

<p>DISTRICT COURT, DENVER COUNTY, COLORADO  1437 Bannock Street  Denver, CO 80202  (303) 606-2433</p> <hr/> <p><b>Plaintiff:</b> Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p><b>Defendants:</b> Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC.</p>	<p>DATE FILED: May 19, 2020 1:58 PM  FILED ID: AB9804AAD1993  CASE NUMBER: 2018CV33011</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>ATTORNEYS FOR RECEIVER HARVEY SENDER</b></p> <p>Patrick D. Vellone (#15284)  Michael T. Gilbert (#15009)  Rachel A. Sternlieb (#51404)  ALLEN VELLONE WOLF HELFRICH &amp; FACTOR P.C.  1600 Stout St., Suite 1900  Denver, Colorado 80202  Tel: (303) 534-4499  E-mail: pvellone@allen-vellone.com  E-mail: mgilbert@allen-vellone.com  E-mail: rsternlieb@allen-vellone.com</p>	<p>Case No.: 2018 CV 33011</p> <p>Courtroom: 424</p>
<p><b>RECEIVER’S RESPONSE TO FOX’S MOTION TO STRIKE</b></p>	

Harvey Sender, Receiver for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities, hereby responds to Non-Party Creditors ACF Property Management, Inc. and Alan C. Fox’s (jointly, “Fox”) Motion to Strike, or Alternatively, for Leave to File Surreply (“Motion to Strike,” filed May 13, 2020).

## I. Introduction

The Motion to Strike asks the Court to strike pages 5 through 15 of the Receiver's Reply in Support of Motion for Turnover v. Fox and ACF ("Reply," filed May 8, 2020) and every exhibit submitted with the Reply. Fox argues this is appropriate because: (1) the Reply raises new arguments and submits new documents to support them; (2) the Reply exceeds the presumptive 10-page limit in C.R.C.P. 121, § 1-15; (3) the Reply was not properly served; and (4) the exhibits contain proprietary and confidential information.

The Motion to Strike attempts to flame procedural complaints into a bonfire to divert attention from the facts that Fox (1) refuses to produce documents, (2) refuses to pay more than \$180,000 owed to the Estate, and (3) in July 2019, he knowingly diverted funds to Dragul that should have been paid to the Estate. The Receiver asks the Court to deny the Motion for the following reasons.

## II. Argument

### A. **The Reply properly responds to arguments Fox raised in his Response.**

Fox asks the Court to strike pages 5-15 of the Reply arguing these pages raise new arguments and contain impertinent and scandalous allegations. Motion to Strike at 3-6. That is not the case.

Fox complains the Reply spends "four pages and twelve exhibits blindly dissecting the *irrelevant* negotiations and transactions connected to an unrelated entity, Shoppes at Bedford." Motion to Strike at 4 (emphasis in original). But the Shoppes at Bedford is not beyond the scope of the Turnover Motion. It is one of the

Fox Entities that is the subject of the Turnover Motion, for which Fox refuses to produce documents, and for which he may be withholding distributions. *See* Turnover Motion at 3.

One of the issues raised in the Turnover Motion is whether Fox conspired to pay Dragul for assets rightfully belonging to the Estate. To recap, SSC 02, LLC owned membership interests in three Fox Entities – Kenwood Pavilion 14 A, LLC (0.581% interest), Fenton Commons (0.221%), and College Marketplace (0.115%). Although Dragul maintained SSC 02 was owned by his three children, in April 2019 the Receiver discovered that was not the case. Instead, SSC 02 had been primarily funded and entirely operated by Dragul. In July 2019, Fox paid Dragul (through his wife Shelly's bank account) \$60,000 for these interests, without disclosing the transaction to the Receiver or the Court.

In his Response, Fox argued (1) he didn't know in July 2019 that the Receiver claimed that SSC 02 and its assets were property of the Estate, and (2) that he reasonably believed he didn't need approval from the Receiver or the Court to buy its assets. *See* Resp. at 13. The Receiver's Reply and its exhibits demonstrated this is not true. On *April 9th*, more than two months before Fox consummated the SSC 02 transaction, Dragul expressly told Fox the Receiver claimed that SSC 02 and its assets – *specifically including its membership interests* in Kenwood Pavilion, Fenton Commons, and College Marketplace – were property of the Receivership Estate and must be turned over. Dragul then immediately conspired with Fox to transfer those interests to Fox without the Receiver's knowledge to keep them out of the Estate. *See*

Reply, Exhibit 11. Fox now asks the Court to strike the very evidence that proves he he knew about the Receiver's SSC 02 demand before he bought the SSC 02 interests without paying the Estate anything.

The Bedford transaction Fox argues is beyond the scope of his Response, *irrelevant*, and “an exercise in distraction” (Motion to Strike at 4, n.2), concerns a parallel transaction Dragul and Fox concocted at the time of the SSC 02 deal to transfer Dragul's membership interest in Bedford to wrongfully keep it out of the Estate. That transaction again shows Fox knew he needed the Receiver's consent to purchase any of Dragul's interests in the Fox Entities, and directly rebuts Fox's argument that he didn't know Receiver approval was needed for the SSC 02 transaction. The evidence is both relevant and in direct rebuttal to the position Fox stakes out in his Response.

**B. The Reply is not impertinent or scandalous.**

Fox also seeks to strike the entirety of pages 5-15 of the Reply because he contends those pages contain impertinent scandalous attacks, including statements that (1) Fox was Dragul's co-conspirator, and (2) Fox and Dragul routinely failed to make required distributions to investors. Motion to Strike at 5. In connection with the former, Fox seeks to strike Exhibit 7, a complaint filed against him in California Superior Court by an investor, which details Dragul's long involvement with Fox in fraudulent investment schemes similar to those that prompted Dragul's indictment in Colorado on 14 counts of securities fraud and resulted in this Receivership. Fox also seeks to strike evidence of the “irrelevant” Bedford transaction as impertinent and scandalous. *Id.*

Rule 12(f) “provides that the Court ‘*may* order any redundant, immaterial, impertinent, or scandalous matter stricken.’ The use of the term ‘*may*’ indicates a grant of discretion to the court.” *Rabin v. Freirich (In re Estate of Rabin)*, 2018 COA 183 ¶ 33, *cert. granted on other grounds, In re Estate of Rabin* (Sept. 23, 2019). Motions to strike are disfavored drastic remedies to be granted only when the matter has no possible bearing on the controversy. *Koch v. Whitten*, 342 P.2d 1011, 1015 (Colo. 1959); *Sierra Club v. Tri-State Generation & Transmission, Ass’n, Inc.*, 173 F.R.D. 275, 285 (D. Colo. 1997). Fox doesn’t meet these standards.

The allegation that Fox and Dragul conspired to defraud investors is directly relevant to the Receiver’s claim – which is supported by significant evidence – that they did so here in connection with the SSC 02 transaction. The assertion that Fox and Dragul failed to make distributions to investors is consistent with the Commissioner’s complaint in this case, the Receiver’s complaint in the Insider Case before Judge McGahey, and is directly relevant to Fox’s refusal to pay required distributions to the Receiver. And as discussed, the Bedford transaction refutes Fox’s argument that he did not know he needed the Receiver’s approval for the SSC 02 transaction. These allegations and supporting documents are therefore relevant to the present dispute and should not be stricken.

**C. Purported procedural defects do not warrant striking the Reply.**

Fox spends 3 pages of his Motion to Strike arguing that the damaging evidence and documents supporting pages 5-15 of the Reply should be stricken because of “the Receiver and his counsel’s apparent belief that they are above the Rules of Civil Procedure and beyond reproach.” Motion to Strike at 8. This because the Reply:

(1) exceeds the 10-page limit in Rule 121, § 1-15(1)(a); (2) was not served with its exhibits on Fox's counsel via CCE; and (3) didn't completely redact confidential information from its exhibits.

The Reply does exceed the presumptive 10-page limit in Rule 121, but this is due to the complexity and number of issues it addresses, and because the Reply includes two tables to make the Court's review of the issues easier. To evade Rule 121's page limits, Fox filed a 15+ page Response to the Turnover Motion to which he attached an 8-page affidavit with additional argument; his Response also includes more than 90 pages of exhibits. The Receiver could easily have filed a 10-page reply and attached a 5-page affidavit containing additional argument. If that is what the Court prefers, the Receiver is prepared to do so.

As to service, the Reply was served by mail on Fox's counsel on Friday May 8th, the day it was filed, and three days before it was actually due. Fox's counsel received it Monday the 11th, the day the Reply was due. Fox is not a party in this case so serving the Reply through CCE was not automatic; it required typing in Fox's counsel as an additional email recipient. The Receiver's staff inadvertently did not do that, and apparently the exhibits to the Reply were not included in the May 8th mailing. These omissions were neither intentional nor prejudicial.<sup>1</sup> Immediately after receiving an email from Fox's counsel on May 11th, electronic copies of the Reply and all of its exhibits were provided to Fox's counsel. Two days later, Fox filed his Motion

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<sup>1</sup> These service issues are attributable in part to communication issues created by counsel and staff working remotely because of Covid-19, and staff not being in the same office with the lawyers to clearly address the means of service.

to Strike. The rules do not authorize sur-replies so the lack of instantaneous electronic service did not truncate any time for responding. As demonstrated by Fox filing the Motion to Strike on May 13th, it does not appear the brief weekend's delay caused him any prejudice.

Finally, Fox asks the Court to strike 10 pages of the Reply and *all* of its exhibits because 6 exhibits (nos. 6, 7, 10, 12, 17, and 18) allegedly contain confidential business or personal information. Motion to Strike at 8. All of these exhibits are “protected” in the Court’s e-filing system and therefore not accessible to non-parties. The only exhibit that arguably contains “confidential” information concerning Fox is Exhibit 6, which referred to Fox’s age, a minor medical condition, and the reasons he could not travel to Colorado for a deposition. Any reference to his medical condition was immediately redacted and replaced on the Receiver’s website.

Fox claims Exhibit 7 contains proprietary business and financial information. Motion to Strike at 8. But Exhibit 7 is a complaint that has been filed in California state court and is therefore a matter of public record. Exhibit 10, page 2 of Exhibit 12, and Exhibits 17-18 do not disclose any of Fox’s confidential information. References to two bank account numbers and one social security number of other non-parties (*i.e.*, not Fox) in those exhibits were immediately redacted once brought to the Receiver’s attention, and as with Exhibit 6, replaced with fully-redacted copies on the Receiver’s website. Immediately after being alerted to the three inadvertent disclosures, the Receiver’s counsel remedied them. As to Fox’s assertion that pages 4-

8 of Exhibit 12 contain proprietary financial information, those documents were sent without restriction to Dragul and Fox's other investors.

Fox's characterization of minor, inadvertent disclosures, as an abuse of power, and his proposed remedy of striking two-thirds of the Reply, is a transparent attempt to divert the Court from the facts that he (1) refuses to produce documents, (2) is withholding more than \$180,000 owed to the Estate, and (3) in July 2019, knowingly diverted funds to Dragul that should have been paid to the Estate. The Motion to Strike should be denied.

**D. The Court should deny Fox's request for leave to file a sur-reply.**

At some point, briefing must stop, which is why the rules don't provide for sur-replies. Sur-replies inevitably lead to requests for sur-sur-replies, and so on. As discussed, the "new information" presented in the Reply rebutted Fox's assertion that he did not know at the time of the SSC 02 transaction the Receiver claimed SSC 02 was property of the Estate. This is entirely appropriate subject matter for a reply. Fox cannot legitimately profess surprise because the most damaging evidence contained in the Reply's exhibits are his own emails.

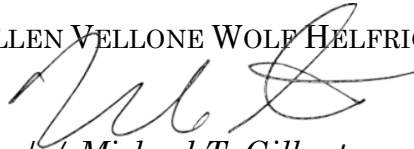
**III. Conclusion**

The Receiver asks the Court to deny the Motion to Strike and Fox's request for leave to file a sur-reply.



Dated: May 19, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



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ATTORNEYS FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2020, I served a true and correct copy of the foregoing **RECEIVER'S RESPONSE TO FOX'S MOTION TO STRIKE** via CCE to the following:

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