

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

**CASE NO.: 08-81565-CIV-HURLEY/HOPKINS**

**SECURITIES AND EXCHANGE COMMISSION,**

**Plaintiff,**

**v.**

**CREATIVE CAPITAL CONSORTIUM, LLC,  
A CREATIVE CAPITAL CONCEPT\$, LLC, and  
GEORGE L. THEODULE,**

**Defendants.**

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**PLAINTIFF'S MOTION TO STRIKE  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
AND TO EXTEND TIME TO FILE OPPOSITION**

Pursuant to Federal Rule of Civil Procedure 12(f), Plaintiff Securities and Exchange Commission moves the Court to strike Defendant George Theodule's Motion for Summary Judgment (D.E. 90) for failure to comply with S.D. Fla. L.R. 7.5.C.3 requiring a numbered paragraph scheme in the Statement of Facts. The Commission also requests an extension of time to respond to Theodule's motion until after the Court rules on this Motion, as a favorable ruling will moot our need to respond. Alternatively, should the Court not be inclined to grant the Commission that long an extension, the Commission seeks an extension of time until May 22, 2009 to file an Opposition to Theodule's summary judgment motion.

Given the impending May 11 deadline by which the Commission is currently required to respond to the summary judgment motion, the Commission respectfully requests an expedited ruling on our Motion. The grounds for the Commission's Motion are as follows.

*Motion to Strike*

On April 22, 2009, Theodule filed a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. Theodule's motion violates S.D. Fla. L.R. 7.5.C.3, which requires the Statement of Material Facts to consist of separately numbered paragraphs. Theodule's violation of S.D. Fla. L.R. 7.5.C.3 impairs the Commission's ability to file a response consistent with the Local Rule, which requires the Commission's Opposition to correspond to Theodule's filing: "Statements of material facts submitted in opposition to a motion for summary judgment shall correspond with the order and with the paragraph numbering scheme used by the movant." S.D. Fla. L.R. 7.5.C.3.

This is more than a technical pleading requirement. The Local Rule allows parties opposing summary judgment to respond specifically and concisely to the moving party's factual allegations. This is especially important because facts the opposing party does not respond to can be deemed admitted. The Local Rule also allows the Court to readily determine controverted and uncontroverted facts by requiring the parties to organize their factual allegations in the same manner. Theodule's Statement of Material Facts runs from pages 2-13 of Theodule's motion. In some cases, the same alleged facts are repeated in multiple paragraphs. In other cases, single paragraphs contain numerous and varied alleged facts. It would be impossible to respond to Theodule's motion in any organized manner.

Pleadings may be struck under Fed. R. Civ. P. 12(f) for failure to comply with procedural requirements. *Djahad v. Boniface & Co.*, 2009 WL 453408, at \*3 (M.D. Fla. Feb. 23, 2009) (granting Rule 12(f) motion to strike conclusory allegations and legally flawed claims); *United Fixtures Co. v. Base Mfg.*, 2008 WL 4550212 at \*4 (M.D. Fla. Oct. 8, 2008) ("When pleadings are unclear, the Court may sua sponte strike the pleading or require a more definite statement.").

Even drafting violations are a basis to strike pleadings under Rule 12(f). *Guimaraes v. NORS*, 2008 WL 4186970, at \* 5 (S.D. Fla. Sept. 5, 2008).

The facts in *Guimaraes* mirror the facts here. In *Guimareas*, the Court struck the deficient pleading under Rule 12(f) for failure to comply with pleading requirements. In *Guimaraes*, as here, the deficient pleading failed to number paragraphs where such numbering was required. In *Guimaraes*, as here, the deficient pleading employed a “shotgun scheme” of drafting that made it impossible for the opposing party to respond in an organized manner. Indeed, greater cause exists to strike Theodule’s motion as Theodule is proceeding with the benefit of counsel, unlike the pro se litigant in *Guimaraes*. Striking Theodule’s motion under Rule 12(f) is the appropriate remedy for Theodule’s failure to comply with pleading requirements.

*Motion to Extend Time to File Opposition*

The Commission’s Opposition to Theodule’s motion is currently due May 11, 2009, pursuant to S.D. Fla. L.R. 7.1.C.1.(a) and S.D. Fla. L.R. 7.5.E. A favorable ruling on the Commission’s Motion to Strike would render moot any need to respond to Theodule’s motion. To preserve resources,<sup>1</sup> the Commission respectfully requests that the Court grant us an extension of time to respond to Theodule’s motion until after it has ruled on the Commission’s Motion.

Should the Court not be inclined to grant the Commission such a long extension, the Commission alternatively requests an extension of nine business days from May 11, until May 22, to file a response. Theodule’s motion is voluminous, attaching 164 declarations and 19 other

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<sup>1</sup> Although not a specific grounds for our request for an extension of time, we note Theodule’s motion is highly premature. Discovery has just commenced. The parties have not exchanged Rule 26 disclosures. Neither the Commission nor Theodule has noticed any depositions. At a minimum, we would be entitled to interview and or depose the dozens of investors whose declarations Theodule has attached to his motion.

exhibits. Moreover, since receiving Theodule's unanticipated motion, undersigned counsel has been and will be participating in numerous complex depositions and court hearings requiring significant preparation time.

Good cause exists for this Motion. This Motion is made in good faith and not interposed for purposes of delay.

*S.D. Fla. L.R. 7.1.A.3 Certification*

Pursuant to S.D. Fla. L.R. 7.1.A.3, undersigned counsel has conferred with Theodule's counsel. Counsel would not state what action he would take in response to the Commission's request that Theodule immediately withdraw his motion. Counsel opposes any extension of time for the Commission to respond.

*Relief Requested*

For these reasons, the Commission respectfully requests the following relief:

- (i) An expedited ruling on its alternative requests for an extension of time; and
- (ii) An order striking Theodule's motion for failure to comply with the Local Rules.

Respectfully submitted,

May 1, 2009

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on May 1, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Rachel K. Paulose  
Rachel K. Paulose

**SERVICE LIST**

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Case No. 08-81565-CIV-HURLEY/HOPKINS  
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT  
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**ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
AND TO EXTEND TIME TO FILE OPPOSITION**

**THIS CAUSE** came before the Court on the Commission's Motion to Strike Defendant's Motion for Summary Judgment and to Extend Time to File Opposition. **THE COURT** has considered the Commission's Motion and the record herein and accordingly it is

**ORDERED AND ADJUDGED** that the Motion is **GRANTED**. The Defendant's Motion for Summary Judgment is stricken.

**DONE AND ORDERED** in chambers at West Palm Beach, Florida this \_\_\_\_ day of May, 2009.

\_\_\_\_\_  
**THE HONORABLE DANIEL T.K. HURLEY**  
**UNITED STATES DISTRICT JUDGE**

cc: All Counsel and Parties of Record

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
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GEORGE L. THEODULE,**

**Defendants.**

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**ORDER GRANTING PLAINTIFF'S MOTION TO EXTEND TIME TO FILE  
OPPOSITION**

**THIS CAUSE** came before the Court on the Commission's Motion to Strike Defendant's Motion for Summary Judgment and to Extend Time to File Opposition ("Commission's Motion"). **THE COURT** has considered the Commission's Motion and the record herein and accordingly it is

**ORDERED AND ADJUDGED** that the Motion is **GRANTED IN PART**. The Commission shall not respond to Defendant's Motion for Summary Judgment until after this Court has ruled on the Commission's Motion.

**DONE AND ORDERED** in chambers at West Palm Beach, Florida this \_\_\_\_ day of May, 2009.

**THE HONORABLE DANIEL T.K. HURLEY  
UNITED STATES DISTRICT JUDGE**

cc: All Counsel and Parties of Record