

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-02875-WJM-NYW

HARVEY SENDER, AS RECEIVER FOR GARY
DRAGUL, DGA REAL ESTATE SERVICES, LLC,
AND GDA REAL ESTATE MANAGEMENT,
LLC.,

Plaintiff,

-against-

BANK OF AMERICA, N.A., AMERICAN
EXPRESS COMPANY, AND DISCOVER BANK.

Defendant.

DISCOVER BANK'S ANSWER TO COMPLAINT

Defendant Discover Bank (“Discover”), by its undersigned attorneys, for its Answer to Plaintiff’s Complaint (“Complaint”), states and alleges as follows.

I. PARTIES

1. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 1 of the Complaint and therefore denies the same.

2. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 2 of the Complaint and therefore denies the same.

3. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 3 of the Complaint and therefore denies the same.

4. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 4 of the Complaint and therefore denies the same.

5. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 5 of the Complaint and therefore denies the same.

6. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 6 of the Complaint and therefore denies the same.

7. Discover admits the allegations of paragraph 7 of the Complaint.

8. Discover admits the allegations of paragraph 8 of the Complaint.

II. JURISDICTION AND VENUE

9. Discover admits the allegations of paragraph 9 of the Complaint

10. Discover admits the allegations set forth in paragraph 10 of the Complaint insofar as they are intended to refer or apply to Discover. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 10 of the Complaint.

11. In regard to the allegations contained in paragraph 11 of the Complaint, it is admitted that venue is proper as to Discover. It is denied for lack of information or belief as to all of the parties' residency.

III. GENERAL ALLEGATIONS

12. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 12 of the Complaint and therefore denies the same.

13. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 13 of the Complaint and therefore denies the same.

14. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 14 of the Complaint and therefore denies the same.

15. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 15 of the Complaint and therefore denies the same.

16. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 16 of the Complaint and therefore denies the same.

17. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 17 of the Complaint and therefore denies the same.

18. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 18 of the Complaint and therefore denies the same.

19. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 19 of the Complaint and therefore denies the same.

20. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 20 of the Complaint and therefore denies the same.

21. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 21 of the Complaint and therefore denies the same.

22. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 22 of the Complaint and therefore denies the same.

23. Defendant lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 23 of the Complaint, with the exception that Defendant denies the allegations set forth in the last sentence of paragraph 23, and specifically denies that it was the recipient of any transfers of assets at issue in this action.

24. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 24 of the Complaint and therefore denies the same.

25. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 25 of the Complaint and therefore denies the same.

26. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 26 of the Complaint and therefore denies the same.

27. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 27 of the Complaint and therefore denies the same.

28. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 28 of the Complaint and therefore denies the same.

29. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 29 of the Complaint and therefore denies the same.

30. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 30 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

31. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 31 of the Complaint and therefore denies the same.

32. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 32 of the Complaint and therefore denies the same.

33. Discover is without sufficient information and knowledge to form an opinion as to the truth of the allegations of paragraph 33 of the Complaint and therefore denies the same.

34. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 34 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

35. Discover denies the allegations set forth in paragraph 35 of the Complaint insofar as they are intended to refer or apply to Discover. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 35 of the Complaint.

36. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 36 of the Complaint, with the exception that Discover admits the allegation that Shelly Dragul maintained a credit card account with Discover and denies the allegation that it was the recipient of any transfers of assets at issue in this action..

37. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 37 of the Complaint.

38. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 38 of the Complaint.

39. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 39 of the Complaint, with the exception that Discover admits the allegation that Shelly Dragul maintained a credit card account with Discover.

40. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 40 of the Complaint.

41. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 41 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

42. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 42 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

First Claim for Relief v. Defendants

(Turnover)

43. Discover incorporates its responses to the preceding paragraphs of the Complaint as if set forth fully herein.

44. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 44 of the Complaint. Discover further answers that the terms and provisions of the documents referenced in paragraph 44 of the Complaint speak for themselves.

45. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 45 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action, and accordingly denies that it is in any way obligated to turn over or return any such transfers to the receiver, or is liable to the Receiver on any other basis.

Second Claim for Relief v. Defendants

(Actual Fraud – COLO. REV. STAT. § 38-8-105(1)(a))

46. Discover incorporates its responses to the preceding paragraphs of the Complaint as if set forth fully herein.

47. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 47 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at

issue in this action. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the Complaint.

48. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 48 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the Complaint.

49. Discover denies the allegations set forth in paragraph 49 of the Complaint insofar as they are intended to refer or apply to Discover. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 49 of the Complaint.

50. Discover denies the allegations set forth in paragraph 50 of the Complaint insofar as they are intended to refer or apply to Discover. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 50 of the Complaint.

Third Claim for Relief v. Defendants

(Constructive Fraud – COLO.REV.STAT. § 38-8-105(1)(b))

51. Discover incorporates its responses to the preceding paragraphs of the Complaint as if set forth fully herein.

52. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 52 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

53. Discover denies the allegations set forth in paragraph 53 of the Complaint insofar as they are intended to refer or apply to Discover, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 53 of the Complaint.

54. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 54 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

55. Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 55 of the Complaint, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action.

56. Discover denies the allegations set forth in paragraph 56 of the Complaint insofar as they are intended to refer or apply to Discover, with the exception that Discover specifically denies the allegation that it was the recipient of any transfers of assets at issue in this action. To the extent that such allegations are intended to refer or apply to Bank of America or American Express, Discover lacks knowledge or information at this time sufficient to form a belief as to the truth of the allegations set forth in paragraph 56 of the Complaint.

AFFIRMATIVE DEFENSES

Discover asserts its Affirmative Defenses to the Complaint as follows:

First Affirmative Defense

Plaintiff has failed to allege facts with sufficient specificity that, if proven, establish a prima facie case for recovery against Discover.

Second Affirmative Defense

To the extent that Discover received any of the transfers alleged in the Complaint, Discover provided reasonably equivalent (if not full, dollar-for-dollar) value in exchange for such transfers. *See, e.g.*, COLO. REV. STAT §§ 38-8-104, 38-8-109.

Third Affirmative Defense

To the extent that Discover received any of the transfers alleged in the Complaint, Discover took in good faith, provided reasonably equivalent (if not full, dollar-for-dollar) value and/or extinguished an antecedent debt in exchange therefor. *See, e.g.*, COLO. REV. STAT §§ 38-8-104, 38-8-109.

Fourth Affirmative Defense

To the extent that Discover received any of the transfers referenced in the Complaint and Discover was not the initial transferee, Plaintiff cannot recover from Discover because Discover took the transfers for value (the satisfaction of a debt), in good faith, without knowledge of the voidability of the transfers. *See, e.g.*, COLO. REV. STAT §§ 38-8-104, 38-8-109.

Fifth Affirmative Defense

Any claim by the Plaintiff for recovery of the transfers referenced in the Complaint fails to the extent that such claim is time-barred by the applicable statute of limitation, and/or to the extent that such claim exceeds the reach-back period for avoidance and recovery of such transfers provided under applicable law.

Sixth Affirmative Defense

Discover denies each and every allegation of the Complaint not admitted or otherwise controverted or qualified, and further denies that Plaintiff is entitled to any relief whatsoever from Discover.

Seventh Affirmative Defense

Plaintiff has failed to name, join or serve process upon the correct legal entity or entities that did business with any of the persons or entities in receivership, or that received or benefitted from any transfers of assets at issue in this action.

Eighth Affirmative Defense

Plaintiff cannot obtain a double-recovery of any transfers that are recovered or determined to be recoverable from any persons or entities in receivership or their insiders, from the beneficiaries of the alleged transfers, or from any persons or entities other than Discover.

Eighth Affirmative Defense

Plaintiff's claims fail in whole or in part by his failure to join a party without whom the action cannot proceed.

Ninth Affirmative Defense

Plaintiff's claims fail in whole or in part under the doctrine of laches.

Tenth Affirmative Defense

Plaintiff's claims are barred because Discover performed all of its obligations under its agreement with Plaintiff.

Eleventh Affirmative Defense

Discover reserves its right to amend its pleading to assert such additional defenses as may arise during the continued course of discovery and investigation in this matter.

WHEREFORE, Discover respectfully requests that the Court enter an Order dismissing the Complaint, including each and every claim set forth against Discover therein, with prejudice, and denying any of the relief sought in the Complaint as to Discover, or that judgment be rendered in favor of Discover and against the Plaintiff with respect to all matters before this Court, and that Discover be granted such other and further relief as the Court deems just, equitable, and proper.

Dated: October 23, 2019

Respectfully Submitted,

By: /s/ Karla Kraft
Scott W. Shaver (Reg. #: 80202)
Stradling Yocca Carlson & Rauth, P.C.
1400 16th Street, Suite 400
Denver, CO 80202
Phone: (949) 724-4000
Facsimile: (949) 725-4100
sshaver@sycr.com

Karla Kraft (SBN 205530)
Katie Beaudin (SBN 306402)
Stradling Yocca Carlson & Rauth, P.C.
660 Newport Center Drive, Suite 1600
Newport Beach, CA 92660-6422
Phone: (949) 724-4000
Facsimile: (949) 725-4100
kkraft@sycr.com
kbeaudin@sycr.com

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HARVEY SENDER, AS RECEIVER FOR GARY
DRAGUL, DGA REAL ESTATE SERVICES, LLC,
AND GDA REAL ESTATE MANAGEMENT,
LLC.,

Plaintiff,

-against-

BANK OF AMERICA, N.A., AMERICAN
EXPRESS COMPANY, AND DISCOVER BANK.

Defendant.

CERTIFICATE OF SERVICE

I, Karla Kraft HEREBY CERTIFY that I have on this 23rd day of October, 2019, sent by United States Mail, first class postage prepaid, true and complete copies of DISCOVER BANK'S ANSWER TO COMPLAINT to:

Micheal T. Gilbert
Patrick D. Vellone
Jeremy T. Jonsen
Rachel A. Sternlieb
ALLEN VELLONE WOLF HELFRICH & FACTOR, P.C.
1600 Stout St., Suite 1100
Denver, CO 80202
Phone Number: (303) 534-4499
Email: mgilbert@allen-vellone.com, pvellone@allen-vellone.com, jjonsen@allen-vellone.com, rsternlieb@allen-vellone.com
Attorneys for the Plaintiff as Receiver, Harvey Sender

Jeffery A. Springer
Springer and Steinberg P.C.

