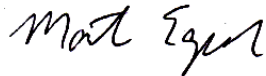


DISTRICT COURT, DENVER COUNTY, COLORADO	
Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF et al. v. Defendant(s) GARY DRAGUL et al.	DATE FILED: June 2, 2020 8:29 AM CASE NUMBER: 2018CV33011 <p style="text-align: center;">△ COURT USE ONLY △</p> Case Number: 2018CV33011 Division: 424 Courtroom:
Order: Non-Party Creditors ACF Property Management, Inc. And Alan C. Fox's Motion To Strike, Or Alternatively, For Leave To File Surreply w/ attach	

The motion/proposed order attached hereto: GRANTED IN PART.

The motion to strike is denied. A sur-reply, not to exceed 6 pages, is authorized and may be filed within 7 days of this order. The page limitation will be strictly enforced; any exhibits or affidavits that have the effect of circumventing this limitation, through additional argument or otherwise, will be stricken. No additional briefing on the issues raised in the turnover motion will be permitted.

Issue Date: 6/2/2020



MARTIN FOSTER EGELHOFF
District Court Judge

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Telephone: 303-606-2429</p>	
<p>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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>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</p> <p style="text-align: center;">and</p> <p>Gary S. Lincenberg (<i>pro hac vice admission pending</i>) Sharon Ben-Shahar Mayer (<i>pro hac vice admission pending</i>) 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</p>	<p>Case Number: 2018CV33011 Courtroom 424</p>
<p style="text-align: center;">NON-PARTY CREDITORS ACF PROPERTY MANAGEMENT, INC. AND ALAN C. FOX'S MOTION TO STRIKE, OR ALTERNATIVELY, FOR LEAVE TO FILE SURREPLY</p>	

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 surrepley. 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

Eric B. Liebman

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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