**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

OKLAHOMA LAND HOLDINGS, LLC,)
)
      Plaintiff,   )
)
) Case No. 5:17-CV-01036-D
v.   )
)
BMR II, LLC and ANDREW   )
M. ASHBY,   )
)
      Defendants.   )

ORDER

Before the Court is Defendants' Motion to Strike Plaintiff's Sur-Reply to Defendants' Motion for Summary Judgment [Doc. No. 117]. Plaintiff has responded [Doc. No. 124] and Defendants have replied [Doc. No. 141]. The matter is fully briefed and at issue.

BACKGROUND

On May 6, 2019, Defendants filed their Motion for Summary Judgment [Doc. No. 76]. Plaintiff responded [Doc. No. 89] and Defendants replied [Doc. No. 111]. Plaintiff then filed a Motion for Leave to File Sur-Reply [Doc. No. 112] indicating that the Motion for Leave was unopposed. The Court granted the Motion on June 20, 2019 [Doc. No. 115] and Plaintiff filed its sur-reply [Doc. No. 116] on June 21, 2019.

Defendants informed Plaintiff that the Motion for Leave was not unopposed on June 17, 2019. Motion to Strike at 2. However, Defendants failed to file any opposition to the

Motion for Leave.[1] Instead, Defendants filed a Motion to Strike Plaintiff's Sur-Reply [Doc. No. 117] on June 25, 2019. Plaintiff responded [Doc. No. 124] on July 16, 2019 and Defendants replied [Doc. No. 141] on July 22, 2019.

DISCUSSION

Defendants assert that: (1) contrary to Plaintiff's representation, the Motion for Leave to File Sur-Reply [Doc. No. 112] was not unopposed; and, (2) Plaintiff's Sur-Reply "violates the well-recognized rule that the movant should have the first and last opportunity to speak on the issue raised and that sur-replies are an exception, to be used sparingly and only when necessary to address new grounds in support of a motion raised for the first time in a reply brief." Motion to Strike at 3. In response, Plaintiff argues that the mischaracterization of its Motion for Leave as "unopposed" was inadvertent and asserts a sur-reply is proper when a party attaches new exhibits to a reply. Response to Motion to Strike at 2, 7.

Because Defendants failed to inform the Court that the Motion for Leave was not "unopposed" until seven days after the Motion for Leave was filed and five (5) days after the Court issued its Order [Doc. No. 115] granting the Motion, the Court declines to strike the Sur-Reply on that basis.

Regarding Defendant's contention that the Sur-Reply does not address new material presented for the first time in the Reply, the Court will consider the Sur-Reply within the

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[1] Although Plaintiff states that Defendants informed the Court of their opposition to the Motion for Leave on June 17, 2019, there is no such notice in the record. Response at 2-3.
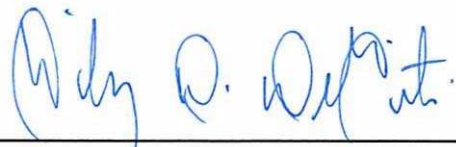
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confines of the Tenth Circuit's directives regarding such filings. The rule in the Tenth Circuit is clear: "[a]n issue or argument insufficiently raised in a party's opening brief is deemed waived." *SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1226 (10th Cir. 2009) (citing *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277–78 (10th Cir.1994)); *see also*, LCvR 7.1(i) (noting "[r]eply briefs are optional and not encouraged" and that "[s]upplemental briefs may be filed only upon motion and leave of court"). However, "the nonmoving party should be given an opportunity to respond to new material raised for the first time in the movant's reply. . . . 'Material,' for purposes of this framework, includes both new evidence and new legal arguments." *Locke v. Grady Cty.*, 437 Fed. Appx. 626, 633 (10th Cir. 2011) (quoting *Green v. New Mexico,* 420 F.3d 1189, 1197 (10th Cir. 2005)) (internal quotation marks omitted).

Accordingly, the Court will only consider the arguments in Plaintiff's Sur-Reply which are raised to address new issues or arguments addressed for the first time in Defendant's Reply. All other argument will be disregarded.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Strike Sur-Reply to Defendants' Motion for Summary Judgment [Doc. No. 117] is **DENIED**.

IT IS SO ORDERED this 24th day of July, 2019.

TIMOTHY D. DeGIUSTI
Chief United States District Judge