

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge William J. Martínez**

Civil Action No. 13-cv-0160-WJM-BNB

DARRELL S. ELLIOTT,  
DIANE ELLIOTT, and  
DARRELL S. ELLIOTT PSP

Plaintiffs,

v.

THOMPSON NATIONAL PROPERTIES, LLC, a Delaware limited liability company,  
TNP 12% NOTES PROGRAM, LLC,  
TNP STRATEGIC RETAIL TRUST, INC., and  
ANTHONY W. THOMPSON

Defendants.

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**ORDER DENYING DEFENDANTS' MOTION TO DISMISS  
PURSUANT TO RULE 12(b)(6) AS MOOT**

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This matter is before the Court on the Motions filed by Defendants TNP Strategic Retail Trust, Inc. (ECF No. 22) and Anthony W. Thompson (ECF No. 27) ("Defendants"), respectively. Plaintiffs have filed responses to each of these motions (ECF Nos. 43,44), and Defendants a reply. (ECF Nos. 48, 49.)

For the reasons set forth below, the Court denies each of Defendants' Motion to Dismiss on moot.

**I. DISCUSSION**

Defendants' Motions were filed on March 14, 2013 and April 2, 2013, respectively. (ECF No. 22, 27.) Plaintiffs subsequently filed a Further Amended Complaint on April 23, 2013. (ECF No. 42-1). As this was Plaintiff's second amended complaint, Plaintiff moved the Court to accept same as the operative complaint. (ECF No. 42). That motion

was opposed by Defendants. ECF No. 47. On September 19, 2013, U.S. Magistrate Judge Boyd N. Boland' Recommendation (ECF No. 51) GRANTED Plaintiffs' Motion in part and denied in part. Plaintiffs' Motion was denied insofar as Plaintiffs sought to add a Third Claim for violations of the federal securities laws. Plaintiffs motion was granted in all other respects.

On November 4, 2013, the Court adopted Judge Boland's Recommendation. (ECF No. 52.) As such, the Further Amended Complaint exhibited to Plaintiffs' Motion to Amend Complaint superseded previous complaints in the record. (ECF No. 42-1)

With respect to disposition of Defendants' Motions to Dismiss, it is well established that an "amended complaint ordinarily supersedes the original and renders it of no legal effect." *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991). It follows that because an original complaint has been "superseded and nullified, there is no longer a live dispute about the propriety or merit of the claims asserted therein; therefore, any motion to dismiss such claims is moot." *Glass v. The Kellogg Co.*, 252 F.R.D. 367, 368 (W.D. Mich. 2008); *Ky. Press Ass'n, Inc. v. Ky.*, 355 F. Supp. 2d 853, 857 (E.D. Ky. 2005) ("Plaintiff's amended complaint supersedes the original complaint, thus making the motion to dismiss the original complaint moot.").

Here, similarly, because the Amended Complaint at ECF No. 42-1 supersedes previous complaints in the record, Defendants' Motions to Dismiss are moot. (ECF Nos. 22, 27). The Court takes no view on the merits of Defendants' Motions as to the previous complaint. As such, both of the Motions to Dismiss are denied without prejudice. See *Glass*, 252 F.R.D. at 368; *Ky. Press Ass'n, Inc.* F. Supp. 2d at 857.

## II. CONCLUSION

1. Defendants' Motions to Dismiss (ECF Nos. 22 and 27) are DENIED AS MOOT.
2. Plaintiffs are DIRECTED to re-file their Further Amended Complaint, which was appended as an exhibit to their motion for leave to file an amended complaint (ECF No. 42). Plaintiffs are advised to carefully ensure that their re-filed Further Amended Complaint is fully consistent with Judge Boland's Recommendation Order (ECF No. 51), and the Court's Order adopting same. (ECF No. 52.) Such filing is to be made no later than 5 p.m., November 20, 2013.

Dated this 8<sup>th</sup> day of November, 2013.

BY THE COURT:



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William J. Martinez  
United States District Judge