DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Telephone: 303-606-2429	
Plaintiff: DAVID S. CHEVAL, Acting Securities Commissioner for the State of Colorado, v. **Defendants:** GARY J. DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC.	▲COURT USE ONLY ▲
Attorneys for Non-Party Creditors ACF Property Management, Inc., and Alan C. Fox: Lucas T. Ritchie, Atty. Reg. No. 35805 Eric B. Liebman, Atty. Reg. No. 27051 Joyce C. Williams, Atty. Reg. No. 52930 MOYE WHITE LLP 16 Market Square 6th Floor 1400 16th Street Denver, CO 80202 Telephone: 303-292-2900 Email: Luke.Ritchie@moyewhite.com Eric.Liebman@moyewhite.com Joyce.Williams@moyewhite.com and Gary S. Lincenberg *(pro hac vice admission pending)* Sharon Ben-Shahar Mayer *(pro hac vice admission pending)* BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW, P.C. 1875 Century Park East, Twenty-Third Floor Los Angeles, CA 90067 Telephone: 310-201-2100 Email: glincenberg@birdmarella.com smayer@birdmarella.com	Case Number: 2018CV33011 Courtroom 424
NON-PARTY CREDITORS ACF PROPERTY MANAGEMENT, INC. AND ALAN C. FOX'S MOTION TO STRIKE, OR ALTERNATIVELY, FOR LEAVE TO FILE SURREPLY	

Non-party creditors ACF Property Management, Inc. and Alan C. Fox (collectively, "ACF Creditors"), through counsel, pursuant to C.R.C.P. 12(f), move the Court for an order striking

Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Receiver's Reply In Support of Motion for Turnover ("Reply). In the alternative, the ACF Creditors request leave to file a surreply. As grounds therefor, the ACF Creditors state as follows.

C.R.C.P. 121 § 1-15(8) CERTIFICATE OF CONFERRAL

The undersigned certifies that the ACF Creditors' counsel has conferred in good faith with the Receiver's counsel about this motion and, based thereon, advises the Court that the Receiver opposes the requested relief.

INTRODUCTION

The Receivership Order constituted a grant of significant power to the Receiver, but with that came an equally significant responsibility. In the twenty months since the Court's entry of the Receivership Order, the Receiver has wielded that power with reckless abandon, seeming to grow more and more comfortable dangling precariously on the line of abusing his power. The Reply is the most recent example of the Receiver flouting his responsibility—it suffers from multiple procedural defects that merit striking significant portions of it. Specifically, and as further detailed below, the Reply:

- raises new allegations and presents new documents and arguments that are beyond the scope of the underlying briefing on the Turnover Motion;
- raises new allegations and presents new documents and arguments that are irrelevant to a determination of this matter, serving no purpose but to harass, impugn, and defame the ACF Creditors;
- flouts the page limitation of C.R.C.P. 121 § 1-15(1)(a);
- flouts the requirements of service under C.R.C.P. 5(b);
- flouts the requirements of service of exhibits under C.R.C.P. 121 § 1-15(2);

- flouts the requirements of e-service under C.R.C.P. 121 § 1-26(6); and
- flouts the ACF Creditors and other nonparties' reasonable expectations of privacy to their confidential health, financial, and business information.

The ACF Creditors might ordinarily give the Receiver the benefit of the doubt—assuming a clerical error—in the event of one or even two of these sorts of important procedural defects. Taken collectively, however, the Reply's many defects demonstrate the Receiver and his counsel's apparent belief that they are above the Rules of Civil Procedure and beyond reproach. Of course, this is not so – granting this Motion to Strike is necessary to confirm that fact loud and clear.

LEGAL ARGUMENT

1. Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply should be stricken because they raise factual and legal arguments outside the scope of the Turnover Motion briefing.

Arguments raised for the first time in a reply brief as opposed to an opening brief are not properly before the court and should be disregarded. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990); *Lakewood v. Armstrong*, 419 P.3d 1005, 1012 (Colo. App. 2017); *Colorado Korean Ass'n v. Korean Senior Ass'n*, 151 P.3d 626, 629 (Colo. App. 2006). This rule applies not only to a movant's new arguments raised in reply, but also when a movant's "original arguments" are "expanded on" in reply. *Dean v. Cook*, 413 P.3d 246, 252 (Colo. App. 2017); *Sayed v. Williams*, 2020 Colo. App. LEXIS 727, *2, n.2 (Colo. App. April 2, 2020)[1]. While the foregoing cases apply the rule in the appellate briefing context, it applies just as soundly in the context of motions briefing at the trial court level because there too the nonmovant has no opportunity to address arguments first raised in the "reply" stage of the briefing. *See Flagstaff Enterprises Constr. v. Snow*, 908 P.2d

[1] At the time of filing, this very recent opinion remained unpublished. A copy is thus submitted for convenience of reference as **Exhibit A** hereto.

1183, 1185 (Colo. App. 1995) (refusing to consider argument first raised in reply brief in support of Rule 59 motion at trial court level, explaining "the reasoning of *Czemerynski*…, is as applicable to issues raised for the first time in reply briefs on post-trial motions as it is to issues asserted for the first time in reply briefs on appeal.").

Here, the Receiver attached to his Reply ***nineteen*** new exhibits consisting of roughly ***159 pages***. Aside from impugning the ACF Creditors, these new exhibits serve no purpose but to advance the Receiver's impermissible new arguments, which include, without limitation:

- spending four pages and twelve exhibits blindly dissecting the ***irrelevant*** negotiations and transactions connected to an unrelated entity, Shoppes at Bedford 15A, LLC ("Bedford"). *See* Reply, at 11-15, Exs. 12-24.[2]

- positing that the ACF Creditors are hiding behind Mr. Fox's recent illness and the Covid-19 global pandemic to "deplete Estate resources," *see* Reply at 5, n. 5, and Ex. 6;

- "suspecting" that the ACF Creditors refuse to turnover irrelevant and confidential documents to "conceal" some "parallel investment schemes," *id.* at 6, and Ex. 7; and

- requesting an award for attorneys' fees and costs for having to bring the Turnover Motion, *id*. at 14.

[2] The Receiver discusses the Bedford transaction as though it somehow supports his argument that ACF knew it needed the Receiver's approval to acquire assets from SSC 02. It is clear, however, the two transactions had nothing to do with each other. That ACF sought the Receiver's approval for its acquisition of Dragul's interest in Bedford does not mean that ACF was required to seek the Receiver's approval for the acquisition of the membership interests owned by SSC 02. Unlike Dragul's interest in Bedford, SSC 02 was owned by Dragul's children – ***not*** Dragul. In a footnote, the Receiver also points to the ACF Creditors' reluctance to hand over Bedford's confidential financial and business records as somehow justifying his sweeping review concerning Bedford. Reply at n. 9. In fact, the Receiver's detour into Bedford is an exercise in distraction—directing the Court's focus towards his irresponsible and irrelevant hypotheses and away from his lack of any legal or factual basis for requesting the Court to order the turnover of the assets that ACF had acquired from SSC 02.

Having raised these voluminous exhibits and arguments only after the ACF Creditors' Response was filed, the Receiver deprived the ACF Creditors of a fair opportunity to address them. Nothing but his own tactical decision to sandbag the ACF Creditors prevented the Receiver from properly raising such evidence and arguments in the Turnover Motion. Under the circumstances, Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply should be disregarded, *Colorado Korean Ass'n*, 151 P.3d at 629; *Province*, 894 P.2d at 69, or more appropriately, stricken in their entirety.

2. Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply should also be stricken because they are impertinent and scandalous.

Courts may strike "any redundant, immaterial, impertinent, or scandalous matter" from "any pleading, motion, or other paper." C.R.C.P. 12(f). Here, the Reply and its exhibits are replete with immaterial evidence and arguments as well as impertinent and scandalous personal attacks on the ACF Creditors, including, without limitation, the following:

- stating "Fox is Dragul's long-time co-conspirator" and that "he and Dragul participated in Fox's parallel investment schemes," Reply at 6;
- attaching an unredacted copy of the complaint and its unredacted exhibits from an unrelated and irrelevant civil action pending in the State of California, *id.*, Ex. 7;
- stating "Fox and Dragul both routinely and systematically failed to distribute proportionate income or sales proceeds to their investors," *id*. at 8; and
- baselessly speculating at length over the course of four pages and twelve exhibits, many of which involve clearly personal discussions about finances and family, about the irrelevant negotiations and transactions concerning Bedford. *Id*. at 11-15, Exs. 12-24.

Not only do these statements contain serious accusations that are thrown around without a shred of supporting evidence, they are also entirely irrelevant to the matters at issue in the

Turnover Motion. The Receiver's personal attacks against the ACF Creditors serve but one improper purpose—to bolster the fictional narrative dreamt-up by the Receiver and irresponsibly advanced by him before this Court and others to justify his dragging of the ACF Creditors into this enforcement action as well as into the parallel Receiver's Action. The Receiver's desperate attempt to sling mud in order to distract from the gaping holes in his misguided theory should not be condoned and his irresponsible attacks should be stricken from the record. C.R.C.P. 12(f).

3. Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply should also be stricken because the Receiver flouted the Rules of Civil Procedure as well as nonparties' privacy rights in advancing them.

In addition to impermissibly raising new evidence and arguments, the Reply and the circumstances of its filing violated multiple other procedural and statutory requirements.

First, the Reply exceeds the ten-page limitation for reply briefs set forth in C.R.C.P. 121 § 1-15(1)(a). Section 1-15 of Rule 121 was amended in 2015 to confirm that its page limitations were not merely aspirational, but enforceable restrictions. *See* C.R.C.P. 121 § 1-15(1)(a) cmt. 5. Here, the Reply was over fourteen pages in length, not including the case caption, signature block, certificate of service and attachments. The Receiver did not seek and was not granted leave to exceed that page limit.

Second, in filing the Reply, the Receiver violated service requirements under C.R.C.P. 5(b), as well as C.R.C.P. 121 §§ 1-15(2) and 1-26(6). The Receiver filed his Reply on Friday, May 8th, three days in advance of his Monday, May 11th deadline, via CCEF as required for filings in Denver District Court. But rather than serve the Reply on the ACF Creditors' counsel via CCEF, which would have provided them with immediate notice of the early filing, the Receiver ***mailed*** a copy of the brief ***without*** Exhibits 6 through 24 to Moye White's office – presumably, knowing

the brief would not be delivered until after the weekend and that counsel's office would be operating on a skeleton crew as required by applicable COVID-19 "stay at home" orders.

As a result, the ACF Creditors' counsel first learned of the Reply's filing when it was delivered to his near-empty law firm and eventually emailed to him by an office clerk midday on Monday, May 11th, three days after its CCEF filing, and without its exhibits. Even after receiving the Reply, the ACF Creditors' counsel could not simply obtain copies of the Reply's missing exhibits via CCEF, because they were necessarily filed as "protected" and thus only accessible to parties in the action—not to the ACF Creditors. So, the ACF Creditors only obtained copies of Exhibits 6 through 24 after their counsel notified the Receiver's counsel of the omission and received a response on Monday evening containing an electronic link to the documents.

Deliberate or not, the Receiver's maneuver violated Rules 5 and 121 § 1-15 because the brief that was served by mail was ***not*** a complete copy of his filing. C.R.C.P. 5(b) & 121 § 1-15(2). Likewise, the Receiver's maneuver also violated Rule 121 § 1-26, which mandates "[d]ocuments submitted to the court through E-Filing shall be served under C.R.C.P. 5 ***by E-Service***." C.R.C.P. 121 § 1-26(6) (emphasis added). Of course, the ACF Creditors' counsel are registered CCEF users, meaning, the Receiver's counsel only needed to check a box when filing through CCEF to add them as E-Service recipients.

Third, the Receiver violated various regulatory and statutory requirements by posting a complete copy of the Reply and Exhibits 6 through 24 to his publicly accessible website (https://dragulreceivership.com/), without first redacting the ACF Creditors and other nonparties' private and confidential personal health and financial information as well as proprietary business information. Items the Receiver published without redactions include, without limitation:

- nonparty's confidential medical information, Reply Ex. 6 at 1 & 2;
- nonparties' proprietary business and financial information, *id*., Ex. 7 at 55, 57, 80, 82, 84, & 88;
- nonparty's checking account number, *id.*, Ex. 10 at 1;
- nonparty's social security number, *id.,* Ex. 12 at 2;
- nonparties' proprietary business and financial information, *id.*, Ex. 12 at 4-8;
- nonparty's account numbers and financial information, *id*., Ex. 17 at 1-7; and
- nonparty's account number. *Id.*, Ex. 18 at 1.

Colorado recognizes as right to privacy "which protects the individual interest in avoiding disclosure of personal matters." *Martinelli v. District Court*, 612 P.2d 1083, 1091 (Colo. 1980) (internal quotations omitted). Financial documents and information fall under the umbrella of the right to privacy and Colorado courts have long recognized a legitimate expectation of privacy in such documents. *In re Dist. Ct.*, 256 P.3d 687, 692 (Colo. 2011); *see also Leidholt v. Dist. Court,* 619 P.2d 768, 770 (Colo.1980). Of course, proprietary trade secrets do as well. *See* C.R.C.P. 45(c)(3)(B)(i). By publishing the foregoing confidential and proprietary information without redaction the Receiver violated these individuals' privacy rights as well as the Colorado' Uniform Trade Secrets Act, C.R.S. §§ 7-74-101 *et seq*., and the Colorado Consumer Protection Act. *See* C.R.S. §§ 6-1-713.5(1) & 6-1-715(1)(a). The ACF Creditors reserve all rights with respect to the Receiver's violations of their privacy rights.

Taken together the Reply and the circumstances of its filing demonstrate the Receiver and his counsel's apparent belief that they are above the Rules of Civil Procedure and beyond reproach. "Parties litigant have a right to rely upon the rules as written," and "[i]t is the duty of

trial courts…, to enforce them when timely objection is made…." *Capital Industrial Bank v. Strain*, 442 P.2d 187, 188 (Colo. 1968). By this motion, the ACF Creditors timely object to the Receiver's violations of the rules and request that the Court strike Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply.

4. **In the event the Court does not strike Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply, the ACF Creditors respectfully request leave of Court to submit a surreply.**

A surreply "allows the nonmoving party…to respond to new evidence and new legal arguments raised for the first time in the moving party's reply brief." *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 860 (Colo. App. 2007). As demonstrated above, the Reply is replete with examples of such new evidence and new legal arguments. In the event the Court decides to consider Exhibits 6 through 24 and corresponding arguments at pages 5 through 15 of the Reply, the Court should grant the ACF Creditors leave to file a surreply within seven days, so that they may fairly and fully respond thereto.

A proposed Order granting the requested relief is submitted herewith.

DATED: May 13, 2020

Respectfully submitted,

MOYE WHITE LLP

s/ Lucas T. Ritchie
Lucas T. Ritchie
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Joyce C. Williams
Attorneys for Non-Party Creditors ACF Property Management, Inc., and Alan C. Fox

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2020 a true and correct copy of the foregoing was electronically filed via CCEF and served on the following:

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As of: May 13, 2020 4:05 PM Z

Sayed v. Williams

Court of Appeals of Colorado, Division One

April 2, 2020, Decided

Court of No. 19CA0563

Reporter
2020 Colo. App. LEXIS 727 *

Hazhar A. Sayed, Plaintiff-Appellant, v. Dean Williams, Executive Director of the Department of Corrections, Defendant-Appellee.

Notice: NOT PUBLISHED PURSUANT TO *C.A.R. 35(e)*

Prior History: **[*1]** El Paso County District Court No. 19CV3. Honorable Thomas K. Kane, Judge.

Disposition: JUDGMENT AFFIRMED.

Counsel: Hazhar A. Sayed, Pro se.

Philip J. Weiser, Attorney General, Karen E. Lorenz, Assistant Attorney General, Denver, Colorado, for Defendant-Appellee.

Judges: Opinion by JUDGE DAILEY. Navarro and Gomez, JJ., concur.

Opinion by: DAILEY

Opinion

In this action to compel access to sex offender treatment, plaintiff, Hazhar A. Sayed, appeals the district court's judgment dismissing his complaint against defendant, Dean Williams, Executive Director of the Colorado Department of Corrections (DOC).[1] We affirm.

I. Background

In 2006, Sayed was sentenced under the Colorado Sex Offender Lifetime Supervision Act of 1998 (SOLSA), §§ 18-1.3-1001 to - 1012, C.R.S. 2019, to a term of twenty-four years to life imprisonment in the custody of the DOC.

In 2018, Sayed initiated the present action, seeking injunctive relief, nominal damages, punitive

[1] Although Sayed originally sued Rick Raemisch, Dean Williams has since replaced Raemisch as the Executive Director of the DOC, and, consequently, must be automatically substituted for Raemisch as a party. *See* ***C.R.C.P. 43(c)(2)***.

EXHIBIT A

damages, and an award of costs for "violation[s] of civil rights and statutory mandates." In his complaint, he alleged that the DOC had (1) failed to enroll him in sex offender treatment as required by Colorado statute; (2) violated his right to equal protection of the law; and (3) violated both the Americans with Disabilities **[*2]** Act (ADA), *42 U.S.C. § 12101 (2018)* and the Rehabilitation Act, *29 U.S.C. § 794(a) (2018)*.

The DOC moved to dismiss Sayed's complaint (1) under *C.R.C.P. 12(b)(1)*, for lack of subject matter jurisdiction; and (2) under *C.R.C.P. 12(b)(5)*, for failure to state a claim upon which relief could be granted. The district court summarily granted the DOC's motion, stating only that "[t]he Motion to Dismiss is granted."

Sayed now appeals.

II. Analysis

In his opening brief, Sayed contends that the court erred in dismissing his complaint under *C.R.C.P. 12(b)(5)*.2[1] We perceive no grounds for reversal.

A. Sayed's Appeal Focuses on Dismissal Under C.R.C.P. 12(b)(5) and Ignores the Alternative C.R.C.P. 12(b)(1) Ground for Dismissing the Case

In his opening brief, Sayed challenges only those parts of the court's order that encompass dismissal under *C.R.C.P. 12(b)(5)*; he does not independently challenge the alternative ground for which dismissal was sought and presumably granted, i.e., lack of subject matter jurisdiction under *C.R.C.P. 12(b)(1)*.[3]

It is incumbent on Sayed, as the appellant, to challenge on appeal all stated reasons or grounds for a district court's decision. *See IBC Denver II, LLC v. City of Wheat Ridge, 183 P.3d 714, 716-17 (Colo. App. 2008)*. Because Sayed failed to contest the lack of subject matter jurisdiction ground for dismissal in his opening brief, affirmance of the district court's order is required. **[*3]** *Id.*

Even if Sayed could be said to have raised a challenge to dismissal on that ground, the record and the law support the district court's ruling.

"Where parties are required to follow administrative procedures, the courts do not have subject matter jurisdiction to hear any dispute between them until they have exhausted those remedies . . . ." *New Design Constr. Co. v. Hamon Contractors, Inc., 215 P.3d 1172, 1178 (Colo. App. 2008)*; *see also City & Cty. of Denver v. United Air Lines, Inc., 8 P.3d 1206, 1212 (Colo. 2000)* ("If complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court."); *Egle v. City & Cty. of Denver, 93 P.3d 609, 612 (Colo. App. 2004)* ("When administrative remedies are provided by statute or ordinance, the procedure outlined in the statute or ordinance must be followed if the contested matter is within the jurisdiction of the administrative authority.").

Whether a party has exhausted available administrative remedies, and, consequently, whether a district court has subject matter jurisdiction over a particular dispute, are questions of law subject to de novo review. *New Design Constr. Co., 215 P.3d at 1178*.

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[2] To the extent that in his reply brief Sayed raised new arguments or expanded on his original arguments, we do not consider them. *See In re Marriage of Dean, 2017 COA 51, ¶ 31* ("We do not consider the arguments mother makes for the first time in her reply brief or those that seek to expand upon the contentions she raised in her opening brief.").

[3] The closest Sayed comes to challenging the ***C.R.C.P. 12(b)(1)*** ground for dismissal is his contention that the district court improperly "converted Defendant's Motion to Dismiss to a Motion for Summary Judgment as it considered attachments to said." He did not, however, in his opening brief explain what attachments were considered by the court, or to what those attachments related. (The attachments were three grievances he filed with the DOC, the DOC's responses thereto, and an affidavit correcting a clerical error in the date of one of the DOC's responses — all of which pertained only to that part of the DOC's motion to dismiss for lack of subject matter jurisdiction.)

Pursuant to the Colorado Prison Litigation Reform Act (CPLRA), *§§ 13-17.5-101* to - 108, C.R.S. 2019, inmates are required to exhaust all available administrative remedies in a timely fashion before bringing a civil action. *§ 13-17.5-102.3, C.R.S. 2019*. To properly exhaust remedies, an inmate **[*4]** must complete the administrative review process with the applicable procedural rules that are defined by the prison grievance process itself. *See* Jones v. Bock, 549 U.S. 199, 200, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007) (examining the requirement of inmates to follow procedural rules under the federal Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a) (2018)); *see* Glover v. State, 129 P.3d 1083, 1085 (Colo. App. 2005) (applying the rules of the PLRA to the CPLRA because the CPLRA is substantially similar to the PLRA).

The DOC's grievance process consists of three levels of review. DOC Admin. Reg. 850-04(I). "Offenders who wish to proceed to the next step in the grievance process must submit their written grievance within five calendar days of receiving the written response to the previous step." DOC Admin. Reg. 850-04(IV)(F)(1)(d).

Sayed attached three grievances and the DOC's responses to his complaint,[4] asserting, simply, that he had "exhausted all administrative remedies."

However, the DOC pointed out that Sayed had not complied with the DOC grievance process: his third grievance (the last step of the process) was belatedly filed. Sayed was required to submit a third grievance within five days of receiving the response to his second grievance. The DOC's response to the second grievance is dated August **[*5]** 22, 2018; according to an affidavit attached to the DOC's reply to Sayed's response to the motion to dismiss, the response contained a clerical error, inasmuch as the date should have been August 22, 2017. Measured by either date, Sayed's submission of his third grievance on October 31, 2018, was well beyond the five-day period for continuing the grievance process.

Sayed *did not* dispute the untimeliness of his third grievance. Because Sayed did not properly complete the grievance process, he did not exhaust his administrative remedies. Consequently, the district court did not have subject matter jurisdiction over Sayed's claims and the complaint was properly dismissed under *C.R.C.P. 12(b)(1)*.

B. Alternatively, Sayed's Complaint Was Properly Dismissed Under C.R.C.P. 12(b)(5)

Sayed contends that the district court erred in dismissing his complaint on *C.R.C.P. 12(b)(5)* grounds (1) without issuing written findings and (2) by misinterpreting or misapplying substantive law (i.e., Colorado statutes, equal protection principles, the ADA, and the Rehabilitation Act). We are not persuaded.

1. No Written Findings Were Required

"Findings of fact and conclusions of law are unnecessary on decisions on motions under *Rule 12* or *56* or any other motion except **[*6]** as provided in these rules or other law." *C.R.C.P. 52*. Because the court "dismissed plaintiffs' complaint pursuant to *C.R.C.P. 12(b)(5)* for failure to state a claim[,] . . . it was not required to make specific findings of fact and conclusions of law for the record." Henderson v. Romer, 910 P.2d 48, 54 (Colo. App. 1995), *aff'd sub nom.* Henderson v. Gunther, 931 P.2d 1150 (Colo. 1997).

2. Substantive Issues

We review de novo the district court's ruling on a *C.R.C.P. 12(b)(5)* motion to dismiss for failure to state a claim upon which relief can be granted. Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088

[4] These could be considered by the court without converting the motion to dismiss into a motion for summary judgment. *See* Yadon v. Lowry, 126 P.3d 332, 335-36 (Colo. App. 2005).

(Colo. 2011).

A claim may be dismissed under *C.R.C.P. 12(b)(5)* if the substantive law does not support it, *W. Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008)*, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief, *Ritter, 255 P.3d at 1088*.

a. Colorado Statutory and Regulatory Law

On appeal, Sayed asserts that he is being denied his statutory right to participate in sex offender treatment, *see § 18-1.3-1004(3), C.R.S. 2019* ("Each sex offender . . . shall be required as a part of the sentence to undergo treatment to the extent appropriate pursuant to *section 16-11.7-105, C.R.S.*"), within the period prescribed by DOC regulations for receipt of such treatment. *See* DOC Admin. Reg. 700-19(IV)(E) (offenders that are within four years of their parole eligibility date are prioritized to receive treatment).

Sayed asserts that he is entitled to enroll in sex offender treatment because, he says, he is within **[*7]** four years of his parole eligibility date. He asserts he is within four years of his parole eligibility date because his parole eligibility date is calculable under *section 17-22.5-403(1), C.R.S. 2019*. That provision says that individuals convicted of certain felonies are eligible for parole after serving fifty percent of their sentence. Fifty percent of Sayed's minimum twenty-four-year term would thus be twelve years. If measured from his 2006 sentencing date, Sayed would be eligible for parole in 2018 and have priority under the DOC regulations for receiving sex offender treatment.

The problem with Sayed's analysis is that it is grounded in the wrong statute.

Section 17-22.5-403(1) was enacted in 1990.[5] It addresses parole eligibility for offenders generally and provides, in pertinent part, that persons sentenced for class 2-6 felonies "shall be eligible for parole after such person has served fifty percent of the sentence imposed upon such person, less any time authorized for earned time granted."

In contrast, *section 18-1.3-1006(1)(a), C.R.S. 2019*, enacted eight years later in 1998, specifically addresses sex offender parole and release from incarceration.[6] It provides that "[o]n completion of the minimum period of incarceration specified in a sex offender's indeterminate **[*8]** sentence, less any earned time credited . . . , the parole board shall schedule a hearing to determine whether the sex offender may be released on parole."

Colorado law is well settled that *section 18-1.3-1006(1)(a)* applies in determining the parole eligibility date of sex offenders like Sayed who have received indeterminate sentences. *See Vensor v. People, 151 P.3d 1274, 1276 (Colo. 2007)* ("On completion of the minimum period of incarceration specified in the sex offender's indeterminate sentence, less any credits earned by him, [SOLSA] assigns discretion to the parole board to release him . . . ."); *People v. Oglethorpe, 87 P.3d 129, 134 (Colo. App. 2003)*; *People v. Strean, 74 P.3d 387, 393 (Colo. App. 2002)*; *see also Firth v. Shoemaker, 496 F. App'x 778, 781 n.2 (10th Cir. 2012)* (noting that inmate "was eligible for a parole hearing when he completed his six-year minimum sentence, less earned time" and citing *section 18-1.3-1006(1)(a)*).

Applying *section 18-1.3-1006(1)(a)*, we conclude that Sayed will not be parole eligible until he completes the minimum twenty-four-year term of his sentence (less any earned time credits he has been awarded). Measured from his 2006 sentencing, he would be eligible for parole in 2030, or earlier depending upon whether he has received any earned time credits. Sayed will become prioritized to enroll in sex offender treatment

[5] See Ch. 120, sec. 19, ***§ 17-22.5-403***, 1990 Colo. Sess. Laws 947.

[6] The statute as originally enacted in 1998 was codified at section 16-13-806. It was relocated in 2002 to its present site. *See* Ch. 303, sec. 1, § 16-13-806, 1998 Colo. Sess. Laws 1282-84; Ch. 318, sec. 2, ***§ 18-1.3-1006***, 2002 Colo. Sess. Laws 1438.

programs only four years before he becomes eligible for parole. Regardless of the exact dates involved, it is clear **[*9]** that, at this point, Sayed is not near the time when he would be entitled to be "prioritized" for receipt of sex offender treatment.

Consequently, Sayed has not stated a Colorado statutory claim upon which relief can be granted.

b. Equal Protection

Sayed contends that he stated an equal protection claim, inasmuch as he alleged that he is being denied sex offender treatment because he is not a U.S. citizen and cannot sufficiently read or write English.

The doctrine of equal protection provides that those who are similarly situated must be similarly treated. *U.S. Const. amend. XIV*; *Colo. Const. art. II, § 25*; *People v. Black, 915 P.2d 1257, 1260 (Colo. 1996)*. Therefore, at a threshold level, Sayed must allege that he was treated differently than others in a similar situation. *Black, 915 P.2d at 1260*. Without this allegation, Sayed's complaint must be dismissed for failure to state a claim upon which relief can be granted.

In his complaint, Sayed alleged that he was similarly situated to inmates who were currently within their eligibility period and were enrolled in treatment programs. As the DOC argued in the district court, Sayed did "not identify any other specific inmates, or state how they were similarly situated to him, or state what more favorable treatment they received." Sayed's assertion of a **[*10]** similar situation is based on his incorrect analysis of parole eligibility calculations, explained in Part II.B.2.a, above. Consequently, Sayed is *not* similarly situated to those who are already in the treatment programs because Sayed is *not* currently eligible for parole, nor is he within four years of it.

Without more, Sayed's complaint fails to allege any factual circumstance supporting an equal protection claim.

c. ADA and Rehabilitation Act Claims

Sayed claims he has been discriminated against because of his alleged disabilities in violation of both the ADA and the Rehabilitation Act.

The ADA and the Rehabilitation Act foster similar goals. To state a claim under the ADA, a plaintiff must allege (1) he is a qualified individual with a disability; (2) he was excluded from participation in or denied the benefits of a public entity's services, programs, or activities; and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability. *Robertson v. Las Animas Cty. Sheriff's Dep't, 500 F.3d 1185, 1193 (10th Cir. 2007)*. To state a claim under the Rehabilitation Act, a plaintiff must allege the same elements. *See Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir. 2000)*.

Under either Act, Sayed must allege that he had a qualified disability. Without this allegation, Sayed's complaint must be dismissed **[*11]** for failure to state a claim upon which relief can be granted.

As noted above, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall, 2016 CO 50, ¶ 1* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*).

A claim has facial plausibility when its factual allegations "raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, by allowing a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal, 556 U.S. at 678*. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Twombly, 550 U.S. at 556*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of

'entitle[ment] to relief.'" *Id. at 557* (citation omitted).

In deciding whether a plaintiff has set forth a "plausible" claim, the court must accept, as true, the factual allegations in the complaint. *Iqbal, 556 U.S. at 678*. That requirement, however, "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action." *Id.* In reviewing a complaint, then, a court should disregard conclusory allegations and "assume the[] veracity" **[*12]** of any "well-pleaded factual allegations" to "determine whether they plausibly give rise to an entitlement to relief." *Id. at 679*; *see Peña v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 15* ("Although we view the factual allegations in the complaint as true and in the light most favorable to the plaintiff, 'we are not required to accept as true legal conclusions that are couched as factual allegations[.]'" (quoting *Fry v. Lee, 2013 COA 100, ¶ 17)*) (citation omitted).

In his complaint, Sayed alleged that he "has a learning disability" as he is not a U.S. citizen and cannot properly read or write English[7] and that he "may also" have "physical learning disabilities, but to date there has been no diagnosis o [sic] attempt to diagnose him concerning said[.]" Although he states in conclusory terms that "he has been discriminated" against because of his disabilities, he alleges no facts to support his claim in either his complaint or his opening brief. For example, he does not allege that he was told by DOC personnel that he was denied sex offender treatment because of his alleged disabilities.

Because Sayed alleged no facts in support his federal discrimination claims, the district court properly dismissed those claims.

III. Disposition

The judgment **[*13]** dismissing the complaint is affirmed.

JUDGE NAVARRO and JUDGE GOMEZ concur.

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[7] In a different case, a division of this court rejected Sayed's argument that a lack of proficiency in English qualifies as a disability under the ADA or Rehabilitation Act. *Sayed v. Colo. Dep't of Corr., 2015 Colo. App. LEXIS 999 (Colo. App. No. 14CA0683, July 2, 2015)*; *see Buck v. Thomas M. Cooley Law Sch., 272 Mich. App. 93, 725 N.W.2d 485, 489 (Mich. Ct. App. 2006)* (holding that English as a second language does not constitute a learning disability under similarly worded antidiscrimination statutes); *see also Steward v. New Chrysler, 415 F. App'x 632, 641 (6th Cir. 2011)* (Michigan's antidiscrimination statutes "'substantially mirror' the ADA, and claims under both statutes are generally analyzed identically.") (citation omitted).