in defendants' motion to strike . . . plaintiff attached declarations of three new witnesses in its reply briefs . . .").

⁶⁵ See *Tishcon Corp.*, 2005 WL 6038743, at *2, *7 (citing FED. R. CIV. P. 6(d) [current version at FED. R. CIV. P. 6(c)(2) (2009)]; cf. *S. Concrete Co. v. U.S. Steel Corp.*, 394 F. Supp. 362, 381 (N.D. Ga. 1975) ("Rule 56(e) states that the affidavit submitted in support of . . . the motion for summary judgment, rather than a subsequent affidavit, 'shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" (emphasis added) (quoting FED. R. CIV. P. 56(e) [current version at FED. R. CIV. P. 56(e)(1) (2009)])).

unfairly prejudiced by the court's consideration of those declarations.⁶⁶

The court agreed, noting that Rule 6(d) was intended "to insure that the party opposing a motion for summary judgment be given sufficient time to respond to the affidavits filed by the moving party, thereby avoiding any undue prejudice."⁶⁷ The court concluded that its acceptance of the plaintiff's reply declarations would undermine this objective, stating:

Justice is not served by allowing a moving party to unfairly surprise and prejudice the non-movant by producing evidence of new, substantive facts at the last minute when there is no opportunity for the non-movant to respond. This is precisely the kind of trial by ambush that the federal rules summarily reject.⁶⁸

3. Replying To Factual Matters Initiated by the Nonmovant: Not Ambush, But Still Not Within the Contemplation of Rule 6(c)(2)

Despite its refusal to consider the movant's declarations, the *Tishcon* court indicated that the submission of reply affidavits might be appropriate to address factual matters "initiated" by the opposing party in its response to a summary judgment motion.⁶⁹ The court in *Litton*

⁶⁶ See *Tishcon Corp.*, 2005 WL 6038743, at *8; cf. *Gametech Int'l, Inc. v. Trend Gaming Sys., L.L.C.*, 380 F. Supp. 2d 1084, 1092 (D. Ariz. 2005) (explaining movants typically not permitted to submit evidence after response is filed because "such a late submission would preclude respondent from addressing [it]").

⁶⁷ *Tishcon Corp.*, 2005 WL 6038743, at *8; see also *Gametech Int'l*, 380 F. Supp. 2d at 1092 (reasoning Rule 6 is intended to prevent moving party from offering new evidence after opposition responds). "[I]f a movant is permitted to proffer new evidence after the respondent has filed its opposition papers, the respondent cannot address the evidence and . . . FED. R. CIV. P. 6 . . . [is] intended to address that problem." *Id.*; see also *RepublicBank Dallas, N.A. v. First Wis. Nat'l Bank of Milwaukee*, 636 F. Supp. 1470, 1472 (E.D. Wis. 1986) ("[Rule 6] is designed to prevent movants from springing new facts on the opposing party when it is too late for the party to contest them.").

⁶⁸ *Tishcon Corp.*, 2005 WL 6038743, at *8. The court recognized that it could have minimized the potential prejudice to the defendants by providing them with an opportunity to "reply to plaintiff's reply." *Id.* at *8-9. However, the court rejected this approach on the grounds that it would significantly expand the time and resources necessary to resolve summary judgment motions. See *id.* For a further discussion of this issue, see *infra* notes 197-205 and accompanying text.

⁶⁹ See *Tishcon Corp.*, 2005 WL 6038743, at *8; see also *Kershner v. Norton*, No. 02-1887(RMU), 2003 WL 21960605, at *2 (D.D.C. Aug. 14, 2003) ("[F]iling an affidavit with a reply is appropriate when the affidavit addresses matters raised in the opposition. Such an approach fulfills the purpose of Rule 6(d), which is to avoid unfair surprise and permit the court to resolve motions on the merits." (citations omitted)).

*Industries, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*⁷⁰ reached a similar conclusion by rejecting the plaintiff's argument that an affidavit submitted with the moving defendant's reply was untimely.⁷¹ The *Litton* court acknowledged that Rule 6(d) "clearly" addressed supporting and opposing affidavits, but held that the rule's silence as to reply affidavits allowed such papers when they "address new material issues raised in the opposition so as to avoid giving unfair advantage to the answering party."⁷² Because the defendant's reply affidavit only responded to matters asserted in opposition to its motion, the court concluded that the reply affidavit should be considered.⁷³ Several other courts have found *Litton's* analysis persuasive.⁷⁴

If the analysis in *Litton* is correct, Rule 6(c)(2) is not inflexible but instead allows courts to accept affidavits submitted with a moving party's reply under limited circumstances.⁷⁵ Nevertheless, because until recently

⁷⁰ 767 F. Supp. 1220, 1234-35 (S.D.N.Y. 1991), *rev'd on other grounds*, 967 F.2d 742 (2d Cir. 1992).

⁷¹ *Litton*, 767 F. Supp. at 1234-35 (citing FED. R. CIV. P. 6(d) [current version at FED. R. CIV. P. 6(c)(2) (2009)]).

⁷² *Id.* at 1235 (citing *Travelers Ins. Co. v. Buffalo Reinsurance Co.*, 735 F.Supp. 492, 495 (S.D.N.Y. 1990), *vacated in part on other grounds*, 739 F.Supp. 209 (S.D.N.Y.1990)). The *Litton* court appears to have been influenced by an applicable local rule that "expressly provide[d] for the submission of 'reply papers' at the option of the moving party." *Id.* (quoting S.D.N.Y. CIV. R. 3(c)(2)).

⁷³ *Id.*

⁷⁴ See, e.g., *Bayway Ref. Co. v. Oxygenated Mktg. & Trading, AG*, 215 F.3d 219, 226-27 (2d Cir. 2000) (relying on *Litton* abuse of discretion standard to affirm district court's ruling on summary judgment); *ADR/JB Corp. v. MCY III, Inc.*, 299 F. Supp. 2d 110, 116 (E.D.N.Y. 2004) (denying plaintiff's motion to file sur-reply brief based on reasoning in *Litton*); *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1456-57 (E.D. Wis. 1993), *aff'd* 41 F.3d 1510 (7th Cir. 1994) (emphasizing centrality of prejudice concerns in determining whether to allow reply brief or affidavit).

⁷⁵ See FED. R. CIV. P. 6(c)(2) (2009) (setting forth rule regarding supporting affidavits): see also *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958) (observing that Rule (6)(c)(2)'s predecessor, former Rule 6(d), was "not a hard and fast rule"); *O'Brien v. Ed Donnelly Enters., Inc.*, No. 2:04-CV-00085, 2007 WL 4510246, at *11 (S.D. Ohio Dec. 18, 2007), *rev'd on other grounds*, Nos. 07-4550, 08-3184, 2009 WL 2382437 (6th Cir. Aug. 5, 2009) ("Because the [Reply] Affidavit is responsive to issues raised in the Plaintiff's memorandum in opposition, FED. R. CIV. P. 6(d) [current version at FED. R. CIV. P. 6(c)(2)(2009)] does not render the affidavit untimely."); *Olsen v. Marshall & Ilsley Corp.*, No. 99-C-0774-C, 2000 WL 34233699, at *1 (W.D. Wis. Sept. 7, 2000), *aff'd*, 267 F.3d 597 (7th Cir. 2001) ("[Rule] 6(d) is not a rigid rule without exceptions; courts are given wide discretion to accept affidavits beyond the date the motion is filed." (citing *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1523 n.9 (10th Cir. 1994))). But see *In re Stone*, 588 F.2d 1316, 1321 (10th Cir. 1978) ("The language of the rule is clear. Affidavits in support of a motion must be served with the motion."); *Loewen v. Turnipseed*, 505 F. Supp. 512, 520 (N.D. Miss. 1981) (explaining "mandatory" rule that affidavits must be stricken if they do not accompany a motion). Even though the default provisions of Rule 56 now contemplate reply briefs, they still do not contemplate reply affidavits. See FED. R. CIV. P. 56(c)(1) (2009).

neither Rule 6(c)(2) nor any other generally applicable federal rule affirmatively authorized the filing of reply *briefs* in summary judgment proceedings, the rules' drafters likely did not contemplate the submission of *affidavits* with a reply.⁷⁶ Indeed, Rule 6(c)(2) expressly authorizes courts to extend the time for the party *opposing* a motion to file its affidavits, but not the time for the moving party to submit affidavits in support of the motion.⁷⁷ For this additional reason, the plain language of Rule 6 provides questionable authority for the judicial recognition of a moving party's right to submit reply affidavits in support of a summary judgment motion.⁷⁸

C. Other Potential Mechanisms for Submitting Reply Affidavits

1. Standards for Amendment Embodied in Federal Rule 6(b)

Although Rule 6(c)(2) may provide questionable support for the filing of reply affidavits, the submission of such evidence might be permissible under Rule 6(b), an "all-purpose provision for enlargement of time," when read in conjunction with Rules 6(c)(2) and 56(c).⁷⁹ In *McCloud River Railroad Co. v. Sabine River Forest Products Inc.*,⁸⁰ for

⁷⁶ See FED. R. CIV. P. 56(c) (2009) (authorizing submission of reply brief); *Burciaga v. West*, 996 F. Supp. 628, 639 (W.D. Tex. 1998), *aff'd*, 162 F.3d 94 (5th Cir. 1998) (noting absence of rule giving right to reply so "evidentiary attachments . . . should be filed with the original motion for summary judgment or response").

⁷⁷ See FED. R. CIV. P. 6(c)(2) ("[A]ny opposing affidavit must be served at least 7 days before the hearing, *unless the court permits service at another time.*" (emphasis added)); 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2719, at 308 n.9 (3d ed. 1998) ("[T]he passage . . . that authorizes the trial court to permit service at some other time in the case of opposing affidavits . . . does not seem applicable to a supporting affidavit."); cf. Alicia Christina Almeida, Note, Precision Fabrics Group, Inc. v. Transformer Sales & Service, Inc.: *Evening the Odds in Summary Judgment Motions in North Carolina*, 75 N.C. L. REV. 2229, 2246 (1997) (asserting, with respect to N.C.R. CIV. P. 6(d), judicial discretion permitted only over deadlines for submission of opposing affidavits).

⁷⁸ See, e.g., *Russo v. Ballard Med. Prods.*, No. 2:05 CV 59, 2006 WL 2345868, at *10 n.1 (D. Utah Aug. 10, 2006) (invoking former Rule 6(d) in declining to consider declarations submitted by movant "two days following the hearing on this motion"); *Fisher v. Crest Corp.*, 735 P.2d 1052, 1056 n.4 (Idaho Ct. App. 1987) (explaining some courts have held they have no discretion to allow late affidavits, while others find they do).

⁷⁹ *Schafer Bakeries, Inc. v. Int'l Bhd. of Teamsters*, 650 F. Supp. 753, 756 (E.D. Mich. 1986). Rule 6(b) provides that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect." FED. R. CIV. P. 6(b); see also *Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993) ("Of course, a district court has discretion to consider a late affidavit if it chooses to do so . . . Fed.R.Civ.P. 6(b) allows courts to enlarge the Rules' time periods.").

⁸⁰ 735 F.2d 879 (5th Cir. 1984).

example, the Fifth Circuit held that an affidavit the plaintiff submitted after filing its motion for summary judgment was properly considered, even though the former Rule 6(d) stated that “an affidavit filed in support of a motion ‘shall’ be served with the motion.”⁸¹ The court based its holding on Rule 6(b), which gives a trial court the discretion to accept untimely affidavits under circumstances demonstrating that excusable neglect was the reason for the late submission.⁸²

In order to obtain leave to submit a belated supporting affidavit under Rule 6(b), the moving party must show “good cause” for failing to submit the affidavit at the time it filed its motion.⁸³ Because in most cases a request for such leave would be made only after the time by which supporting affidavits were required to have been submitted under Rule 6(c)(2) (i.e., “with” the motion), the moving party may further be required to show that its failure to submit the affidavit with its motion was the result of excusable neglect.⁸⁴ As the Seventh Circuit explained:

Federal Rule of Civil Procedure 6 . . . discusses the circumstances under which an enlargement of a time period may be granted (Rule 6(b)). If a request for enlargement of time . . . is made after the time has expired, the court must be satisfied that the failure to act was the result of excusable neglect.⁸⁵

⁸¹ *Id.* at 882 (stating judicial discretion ultimately governs application of FED. R. CIV. P. 6(d) [current version at FED. R. CIV. P. 6(c)(2) (2009)]).

⁸² *See id.*; *see also* Laroque v. Domino’s Pizza, LLC, 557 F. Supp. 2d 346, 350-51 (E.D.N.Y. 2008):

Generally, affidavits must be served contemporaneously with the motion that they support. Rule 6(b), however, provides that . . . “the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.” This grant of discretion applies to any temporal requirement found in the Federal Rules, unless expressly excepted, which the requirement regarding service of affidavits is not.

(internal citations omitted).

⁸³ Fed. R. Civ. P. 6(b)(1).

⁸⁴ *See* Eguia v. Tompkins, 756 F.2d 1130, 1136 n.6 (5th Cir. 1985) (reversing summary judgment because failure to submit affidavit until after judgment was inexcusable delay); Farina v. Mission Inv. Trust, 615 F.2d 1068, 1075 (5th Cir. 1980) (“[A]bsent an affirmative showing . . . of excusable neglect according to Rule 6(b) a court does not abuse its discretion when it refuses to accept out-of-time affidavits.”).

⁸⁵ Reales v. Consol. Rail Corp., 84 F.3d 993, 996 (7th Cir. 1996) (holding district court did not abuse discretion by denying plaintiff’s request to extend summary judgment deadline). *See generally* Inst. for Policy Studies v. U.S. Cent. Intelligence Agency, 246 F.R.D. 380, 383 (D.D.C. 2007) (outlining factors constituting “excusable neglect” under Rule 6(b)).

The showing required by Rule 6(b) defies precise definition, yet may not be particularly difficult to satisfy.⁸⁶ Still, the Rule 6 requirements are not entirely illusory in the sense that the moving party must show good cause and/or excusable neglect.⁸⁷ Significantly, the rule's "good cause" and "excusable neglect" provisions are intended to "prevent the moving party from springing new facts on the nonmoving party when it is too late to contest them."⁸⁸ This objective is identical to the objective that underlies Rule 6(c)(2)'s general requirement that affidavits be filed *with* the motions they support.⁸⁹

The moving party presumably can satisfy its burden under Rule 6(b) by showing that its reply affidavits contain "newly discovered evidence extracted from a previously missing source."⁹⁰ The burden also might be satisfied by establishing a need to address factual matters raised for the first time in the nonmovant's opposition to a motion for summary judgment.⁹¹ However, Rule 6(b)'s provision for the discretionary enlargement of time to submit affidavits does not alter the "general rule [that] a party may not submit evidence with a reply that was available but

⁸⁶ See *Lovelace v. Lee*, 472 F.3d 174, 204 (4th Cir. 2006) (allowing affidavit submission five weeks after summary judgment motion filed despite lack of explanation); *Bilodeau v. Angelone*, 39 F. Supp. 2d 652, 659 (E.D. Va. 1999) (explaining FED. R. CIV. P. 6(b)(2) grants "considerable discretion to district courts . . . in excusing tardiness." (citations omitted)); *Dubuc v. Green Oak Twp.*, 958 F. Supp. 1231, 1241 (E.D. Mich. 1997) (referring to excusable neglect as "a somewhat 'elastic concept'" (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 390 (1993))).

⁸⁷ See *Kernisant v. City of New York*, 225 F.R.D. 422, 431 (E.D.N.Y. 2005) ("Because this Court may exercise its discretion under Rule 6(b)(1) only for 'cause shown' a party must demonstrate some justification for the issuance of the enlargement order." (citation omitted)); *Schafer Bakeries, Inc. v. Int'l Bhd. Of Teamsters*, 650 F. Supp. 753, 756 (E.D. Mich. 1986) (emphasizing movant's burden to show "excusable neglect" if it fails to timely file motion or affidavit).

⁸⁸ *Kernisant*, 225 F.R.D. at 431-32 (outlining good cause standard); *Schafer Bakeries*, 650 F. Supp. at 756 (emphasizing need to show "excusable neglect" in failing to file timely motion or affidavit).

⁸⁹ See *supra* notes 65-67 and accompanying text; see also *Owner-Operator Indep. Drivers Ass'n v. Artic Express, Inc.*, 288 F. Supp. 2d 898, 903-04 (S.D. Ohio 2003) (discussing FED. R. CIV. P. 6(b)).

⁹⁰ *Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991) (affirming district court's decision to strike untimely affidavit because its information was available during discovery); see also *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1487 (E.D. Wis. 1994) (extending period for filing affidavits pursuant to FED. R. CIV. P. 6(b) after new evidence discovered).

⁹¹ See *supra* notes 69-74 and accompanying text; see also *Smith v. Burns Clinic Med. Ctr., P.C.*, 779 F.2d 1173, 1175 n.6 (6th Cir. 1985) (finding defendant's need to address claims in plaintiffs' opposition to summary judgment satisfied cause requirement); *Morrison v. Quality Transps. Servs., Inc.*, 474 F. Supp. 2d 1303, 1314 (S.D. Fla. 2007) (denying plaintiff's motion to strike defendant's supplemental affidavits where filed to rebut plaintiff's summary judgment opposition).

not included with the original motion.”⁹² For example, in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*,⁹³ the First Circuit held that the district court improperly considered reply affidavits containing new evidence.⁹⁴ The First Circuit observed that although Rule 6(b) “allows ‘for cause shown’ a discretionary enlargement of time, this discretion must not be exercised in a manner that prejudices the other party’s substantial rights.”⁹⁵ The court further held that the moving parties’ new evidence prejudiced the opposing party, who did not have a meaningful opportunity to respond.⁹⁶

2. Curing Deficiencies Through Rule 56(e)

Parties seeking to support their summary judgment motions with reply affidavits also occasionally invoke Rule 56(e), which states that a court may permit an affidavit supporting a motion for summary judgment to be “supplemented” by additional affidavits.⁹⁷ Rule 56(e) is often used to cure deficiencies in a party’s initial affidavits, in part because Rule 6(b)’s language is not particularly well suited for general applicability.⁹⁸

Beyond merely curing deficiencies in a movant’s initial affidavits, parties also occasionally use supplemental affidavits to support summary judgment on more substantive grounds, including the strength of the evidence in support of each party’s claims.⁹⁹ When a state appellate court

⁹² Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 678 n.30 (N.D. Ga. 2001) (applying “general rule” in denying plaintiff’s motion for class certification); see also *Tetra Techs., Inc. v. Harter*, 823 F. Supp. 1116, 1120 (S.D.N.Y. 1993) (prohibiting party from raising “entirely new but foreseeable points relevant to a motion” in reply affidavit).

⁹³ 754 F.2d 404 (1st Cir. 1985).

⁹⁴ *Id.* at 409-10 (reasoning defendant’s affidavits submitted on day of the hearing substantially prejudiced the plaintiff).

⁹⁵ *Id.* (quoting FED. R. CIV. P. 6(b) [current version at FED. R. CIV. P. 6(b)(1) (2009)]); cf. *Yonofsky v. Wernick*, 362 F. Supp. 1005, 1015 (S.D.N.Y. 1973) (recounting importance of prejudice or lack thereof to the nonmoving party in applying Rule 6(b)).

⁹⁶ See *Cia. Petrolera Caribe, Inc.*, 754 F.2d at 409-10. The court also noted that the district court’s opinion “relied heavily on defendants’ reply brief and supporting affidavits and even incorporated verbatim a number of consecutive pages from defendants’ brief.” *Id.* at 410.

⁹⁷ Fed. R. Civ. P. 56(e)(1).

⁹⁸ See Fed. R. Civ. P. 56(e) (“The court may permit an affidavit to be supplemented or opposed by . . . additional affidavits.”); *supra* notes 83–96. Compare *Eguia v. Tompkins*, 756 F.2d 1130, 1136 n.6 (5th Cir. 1985) (concluding party may not “shore up . . . a motion for summary judgment with subsequently filed affidavits”), with *Lowe v. Phila. Newspapers, Inc.*, 594 F. Supp. 123, 127 n.4 (E.D. Pa. 1984) (permitting “timely amendment, supplementation and resubmission of affidavits” based on Rule 56(e)).

⁹⁹ See *RGI, Inc. v. Unified Indus., Inc.*, 963 F.2d 658, 662 (4th Cir. 1992) (emphasizing court’s discretion to allow supplementary material supporting motion for summary judgment under Rule 56(e)); *Mills v. Barreto*, No. 3:03CV735, 2004 WL 3335448, at *3 (E.D. Va. Mar. 8, 2004) (“[S]ummary judgment may be granted based on facts developed . . . [in] supplemental

interpreted a similarly-worded state rule, it found this aspect of Rule 56(e) allowed the moving party to supplement its arguments in order to show that there was no genuine issue of material fact for trial.¹⁰⁰ In addition, because Rule 56(e) contains no explicit excusable neglect requirement, it may provide a somewhat more permissive and predictable procedural mechanism than Rule 6(b) for the submission of reply affidavits in summary judgment proceedings.¹⁰¹

For example, in *Brown v. Retirement Committee of Briggs & Stratton Retirement Plan*,¹⁰² the plaintiff argued that the district court improperly considered the defendants' supplemental affidavit in support of their summary judgment motion.¹⁰³ The plaintiff asserted that a party moving for summary judgment must produce all of its evidence at the time its motion is filed.¹⁰⁴ The Seventh Circuit rejected the plaintiff's argument and affirmed the district court's decision for the defendant, stating without elaboration that Rule 56(e) authorizes courts to permit summary judgment affidavits to be supplemented.¹⁰⁵

Nevertheless, like Rule 6(b),¹⁰⁶ a proper application of Rule 56(e) may be limited to the submission of affidavits containing newly discovered evidence, or affidavits responding to matters first raised by the nonmoving party in opposition to the motion.¹⁰⁷ In *Vakas v. Transamerica Occidental*

affidavits.”).

¹⁰⁰ See *Renn v. Davidson's Southport Lumber Co.*, 300 N.E.2d 682, 686-87 (Ind. Ct. App. 1973) (noting Indiana Trial Rule 56(E), which mirrors the Federal Rules allows supplemental affidavits): see also *Amwest Sur. Ins. Co. v. Vaughn*, 100 F. Supp. 2d 335, 338 (E.D.N.C. 2000) (“Summary judgment is proper if after viewing all the evidence, including supplemental affidavits, in the light most favorable to the non-moving party, the Court finds no genuine issue exists.” (emphasis added) (citation omitted)).

¹⁰¹ *Compare Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, N.V.*, 28 F. Supp. 2d 126, 130 (S.D.N.Y. 1998) (“Rule 56(e) grants [courts] the discretion to permit the filing of . . . supplemental materials and does not specify when that permission must be granted.”), with *Orsi v. Kirkwood*, 999 F.2d 86, 91 (4th Cir. 1993) (observing Rule 6(b) should be employed “only if cause or excusable neglect has been shown”).

¹⁰² 797 F.2d 521 (7th Cir. 1986).

¹⁰³ See *id.* at 524, 529 n.1.

¹⁰⁴ *Id.* at 529 n.1.

¹⁰⁵ See *id.* at 523, 529 n.1, 536; cf. *In re Jackson*, 92 B.R. 987, 992 (Bankr. E.D. Pa. 1988) (“[T]he provision of F.R. Civ. P. 56(e) expressly allowing ‘affidavits to be supplemented,’ causes us to conclude that all competent evidence submitted to the court should be considered in deciding a motion for summary judgment, whether submitted initially or in response to objections to the motion.”).

¹⁰⁶ See *supra* notes 83-96 and accompanying text (discussing appropriate grounds for enlargement of time pursuant to Rule 6(b)).

¹⁰⁷ See, e.g., *Pelletier v. Zweifel*, 921 F.2d 1465, 1494 (11th Cir. 1991) (noting defendant seeking leave to submit supplemental affidavit was “armed with [new] information,” which justified the granting of the request); *Dudo v. Schaffer*, 91 F.R.D. 128, 133 (E.D. Pa. 1981) (noting propriety of submitting a “supplemental affidavit for newly discovered matter”); *Bell v.*

Life Insurance Co.,¹⁰⁸ for example, the plaintiffs objected to an affidavit submitted with the defendant's summary judgment motion, claiming the affidavit recited facts that were not within the affiant's personal knowledge.¹⁰⁹ In response to this objection, the defendant submitted a supplemental affidavit with its reply from the same affiant elaborating on the matters asserted in his original affidavit and presenting new factual information not contained in the prior affidavit.¹¹⁰

Relying on Rule 56(e), the plaintiffs moved to strike the supplemental affidavit and portions of the defendant's reply brief that relied upon the affidavit, arguing that the defendant's right to reply was limited to matters raised in their opposition.¹¹¹ However, the court accepted, in part, the defendant's argument that Rule 56(e) permitted the affidavit based on efficiency considerations, and declined to strike the affidavit to the extent it responded to issues raised by the plaintiffs.¹¹² The court nevertheless refused to consider either the portions of the affidavit asserting new facts or the sections of the defendant's reply relying upon those facts.¹¹³

Such an approach, as succinctly stated in *Olsen v. Marshall Ilsley Corp.*,¹¹⁴ attempts to balance competing prejudice and efficiency interests:

[T]o the extent that the affidavits were used to rebut plaintiff's . . . opposition to defendants' motion, the affidavits will be considered. To the extent they were used

Kolongo, No. 1:03CV501(GBL), 2004 WL 3247156, at *4 (E.D. Va. Oct. 25, 2004), *aff'd*, 120 Fed. Appx. 985 (4th Cir. 2005) (stating Rule 56(e) permits supplemental affidavits for "allegations . . . raised for the first time in [the] Opposition").

¹⁰⁸ 242 F.R.D. 589 (D. Kan. 2006).

¹⁰⁹ *Id.* at 592.

¹¹⁰ *Id.* at 593.

¹¹¹ See *id.* at 593; *cf.* *Shurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 919 (E.D. Wis. 1999) (disregarding new evidence in movant's reply because non-movant did not raise matter in its response). To the extent the *Vakas* defendant submitted a supplemental affidavit without first obtaining the court's permission, that itself was improper. See Fed. R. Civ. P. 56(e) ("The court may permit an affidavit to be supplemented or opposed by . . . additional affidavits.") (emphasis added); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440, 455 (E.D. Pa. 1966) (stating Rule 56(e) requires court permission before submitting supplemental materials for summary judgment motion).

¹¹² See *Vakas*, 242 F.R.D. at 59; *cf.* *Torre v. Federated Mut. Ins. Co.*, 854 F. Supp. 790, 833 (D. Kan. 1994) (observing moving party "justified in presenting additional facts challenging those presented by the nonmovant").

¹¹³ See *Vakas*, 242 F.R.D. at 59; *cf.* *Martinez v. Weyerhaeuser Mortgage Co.*, 959 F. Supp. 1511, 1515-16 (S.D. Fla. 1996) (striking portions of reply affidavit and memorandum that "raise[] new arguments . . ."). See generally *Potter v. Shoney's, Inc.*, 108 F. Supp. 2d 489, 498 (M.D.N.C. 1999) (indicating Rule 56 allows discretion in permitting supplemental affidavits).

¹¹⁴ No. 99-C-0774-C, 2000 WL 34233699 (W.D. Wis. Sept. 7, 2000).

in an attempt to propose new facts, they will be ignored. In this way, neither side is prejudiced; defendants are given the opportunity to respond to assertions made by plaintiff, but plaintiff is not left in the precarious position of being unable to respond to newly proposed facts.¹¹⁵

III. AVOIDABLE CONSEQUENCES: EFFECTIVE DISCOVERY AS A MEANS OF AVOIDING THE NEED FOR REPLY AFFIDAVITS

Reasoning similar to that of the *Olsen* court has prompted a number of other courts to permit the filing of reply affidavits in summary judgment cases.¹¹⁶ These courts assume that the opposing party may respond to a summary judgment motion with evidence that goes beyond the issues framed by the motion, and that the moving party may not have anticipated this evidence at the time it filed the motion.¹¹⁷ In this situation, the moving party may feel compelled to submit additional affidavits in response to new and unanticipated evidence.¹¹⁸

Despite the superficial appeal of this reasoning, a moving party rarely should be surprised by evidence submitted in opposition to its motion, assuming it conducted appropriate discovery before filing the motion.¹¹⁹ The party opposing summary judgment should use the

¹¹⁵ *Id.* at *1 (declining to strike defendant's "untimely affidavits" and affirming summary judgment).

¹¹⁶ *See, e.g., Vakas*, 242 F.R.D. at 593 (allowing supplemental affidavit to extent it directly responds to assertions raised in response); *Beveridge v. Nw. Airlines, Inc.*, 259 F. Supp. 2d 838, 845 (D. Minn. 2003) (explaining propriety of reply affidavits "when necessary to address factual claims . . . not reasonably anticipated" (quoting D. MINN. LR. 7.1, Advisory Committee Note to 1999 Amendment)); *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1456-57 (E.D. Wis. 1993), *aff'd*, 41 F.3d 1510 (7th Cir. 1994) (permitting reply affidavits to prevent opposing party from "gain[ing] an unfair advantage").

¹¹⁷ *See In re Clark*, 262 B.R. 508, 513 n.10 (B.A.P. 9th Cir. 2001) (holding moving party need not anticipate all possible defenses in initial moving papers); *Smith v. Johnson*, 862 F. Supp. 1287, 1289 (M.D. Pa. 1994) (movant should not "be expected to anticipate . . . every argument or factual assertion made by . . . respondent").

¹¹⁸ *See, e.g., Brantley v. Cinergy Corp.*, No. C-1-01-378, 2006 WL 314494, at *2 (S.D. Ohio Feb. 9, 2006) (summarizing defendant's argument to allow reply submission based on impossibility of anticipating plaintiff's responsive evidence); *Ticor Title Ins. Co. of Cal. v. FFCA/IIP 1988 Prop. Co.*, 898 F. Supp. 633, 636 (N.D. Ind. 1995) (recounting plaintiff's belief reply brief "necessary" to respond to defendant's responsive evidence).

¹¹⁹ *See Contreras v. City of Chi.*, 920 F. Supp. 1370, 1379 n.3 (N.D. Ill. 1996) ("[T]he whole point of the discovery process . . . is to determine whether there is insufficient evidence to proceed to trial."); *In re Digital Equip. Corp. Secs. Litig.*, 601 F. Supp. 311, 316-17 (D. Mass. 1984) ("[A] motion for summary judgment cannot be granted when . . . it is not yet certain whether essential assertions of fact made by the moving party will be genuinely in dispute.").

discovery process to obtain the evidence necessary to oppose the motion.¹²⁰ Likewise, the party intending to file a motion for summary judgment should conduct the discovery necessary to anticipate the opposing party's response.¹²¹ Thus, before moving for summary judgment, a party is expected to use the various discovery tools at its disposal to determine whether the opposing party would be able to produce sufficient evidence to survive the motion.¹²²

In fact, because the opposing party need only establish the existence of a single genuinely disputed material fact in order to avoid summary judgment, the moving party must "anticipate every potential adverse fact" that might be submitted in opposition to its motion.¹²³ Put another way, a moving party must attempt to plug "every evidentiary hole" in its right to summary judgment before it submits the motion.¹²⁴ Therefore, the moving party should not be surprised by matters asserted in opposition to its motion unless it neglects to conduct discovery with these critical objectives in mind.¹²⁵ The apparent failure of some courts to

¹²⁰ See *Smook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988) (discussing right of opposing parties to use discovery to determine facts necessary to justify opposition); see also *Parrish v. Bd. of Comm'rs of Ala. State Bar*, 533 F.2d 942, 948 (5th Cir. 1976) (extolling myriad of fact-finding opportunities available to parties opposing summary judgment during discovery process).

¹²¹ See, e.g., *Estate of Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund Hosp., Med., Surgical Health Benefit*, 822 F. Supp. 951, 956 (E.D.N.Y. 1993) (noting defendant had ample opportunity to conduct discovery prior to bringing summary judgment motion).

¹²² See *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1105 (9th Cir. 2000) ("In a typical case . . . the moving party will have made reasonable efforts, using the normal tools of discovery, to discover whether the nonmoving party has enough evidence to carry its burden of persuasion at trial."); *Digital Equip. Corp.*, 601 F. Supp. at 317 ("I urge counsel to defer filing motions for summary judgment in every instance in which there is any doubt, before discovery is completed, whether some fact on which the legal argument for the motion is premised will be disputed.").

¹²³ *City of Dothan v. Eighty-Four W., Inc.*, 738 So.2d 903, 909 (Ala. Civ. App. 1999) (quoting *CHAMP LYONS, JR., ALABAMA RULES OF CIVIL PROCEDURE ANNOTATED*, § 56.5, at 103 (3d ed. 1996)); see also *FED. R. CIV. P. 56(c)* ("The judgment . . . should be rendered if . . . there is no genuine issue as to any material fact . . ."); *Pike v. Caldera*, 188 F.R.D. 519, 531 (S.D. Ind. 1999) ("[T]o defeat a summary judgment motion, the nonmovant need only demonstrate a single genuine issue of material fact."); *Digital Equip. Corp.*, 601 F. Supp. at 316 ("If, as counsel for a moving party, you know that even one of the facts essential to a motion for summary judgment is in dispute, you cannot properly file the motion.").

¹²⁴ *City of Dothan*, 738 So.2d at 909 (quoting *LYONS, supra* note 123, at 103) (explaining obligation of moving party in filing motion for summary judgment); see also *Ritt v. Ritt v. Lenox Hill Hosp.*, 582 N.Y.S.2d 712, 714 (N.Y. App. Div. 1992) ("If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel *all questions of material fact*, the motion should simply not be submitted." (emphasis added)).

¹²⁵ See, e.g., *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (calling decision to forego discovery and proceed to summary judgment "an unusual and risky maneuver"); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 90 F.R.D. 140, 143 (M.D.

recognize this fundamental interplay between discovery and summary judgment has occasionally enabled moving parties to engage in the type of “sandbagging” that has prompted other courts to view the submission of reply affidavits with a more critical eye.¹²⁶

For example, in *Viero v. Bufano*,¹²⁷ the court held that a party moving for summary judgment must apprise the opposing party of all of the evidence the moving party plans to utilize before the opposing party’s response to the motion is due.¹²⁸ The court indicated that the moving party’s purported need to submit a reply affidavit, in an attempt to “beef up” the evidence the party presented (or failed to present) with its initial motion, necessarily reflected either a lack of preparation or intentional sandbagging.¹²⁹ In the court’s view, neither possibility provided a legitimate basis for considering such untimely evidence.¹³⁰

Ga. 1981) (citing insufficient pre-trial discovery as “primary cause” of defendant’s lack of viable defense).

¹²⁶ See *Pike*, 188 F.R.D. at 532 (condemning sandbagging). “In this context, ‘sandbagging’ is defined as a party intentionally withholding its best evidence and/or argument until the opposing party does not have an adequate opportunity to respond.” *Id.* at 532 n.23; see also *Adams v. Jackson*, 218 F. Supp. 2d 1006, 1010 (N.D. Ind. 2002) (observing moving party sandbagging by waiting until reply to submit evidentiary support for his motion); *Tetra Techs., Inc. v. Harter*, 823 F. Supp. 1116, 1120 (S.D.N.Y. 1993) (asserting movants’ sandbagging was “foreign to the spirit and objectives of the Federal Rules” (citing, *inter alia*, FED. R. CIV. P. 56)); *Murphy v. Vill. of Hoffman Estates*, No. 95 C 5192, 1999 WL 160305, at *2 (N.D. Ill. Mar. 17, 1999), *aff’d*, 234 F.3d 1273 (7th Cir. 2000) (“[I]t is established beyond peradventure that it is improper to sandbag one’s opponent by raising new matter in reply.”).

¹²⁷ 925 F. Supp. 1374 (N.D. Ill. 1996).

¹²⁸ See *id.* at 1379-80 (admonishing defendants’ “last-minute attempts to bolster the record in their favor” with new evidence in reply); see also *O’Connell v. Smith*, No. CV 07-0198-PHX-SMM, 2007 WL 4189504, at *1 (D. Ariz. Nov. 21, 2007) (noting prejudice to non-movant and conflict with principles of Federal Rules when evidence submitted after response); *FM 103.1, Inc. v. Universal Broad. of N.Y., Inc.*, 929 F. Supp. 187, 197 n.5 (D.N.J. 1996) (“Saving important factual evidence for reply papers is improper and unfair to the movant’s adversary.”).

¹²⁹ *Viero*, 925 F. Supp. at 1380 (declining to consider defendant’s supplemental affidavit); cf. *Aurora Loan Servs., Inc. v. Posner, Posner & Assocs., P.C.*, 513 F. Supp. 2d 18, 20 (S.D.N.Y. 2007) (prohibiting plaintiff from submitting additional evidence with reply); *Burney v. Thorn Ams., Inc.*, 970 F. Supp. 668, 671 (E.D. Wis. 1997) (condemning parties that fail to submit relevant evidence and parties that engage in sandbagging).

¹³⁰ *Viero*, 925 F. Supp. at 1380 (refusing to consider defendant’s expert deposition submitted with reply brief because of undue prejudice to plaintiff). The *Viero* court explained:

Whatever the case may be, any consideration of [the] affidavit would involve a one-sided and unfair analysis, where [the opposing party] would be left without an opportunity to respond Trial by ambush is the stuff of Hollywood or TV movies, and it was once a recognized part of the sporting (or “fox-hunt”) theory of justice, but today it has no place in a court of law, and particularly not in the well-ordered world of summary judgment motions.

Id.; see also *Autotech Techs. Ltd. P’ship v. Automationdirect.com, Inc.*, 235 F.R.D. 435, 437

IV. BE CAREFUL WHAT YOU WISH FOR: A MOVANT PERMITTED TO SUBMIT REPLY AFFIDAVITS RARELY SHOULD DO SO

A. Reply Affidavits and the Absence of a Genuine Issue of Material Fact Are Almost Always Mutually Exclusive

The *Viero* court also indicated that even if procedurally permissible, the moving party's submission of a reply affidavit is likely to be strategically futile.¹³¹ The court explained that once the opposing party presents evidence that appears to establish the existence of a genuine factual dispute, the court's summary judgment decision is affected.¹³² The moving party's submission of additional affidavits to discredit the opposing party's evidence does the moving party "absolutely no good in moving . . . toward summary judgment."¹³³

Reply affidavits have a tendency to highlight the factual disputes that prevent summary judgment.¹³⁴ A moving party faced with an apparent factual dispute can prevail on its motion only one of two ways. First, a party will prevail on summary judgment if it establishes that there is no genuine dispute because the evidence submitted in opposition to the motion is so insubstantial that no reasonable fact-finder could resolve the dispute in the opposing party's favor.¹³⁵ Second, the movant may argue that the

(N.D. Ill. 2006) (admonishing sandbagging tactics). "The courts have characterized this tactic in a variety of ways - all negative. Blind-siding, gamesmanship, and sandbagging are the most commonly used epithets. Regardless of the name applied, the gambit has no place in the judicial system." *Id.*

¹³¹ See *Viero*, 925 F. Supp. at 1379 n.11 (N.D. Ill. 1996) (reasoning dueling affidavits may cause denial of summary judgment by highlighting factual inconsistencies).

¹³² See *id.*

¹³³ *Id.* at 1379 n.11; see also *Elghanmi v. Franklin Coll. of Ind., Inc.*, No. IP 99-879-C H/G, 2000 WL 1707934, at *2 (S.D. Ind. Oct. 2, 2000) ("[I]t is a complete waste of time for the moving party to come forward with conflicting evidence in an effort to 'dispute' the non-moving party's factual assertions.").

¹³⁴ See *Waters v. City of Chi.*, 416 F. Supp. 2d 628, 629 n.1 (N.D. Ill. 2006).

[O]nce a party responding to a Rule 56 motion has identified a genuine issue of material fact that would preclude summary judgment . . . nothing that the movant can offer up by way of reply as to its version of the facts can stave off rejection of the summary judgment motion - just as an omelette, once scrambled, cannot be stuffed back into the eggshell.

Id.

¹³⁵ See *Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co.*, 10 F.3d 144, 148 (3d Cir. 1993) (discussing successful demonstration of genuine factual issue). "For an issue to be

factual dispute, while perhaps genuine, is not material because the opposing party could not prevail under the governing legal principles even if the factual dispute was resolved in its favor.¹³⁶

Moving parties often submit reply briefs in an attempt to establish one or both of these potential deficiencies in an opposing party's factual presentation.¹³⁷ As the Ninth Circuit has explained:

The gist of a summary judgment motion is to require the adverse party to show that it has a claim or defense, and has evidence sufficient to allow a jury to find in its favor on that claim or defense. The opposition sets it out, and then the movant has a fair chance in its reply papers to show why the respondent's evidence fails to establish a genuine issue of material fact.¹³⁸

1. Genuine Factual Disputes and Sham Affidavits

The moving party's submission of affidavits or other evidence with its reply brief will rarely assist it in showing that an alleged factual dispute

genuine, the nonmovant needs to supply more than a scintilla of evidence in support of its position – there must be sufficient evidence (not mere allegations) for a reasonable jury to find for the nonmovant.” *Id.*; see also *Friedman v. Coldwater Creek, Inc.*, 551 F. Supp. 2d 164, 169 (S.D.N.Y. 2008) (“[A] factual ‘dispute’ is not genuine if no rational fact-finder ‘could find in favor of the nonmoving party because the evidence to support its case is so slight.’” (quoting *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir. 1994))).

¹³⁶ See *Valance v. Wisel*, 110 F.3d 1269, 1274-75 (7th Cir. 1997) (emphasizing factual dispute must be material to preclude summary judgment); *Waring v. Meachum*, 175 F. Supp. 2d 230, 237 (D. Conn. 2001):

[D]isputed issues of fact are not material if the moving party would be entitled to judgment as a matter of law even if the disputed issues were resolved in favor of the non-moving party. Such factual disputes, however genuine, are not material, and their presence will not preclude summary judgment.

¹³⁷ See, e.g., *Green v. New Mexico*, 420 F.3d 1189, 1196-97 (10th Cir. 2005) (noting “main purpose” of movant’s reply “to point out the defects in [opposing party’s] response”); *Hinton v. Stein*, 278 F. Supp. 2d 27, 31 (D.D.C. 2003) (recounting movant’s assertion that opposing party failed to raise material issues of fact).

¹³⁸ *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001).

[T]he situation that may most often give rise to . . . a reply brief is the summary judgment motion where the responding party’s response includes affidavits and new factual matter. In that situation, the movant may properly need to explain the facts that establish [disputed] fact issues as either not genuine issues or as issues of immaterial fact.

is not genuine.¹³⁹ In most cases, the submission of such evidence instead will simply illustrate that the opposing party's fact is indeed disputed.¹⁴⁰ In analyzing such a dispute, a court cannot credit the moving party's affidavits over the conflicting evidence the non-moving party presented; in fact, the opposite is true in that the court must favor the evidence submitted by the non-moving party.¹⁴¹ Thus, the moving party's submission of affidavits with its reply ordinarily will not enhance its prospects for prevailing on summary judgment.¹⁴² As one United States District Court explained, once an issue of material fact emerges, that issue "may not be tried upon a summary judgment by means of an 'affidavit match.'"¹⁴³

However, the moving party may submit reply evidence if it might establish that an alleged factual dispute is not genuine.¹⁴⁴ In particular, the moving party could use its reply to show that an affidavit submitted in opposition to its motion contradicts the same affiant's own prior sworn

¹³⁹ See, e.g., *First Specialty Ins. Corp. v. NAIS, Inc.*, 459 F. Supp. 2d 1094, 1100 (D. Kan. 2006) (finding "a genuine issue of material fact still exists" despite movant's additional evidence in reply); *Livingston v. S.D. State Med. Holding Co.*, 411 F. Supp. 2d 1161, 1171 (D.S.D. 2006) (asserting neither of defendant's supplemental affidavits established "absence of a genuine issue of material fact").

¹⁴⁰ See, e.g., *Charles O. Bradley Trust v. Zenith Capital LLC*, No. C 04-02239 JSW, 2008 WL 3400340, at *6 n.2 (N.D. Cal. Aug. 11, 2008) (noting defendant's introduction of new evidence "creates a dispute of fact" precluding summary judgment); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F. Supp. 2d 970, 984 n.13 (C.D. Cal. 2000) (pointing out defendants' reply evidence "merely creates a genuine issue for trial."); *Johnson v. Freeburn*, 29 F. Supp. 2d 764, 768 (E.D. Mich. 1998) (reasoning defendant's affidavits created dispute of material fact which precluded summary judgment); *Fasules v. D.D.B. Needham Worldwide, Inc.*, No. 89 C 1078, 1989 WL 105264, at *4 (N.D. Ill. Sept. 7, 1989) (asserting contrary evidence in defendants' reply brief undermined summary judgment); *Ry. Labor Executives Ass'n v. Long Island R.R. Co.*, 651 F. Supp. 1284, 1285 (E.D.N.Y. 1987) (holding movant's reply affidavits raised more factual issues than they resolved).

¹⁴¹ See *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (refusing to credit movant's version of the facts); *Cole v. Cole*, 633 F.2d 1083, 1092 (4th Cir. 1980) (stating court's obligation to credit factual assertions in favor of the party opposing summary judgment); *Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 464 n.3 (E.D. Pa. 2008) (explaining court "must credit the non-moving party's evidence over that presented by the moving party."); *Owsiak v. Kimco Corp.*, No. 95 C 4116, 1997 WL 722990, at *11 (N.D. Ill. Nov. 13, 1997) (observing reply evidence did "not extinguish any genuine dispute" because court could not "ignore [contrary] testimony").

¹⁴² See *supra* note 140 and accompanying text (illustrating reply affidavits can create factual issues that preclude summary judgment).

¹⁴³ *Yonkers Contracting Co. v. Mc. Tpk. Auth.*, 24 F.R.D. 205, 228 (D. Me. 1958) (overturning trial court and denying motion for summary judgment).

¹⁴⁴ See *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (noting reply can establish lack of genuine fact issue). "[T]he movant has a fair chance in its reply papers to show why the respondent's evidence fails to establish a genuine issue of material fact If given an opportunity, the movant might sometimes be able to show that the appearance of a genuine issue of fact was illusory." *Id.*

deposition testimony.¹⁴⁵ Such a showing typically is made through the movant's submission of the affiant's deposition transcript, which might persuade the court to disregard the opposing affidavit as a sham manufactured for the sole purpose of avoiding summary judgment when determining whether the facts are genuinely in dispute.¹⁴⁶ If this tactic is successful, and the affidavit was the only pertinent evidence submitted by the opposing party, the moving party presumably would prevail on its motion.¹⁴⁷

Permitting the submission of reply evidence would be appropriate in this situation because a moving party's failure to anticipate a sham affidavit cannot be attributed to inadequate discovery efforts or other lack of preparation.¹⁴⁸ As one court explained:

Depositions are taken in order for a party to understand
and respond to an opponent's case; if a party could force a

¹⁴⁵ See, e.g., *Stinebeck v. Cutrona*, No. 06-CV-01883, 2008 WL 859240, at *6 (E.D. Pa. Mar. 28, 2008) (noting reply brief argued plaintiff's affidavit should not be considered because it contradicted deposition testimony); *Gebhardt v. Allspect, Inc.*, 177 F. Supp. 2d 267, 271 n.6 (S.D.N.Y. 2001) ("In their reply brief, ALIA claims that [a] statement from Rickard's affidavit is contradicted by his deposition testimony and that this Court should disregard the statement . . ."). An affidavit that contradicts prior sworn testimony is referred to as a sham affidavit. See generally *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007) (defining "sham" affidavit). "A sham affidavit is a contradictory affidavit that indicates only that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of defeating summary judgment." *Id.*

¹⁴⁶ See, e.g., *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991) ("When, without a satisfactory explanation, a nonmovant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists."); *Powell v. GAF Corp.*, 760 F. Supp. 469, 471 (W.D. Pa. 1990) (summarizing movant's argument that court should "disregard the affidavits filed by plaintiff[] as sham affidavits").

¹⁴⁷ See, e.g., *Schiernbeck v. Davis*, 143 F.3d 434, 437 (8th Cir. 1998) (noting no genuine issue of material fact because plaintiff's only evidence conflicted with earlier testimony); *Estevez v. Edwards Lifesciences Corp.*, 379 F. Supp. 2d 261, 265 (D.P.R. 2005) (finding only evidence was a "self-serving affidavit . . . inconsistent with . . . previous testimony. . ."); *Rosoff v. Mountain Laurel Ctr. For Performing Arts*, 317 F. Supp. 2d 493, 502 (S.D.N.Y. 2004) ("An affidavit that contradicts the witness's deposition testimony is insufficient to raise a genuine issue of fact and thus insufficient to defeat a motion for summary judgment."); *Hill v. McHenry*, 211 F. Supp. 2d 1267, 1273 (D. Kan. 2002) (concluding conflict between plaintiff's affidavit and deposition testimony incited court to disregard portions of affidavit).

¹⁴⁸ See, e.g., *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 715 (6th Cir. 2006) ("That [plaintiff's] affidavit . . . contradicted his deposition testimony . . . could *not* have been raised before seeing [plaintiff's] response brief."); *Stein v. Foamex Int'l, Inc.*, No. Civ. A. 00-2356, 2001 WL 936566, at *7 (E.D. Pa. Aug. 15, 2001) (holding reply evidence appropriate because defendant could not anticipate inconsistencies between response affidavit and deposition); see also *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001) ("factual allegations that might otherwise defeat a motion for summary judgment will not be permitted to do so when they are made for the first time in the plaintiff's affidavit . . . [that] contradicts her own prior deposition testimony.").

trial by blithely disavowing her deposition testimony after it appears that the opposing party would otherwise prevail on summary judgment, the summary judgment procedure would be useless.¹⁴⁹

However, even when confronted with a sham affidavit in opposition to its summary judgment motion, the moving party will seldom improve its prospects by submitting a reply affidavit because the inconsistencies will likely create a factual dispute ripe for testing at trial.¹⁵⁰ Part of the basis of the sham affidavit doctrine is that affidavits, unlike depositions, are not subject to the acid test of cross-examination, and therefore are inherently less reliable.¹⁵¹ Thus, a party may not avoid summary judgment by asserting facts in an affidavit opposing summary judgment that contradict the same affiant's prior deposition testimony.¹⁵² Similarly, the doctrine usually does not enable the party seeking summary

¹⁴⁹ *United States v. \$7300 in U.S. Currency*, No. 02 Civ. 3633(GEL), 2003 WL 21496858, at * 4 (S.D.N.Y. June 27, 2003) (citing *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)); *see also* *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 54 (1st Cir. 2000) (cautioning discretionary disregard of sworn statement would present moving party "with a constantly moving target").

¹⁵⁰ *See, e.g.,* *Jefferson v. Mo. Dep't of Corr.*, No. 2:05CV00025 AGF, 2007 WL 1240256, at *2 (E.D. Mo. Apr. 27, 2007) (finding genuine issue of material fact based on two conflicting affidavits from same witness); *Quintanilla v. K-Bin, Inc.*, 8 F. Supp. 2d 928, 935 (S.D. Tex. 1998) (finding witness's acknowledgement of inconsistent affidavits left fact issue); *Viero v. Bufano*, 925 F. Supp. 1374, 1379-80 n.11 (N.D. Ill. 1996) ("Dueling affidavits are a matter for a factfinder at trial, not for this Court at the summary judgment stage."); *Jersild v. Aker*, 766 F. Supp. 713, 720 (E.D. Wis. 1991) (finding genuine issue of material fact for trial where defendant submitted conflicting evidence); *Stinson v. Lumpkin Lumber Co.*, 460 S.E.2d 846, 848 (Ga. Ct. App. 1995) (finding "conflicting affidavits present a question of credibility as to a material issue" (internal punctuation and citations omitted)).

¹⁵¹ *See* *Jimenez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007) (supporting sham affidavit doctrine because "depositions are more reliable than affidavits"); *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994) (stating depositions more reliable than affidavits due to opportunity for cross-examination); *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 651 (D. Colo. 2001) (explaining importance of deposition cross-examination in cases excluding sham affidavits); *Dunlap v. Medtronic, Inc.*, 47 F. Supp. 2d 888, 891 n.2 (N.D. Ohio 1999) (noting affidavits are not subject to cross-examination); *Bergeron v. State Farm Mut. Auto. Ins. Co.*, 198 F. Supp. 723, 726 (E.D. La. 1961) ("Affidavits are, of course, the weakest form of evidence The weakness in affidavits derives from the inability to cross-examine the affiant.").

¹⁵² *See* *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001) (refusing to acknowledge affidavit that would otherwise defeat summary judgment when it contradicts deposition testimony); *cf.* *Hankins v. Title Max of Ala., Inc.*, 12 Wage & Hour Cas. 2d (BNA) 1796, 1803 (N.D. Ala. 2006) ("[E]xclusion of sham testimony is appropriate in any case where earlier sworn testimony is subsequently conflicted." (citation omitted)); *Danis v. USN Commc'ns, Inc.*, 121 F. Supp. 2d 1183, 1189 (N.D. Ill. 2000) (stating courts should rely on deposition testimony when affidavit contradicts prior deposition). *But see* *Yeatman v. Inland Prop. Mgmt., Inc.*, 845 F. Supp. 625, 629 (N.D. Ill. 1994) (noting court may grant summary judgment despite affidavit that contradicts deposition testimony).

judgment to negate the existence of a genuine issue of fact by submitting a reply affidavit that contradicts deposition testimony included in opposition to its motion.¹⁵³

The submission of a reply affidavit in an attempt to demonstrate a sham opposition to summary judgment might be effective if the reply affidavit directly contradicts the affidavit from the same witness that was offered in opposition to the motion.¹⁵⁴ The success of this strategy assumes that the opposing affidavit was the only pertinent evidence submitted in opposition to summary judgment.¹⁵⁵ The submission of a reply affidavit under any other circumstances is more likely to confirm than to negate the existence of a genuine issue of fact—and may even do so in this situation.¹⁵⁶

B. In Attempting to Demonstrate the Absence of Material Factual Disputes, Reply Affidavits Are Distinctly Immaterial

The submission of affidavits with a reply brief also will not assist the moving party in establishing that a factual dispute is not “material” to the outcome of the case.¹⁵⁷ Indeed, there is no need for the moving party to address the evidence submitted in opposition to its motion if the movant contends that any factual disputes in the case are not material.¹⁵⁸ This is because it is unnecessary for immaterial disputed facts to be resolved in the moving party’s favor.¹⁵⁹

¹⁵³ See *Amadio v. Ford Motor Co.*, 238 F.3d 919, 926 (7th Cir. 2001) (cautioning movant against relying on “contradictory affidavit to negate the existence of a factual dispute”).

¹⁵⁴ See *Crady v. Liberty Nat’l Bank*, No. NA 90-22-C, 1992 WL 479270, at *8 (S.D. Ind. Mar. 30, 1992), *aff’d*, 993 F.2d 132 (7th Cir. 1993) (finding conflicting affidavits from same witness not credible); see also *Robinson v. Globe Newspaper Co.*, 26 F. Supp. 2d 195, 198 (D. Me. 1998) (noting party cannot defeat motion using same witness’s directly contradictory affidavits without explaining contradiction).

¹⁵⁵ See *Crady*, 1992 WL 479270, at *8. The *Crady* court granted summary judgment where the only affidavit offered in opposition to summary judgment was the affidavit shown to be a sham by the contradictory reply affidavit from the same affiant. *Id.* at *9.

¹⁵⁶ See *supra* note 150 and accompanying text (discussing denial of motion where inconsistent affidavits created factual dispute).

¹⁵⁷ See *Cook v. Shaw Indus.*, 953 F. Supp. 379, 383 (M.D. Ala. 1996) (observing movant’s submission of “rebuttal evidence only confirms . . . a material issue of fact exists”).

¹⁵⁸ See *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 272 (5th Cir. 1987) (“with regard to ‘materiality,’ only those disputes over facts that might affect the outcome of the lawsuit under the governing substantive law will preclude summary judgment.”); *SI Handling Sys., Inc. v. Heisley*, 658 F. Supp. 362, 365 (E.D. Pa. 1986) (noting lack of factual dispute). “It will avail the proponent of summary judgment nothing to establish the lack of a factual dispute if the issue in question is not an essential element of the opponent’s claim or defense, *i.e.*, is not material or is not otherwise legally determinative of the outcome of the case.” *Id.*

¹⁵⁹ See *Unterberg v. Corr. Med. Sys., Inc.*, 799 F. Supp. 490, 494 (E.D. Pa. 1992) (“The

In *White v. Bruck*,¹⁶⁰ for example, the court granted summary judgment even though the parties had submitted differing versions of the facts, because the issue before the court was a question of law “to which none of the facts underlying plaintiff’s claims are material.”¹⁶¹ The court reached this conclusion even though the defendant did not submit a reply disputing the evidence the plaintiff presented in opposition to the motion, and the evidence that was in dispute was required to be construed in the plaintiff’s favor.¹⁶² The court reasoned that even if all of the plaintiff’s evidence was true, that evidence would not preclude summary judgment because it was not material to the question of law raised in the defendant’s motion.¹⁶³

Highlighting factual disputes the moving party claims are not material by submitting additional evidence with a reply, only serves to demonstrate the existence of factual issues, and therefore is not in the moving party’s interest.¹⁶⁴ Similarly, in *Portfolio Technologies, Inc. v. Church & Dwight Co.*,¹⁶⁵ the defendant submitted photographic evidence and a supplemental expert witness report with its reply brief to support its argument that evidence submitted with the plaintiff’s brief was not material.¹⁶⁶ The court denied the defendant’s summary judgment motion, noting that its submission of additional evidence with its reply was inconsistent with its contention that there were no material factual disputes

presence of factual issues . . . will not bar the granting of summary judgment when the issues of fact are not material to the controlling legal principles of the case.”); *Givens v. Chambers*, 548 F. Supp. 2d 1259, 1272 n.6 (M.D. Ala. 2008) (finding summary judgment appropriate where existing factual disputes immaterial).

¹⁶⁰ 927 F. Supp. 1168 (W.D. Wis. 1996).

¹⁶¹ *Id.* at 1169.

¹⁶² *See id.* at 1169, 1172; *cf. Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (“[W]here the non-moving party’s evidence contradicts the movant’s, then the non-movant’s must be taken as true.”); *Erickson v. Wis. Dep’t of Corr.*, 358 F. Supp. 2d 709, 713 (W.D. Wis. 2005) (accepting opposing party’s factual assertion provided it was “properly and sufficiently supported by admissible evidence”).

¹⁶³ *White*, 927 F. Supp. at 1169 (declining to consider contradictory facts because immaterial).

¹⁶⁴ *See Gowdish v. Eaton Corp.*, No. C-78-295-G, 1981 WL 2041 (M.D.N.C. 1981) (noting submission of contradictory affidavits points out existence of factual issues); *see also Warren v. Williams*, No. Civ. A. 304CV537(JCH) 2006 WL 860998, at *9 n.5 (D. Conn. Mar. 31, 2006) (noting reply briefs highlighting factual misrepresentations ineffective to support summary judgment). “The . . . ‘misrepresentations of fact’ by the plaintiffs highlighted by the defendants in their reply brief largely demonstrate the number of material issues of fact that exist in this action, and do not, contrary to the defendants’ assertions, demonstrate their entitlement to summary judgment.” *Id.*

¹⁶⁵ No. Civ. A. 04-6340(JAG) 2006 WL 288082 (D.N.J. Feb. 6, 2006).

¹⁶⁶ *Id.* at *3.

in the case.¹⁶⁷

Instead of submitting additional evidence, the moving party in such a case should acknowledge the factual dispute, or even concede, for purposes of the motion, that the opposing party's version of the facts is true.¹⁶⁸ The party may then use its reply to further argue that "the motion is grounded on a legal theory under which the . . . factual controversies in the case are irrelevant."¹⁶⁹ As one court explained, a movant may concede that an opponent's version of the facts is accurate and still demonstrate entitlement to summary judgment "by citing relevant precedent to convince the [c]ourt that there is no legally cognizable theory upon which the opposing party could obtain a judgment in his favor."¹⁷⁰

V. REPLY AFFIDAVITS: THE KEY TO PERPETUAL BRIEFING AND ENEMY OF THE LAST WORD

The foregoing analysis suggests that moving parties rarely should submit evidence with their summary judgment replies.¹⁷¹ Moreover, any reply evidence submitted without the court's permission ordinarily should be disregarded.¹⁷² Indeed, courts frequently reject reply evidence not only

¹⁶⁷ See *id.* at *3 ("Submitting . . . rebuttal of factual assertions, by way of new factual assertions, undercuts [the defendant's] argument: if the factual disputes are not material, why submit . . . supplemental [evidence]?"); cf. *Fasules v. D.D.B. Needham Worldwide, Inc.*, No. 89 C 1078, 1989 WL 105264, at *2 (N.D. Ill. Sept. 7, 1989) (noting factual assertions in reply incompatible with claim that only legal principles are at issue).

¹⁶⁸ See, e.g., *In re Digital Equip. Corp. Secs. Litig.*, 601 F. Supp. 311, 317 (D. Mass. 1984) (noting summary judgment motion proper when "the many factual controversies in the case are irrelevant"); see also *Felch v. Air Fla., Inc.*, 866 F.2d 1521, 1525 (D.C. Cir. 1989) (observing movant "did note a dispute," but stated disputed facts were not material); *Mays v. Travelers Prop. Cas. Co. of Am.*, No. Civ. A. 04-D-486 CBS, 2005 WL 2406108, at *1 (D. Colo. Sept. 28, 2005) ("Defendant acknowledges that the facts . . . are, in fact, disputed, but maintains that those facts, even if true, are immaterial."); *Cunningham v. Local 30, Int'l Union of Operating Eng'rs, AFL-CIO*, 234 F. Supp. 2d 383, 387 (S.D.N.Y. 2002) (finding moving party's acknowledgement of non-material factual dispute does not preclude summary judgment); *Houston v. Escott*, 85 F. Supp. 59, 60 (D. Del. 1949) ("[D]efendant's counsel contended that the . . . disputed facts are not material and therefore conceded that the opposition affidavits should be accepted on these disputed facts.").

¹⁶⁹ *In re Digital Equip. Corp. Secs. Litig.*, 601 F. Supp. at 317 (emphasis omitted); see also *supra* note 168 (explaining opportunities for legal argument in reply briefs).

¹⁷⁰ *SI Handling Sys. v. Heisley*, 658 F. Supp. 362, 365 (E.D. Pa. 1986).

¹⁷¹ See *supra* notes 131-170 and accompanying text (explaining submission of evidence with summary judgment replies is generally futile); see also William M. Hensley, *Recent Developments on the Summary Judgment Front*, ORANGE COUNTY LAW., Dec. 2002, at 6, 7 (indicating contradictory deposition testimony is "only . . . form of evidence which might be appropriate . . . [to] trump mendacious declaration testimony").

¹⁷² See Fed. R. Civ. P. 56(e)(1) ("The court *may permit* an affidavit to be supplemented or opposed by . . . additional affidavits.") (emphasis added); *United States v. Johns-Manville Corp.*,

because the submission of such evidence is likely to be futile,¹⁷³ but also because consideration of the evidence may deprive the opposing party of a full and fair opportunity to respond to the motion.¹⁷⁴

This prejudice to the party opposing summary judgment led the court in *Lewis v. Zilog, Inc.*¹⁷⁵ to disregard a reply declaration.¹⁷⁶ Specifically, in *Lewis*, the plaintiff objected on two procedural grounds to the court's consideration of a declaration submitted with the defendant's reply.¹⁷⁷ Because the local rules governing summary judgment proceedings did not permit the plaintiff to respond to the reply, the plaintiff was effectively precluded from addressing the evidence contained in the defendant's declaration.¹⁷⁸ Accordingly, the court sustained the plaintiff's objection and declined to consider the declaration.¹⁷⁹

Similarly, in *Lalco v. Exeter Energy Ltd. Partnership*,¹⁸⁰ the plaintiff submitted evidence with its reply that the defendant did not refute because the applicable local rules did not authorize the filing of a surreply.¹⁸¹ Although the plaintiff's reply evidence was therefore not contradicted, the court nevertheless denied the plaintiff's summary judgment motion.¹⁸² The court held that, having made a sufficient "initial factual demonstration in opposition to summary judgment," the defendant

259 F. Supp. 440, 455 (E.D. Pa. 1966) (stating Rule 56(e) requires court permission before submitting supplemental materials for summary judgment motion).

¹⁷³ See *supra* notes 150, 157-159, 164 and accompanying text (discussing futility of reply affidavits).

¹⁷⁴ See *supra* notes 127-130 and accompanying text (discussing prejudice associated with late submissions).

¹⁷⁵ 908 F. Supp. 931 (N.D. Ga. 1995).

¹⁷⁶ *Id.* at 959.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* (sustaining plaintiff's objection that she had no opportunity to respond to new evidence in reply brief). In the federal district in which *Lewis* arose, surreplies are "not contemplated by the Local Rules . . ." *Elliott v. Am. Int'l Life Assurance Co. of N.Y.*, 394 F. Supp. 2d 1357, 1362 (N.D. Ga. 2005).

¹⁷⁹ See *Lewis*, 908 F. Supp. at 959 (emphasizing fairness concerns to plaintiff); *cf.* *Georgeadis v. County of Franklin*, No. C-2-99-1027, 2000 WL 1459369, at *1 (S.D. Ohio Sept. 22, 2000) (finding improper the submission of affidavit for first time with reply memorandum); *Andrews v. Emerald Green Pension Fund*, No. 98-436-P-H, 2000 WL 760729, at *2 n.2 (D. Me. Jan. 26, 2000) (finding movant's attempt to add facts in reply "unfair and inappropriate" because non-movant cannot respond).

¹⁸⁰ 989 F. Supp. 425 (D. Conn. 1997).

¹⁸¹ See *id.* at 429 n.1 (refusing to recognize evidence in surreply).

¹⁸² See *id.* at 989 F. Supp. at 430 (concluding defendant met its burden on summary judgment); *cf.* *Portfolio Techs., Inc. v. Church & Dwight Co.*, No. 04-6340 (JAG), 2006 WL 288082, at *3 (D.N.J. Feb. 6, 2006) ("[F]or a party to offer new factual support in a reply brief, and then claim entitlement to summary judgment because the opponent has not disputed this factual support, is manifestly unreasonable.").

was not required to refute the additional facts asserted in the plaintiff's reply to defeat the plaintiff's motion.¹⁸³

These cases advance the premise that a moving party should not be allowed to use a reply affidavit to negate the existence of a genuine issue of material fact because the opposing party has no explicit right to respond to the moving party's reply papers.¹⁸⁴ Conversely, when a court does permit the moving party to submit a reply affidavit, the opposing party should have an opportunity to respond to the new evidence in order to ensure that it has been afforded the procedural rights to which it is entitled under Rule 56.¹⁸⁵

These principles are illustrated by the analysis in *Beaird v. Seagate Technology, Inc.*,¹⁸⁶ where the parties opposing a motion for summary judgment challenged the district court's refusal to permit them to submit a surreply.¹⁸⁷ Because the moving party's reply presented new evidence, the nonmovants analogized the reply to "an initial summary judgment motion."¹⁸⁸ The nonmovants argued that they were deprived of the notice

¹⁸³ *Lalco*, 989 F. Supp. at 429 n.1. ("The Local Rules give no recognition to a 'surreply' and thus defendant is under no requirement for further filing . . ."); *cf. Owsiak v. Kimco Corp.*, No. 95 C 4116, 1997 WL 722990, at *11 (N.D. Ill. Nov. 13, 1997) (holding evidence provided with moving party's reply did "not extinguish any genuine dispute").

¹⁸⁴ *See Desrosiers v. Hartford Life & Accident Ins. Co.*, 515 F.3d 87, 91 (1st Cir. 2008) (noting the parties to the appeal "[did] not dispute [the] general premise" that "a party seeking summary judgment may not add new facts or legal arguments in a reply"); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003) (finding Rule 56(c) conflict where movant submits reply affidavits but court bars surreply addressing them); *Ficq v. Tex. Instruments Inc.*, No. 3:02-CV-1273-D, 2004 WL 576057, at *2 (N.D. Tex. Mar. 1, 2004) ("[I]t is well settled that . . . the summary judgment nonmovant[] is not entitled to file a reply after [the moving parties] file their reply."); *McCulley v. U.S. Dep't of Veterans Affairs*, 851 F. Supp. 1271, 1275 n.4 (E.D. Wis. 1994) ("[A] non-moving party is not authorized to file a 'reply to the movant's reply brief' under the Federal Rules of Civil Procedure . . ."). *But see Lacher v. West*, 147 F. Supp. 2d 538, 540 (N.D. Tex. 2001) (suggesting court will consider evidence, but not arguments, raised for the first time in reply).

¹⁸⁵ *See Cuenca v. Univ. of Kan.*, 265 F. Supp. 2d 1191, 1199 (D. Kan. 2003), *aff'd*, 101 Fed. Appx. 782 (10th Cir. 2004) (granting nonmoving party opportunity to respond to new evidence submitted in moving party's reply). The court in *Cuenca* explained that under Rule 56(c) "the nonmoving party is to be given notice and a reasonable opportunity to respond to the movant's summary judgment materials." *Id.*; *cf. Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1192 (10th Cir. 2006) ("[I]f the district court does preclude a surreply, then the court can avoid error only by not relying on the new materials . . . in the movant's reply brief.").

¹⁸⁶ 145 F.3d 1159 (10th Cir. 1998).

¹⁸⁷ *See id.* at 1163-64 (applying Rule 56 analysis to determine propriety of denial of leave to file surreply).

¹⁸⁸ *Id.* at 1164. Presentation of new evidence in a reply in support of summary judgment is one of the few situations in which the submission of a surreply might be permitted. *See, e.g., Stephens v. Trust for Pub. Land*, 475 F. Supp. 2d 1299, 1303-04 (N.D. Ga. 2007) (finding surreply unwarranted where movant's reply only addressed arguments raised in response to summary judgment motion); *Sublet v. John Wiley & Sons, Inc.*, 351 F. Supp. 2d 836, 841 (S.D.

and opportunity to respond to which they were entitled under Rule 56(c) and that the court could not award summary judgment without first allowing them to respond to the new evidence.¹⁸⁹ The court in *Beaird* acknowledged that district courts must give the opposing party a reasonable opportunity to respond to the evidence supporting summary judgment.¹⁹⁰

Rule 56 neither expressly authorizes nor expressly prohibits the filing of a surreply.¹⁹¹ However, the opposing party's right to respond to evidence submitted in support of a summary judgment reply is implicit in the requirement that the opposing party receive notice and an opportunity to respond before the court rules on the motion.¹⁹² The *Beaird* court relied on this reasoning in holding that when a district court considers evidence submitted with a reply, it cannot prohibit the nonmoving party from responding to that evidence.¹⁹³

This reasoning suggests that any reply affidavits should be presented to the court "in the form of a motion to file additional evidence, with opportunity given to the opposing side to respond in kind."¹⁹⁴ The

Ind. 2004), *aff'd*, 463 F.3d 731 (7th Cir. 2006) (discussing local rule allowing surreplies only when reply "relied upon evidence not previously cited").

¹⁸⁹ See *Beaird*, 145 F.3d at 1164. Other courts have taken the position of the nonmoving party in *Beaird*. See, e.g., *Edwards v. Honeywell, Inc.*, 960 F.2d 673, 675 (7th Cir. 1992) (holding moving party's assertion of issue in memorandum filed subsequent to its motion "reset[s] . . . the clock"); *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990) (holding district court should not consider new evidence in reply without affording nonmovant opportunity to respond).

¹⁹⁰ See *Beaird*, 145 F.3d at 1164 (emphasizing fairness concerns in allowing reply affidavits).

¹⁹¹ See FED. R. CIV. P. 56(c)(1)(2009) (establishing default provisions for a motion, response, and reply); *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002) (acknowledging the Federal Rules' silence on the issue of surreplies); *King County v. Rasmussen*, 143 F. Supp. 2d 1225, 1228 (W.D. Wash. 2001), *aff'd*, 299 F.3d 1077 (9th Cir. 2002) (same).

¹⁹² See *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481-82 (6th Cir. 2003) (noting applicability of notice and opportunity to respond). "[T]he purposes of notice and opportunity to respond extend Rule 56(c) to the situation where the moving party submits in a reply brief new . . . evidence in support of its motion for summary judgment, and require a district court to allow the nonmoving party an opportunity to respond." *Id.*; see also FED. R. CIV. P. 6(c)(2) (2009) ("An affidavit supporting a motion must be served with the motion."); *Stevens v. Deluxe Fin. Servs., Inc.*, 199 F. Supp. 2d 1128, 1130 (D. Kan. 2002) (finding nonmoving party's opportunity to respond to new evidence implicit in Rule 56 notice requirement); *supra* notes 175-182.

¹⁹³ See *Beaird* 145 F.3d at 1165 (discussing Rule 56(c)). Despite lower court holdings to the contrary, the Tenth Circuit subsequently refused to limit its holding in *Beaird* to replies asserting "new legal arguments supported by new materials." *Doeble v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir. 2003). In *Doeble*, the Tenth Circuit specifically held that the nonmoving party is entitled to submit a surreply whenever the court relies upon evidence presented for the first time in a reply. *Id.*

¹⁹⁴ *Burciaga v. West*, 996 F. Supp. 628, 639 (W.D. Tex. 1998), *aff'd*, 162 F.3d 94 (5th Cir.

opposing party's right to respond in kind contemplates the submission of supplemental controverting affidavits, because any legal arguments made solely in a surreply brief would be unlikely to preclude summary judgment.¹⁹⁵ Indeed, the opposing party may not need the court's permission to submit affidavits with (or in lieu of) a surreply brief in this situation, as long as those affidavits are submitted within twenty-one days of service of the movant's reply papers.¹⁹⁶

Unfortunately, the opposing party's submission of a surreply brief and supplemental affidavits does not necessarily spell an end to the briefing.¹⁹⁷ Because the movant has the burden of proof on a motion for summary judgment,¹⁹⁸ the moving party may be entitled to respond to the opposing party's post-reply submissions in order to have the "last word."¹⁹⁹ Indeed, surreplies are disfavored precisely because they are often perceived to be the opposing party's attempt to usurp the moving party's traditional right to the last word in the briefing of its motion.²⁰⁰

1998).

¹⁹⁵ See *supra* notes 150, 157-159, 164; see also, e.g., *Green v. New Mexico*, 420 F.3d 1189, 1197 n.6 (10th Cir. 2005) ("We note that [the] surreply . . . does not offer any evidence to rebut the materials supplied by the [moving party] in its reply brief"); *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 737 (S.D. Iowa 2004), *aff'd*, 431 F.3d 325 (8th Cir. 2005) (allowing nonmovant's surreply materials because they present factual issue); *Johnson v. Sw. Bell Tel. Co.*, 819 F. Supp. 578, 582 (E.D. Tex. 1993) *aff'd*, 22 F.3d 1094 (5th Cir. 1994) ("[I]t is insufficient for the nonmovant to argue in the abstract that the legal theory involved . . . encompasses some factual questions."). See generally *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356, 361 (7th Cir. 1992) (explaining "[a]rgument is not evidence upon which to base a denial of summary judgment.").

¹⁹⁶ See, e.g., *Smithkline Beecham PLC v. Teva Pharms. USA, Inc.*, Nos. 04-0215, 05-0536(NLH)(JS), 2007 WL 1827208, at *3 (D.N.J. June 22, 2007) (holding supplemental affidavit submitted with surreply may be "timely and permissible" under Rule 56 (c) and (e)); *Pike v. Caldera*, 188 F.R.D. 519, 534 (S.D. Ind. 1999) (concluding permission to submit new evidence with surreply unnecessary if responsive to evidence in movant's reply).

¹⁹⁷ See *Paper Sys., Inc. v. Mitsubishi Corp.*, 967 F. Supp. 364, 366 (E.D. Wis. 1997) (noting the allowance of a sur-reply could lead "to a sur-sur-reply."); *Garrison v. Ne. Ga. Med. Ctr., Inc.*, 66 F. Supp. 2d 1336, 1340 (N.D. Ga. 1999) (noting regular admission of surreplies would case "endless volley of briefs").

¹⁹⁸ See generally *Benton-Volvo-Metairie, Inc. v. Volvo Sw., Inc.*, 479 F.2d 135, 139 (5th Cir. 1973) ("It is well established that on a motion for summary judgment, the moving party carries the burden of proof, and he must show that no genuine issue of material fact exists even though at trial his opponent [would have] the burden of proving the facts alleged.").

¹⁹⁹ See *Clutts v. Dillard's, Inc.*, 484 F. Supp. 2d 1222, 1226 (D. Kan. 2007) (permitting defendant to reply to plaintiff's surreply because defendant bears burden of proof); *Onyx Waste Servs., Inc. v. Mogan*, 203 F. Supp. 2d 777, 778 n.1 (E.D. Mich. 2002) (granting defendant's request to file reply to surreply); *Springs Indus., Inc. v. Am. Motorists Ins. Co.*, 137 F.R.D. 238, 239 (N.D. Tex. 1991) ("In our jurisprudence the party who must persuade the court of the merits of the relief it seeks is almost always given the final word.").

²⁰⁰ See *Lacher v. West*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001) (observing surreplies "usually are a strategic effort by the nonmovant to have the last word"); *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 659 (D. Kan. 1999) (noting general rule against

Predictably, permitting the moving party to make a further submission in response to the opposing party's surreply may exacerbate this problem.²⁰¹ Such a submission by the movant might prompt additional filings by the party opposing summary judgment.²⁰² In this fashion, the moving party's submission of a reply affidavit could embroil the court "in a cycle of response and counter-response with evidentiary filings *ad infinitum*."²⁰³ Such extended briefing would prevent the court from disposing of the motion expeditiously, thereby undermining the important efficiency objectives of Rule 56.²⁰⁴ This consequence, however unintended, provides a further persuasive reason for prohibiting the submission of reply affidavits in all but the most compelling circumstances.²⁰⁵

VI. CONCLUSION

The opportunity to submit a reply typically enables a party moving for summary judgment to have the last word in the proceedings. However, a moving party occasionally will use this opportunity to attempt to submit additional affidavits or other evidentiary materials in support of its motion.

surreplies helps courts determine finality of matters and minimize "last word" battles); *C & F Packing Co. v. IBP, Inc.*, 916 F. Supp. 735, 741 (N.D. Ill. 1995) (discussing the nonmovant's effort to use surreply to "get in the 'last word'").

²⁰¹ See *Am. Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc.*, 106 F. Supp. 2d 895, 898 n.7 (N.D. Tex. 2000) (explaining extended summary judgment proceedings due to filing of both surreply and final reply).

²⁰² See, e.g., *epicRealm Licensing, LLC v. Autoflex Leasing, Inc.*, 492 F. Supp. 2d 608, 618 (E.D. Tex. 2007) (noting nonmoving party filed response to moving party's sur-surreply); *Am. Tel. & Tel. Co. v. NOS Commc'ns, Inc.*, 830 F. Supp. 225, 230 n.1 (D.N.J. 1993) (permitting opposing party's "sur-sur-surreply brief").

²⁰³ *Burciaga v. West*, 996 F. Supp. 628, 639 (W.D. Tex. 1998), *aff'd*, 162 F.3d 94 (5th Cir. 1998) (rejecting plaintiff's argument that court wrongfully excluded evidence attached to a reply document); see also *Tetra Techs., Inc. v. Harter*, 823 F. Supp. 1116, 1120 (S.D.N.Y. 1993) (noting if reply affidavits were allowed, "a sur-reply affidavit would be necessary . . . and so on *ad infinitum*").

²⁰⁴ See text accompanying *supra* note 115; see also *Orsi v. Kirkwood*, 999 F. 2d 86, 91 (4th Cir. 1993) (noting Rule 56 procedures designed to "assure . . . prompt disposition of cases"); *Wilder v. Prokop*, 846 F.2d 613, 626 (10th Cir. 1988) ("The purpose of Rule 56 is to permit expeditious disposition of cases in which there is not a substantial issue of fact.").

²⁰⁵ See *Tishcon Corp. v. Soundview Commc'ns, Inc.*, No. 1:04-CV-524-JEC, 2005 WL 6038743, at *9 (N.D. Ga. Feb. 15, 2005) ("[T]he procedure . . . if allowed in every case, would greatly extend the time required to deal with a [summary judgment] motion This the Court cannot allow."); see also *Blackhawk Molding Co. v. Portola Packaging, Inc.*, 422 F. Supp. 2d 948, 952 (N.D. Ill. 2006) ("[I]f the court were to permit a movant to file . . . additional facts in response to a non-movant's . . . additional facts, it would be obliged to allow the non-movant to respond, creating a hall of mirrors that would hardly facilitate an efficient resolution of the issues.").

The courts generally view this tactic with disfavor. Courts disfavor these supplemental materials, in part, because allowing additional evidence with replies is likely to prompt yet another round of factual submissions from the party opposing the motion.²⁰⁶

In addition, the submission of affidavits with a reply may have the unintended practical effect of confirming the existence of genuine issues of material fact precluding summary judgment.²⁰⁷ Therefore, the moving party should limit use of the opportunity to reply to situations where it can illuminate deficiencies in the opposing party's factual submissions, or clarify the legal arguments made by the parties in their opening briefs. If the moving party submits additional supporting evidence with its reply, the "last word" on the issues raised by its motion is unlikely to be heard until the parties present their closing arguments at trial.

²⁰⁶ See *supra* notes 194-200 and accompanying text (noting that reply affidavits often cause nonmoving party to submit additional evidence).

²⁰⁷ See *supra* note 150 (discussing that inconsistent evidence presented in reply affidavit only confirms existence of factual issues).