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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; NELDON JOHNSON; and ROGER FREEBORN, Defendants.	**RECEIVER'S MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE EVIDENCE IN REPLY MEMORANDUM** Civil No. 2:15-cv-00828-DN District Judge David Nuffer

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver"), hereby submits this Memorandum in Opposition to Glenda Johnson's Motion to Strike Evidence in Reply Memorandum.[1]

INTRODUCTION

On August 30, 2019, the Receiver filed his Motion for Order Directing the Turnover and

[1] Docket No. 805, filed November 26, 2019.

Transfer of Real Properties Titled in the Name of Glenda Johnson and Funds in Accounts Controlled by Glenda Johnson (the "Motion").[2] In the Motion, the Receiver included extensive evidence—mostly in the form of bank records—showing that the real property titled in Glenda Johnson's name and the funds in two bank accounts controlled by Glenda Johnson were Receivership assets.

On October 11, 2019, Glenda Johnson submitted an opposition objecting to nearly every document cited by the Receiver as hearsay.[3] These conclusory objections were improper and failed to even attempt to describe why "the material cited . . . cannot be presented in a form that would be admissible in evidence" as required under Rule 56(c)(2) of the Federal Rules of Civil Procedure. Indeed, an objection to evidence must "state[ ] the specific ground,"[4] or "in other words, explain why the proponent of the evidence will have no way of authenticating it at trial (*e.g.*, lack of a competent witness to testify about the document's creation)." [5]

On November 22, 2019, the Receiver filed a reply memorandum responding to Glenda Johnson's opposition.[6] In the reply, the Receiver demonstrated that Glenda Johnson's objections failed to comply with Rule 56(c)(2) and set forth the basis under which the materials attached to the Motion were admissible under the Federal Rules of Evidence. The Receiver also submitted business records declarations from the financial institutions that produced the bank records and submitted a declaration himself setting forth how the records were acquired and why they are admissible.[7]

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[2] Docket No. 757.
[3] Docket No. 784.
[4] Fed. R. Evid. 103(a)(1)(B).
[5] *SEC v. Mahabub*, No. 15-CV-2118-WJM-MLC, 2017 WL 6555039, at *2 (D. Colo. Dec. 22, 2017).
[6] Docket No. 802.
[7] *See* Docket No. 802-2; 802-3; 802-4; 802-5; 802-6; 802-7.

In response to the materials the Receiver submitted with the reply, Glenda Johnson filed the motion to strike at issue here. Just as in the opposition, Glenda Johnson's objections are improper and not supported by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, or this Court's local civil rules. In fact, not only is the substance of Glenda Johnson's objections wrong, but so is the form in which they are made. The Court's rules are clear that when a party offers an evidentiary objection to material submitted on reply "[m]otions to strike evidence as inadmissible are no longer appropriate and should not be filed. The proper procedure is to make an objection."[8] Accordingly, Glenda Johnson's motion to strike should be denied.

ARGUMENT

I. The Material Submitted with the Reply Memorandum is Proper.

At the outset, Glenda Johnson fails to cite or reference the appropriate rule regarding reply memoranda filed in support of a motion for summary judgment. The relevant rule states that "[i]n the reply, a moving party may cite only additional evidence not previously cited in the opening memorandum to rebut a claim that a material fact is in dispute."[9] In the opposition, Glenda Johnson disputed the admissibility of the materials cited in support of the material facts in the Motion. Therefore, the Receiver was permitted to cite additional evidence rebutting Glenda Johnson's claim that the materials submitted in the Motion were inadmissible.

Although Glenda Johnson cites the local rule reflecting the well-established principle that a reply memorandum "must be limited to rebuttal of matter raised in the memorandum in

[8] DUCivR 7-1(b)(1)(B) (citing Fed. R. Civ. P. 56(c)(2)); *see also* *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 281 F. Supp. 3d 1136, 1159 (D. Utah 2017) (denying a motion to strike as improper).
[9] DUCivR 56-1(d).

opposition,"[10] she fails to recognize that by attaching business records declarations to the reply the Receiver *was* rebutting her claim that the bank records were inadmissible. Further, when—as here—material is challenged as inadmissible, the moving party has the obligation to explain why "the material is admissible as presented or to explain the admissible form that is anticipated."[11] When declarations are attached to a reply brief in response to admissibility objections from the nonmoving party, such declarations are proper and satisfy the moving party's burden to explain why the material is admissible.[12] In a recent decision directly on point here, this Court found that declarations and affidavits were properly submitted by the moving party in response to the nonmoving party's objection that materials attached to a motion for summary judgment were inadmissible on the basis of hearsay and lack of foundation.[13] Accordingly, the Receiver's submission of declarations showing the admissibility of the bank records and other documents was proper.

Finally, just as in the opposition, Glenda Johnson's substantive evidentiary objections to the material submitted with the reply uniformly fail to comply with Rule 56(c)(2)'s command to state why "the material cited . . . cannot be presented in a form that would be admissible in evidence."[14] Glenda Johnson must "make [her] objection clear; [such that] the trial judge need not imagine all the possible grounds for an objection."[15] Conclusory objections to the material as lacking foundation or hearsay are not clear and fail to state any reason why the documents cannot

[10] DUCivR 7-1(b)(2); *see also* *Vitale & Associations v. Lowden*, No. 2:12-CV-01400-JAD, 2014 WL 2526962, at *5 (D. Nev. June 4, 2014) ("[t]he purpose of a reply brief is to rebut the nonmovant's response.")
[11] Fed. R. Civ. P. 56(c)(2) advisory committee's note to 2010 Amendment.
[12] *See* *Stella v. Davis Cty.*, No. 1:18-CV-002, 2019 WL 4601611, at *4, fn. 5 (D. Utah Sept. 23, 2019).
[13] *Id*.
[14] Fed. R. Civ. P. 56(c)(2).
[15] *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 960–61 (10th Cir. 1993).

be presented in admissible form.[16]

II. Glenda Johnson's Response to the Admissibility of the Material Cited in the Motion Constitutes an Unauthorized Sur-Reply and Should Not be Considered.

Section two of Glenda Johnson's motion to strike constitutes an impermissible sur-reply that should not be considered. A motion generally consists a memorandum in support, a memorandum in opposition, and a reply.[17] "No additional memoranda will be considered without leave of court."[18] In section two of her motion—instead of objecting to the materials cited in the Receiver's reply—Glenda Johnson responds to the Receiver's rebuttal of her claims made regarding the inadmissibility of the material cited in the motion. This is improper. Leave of court was neither sought nor obtained for an additional objection to the material cited in the motion. Therefore, section two should not be considered.

Even if the Court does consider section two of the motion to strike, it is clear—once again—that Glenda Johnson offers only conclusory objections regarding lack of foundation and hearsay that do not meet her burden under Rule 56 of the Federal Rules of Civil Procedure and provide no basis for excluding the material cited in the Motion.

III. The Reply is Not Overlength.

DUCivR 56-1(g) states that a "reply brief cannot exceed . . . twenty (20) pages."[19] "This limitation excludes the following items: face sheet, table of contents, table of authorities,

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[16] *See* *Stella*, 2019 WL 4601611, at *3-4. It should be noted that virtually all of the documents challenged by Glenda Johnson are records of transactions to which Glenda Johnson was a party or records of her own bank accounts. As such, she is in a perfect position to identify any documents that are not authentic.

[17] *Stake Ctr. Locating, Inc. v. Logix Commc'n, L.P.*, No. 2:13-CV-1090 JNP, 2016 WL 7077000, at *1 (D. Utah Dec. 5, 2016).

[18] DUCivR 7-1(b)(2).

[19] DUCivR 56-1(g).

signature block, certificate of service, and appendix."[20] The Receiver's reply brief—excluding the face sheet, signature block, and certificate of service—does not exceed twenty pages and therefore complies with DUCivR 56-1(g).

CONCLUSION

For the foregoing reasons, Glenda Johnson's motion to strike should be denied.

DATED this 10th day of December, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr
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[20] *Id*.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE EVIDENCE IN REPLY MEMORANDUM** was electronically filed with the Clerk of the Court through the CM/ECF system on December 10, 2019, which sent notice of the electronic filing to all counsel of record.

/s/ *Michael S. Lehr*