The relief described hereinbelow is SO ORDERED.

SIGNED this 1st day of December, 2017.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

JOHN Q. HAMMONS FALL 2006, LLC, et al.,	Case No. 16-21142 (RDB)
	Chapter 11
Debtors.	Jointly Administered

ORDER DENYING DEBTORS' MOTION TO STRIKE

Debtors have moved to strike portions of Creditors' response[1] ("Response") to Debtors' omnibus objection[2] to Creditors' proofs of claim. Debtors argue that this Court should strike certain portions of the Response as "an improper attempt to amend the [claims]."[3] This Court will deny Debtors' motion to strike because (1) the Response is not a "pleading" to which Fed.

[1] ECF No. 1345. For purposes of this order, "Creditors" means creditors JD Holdings, L.L.C.; Atrium Gaming, LLC; Eastgate Funding, LLC; Jonesboro Funding, LLC; Atrium TRS IV LP; and Atrium Finance IV, L.P.

[2] ECF No. 1251.

[3] ECF No. 1374 ¶ 12.

R. Civ. P. 12(f) applies; (2) even if the Response is a "pleading" subject to Rule 12(f), the relevant portions of the Response (the "Specific Responses") do not meet the standard set out by Rule 12(f) itself; (3) the Specific Responses are not "scandalous or defamatory" such that they might be stricken pursuant to 11 U.S.C. § 107(b)(2) or Fed. R. Bankr. P. 9018; and (4) the Specific Responses do not amend Creditors' proofs of claim in any event.

1. <u>The Response is not a "pleading" to which Fed. R. Civ. P. 12(f) applies.</u>

Fed. R. Civ. P. 12(f) allows courts to strike material from a "pleading." However, a creditor's response to a debtor's objection to proofs of claim is not a pleading. *See* Fed R. Civ. P. 7(a) (listing "pleadings"); *In re City of Detroit*, No. 13-53846, 2014 WL 8396419, at *5 (Bankr. E.D. Mich. Aug. 28, 2014) (holding that a bankruptcy plan objection is not a "pleading" to which Rule 12(f) applies); 5C Charles Alan Wright et al., Federal Practice & Procedure § 1380 (3d ed. 2017) ("Rule 12(f) motions only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f)."); *cf. Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022, 1029 (D. Kan. 2006) (denying Rule 12(f) motion to strike on grounds that "[a] brief in support of a *Daubert* motion is not a pleading"). Because the Response is not a pleading to which Rule 12(f) applies, Debtors' motion to strike the Specific Responses—to the extent Debtors make their motion pursuant to Rule 12(f)—will be denied.

2. <u>The Specific Responses do not meet the standard set out by Rule 12(f).</u>

Even if the Response is a "pleading" subject to Rule 12(f), Debtors' motion to strike will be denied because the Specific Responses do not meet the standard set out by Rule 12(f) itself.

Rule 12(f) does not allow a court to strike material at will. Rather, it permits a court to "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

> [T]here appears to be general judicial agreement, as reflected in the extensive case law on the subject, that [Rule 12(f) motions] should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy and may cause some form of significant prejudice to one or more parties to the action. Any doubt about whether the challenged material is redundant, immaterial, impertinent, or scandalous should be resolved in favor of the non-moving party.

5C Charles Alan Wright et al., Federal Practice & Procedure § 1382 (3d ed. 2017) (footnotes omitted); *see, e.g.*, *SFF-TIF, LLC v. Stephenson*, 250 F. Supp. 3d 856, (N.D. Okla. 2017) (citing Wright & Miller § 1382 and listing supporting cases); *Lane v. Page*, 272 F.R.D. 581, 587-88 (D.N.M. 2011) (same).

Here, although Debtors argue that the Specific Responses constitute an improper attempt to amend Creditors' proofs of claim, they do not argue that such an attempt implicates Rule 12(f) by virtue of being redundant, immaterial, impertinent, or scandalous. Indeed, Debtors' argument implicitly concedes that the Specific Responses are neither redundant (an amended proof of claim would necessarily differ from the original in some respect), nor immaterial (an amendment would necessarily be material to the claim itself), nor impertinent (an amendment would necessarily pertain to the claim itself). Put another way, using the language of Wright and Miller, the "relation or logical connection" between the Specific Responses and Creditors' claims is evident. For these reasons, and because it is equally evident that nothing in the Specific Responses is scandalous, the Specific Responses do not meet the standard set out by Rule 12(f). Therefore, Debtors' motion to strike—to the extent Debtors make their motion pursuant to Rule 12(f)—will be denied.

3. <u>The Specific Responses are not scandalous or defamatory.</u>

Because Debtors did not specifically move to strike the Specific Responses pursuant to Rule 12(f), this Court will consider other avenues by which offending material might be removed

from a paper filed in a bankruptcy case. Under 11 U.S.C. § 107(b)(2), and on request of a party in interest, a bankruptcy court shall "protect an entity with respect to scandalous or defamatory matter contained in a paper filed in a case under this title." Similarly, Fed. R. Bankr. P. 9018 permits a bankruptcy court to "protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code." However, the Specific Responses obviously do not contain any scandalous or defamatory matter, and Debtors do not argue otherwise. Therefore, Debtors' motion to strike—to the extent Debtors make their motion pursuant to 11. U.S.C. § 107(b)(2) or Fed. R. Bankr. P. 9018—will be denied.

4. <u>The Specific Responses do not amend Creditors' proofs of claim.</u>

Finally, Debtors' motion to strike will be denied because the Specific Responses do not amend Creditors' proofs of claim. In paragraphs 29-31 of their motion, Debtors argue:

> 29. In the Response, for the first time, with respect to the Original Claims, JDH alleges the following:
>
> (a) numerous "other benefits" for JDH under the ROFR in addition to the 20% discount, to include that JDH could always match for a price much lower than fair market value because the presence of the ROFR would chill the bidding, and other pricing advantages the ROFR allegedly gave JDH (Response at 4-5, 56-57 & 89),
>
> (b) that JDH has a larger claim than the 20% calculation it has made (based on additional discounts in the ROFR not set out in the Claims), if the Claims are unenforceable as a matter of law (*Response* at 9, 57),
>
> (c) assertions of claims for damages allegedly suffered as a result of the denial or delay in the sale of the assets to JDH where no such allegation of claim is made in the Original Claims (*Response* at 57);
>
> (d) a laundry list of bullet point assertions of new and additional claims including the loss of opportunity to cherry pick which hotels to buy under the ROFR, loss of tax benefits, loss of the opportunity to receive future cash flow and collect fees, loss of opportunity costs, loss of the right to assume debt, loss of the

Hammons' guaranty for assumed debt, loss of the right to assume franchise agreements, loss of operational economies of scale and synergies and cost savings for the hotel portfolio, and loss of improved exit strategies related to a JDH public offering (*Response* at 59-60),

(e) new assertions about marketplace valuations of hospitality properties in 2004-05 (*Response* at 58),

(f) the incorporation by reference of unknown reams of documents produced, given, or exchanged in the Delaware Chancery Court (the "DCC") litigation pending on the Commencement Date (*Response* at 11),

(g) an attempt to seek unstated damages if the 20% discount is deemed a penalty suggesting a second (and perhaps a third) round of litigation on new claims yet to be filed if JDH loses in the Claims Objection litigation (*Response* at 61-62),

(h) a new contention that the 22.5% component should be alternatively measured based on the costs of this seller financing to JDH as compared to the cost to JDH of obtaining equity financing bearing a rate of at least 20% relied upon in the Original Claims (*Response* at 66),

(i) a new reservation of rights to amend the Response – yet another amended claim – at any time JDH deems fit (*Response* at 12, 115-18),

(j) an attempt to amend the Original Claims to set out how much each Debtor allegedly owes JDH (*Response* at 50),

(k) an allegation that now the calculations in the pre-petition and the ROFR Original Claims are calculated differently when, on their face, they are not (*Response* at 52), and

(l) attempts to itemize damages not set forth in the Original Claims (*Response* at 106-7).

30. In the Response, with respect to the Original Miscellaneous Claims which failed to assert specific debt amounts, JDH improperly (a) declines to provide calculations, stating rather that they will be presented at trial (*Response* at 126), and (b) states, that instead of attaching supporting documents to the proofs of claims, all relevant documents (without identifying them) are in the Debtors' possession (*Response* at 129).

31. Finally, the Response generically attempts to preserve

> additional claims for actual damages (*Response*, Sixteenth Affirmative Defense at 142.)

Debtors' Motion to Strike 10-11, ECF No. 1374. However, Debtors' argument, with its citations to *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'Ship*, 507 U.S. 380 (1993) (defining "excusable neglect" in late filing of claim), and *Midland Cogeneration Venture Ltd. P'Ship v. Enron Corp. (In re Enron Corp.)*, 419 F.3d 115 (2d Cir. 2005) (setting out two-step test for allowance of late-filed amendment to claim), begs the question of whether the Specific Responses even amend Creditors' proofs of claim. In context of the Response as a whole, it is clear that they do not; rather, they are simply the additional materials Creditors were obligated to include in the Response pursuant to this Court's procedural order of August 22, 2017.[4]

In subparagraph 29(a), for example, Debtors argue that the Specific Responses allege "numerous 'other benefits' for JDH under the ROFR in addition to the 20% discount."[5] However, the Response sets forth these benefits specifically in response to Debtors' affirmative defense[6] that this "20% discount" provision in Section 3.14(b) of the ROFR constitutes an "unenforceable penalty."[7] The Response cites Delaware cases regarding liquidated damages and provides facts (the aforementioned "benefits") to support the argument that Section 3.14(b) is enforceable under the law of those cases. Nothing in Creditors' argument that Section 3.14(b) is

---

[4] *See* Order Pursuant to 11 U.S.C. § 105 Establishing Procedures Regarding Claim Objections and Scheduled Claims Adjustments ¶ 12(e), ECF No. 1198 (directing that the Response "set[] forth the reasons why the Court should not sustain the objection, including, but not limited to, the specific factual and legal bases upon which the claimant relies in opposing the objection").

[5] Motion to Strike ¶ 29(a), ECF No. 1374.

[6] As Creditors point out, neither Fed. R. Bankr. P. 3001 nor Fed. R. Civ. P. 8(a) requires a proof of claim to set forth all facts relating to each possible affirmative defense that a debtor might raise.

[7] *See* Response 53-65, ECF No. 1345 (responding to "COUNT VI: JDH CLAIMS ARE BASED IN PART ON AN UNFORCEABLE PENALTY" of Debtors' omnibus objection).

enforceable under Delaware law serves to amend JD Holdings' proofs of claim, each of which explicitly includes either claims "arising from, or in connection with, or in relation to, the ROFR"[8] or claims "arising from, or in connection with, or in relation to, rejection of the ROFR."[9] Because nothing in Creditors' argument serves to amend JD Holdings' proofs of claim, Debtors' arguments under *Pioneer* and *Enron*, regarding late-filed claims and amendments, must fail as to subparagraph 29(a). Debtors' arguments must also fail as to subparagraphs 29(c), (d), and (e), all of which also pertain to the enforceability of Section 3.14(b).

Subparagraphs 29(b), (g), (h), (j), (k), and (l) all pertain to calculation of JD Holdings' damages for breach of the ROFR. Debtors' argument appears to be that if a creditor's initial calculation of damages for breach of contract is rejected by the bankruptcy court, then the creditor should be entitled to no damages at all for the breach. Such an argument, as Creditors observe, improperly conflates a *claim* for breach of the ROFR with the *remedy* for that breach. Nothing in the Specific Responses changes JD Holdings' *claim* that it is entitled to damages arising out of Debtors' breach of the ROFR. Therefore, Debtors' arguments under *Pioneer* and *Enron* as to subparagraphs (b), (g), (h), (j), (k), and (l) must fail.[10]

---

[8] *See, e.g.*, Proof of Claim 485 at 5.

[9] *See, e.g.*, Proof of Claim 754 at 6.

[10] Even assuming that these subparagraphs (which set forth alternative calculations of damages for breach of the ROFR in the event that any of the affirmative defenses set forth in Debtors' omnibus objection are sustained by this Court) *do* amend JD Holdings' proofs of claim, the Court holds that such amendment is permissible.

> When deciding whether to permit an amendment to a proof of claim, a bankruptcy court is guided by a two-prong test. A court must first look to whether there was timely assertion of a similar claim or demand evidencing an intent to hold the estate liable. If there was such a timely assertion, the court then examines each

As to subparagraphs 29(f) and (i), and paragraphs 30 and 31, Debtors present no explanation as to how those sections of the Response might be read to amend Creditors' claims at this time. Without any such explanation, Debtors' arguments under *Pioneer* and *Enron* as to those Specific Responses must fail.

5. Conclusion.

For the reasons stated above, Debtors' motion to strike (including all relief requested therein) will be denied.

IT IS SO ORDERED.

###

> fact within the case and determines whether it would be equitable to allow the amendment.
>
> In balancing the equities, the court considers the following equitable factors: (1) undue prejudice to opposing party; (2) bad faith or dilatory behavior on part of the claimant; (3) whether other creditors would receive a windfall were the amendment not allowed; (4) whether other claimants might be harmed or prejudiced; and (5) the justification for the creditor's inability to file the amended claim at the time the original claim was filed.

In re Coover, 2006 WL 4491439, at *5 (Bankr. D. Kan. Sept. 28, 2006) (citations omitted). Here, the first prong of the test above is met because JD Holdings' alternative calculations of damages are for the same breach of the ROFR timely asserted in JD Holdings' proofs of claim. The second prong of the test is met because (1) no plan has yet been confirmed or even filed, discovery is ongoing, and Debtors retain the ability to obtain discovery regarding the alternative calculations; (2) Creditors only asserted the alternative calculations in response to the affirmative defenses set forth in Debtors' omnibus objection, evidencing no bad faith or dilatory behavior; (3) as JD Holdings' claims "represent the largest alleged claims in these cases by a substantial magnitude," *see* Motion to Strike ¶ 13, failure to allow the alternative calculations would result in a huge windfall to other creditors if Debtors' affirmative defenses are sustained; (4) no party asserts any harm or prejudice to other claimants; and (5) JD Holdings was not required to present its alternative calculations in its proofs of claim, as neither Fed. R. Bankr. P. 3001 nor Fed. R. Civ. P. 8(a) requires a proof of claim to set forth all facts relating to each possible affirmative defense that a debtor might raise. Because both elements of the two-prong test are met, the Court holds that to the extent that JD Holdings' alternative calculations of damages might be considered an amendment to the proofs of claim, such amendment is permissible.