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<tr><td>DISTRICT COURT, DENVER COUNTY
STATE OF COLORADO
Denver District Court
1437 Bannock St.
Denver, CO 80202</td><td rowspan="2">DATE FILED: March 17, 2020 11:54 PM
FILING ID: 22D38CB395321
CASE NUMBER: 2020CV30255

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<tr><td>Plaintiff: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC

v.

Defendants: GARY J. DRAGUL, an individual; BENJAMIN KAHN, an individual; THE CONUNDRUM GROUP, LLP, a Colorado Limited Liability Company; SUSAN MARKUSCH, an individual; ALAN C. FOX, an individual; ACF PROPERTY MANAGEMENT, INC.; a California Corporation, MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10.</td></tr>
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Courtroom: 414</td></tr>
<tr><td colspan="2">DEFENDANT GARY J. DRAGUL'S MOTION TO DISMISS</td></tr>
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Here, Harvey Sender, who was appointed Receiver *for* Defendant Gary J. Dragul and two if his entities, is suing Mr. Dragul. The Receiver alleges a vast scheme, undertaken by Mr. Dragul, his attorney, and several investors, to defraud other investors (whom the Receiver never identifies). The Receiver purports to bring the claims on behalf of those unnamed investors to recover their damages from the alleged fraud. The Receiver cannot do that. The Receiver's power is based upon the people and entities in receivership. He can control claims against those

people and entities. He can also assert claims belonging to those people and entities against third parties. What he cannot do as a matter of law, however, is assert third-parties' claims, including those of investors. He has no standing to do so. He also cannot, as a matter of law, sue the people or entities in receivership. Since he stands in their shoes, that would mean those people or entities are suing themselves.

The claims—all of which either facially allege fraud or sound in fraud—also fail under C.R.C.P. 9(b). They must be pled with particularity, but wholly fail to provide the particulars required, including but not limited to identifying the investors who were allegedly injured by the fraud. Additionally, many of the claims are time-barred, and the equitable claims cannot be pled when there is an adequate remedy at law, as there is here.

The Receiver's lack of standing, inability to assert claims against Mr. Dragul who is in receivership, and failure to assert claims before the limitations periods expired cannot be cured by repleading. The Court should dismiss the complaint with prejudice pursuant to C.R.C.P. 12(b)(1) and 12(b)(5).

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Gary J. Dragul conferred with counsel for the Receiver, and the Receiver opposes this Motion.

BACKGROUND

The Receiver alleges that, in 2014, the Colorado Securities Commissioner and Attorney General began investigating Mr. Dragul, GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, LLC ("GDAREM") (GDARES and GDAREM are collectively referred to as "GDA Entities") after purportedly receiving complaints from investors. (Compl. ¶ 38.) Four years later, on April 12, 2018, the State indicted Mr. Dragul on alleged securities fraud

charges (though the State seems now to have abandoned that indictment). On August 15, 2018, the Commissioner filed a complaint for injunctive and other relief against Mr. Dragul and the GDA Entities (the "Receivership Action"). The Commissioner immediately moved to appoint a receiver over the GDA Entities *and* Mr. Dragul personally in that action. Harvey Sender was appointed Receiver on August 30, 2018. (*See* Compl. Ex. 1, August 30, 2018 Receivership Order ("Receivership Order")). Since the indictment was hindering Mr. Dragul's ability to manage the properties in which investors had invested, and lenders were threating to declare default based on the indictment, Mr. Dragul believed a receivership would be the most effective way for investors to avoid losses. Thus, Mr. Dragul consented to the appointment of receiver expecting a cooperative process in which the Receiver, Mr. Dragul, and the GDA Entities would manage the properties to maximize investor recovery. When the Receiver was appointed on August 30, 2018, Mr. Dragul began to and then completed turning over all his assets that were derived directly or indirectly from investor funds or the alleged solicitation of securities. He also gave the Receiver access to the entire GDA server on which was saved not only information about the properties and investors, but all of Mr. Dragul's communications including his personal attorney-client privileged communications that Mr. Dragul had with counsel.

For a while, those involved in the receivership process did work cooperatively. Unfortunately, that changed. On January 21, 2020, the Receiver filed his complaint ("Complaint") against Mr. Dragul and several other defendants. The Complaint alleges a vast "fraudulent commercial real estate scheme[,]" purportedly extending "for more than 20 years[,]" in which Mr. Dragul and the other defendants allegedly defrauded investors. (Compl. ¶¶ 1, 4, 20.) Generally, the Complaint alleges the defendants perpetrated this fraud through making false or misleading statements in soliciting investments and taking unauthorized and undisclosed

commissions. It asserts claims against Mr. Dragul for: (1) violations of the Colorado Securities Act, C.R.S. §§ 11-51-501 and 11-51-604(3); (2) negligence; (3) negligent misrepresentation; (4) civil theft, C.R.S. § 18-4-401; (5) COCCA violations, C.R.S. § 18-17-101, *et seq*.; (7)[1] breach of fiduciary duty; (11) fraudulent transfer, C.R.S. § 38-8-105(1)(a); (12) constructive fraud; (13) unjust enrichment; and (14) turnover. All of these claims fail as a matter of law.

STANDARD

A motion to dismiss for lack of jurisdiction under C.R.C.P. 12(b)(1) is appropriately granted when the plaintiff lacks standing to assert the claims.[2] *Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011) (affirming district court's dismissal for lack of standing under C.R.C.P. 12(b)(1)). "If a court determines that standing does not exist, then it must dismiss the case." *Hickenlooper v. Freedom from Religion Found. Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

A motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim tests the formal sufficiency of a plaintiff's complaint. *Dwyer v. State*, 357 P.3d 185, 196 (Colo. 2015). Dismissal under Rule 12(b)(5) is appropriate when the allegations fail, as a matter of law, to support the claim for relief. *E.g.*, *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012).

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[1] The sixth, eight, ninth, and tenth claims are not asserted against Mr. Dragul, but against other defendants.

[2] A motion to dismiss for lack of jurisdiction under C.R.C.P. 12(b)(1) is limited to 25 pages. C.R.C.P. 121, § 1-15(1)(a).

ARGUMENT

I. The Receiver Lacks Standing to Assert Investors' Claims

A receiver's role is to gather and preserve the assets of the entities or people in receivership for later distribution to creditors of those same entities or people in receivership. Consistent with that role, a receiver is often authorized to prosecute claims *held by* the entities or people in receivership against third parties. The resulting recovery is then added to the asset pool for later distribution to the creditors. The receiver's power to assert those claims stems from the receiver's control over those entities or people in receivership.

As a matter of law, however, a receiver lacks authority to assert claims held by entities or people who are not in the receivership. Here, that means the Receiver may not assert claims of the investors who are creditors of the Receivership Estate.

The Receiver asserts he has standing to prosecute claims one through six, eight, and nine on behalf of Special Purpose Entities and/or investors—"all of whom are creditors of the Receivership Estate." (Compl. ¶¶ 167, 177, 182, 193, 200, 214, 236. 241.) The Receiver alleges breaches of duties owed to investor-creditors in claims seven and ten (*Id*. ¶¶ 229, 230, 249), again indicating the Receiver is asserting claims on behalf of investors. He alleges fraudulent transfer of commissions from investors to defendants in claim eleven (*id*. ¶ 257), and constructive fraud for failing to provide equivalent value for the commissions taken from investor money (*id*. ¶¶ 262-263.) And he alleges the defendants received benefits at the expense of creditors in the thirteenth claim for unjust enrichment. (*Id*. ¶ 268.)[3] Indeed, all of the alleged

[3] There and elsewhere, the Receiver also asserts the Receivership Estate has been injured. But all the factual averments in the Complaint allege wrongdoing only through 2018, before the Estate existed.

wrongful acts here—failure to disclose, collecting commissions out of investor funds, etc.—could only have injured the investors.

In support of his claimed authority to assert creditors' claims, the Receiver cites Paragraph 13(s) of the Receivership Order. (*Id.* ¶¶ 167, 177, 182, 193, 200, 214, 236. 241.) Paragraph 13(s) does purport to give the Receiver this power. But the Receivership Order may not grant the Receiver powers he cannot wield as a matter of law. Here, as a matter of law, the Receiver lacks standing to assert creditors' claims, and the Receivership Order cannot create jurisdiction over such claims where none exists.

"Resolution of a standing issue presents two considerations: whether the complaining party has alleged an actual injury from the challenged action; and whether the injury is to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions." *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 781 (Colo. App 1997).

> The 'injury-in-fact' requirement is dictated by the need to assure that an actual controversy exists so that the matter is a proper one for judicial resolution, for consistent with the separation of powers doctrine embodied in Article III of the Colorado Constitution, '[c]ourts cannot, under the pretense of an actual case, assume powers vested in either the executive or legislative branches of government.'

Conrad v. City and Cty of Denver, 656 P.2d 662, 668 (Colo. 1982).

The Receiver in this matter has at least once before advanced this same position that he may assert creditors' claims. The court rejected that position. In *Sender v. Kidder Peabody*, 952 P.2d at 780, the Receiver served as a bankruptcy trustee and filed a complaint alleging aiding and abetting breach of fiduciary duty, negligence, and breach of fiduciary duty against third-party financial institutions. The trial court granted summary judgment in favor of the defendants based on *in pari delicto* and lack of standing. The Receiver appealed, and the Colorado Court of Appeals affirmed, holding among other things that "[a] bankruptcy trustee cannot assert the

claims of creditors or third parties but stands in the shoes of the debtor and may properly assert claims belonging to the debtor." *Id*. at 781 (citing *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996); *Miller v. Accelerated Bureau of Collections, Inc.*, 932 P.2d 824 (Colo. App. 1996)). Myriad other courts have similarly held that trustees lack standing to assert creditor claims. *See, e.g., In re M & L Business Machine Co., Inc.*, 160 B.R. 850, 851 (D. Colo. 1993) (collecting cases).

"[G]enerally, a receiver stands in the shoes *of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve*." *Good Shepherd Health Facilities of Colorado, Inc. v. Department of Health*, 789 P.2d 423, 425 (Colo. App. 1989) (emphasis added) (citing *Seckler v. J.I. Case Co.*, 348 P.2d 368 (Colo. 1960)); *see also Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1128 (D. Minn. 2012) ("[The defendant] is correct that an equity receiver may sue only on behalf of the entity (or person) in receivership, not third parties. This is because a receiver 'stands in the shoes' of the receivership entity.")

The office of a receiver is that of a trustee. *See, e.g.*, *Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 33 (Colo. 1931) ("[T]he office of receiver is in the nature of that of a trustee, and those who have lawful claims against the receivership estate are *cestuis que trustent*."); *see also Kelley*, 901 F.Supp.2d at 1128 ("A federal equity receiver is akin to a bankruptcy trustee.") Just as a bankruptcy trustee may not assert creditors' claims, *Sender*, 952 P.2d at 779 (citing cases), a receiver may not assert creditors' claims, *Kelley*, 901 F. Supp. 2d at 1128. Federal courts have noted that the role of an equity receiver is "to maximize the receivership estates' assets for the benefit of creditors, . . ., but contrary to [the receiver's] assertion it does *not* give him standing to

sue on their behalf." *Kelley*, 901 F.Supp.2d at 1128 (emphasis in original). Further, the Colorado Court of Appeals has stated:

> If a cause of action alleges only indirect harm to a creditor (that is, an injury that derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC, 166 P.3d 166, 180 (Colo. App. 2007).

The Receivership Order also demonstrates the Receiver may not assert creditors' claims. Paragraph 16 provides that "[a]ny parties holding claims against Dragul, GDARES and GDAREM or the Receivership Estate shall not be entitled to participate as creditors in the distribution of recoveries from the Receiver's administration of the Receivership Estate and collection and liquidation of the assets thereof, unless such parties agree not to file or prosecute independent claims such parties may have . . . against Dragul, GDARES and GDAREM[.]" In asserting the creditors' claims here, under the plain language of Paragraph 16, the Receiver is waiving those investors' right to participate in the distribution of recoveries from the Receivership. And since the money the Receiver seeks to recover through the Complaint will go to the Receivership Estate first and not directly to those investors, that means the investors will have no recovery. The Receiver lacks authority to so waive those investors' claims and recovery. Indeed, doing so is expressly contrary to the Receiver's purpose to collect Receivership Property in order to pay creditors. (Receivership Order ¶ 22(c), (e), (f).)

Since the claims of creditors are not claims held by the person or entities in receivership, and the Receivership Order precludes the Receiver from asserting creditors' claims, the Receiver lacks standing as a matter of law. Consequently, claims one through thirteen must be dismissed.

II. The Receiver May Not Sue Gary Dragul Because Mr. Dragul is In Receivership

A. <u>As a Matter of Law, a Receiver May Not Sue a Person or Entity in Receivership</u>

In *Sender v. Kidder Peabody*, 952 P.2d at 781—the case in which the Receiver here was also the plaintiff—the court held that a bankruptcy trustee "stands in the shoes of the debtor and may properly assert claims belonging to the debtor." The Receiver here stands in the shoes of the people and entities in receivership, and may properly assert their claims. Since Mr. Dragul is in receivership, the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. Mr. Dragul cannot sue himself. *See, e.g., BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013) (noting a party may not sue itself even if the party is serving in different legal capacities) (collecting cases).

Indeed, the court in *Sender v. Kidder Peabody* went further and held that because the trustee stands in the shoes of the debtor, the trustee may not even sue third parties with whom the debtor coordinated. There, the court considered whether the trustee could sue third parties who allegedly participated in a Ponzi scheme with James Donahue, who was the principal of the debtors in bankruptcy (Donahue was not personally a debtor in the bankruptcy). 952 P.2d at 780-81. The trustee, Harvey Sender (the Receiver here), was alleging losses by the debtors (i.e., the parties for whom he was trustee) for which he might otherwise have standing. *Id*. at 781. But the court held that he lacked standing under the doctrine of *in pari delicto* (also known as unclean hands). *Id*. at 781-82. Specifically, the court noted that while the losses were suffered by the debtors, they were caused by a scheme orchestrated by the debtors' principal, Donahue, and the defendants. *Id*. at 781. Citing authority, the court held that "a bankruptcy trustee does not have standing to pursue claims against a third party for injury to the debtor when the debtor has joined with the third party in defrauding its creditors." *Id*. at 782 (citing cases). This flows

from "the principle . . . that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed *in pari delicto*, and the law will aid neither, but rather, will leave them where it finds them." *Id.* (citing cases). Thus, the court held that because the debtors "obtained the money they now seek to recover through fraudulent means, we conclude that Sender, standing in their shoes, cannot show injury to a legally protected right[,]" and the court therefore affirmed summary judgment against Sender for lack of standing. *Id.*

If a trustee, and by extension a receiver, cannot sue *third parties* who participated in the debtor's/person in receivership's scheme, it is untenable that the Receiver here could sue the actual person *in* receivership, Mr. Dragul, who the Receiver asserts not only participated in the scheme but was the central figure. Accepting the Complaint's allegations of wrongdoing as true as required on a motion to dismiss, Mr. Dragul would have benefited—not been injured—from this wrongdoing just like a third-party participant. Nor can the GDA Entities in receivership assert claims against Mr. Dragul, as under the holding in *Sender v. Kidder Peabody*, they were also part of the scheme and the Receiver lacks standing to assert their claims against Mr. Dragul. *Id.* at 782.

Moreover, under the reasoning in *Sender v. Kidder Peabody*, the Receiver is also barred from asserting claims against third parties whom the Receiver alleges participated in the purported fraudulent scheme with Mr. Dragul. *Id.* That means the Receiver is barred from asserting claims against all of the other defendants in this action.

B. Equitable Considerations and the Receivership Order Bar the Receiver from Suing Mr. Dragul

This rule that the receiver may not sue a person or entity in receivership is further supported by myriad equitable considerations and the Receivership Order itself.

As the Receiver alleges in Paragraph 11 of the Complaint, the Receivership Order purports to authorize him to "prosecute claims and causes of action *against third parties*[.]" Mr. Dragul is not a third party.

Moreover, pursuant to Paragraph 26 of the Receivership Order, "all actions in equity or at law against the Receiver, *Dragul*, GDARES and GDAREM, or the Receivership Estate are hereby enjoined . . . pending further action by this Court." (emphasis added). Here, the Receiver sued Mr. Dragul. Under the plain language of Paragraph 26, the Receiver is enjoined from suing Mr. Dragul—as it did with the Complaint—without first seeking relief from the stay. The Receiver never sought relief from the stay, and thus he lacks authority to assert claims against Mr. Dragul here.

Paragraph 10 of the Receivership Order required Mr. Dragul to turn over to the Receiver all of his assets that related to, or directly or indirectly derived from, investor funds from the solicitation or sale of alleged securities (except Mr. Dragul's personal residence). While the Receiver disputes that Mr. Dragul turned over everything and there may be disputes over what counts as related to such investor funds, Mr. Dragul did turn over all assets he believed subject to the Receivership Order. Those assets are intended to pay creditors' claims, meaning they are intended *to pay the very claims the Receiver brings here*. Thus, Mr. Dragul has already turned over the assets the Receiver seeks to recover by way of a judgment in this action. Consequently, if the Receiver obtains a judgment, one of two things will happen. Either the Receiver will receive a double-recovery from Mr. Dragul for the same creditor injuries, or the judgment must be paid out of the Receivership Estate. A double-recovery would be barred as a matter of law. *Andrews v. Picard*, 199 P.3d 6, 11 (Colo. App. 2007). And if the Receiver satisfies the judgment out of the Receivership Estate, there is no point in suing Mr. Dragul. The Receiver already has

what he might receive from the judgment, and all he would accomplish with the lawsuit is depleting the funds in the Estate prosecuting the case.

The Receivership Order also required Mr. Dragul to turn over and/or give the Receiver access to all information related to the receivership property, investors and their investments, the operation and management of the GDA Entities, and virtually any other potentially relevant (and in many cases irrelevant) information. (Receivership Order ¶¶ 10, 13(d), 13(g), 28.) Specifically, Paragraph 10 required Mr. Dragul and two related entities to provide to the Receiver all documents related to the Receivership Action, along with explaining the operation, maintenance and management of companies at issue. In other words, the very information Mr. Dragul needs to defend himself against the criminal indictments and this civil suit. In accordance with the Receivership Order, Mr. Dragul gave the Receiver access to his and the GDA Entities' entire server, which included *all* of Mr. Dragul's communications, including privileged communications he had with counsel. Per the Receivership Order, Mr. Dragul did so without attempting to invoke any of the rights under C.R.C.P. 26 or other discovery rules that any other litigant would have to narrow the scope of discovery or protect confidential *or privileged* information. Subsequently, the Receiver seized the server and denied Mr. Dragul access to it or a full copy.

Paragraph 7 of the Receivership Order provides that "[n]othing in the Order operates as a waiver or an abrogation of the attorney-client privilege held by Dragul in his personal capacity." With respect to "all privileges in connection with the professional representation of [Gary Dragul], . . . Dragul maintains all such privileges in his personal capacity." (Receivership Order ¶10.) And the Receiver's authority to take possession of Mr. Dragul's offices and limit access to the Receiver and his agents is expressly "subject to any privileges maintained by Dragul in his

personal capacity[.]" (*Id.* ¶ 13(d).) Additionally, though the Receiver may seize information including computerized records, "information subject to the attorney-client privilege held by Dragul in his personal capacity shall remain privileged. Any such claimed privileged information, or information that may reasonably be considered privileged information, obtained by Receiver or commingled with other information shall be disgorged by the Receiver and notice given to Dragul regarding the privileged information and its disposition by the Receiver." (*Id.* ¶ 28.)

While the Receivership Order requires the Receiver to disgorge all of Mr. Dragul's attorney-client privileged information, the Receiver has never done so in this or the Receivership Action. Indeed, rather than disgorging, the fact that the Receiver here sues Mr. Dragul *and* Mr. Dragul's counsel, Benjamin Kahn and the Conundrum Group, alleging a concerted scheme, suggests the Receiver and his counsel are actively using that very information against Mr. Dragul here.

And even if the Receiver had disgorged the privileged information, the damage would be done. Receipt and review of the opposing party's privileged information is a bell that cannot be un-rung. Indeed, opposing counsel's receipt of a party's privileged information often irreparably taints the integrity of a judicial proceeding so severely that, even though it is an extreme remedy, disqualification of the offending counsel may be appropriate. *In re Estate of Meyers*, 130 P.3d 1023, 1025 (Colo. 2006) (citations omitted); *see also, MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991) (noting that "[e]ven the appearance of impropriety may, under the appropriate circumstances, require prompt remedial action [such as disqualification]" and "any doubt is to be resolved in favor of disqualification") (internal quotation omitted). For that reason, here, the Court would either need to disqualify the

Receiver's counsel, or dismiss the Complaint against Mr. Dragul. Since, as addressed above, there are myriad other legal defects with the Complaint, the fact that this case is irreparably tainted by the Receiver's and his counsel's possession of Mr. Dragul's privileged information, and the Receiver's seizing of the very information Mr. Dragul needs to defend himself, are but additional reasons the case must be dismissed.[4]

III. Since All of the Receiver's Claims Sound in Fraud, They Must All be Pled with Particularity Under Rule 9(b), But None Are

Under C.R.C.P. 9(b), claims sounding in fraud must be pled with particularity. Specifically, "the circumstances constituting fraud or mistake shall be stated with particularity." C.R.C.P. 9(b). "Fraud" is defined as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." Black's Law Dictionary (10th ed. 2014). Rule 9(b) applies to all claims based on fraudulent activity, regardless of the claim's label. *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 289 (Colo. App. 1994). That includes, for example, a breach of fiduciary duty claim for which the breach was a scheme to defraud. *Id*. at 289 (citing and quoting *Robinson v. Caster*, 356 F.2d 924, 925 (7th Cir. 1966)). It also includes claims for intentional misrepresentation, unjust enrichment, and theft by deception if they rely on allegations of fraudulent conduct. *Id*. (affirming dismissal of such claims under Rule 9(b) for failure to plead with particularity). Thus, claims that do not expressly allege fraud nonetheless sound in fraud and are subject to Rule 9(b) if they rely on underlying allegations of fraudulent conduct. *Id*.

[4] Had Mr. Dragul known the Receiver would seize Mr. Dragul's information which he needs to defend, and would seize Mr. Dragul's attorney-client privileged information and not disgorge it, and then use all of that information to sue Mr. Dragul, he would not have stipulated to the Receivership Order.

The Receiver's first claim for violation of the Colorado Securities Act, C.R.S. §§ 11-51-501 and 11-51-604(3), alleges that Mr. Dragul and other defendants "employed a device, scheme, or artifice to defraud" and "engaged in acts, practices and a course of business which operated as fraud". (Compl. ¶ 168.) The Receiver's third claim for negligent misrepresentation alleges that Mr. Dragul and others negligently induced investors to invest, but only "[t]hrough Dragul's fraudulent Scheme[.]" (*Id.* ¶ 183.) The fourth claim for Civil Theft alleges that "[w]ithout investors' knowledge or authorization, Defendants exploited their control over those funds by causing them to be used for Defendants' personal benefit." (*Id.* ¶ 195.) The fifth claim for violation of COCCA alleges that "Defendants formed an association-in-fact for the purpose of defrauding the Estate and GDA Entity investors and prospective investors" (*id.* ¶ 203), and alleges predicate acts of securities fraud, wire fraud, and bankruptcy fraud (*id.* ¶¶ 207; 208; 210). It also alleges that the civil theft predicate act took place "through deceptive and material misstatements." (*Id.* ¶ 208(c).) The seventh claim for breach of fiduciary duty alleges that Mr. Dragul failed to provide honest and accurate material information to investors and engaged in other acts against investors' interests (*id.* ¶ 231), and that these acts or omissions "were intentional, willful, and wanton" (*id.* ¶ 22), and were "intentionally designed to conceal material information" (*id.* ¶ 233). The eleventh claim is for "fraudulent transfer" (*id.* ¶¶ 256-260) based on alleged transfers made with the intent to "defraud creditors" (*id.* ¶ 258). The twelfth claim is for "constructive fraud". (*Id.* ¶¶ 261-266.) These claims all facially allege fraud, either by using the word "fraud" or "fraudulent", or alleging "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment[,]" which is defined as fraud. Black's Law Dictionary (10th ed. 2014).

The second claim for negligence alleges that "defendants failed to exercise reasonable care or competence in preparing and distributing Solicitation Materials to prospective GDA investors" and in making representations to investors. (Compl. ¶ 179.) But all the factual averments about solicitation allege the solicitation was part of a fraudulent scheme. (*E.g., id.* ¶¶ 1, 35, 62-144.) The thirteenth claim for unjust enrichment seeks to recover the alleged benefit Mr. Dragul received "[b]y virtue of the Commissions[.]" (*Id.* ¶ 268.) The fourteenth claim for turnover also seeks turnover of "Commissions[.]" (*Id.* ¶ 271.) Paragraphs 145-165 discuss the "Commissions" and allege that the were obtained when "[v]arious SPEs were used to fraudulently transfer funds to Defendants" (*id.* ¶ 146), and that "all of the commissions set forth below represent the transfer of funds Defendants obtained by fraud from investors" (*id.* ¶ 148).

Consequently, every claim the Receiver alleged against Mr. Dragul either facially alleges fraud or sounds in fraud. Indeed, the entire case is of purported fraud. The Receiver alleges "[t]his case arises from a fraudulent real estate scheme" (Compl. ¶ 1), and "[t]his action arises from a multi-million-dollar fraud and Ponzi scheme" (*id.* ¶ 30.) Under Rule 9(b), all the Receiver's claims must be pled with particularity. *State Farm*, 899 P.2d at 289.

"[T]his requirement of particularity is intended in part to protect defendants from the reputational harm that may result from unsupported allegations of fraud, a charge which involves moral turpitude." *Id.* at 288. The complaint "must at least state the main facts or incidents which constitute the fraud so that the defendant is provided with sufficient information to frame a responsive pleading and defend against the claim." *State Farm*, 899 P.2d at 289.

To satisfy Rule 9(b), "the complaint must sufficiently specify the statements it claims were false or misleading, give particulars as to the respect in which the plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those

responsible for the statements." *State Farm*, 899 P.2d at 288 (internal citations and quotation omitted). "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud, and . . . must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *U.S. ex rel. Lacy v. New Horizons, Inc.*, 348 F. App'x 421, 424 (10th Cir. 2009);[5] *see also Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (complaint alleging fraud must identify time, place, and contents of the false representation, the identity of the party making the false statements, and the consequences thereof).[6]

Here, the Complaint fails to allege any of the claims with particularity (and even fails to satisfy the *Warne v. Hall* pleading standard, *see* n. 4). No where in the Complaint does the Receiver identify *any* of the investors who were purportedly defrauded and on whose behalf the Receiver purports to assert the claims. It alleges Mr. Dragul used promissory notes and loans to further his fraudulent enterprise and Ponzi scheme, but does not identify what promissory notes or loans, to whom they were made, or when. (Id. ¶ 54.) It alleges transfers of funds to falsely represent the financial condition of various special purpose entities ("SPEs") used as investment

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[5] Since C.R.C.P. 9(b) and F.R.C.P. 9(b) are essentially identical, case law interpreting the federal rule is persuasive in analyzing the Colorado rule. *State Farm*, 899 P.2d at 288.

[6] While the factual allegations in the complaint must generally be accepted as true, that does not apply to legal conclusions or conclusory factual allegations. *Warne v. Hall*, 373 P.3d 588, 591, 594, 596 (Colo. 2016); *see also Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (courts are "not required to accept as true legal conclusions that are couched as factual allegations."). The allegations must also satisfy Colorado's "plausibility" standard. *Warne*, 373 P.3d at 591, 595 (Colo. 2016). Under *Warne*, conclusory allegations do not suffice, *id.* at 596, and instead, the factual allegations must contain sufficient detail to "raise the right to belief 'above the speculative level'", *id.* at 591 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Under the *Warne v. Hall* pleading standard, which borrows from the *Twombly* and *Iqbal* federal pleading standard, even non-fraud allegations must "make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations[.]" *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008)

vehicles, but again does not allege when the transfers were made. (*Id.* ¶ 57.) It alleges commingling of funds "used to defraud investors[,]" but never identifies the investors or when. (*Id.* ¶ 58.)

These allegations were described in single paragraphs with no further explanation. The allegations for which the Receiver devotes more than a throw-away sentence fall into two broad categories: (1) providing false or misleading disclosures to investors, primarily through solicitation material; and (2) taking unauthorized commissions (without disclosing them).

Much of the Receiver's complaint relies on alleged false or misleading "Solicitation Materials", which purportedly had inflated purchase prices and closing costs. (*Id.* ¶¶ 65, 68-69.) The Complaint does not identify what investors were provided the purported false Solicitation Materials, what false or misleading statements were in each one, when they were provided, or what investment they were offered in connection with. (*Id.*) Except, the Complaint alleges two examples: The Market at Southpark (*id.* ¶¶ 71-86), and Plaza Mall of Georgia North (*id.* ¶¶ 87-101). But as to Southpark, the Receiver still does not allege who the investors receiving the Solicitation Materials were, or when they each received the Solicitation Materials. The Complaint alleges the defendants sent updates to investors which did not address the sale of the property (*id.* ¶¶ 81-83), which occurred in 2009 (*id.* ¶¶ 77, 78) and again in 2011 (*id.* ¶ 83), and failed to discuss fees Mr. Dragul and other defendants allegedly received but failed to disclose (*id.* ¶¶ 85). But again, the investors are not identified. As to Plaza Mall, the Complaint alleges Mr. Dragul provided investors with Solicitation Material "in or about 2008" (*id.* ¶¶ 87-90), but again does not identify the investors. Nor does the Complaint identify the investors to whom Mr. Dragul failed to disclose anything else about Plaza Mall. (*Id.* ¶¶ 87-101.) The property sold in 2008 and again in 2017. (*Id.* ¶¶ 92, 99.)

The Complaint also alleges that in 2007, Mr. Dragul and other defendants transferred another property, Prospect Square, among them and failed to disclose fees they took and an allegedly inflated purchase price to investors. (*Id.* ¶ 102-108.) And it alleges that in 2016, Mr. Dragul repurchased the Prospect Square property using funds of investors to whom he sent Solicitation Material in 2016 that allegedly made material misrepresentations, though it does not state what statements in the Solicitation Materials were false. (*Id.* ¶¶ 135-139.) Again, the investors are never identified for either the 2007 or 2016 purchases.

With respect to "unauthorized commissions[,]" the Complaint alleges Mr. Dragul and other defendants took commissions from the sale of various properties—some of which are identified and some of which are not—and that those commissions were taken from investor funds and without being disclosed to those investors. (*Id.* ¶¶ 145-165.) Again, the Receiver never identifies the investors whose funds were purportedly used to pay these commissions, or the investors to whom the defendants failed to disclose the commissions.

Since all the claims rely on these fraud averments, all the claims fail. That includes, for example, the COCCA claim. The Receiver alleges "at least two" predicate acts of violation of the Colorado Securities Act, when "from 2006 through 2018", the defendants defrauded investors by providing false and misleading Solicitation Materials and received "illegal and undisclosed commissions." (*Id.* ¶¶ 207, 208(a).) But the Receiver does not identify specifically when or where these alleged predicate acts occurred, the investors allegedly injured by these predicate acts, or what false and misleading statements were provided to which investors. He alleges "at least two predicate acts of wire fraud," again "from 2006 through 2018," in which the defendants defrauded investors and "used interstate or foreign wire communications to carry out the Scheme[.]" (*Id.* ¶¶ 207, 208(b).) Again, the Receiver does not identify the investors that

received these wires, when or where they were sent or received, what purportedly fraudulent statements were conveyed, or even what means of wire was used—he cannot even identify whether they were interstate or domestic.[7] None of these allegations suffice under Rule 9(b). *State Farm*, 899 P.2d at 288 ("the complaint must sufficiently specify the statements it claims were false or misleading, give particulars as to the respect in which the plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements"); *U.S. ex rel. Lacy*, 348 F. App'x at 424 ("At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud, and . . . must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof.").

None of the other claims fare any better, as none of the fraud allegations identify the investors who were allegedly defrauded, where the fraud took place, or precisely when. All the claims fail under Rule 9(b) and must be dismissed.

IV. The Receiver's Claims are Time-Barred or Not Cognizable

A. <u>The First Claim for Securities Fraud is Time-Barred Under the 3-Year Statute of Limitations and 5-Year Statute of Repose</u>

In the first claim for violation of the Colorado Securities Act ("CSA"), C.R.S. §§ 11-51-501 and 11-51-604(3), the Receiver purports to assert investors' claims under those statutory provisions. (Compl. ¶¶ 166-175.) While this claim fails because the Receiver may not assert creditors' claims, and because it was not pled with particularity, it is also time-barred. C.R.S. §

[7] The Receiver also alleges bankruptcy fraud under 18 U.S.C. § 157. (Compl. ¶¶ 207, 208(d).) Bankruptcy fraud under 18 U.S.C. § 157 is not a COCCA predicate act. C.R.S. §§ 18-17-103(5)(b) (not identifying 18 U.S.C. § 157), 103(5)(a) (incorporating RICO's predicate acts under 18 U.S.C. § 1961(1)(A), (B), (C), and (D)); 18 U.S.C. § 1961(1) (not identifying 18 U.S.C. § 157). In fact, bankruptcy fraud under 18 U.S.C. § 157 is expressly excluded from being a racketeering activity predicate act. 18 U.S.C. § 1961(1)(D).

11-51-604 authorizes investors to sue for securities fraud under C.R.S. § 11-51-501, it also imposes a statute of limitation and statute of repose:

> No person may sue under subsection (3) or (4) or paragraph (b) or (c) of subsection (5) of this section more than three years after the discovery of the facts giving rise to a cause of action under subsection (3) or (4) of this section or after such discovery should have been made by the exercise of reasonable diligence and in no event more than five years after the purchase or sale[.]

C.R.S. § 11-51-604(8).

"In the context of securities fraud, the Tenth Circuit has held that the statute of limitations begins to run 'once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.'" *In re Qwest Communications Intern., Inc. Securities Litigation*, 387 F. Supp.2 d 1130, 1141 (D. Colo. 2005) (quoting *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201 (10th Cir. 1998)). "The standard outlined in *Sterlin* and similar cases is viewed often as a two-step process: 1) the date when the plaintiff was on 'inquiry notice' of the possibility of fraud; when there existed 'sufficient storm warnings' to alert a reasonable person to the possibility that misleading statements or significant omissions had been made; and 2) the period thereafter during which a diligent investor should have discovered the facts underlying the alleged fraud." *Id.* Notably, this test turns on when the investor knew or should have known of misleading statements or omissions, not when he or she knew of should have known he or she was injured.

While the statute of limitations or repose is generally an affirmative defense, under the CSA, the timeliness of the claim is an element the plaintiff must prove. "When a statute creates a right unknown at common law, and also establishes a time period within which the right may be asserted, the time limit is a substantive provision which qualifies or conditions the right, as distinguished from a statute of limitations which must be asserted as a defense." *First Interstate Bank of Denver, N.A. v. Ventral Bank & Trust Co. of Denver*, 937 P.2d 855, 861 (Colo.App.

1996) (citing *People v. Riley*, 708 P.2d 1359 (Colo. 1985) (federal securities law is highly persuasive in interpreting the Securities Act); J. Hicks, *Civil Liabilities: Enforcement & Litigation Under the 1933 Act* § 6.01[1] at 6-274 (§ 13 is 'substantive, rather than procedure; it establishe[s] an essential ingredient to a private cause of action') (1989); *In re Longhorn Securities Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983) (Securities Act of 1933 includes statute of limitation and repose which constitute elements of the claim which must be pled in complaint; because statute of limitation is not included in Securities Exchange Act of 1934, it must be asserted as affirmative defense)). Relying on these cases, the court in *First Interstate Bank of Denver* held that the CSA's limitations and repose periods constitute a substantive element of a securities claim and do not implicate a court's subject matter jurisdiction. *Id.*

Thus, section 604(8) of the CSA provides both a limitation period and a period of repose that are substantive elements of the Receiver's claim that must be pled in the complaint. But here, the Receiver failed to plead the identity of the investors on whose behalf he purports to assert the CSA claim and, as a result, he failed to plead that the Complaint was filed within three years of *any* investor's discovery of facts giving rise to the claim, including investors in the Market at Southpark, the Plaza Mall of Georgia North, or any other deals. Instead, the Receiver asserts that "[t]he Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors" (Comp. ¶ 38), indicating that the investors on whose behalf the Receiver apparently brings this action discovered the facts giving rise to the claim at least as early as 2014. Thus, not only does the Receiver fail to plead facts to show the claim is timely, but his allegations demonstrate it is time-barred.

Moreover, the Receiver fails to meet its burden to allege when investors purportedly purchased their interests in the properties at issue (assuming these qualify as securities), and that such purchases were fewer than five years ago as required under the statute of repose. C.R.S. § 11-51-604(8) (securities fraud claim is subject to a 5-year statute of repose running from the sale of the alleged securities). Thus, the first claim is time-barred under the statute of repose as well.

B. The Eleventh Claim for Fraudulent Transfer is Time-Barred

Under C.R.S. § 38-8-110(1)(a), a claim for fraudulent transfer under C.R.S. 38-8-105(1)(a), as the Receiver brings here, must be brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Here, all alleged fraudulent transfers that were made before January 21, 2016 are time-barred unless the one-year discovery rule applies. In *Lewis v. Taylor*, the Colorado Supreme Court noted that, "the transfer was or could reasonably have been discovered by the Receiver on the date of his appointment[.] Thus, section 38–8–110(1)(a) would bar any claim not filed by . . . one year after the [Receiver was appointed]." 375 P.3d 1205, 1207 (Colo. 2016). Thus, even under the discovery rule, any claim for a fraudulent transfer occurring after January 21, 2016 would still be time-barred, as the limitations period ran one year after the Receiver was appointed—August 30, 2018. Here, the vast majority of the transfers alleged—the "Commissions"—pre-dated January 21, 2016. (*See* Compl. Exs. 3-7.)

C. The Twelfth Claim for Constructive Fraud is Time-Barred

A constructive fraud claim under C.R.S. § 38-8-105(1)(b), as the Receiver alleges here, is time-barred if not brought "within four years after the transfer was made or the obligation was incurred." C.R.S. § 38-8-110(1)(b). No discovery rule applies. Thus, the Receiver's claim as to

any transfers/commissions occurring prior to January 21, 2016—the same ones mentioned above with respect to the fraudulent transfer claim—are time-barred.

D. The Thirteenth and Fourteenth Claims for Unjust Enrichment and Turnover Are Time-Barred and Not Cognizable When Pled With a Fraudulent Transfer Claim

While equitable claims such as unjust enrichment and turnover are technically subject to equitable laches rather than statutes of limitation, courts generally apply the statute of limitations applicable to an analogous claim at law. *Sterenbuch v. Gross*, 266 P.3d 428, 436-37 (Colo. App. 2011). Here, these equitable claims seek the same relief as the fraudulent transfer or constructive fraud claims—that Mr. Dragul return to the Receivership Estate whatever he received at the Estate or creditors' expense. Thus, the fraudulent transfer or constructive fraud limitations periods apply, and the unjust enrichment and turnover claims are time-barred for the same reasons the fraudulent transfer and constructive fraud claims are time-barred.

Moreover, equitable claims are not available, and must be dismissed at the pleading stage, when there is an adequate remedy at law. *See Szaloczi v. John Behrmann Revocable Trust*, 90 P.3d 835, 842 (Colo. 2004) ("We have long held that equity will not act if there is a plain, speedy, adequate remedy at law."); *Kelley*, 901 F. Supp. 2d at 1132 (equitable claim must be dismissed at pleading stage when adequate legal remedy is available). Here, the fraudulent transfer and constructive fraud claims provide an adequate remedy at law (in fact that same remedy), and the equitable claims are not cognizable.

CONCLUSION

The Receiver here is trying to exercise power he does not have. His power derives from the people or entities in receivership. As a matter of law, he lacks standing to assert claims of creditors, who are not in receivership. Standing in the shoes of the people or entities in receivership, he also is barred as a matter of law from suing those same people or entities, as that

would be the same as the person in receivership suing himself for alleged wrongdoing from which he himself benefited.

But the Complaint fails for additional reasons. This entire action rests on a purported decades-long scheme to defraud investors. All its allegations are subject to Rule 9(b) and must be pled with particularity. But none of them are. The Receiver never even identifies a single investor who was allegedly a victim of this fraudulent scheme, let alone the rest of the particularized information required under Rule 9(b). And many of the claims are time-barred or otherwise not cognizable.

The entire Complaint fails as a matter of law and must be dismissed. Since repleading will not imbue the Receiver with standing he lacks as a matter of law or enable him to sue a person in the receivership like Mr. Dragul, the Complaint should be dismissed with prejudice.

Dated this 17th day of March, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2020, a true and correct copy of the foregoing **DEFENDANT GARY J. DRAGUL'S MOTION TO DISMISS** was filed and served via the Colorado Court E-filing system to the following:

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