

No. 10-6276

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

U.S. COMMODITY FUTURES
TRADING COMMISSION, et al.,
Plaintiffs - Appellees,

v.

KENNETH WAYNE LEE, an individual,
Defendant-Appellant,

and

SHEILA M. LEE, an individual,
DARREN LEE, an individual,
DAVID A. LEE, an individual,
Relief Defendants-Appellants,

and

PRESTIGE VENTURES CORP.,
a Panamanian corporation, et al.,
Defendants,

STEPHEN J. MORIARTY,
Receiver.

APPELLEES' MOTION TO STRIKE APPELLANTS' SECOND BRIEF IN PART

Appellees U.S. Commodity Futures Trading Commission (“CFTC”) and Oklahoma Department of Securities (“ODS”) hereby move the Court, pursuant to Fed. R. App. P. 27, to strike certain portions of Appellants’ Second Brief filed on June 27, 2011. In support of their motion, the CFTC and ODS state the following:

This is an appeal filed by Appellants Kenneth Lee, Sheila Lee, David Lee and Darren Lee (collectively, the “Lees”), who appear pro se. The Lees filed their opening briefs in this appeal on March 17, 2011. Appellees CFTC and ODS filed their response brief on May 27, 2011. The Lees filed Appellants’ Second Brief, their reply brief, on June 27, 2011.

Appellants’ Second Brief contains documents that are not part of the appellate record and legal issues that were not raised in the opening briefs. First, the brief contains three exhibits, labeled D, F and G, that are not part of the appellate record. Exhibit D (pp. 40-46) consists of trading account statements that were not presented to the District Court and are not part of the appellate record. Exhibit F (pp. 53-54) is a document, written in Spanish, that was also not presented to the District Court and is not part of the appellate record. In addition, Exhibit G (pp. 56-61) contains an *ex parte* letter (pp. 56-57), dated March 29, 2010, from Appellant Kenneth Lee to the District Court Judge that does not appear in either the record below or the appellate record and another *ex parte* letter (pp. 60-61), dated November 1, 2010, that appears in the record below (Doc. No. 123) but was

not made part of the appellate record. Appellants' Second Brief also contains three legal issues (pp. 2-3) that Appellants did not include in their opening briefs. As explained below, these exhibits and legal issues should be stricken from the brief.

I. Exhibits D, F and G Should Be Stricken.

Fed. R. App. P. 10(e)(2) allows the appellate record to be supplemented “[i]f anything material . . . is omitted from or misstated in the record by error or accident,” but it “does not grant a license to build a new record.” *U.S. v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (citing *Anthony v. U.S.*, 667 F.2d 870, 875 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982)). Thus, while a party may file a motion to supplement the appellate record with a document that was submitted to the district court but inadvertently omitted from the appellate record, this Court will not consider “material outside the record before the district court.” *Id.* at 1191 (citing *In re Capital Cities*, 913 F.2d 89, 96 (3d Cir. 1990)).

There was no “error or accident” that resulted in the omission of Exhibits D and F and the March 29th letter (pp. 56-57) in Exhibit G from the record on appeal. These documents were never part of the record below and cannot be used now to build a new record. *Kennedy*, 225 F.3d at 1191. Proceeding *pro se* does not relieve the Lees from following the federal rules of court procedure. *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994) (although courts liberally construe the pleadings of *pro se* parties, an appellant’s *pro se* status does not “excuse the

obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure”); *see also Frazier v. Ortiz*, 2011 WL 1110648 at *3 (10th Cir. 2011). Because the Lees’ submission of these documents as exhibits to their reply brief is an improper attempt to augment the appellate record with materials that were not before the district court, this Court should strike Exhibits D and F and the March 29th letter in Exhibit G.

The November 1st letter (pp. 60-61) in Exhibit G should also be stricken. It appears on the docket below (Doc. No. 123) but was not made part of the appellate record. The Lees have not moved the District Court or this Court to supplement the appellate record with the November 1st letter in Exhibit G, as Fed. R. App. P. 10(e) requires.¹ The Lees’ submission of this document as an exhibit to their reply brief is another improper attempt to supplement the appellate record.

II. Appellants’ Three New Issues Should Also Be Stricken.

In addition to containing documents not in the appellate record, Appellants’ Second Brief presents three issues that should be stricken because they were not presented in the Lees’ opening briefs:

1. Was the District Court proper in granting the amended SRO a day before granting the amended Complaint, therefore, freezing Relief Defendants assets, halfway across the United States in a state with one of the highest unemployment rates in the country, without allowing

¹ The parties have not stipulated to a supplemental record.

Relief Defendants a chance to answer the Complaint and have some fairness to protect what rightfully belongs to Appellants?

2. Was the District Court show [sic] any discretion by never notifying Defendant Lee, or any of the Relief Defendants in that matter, about any hearing on any of the motions to stay or Motion of Continuance, did the District Court exercise reasonable discretion in denying said motions without granting any Appellant a chance to brief the Court, or much less giving any Appellant a chance to participate in the litigation process?
3. Did the District Court abuse its discretion in disregarding any exhibits, in the District Courts [sic] possession, that pertained to any of the alleged 'undisputed facts' that were in the Motion for Summary Judgment, did the District Court follow judicial protocol by ignoring exhibits from *Pro Se* litigants halfway across the country by granting the Motion for Summary Judgment?

Appellants' Second Br. at 2-3.

Appellate courts will generally not entertain issues raised for the first time on appeal in an appellant's reply brief. *Headrick v. Rockwell International Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994). To allow an appellant to raise new issues in his reply brief would be "manifestly unfair to the appellee," who under Fed. R. App. P. 28(C) has no opportunity for a written response without permission of the Court. *Id.* at 1278 (citing *Herbert v. National Academy of Sciences*, 974 F.2d 192, 196 (D.C. Cir. 1992)). Because the CFTC and ODS in preparing their response brief could not have anticipated that the Lees would raise these additional issues in their reply, and because there are no exceptional circumstances that would justify a departure from this Court's general rule, the Court should not consider these new

issues on this appeal.

WHEREFORE, Appellees CFTC and ODS respectfully request that this Court strike Exhibits D, F, and G (pp. 40-46, 53-54, 56-57, 60-61) to Appellants' Second Brief, the new issues presented in Appellants' Second Brief (pp. 2-3), and those portions of Appellants' Second Brief that cite to, discuss, or rely upon Exhibits D, F and G and/or the new issues.

Appellants Darren Lee and Kenneth Lee object to the relief requested herein. Counsel for Appellee ODS attempted to contact Appellants Sheila Lee and David Lee but was unsuccessful. Appellees CFTC and ODS assume that Sheila Lee and David Lee would object to the relief requested herein based on the nature of this motion and the objections of Darren Lee and Kenneth Lee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2011, I caused the foregoing motion to be served by certified mail, return receipt requested, on the following, who are not registered participants of the ECF System:

Darren Lee
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Appellant

David Lee
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Appellant

I hereby certify that on July 20, 2011, I electronically transmitted the foregoing motion to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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