

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO

1437 Bannock Street
Denver, Colorado 80202

HARVEY SENDER, as Receiver for GARY DRAGUL;
GDA REAL ESTATE SERVICES, LLC; and GDA
REAL ESTATE MANAGEMENT, LLC,

Plaintiffs,

v.

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,

Defendants.

Attorneys for Defendants: Benjamin Kahn and
The Conundrum Group, LLP

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Case No.: **2020 CV 30255**

Division: **414**

**DEFENDANTS BENJAMIN KAHN AND THE CONUNDRUM GROUP, LLP'S
MOTION FOR A MORE DEFINITE STATEMENT PURSUANT TO C.R.C.P. 12(e)**

Defendants Benjamin Kahn and The Conundrum Group, LLP (the “Law Firm”), by counsel, Gordon & Rees LLP, move, in part, for a more definite statement pursuant to C.R.C.P. 12(e):

Certificate of Compliance

Undersigned counsel has conferred with counsel for Plaintiff pursuant to C.R.C.P. 121, § 1-15(8) before filing this motion and states that Plaintiff opposes the relief requested herein.

I. Statement of the case.

Plaintiff Harvey Sender brings this action as Receiver for Gray Dragul and two of his companies. The Receiver has inflated the Law Firm’s role as it relates to its representation of GDA Real Estate Services, LLC (GDA RES), asserting the Law Firm was involved in some scheme to deprive investors of tens of millions of dollars. The Receiver ignores that the Law Firm was paid legitimate fees for its legal work, mislabeling such payments as “commissions.” The Receiver seeks to impose on the Law Firm duties to GDA RES and “related entities” he collectively defines as “the GDA Entities.” He also seeks to impose duties on the Law Firm related to “SPEs” that he vaguely defines as “numerous single purpose entities.”

The Receiver’s case falters in attempting to impose on the Law Firm duties to these vague companies, generically defined as “the GDA Entities” or the “SPEs.” Despite having the information, knowledge, and obligation to do so, the Receiver fails to identify with specificity which single purpose entities or companies comprise these “related entities” and “numerous single purpose entities.” Without this level of specificity, the Law Firm is unable to evaluate what, if any, duty it owed to the collectively defined “GDA Entities” or “SPEs” and unable to defend against the Receiver’s related allegations. These allegations, which form the basis of the Receiver’s

negligence (Count Nine) and fiduciary duty (Counts Eight and Ten) claims, lack sufficient definiteness and particularity. The Law Firm requires a more definite statement that identifies with specificity the companies that comprise the “GDA Entities” so that it can defend against these allegations.

II. Standard of review.

Under C.R.C.P. 12(e) a party may file a motion for a more definite statement of any matter that is not averred with sufficient definiteness or particularity to enable the party to prepare a responsive pleading. C.R.C.P. 12(e).

III. The Law Firm cannot prepare a responsive pleading to the Receiver’s Eighth, Ninth, and Tenth Claims for Relief because “GDA Entities” and “SPEs” are not averred with sufficient definiteness or particularity.

To establish a claim for negligence or breach of fiduciary duty, a plaintiff must show that the defendant owed a legal duty to the plaintiff. *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007); *Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999); *Mdm Group Assocs v. CX Reinsurance Co. Ltd.*, 165 P.3d 882 (Colo. App. 2007). When the allegations in a complaint are too vague, insubstantial, and attenuated to allege the existence of a duty, the defendant is not provided an appropriate opportunity to respond. *See Bristol Co. L.P. v. Osman*, 190 P.3d 752, 758 (Colo. App. 2007).

The Receiver’s complaint alleges at ¶ 9 that it was appointed as receiver for GDA RES, GDA REM, and “related entities,” collectively defined as the “GDA Entities,” as well as “their assets, interests, and management rights in related affiliated and subsidiary businesses.” The Receiver’s complaint at ¶¶ 14, 44, 101, 237, 242-243, 245 and 247-250 thereafter asserts the Law Firm was counsel for the “GDA Entities” and owed duties to the “GDA Entities” and investors of

the “GDA Entities.” While at ¶¶ 47 to 48, the Receiver recognizes each of these “GDA Entities” is a separate limited liability company/SPE, in the Eighth (Aiding and Abetting Breach of Fiduciary Duties), Ninth (Negligence) and Tenth (Breach of Fiduciary Duties) claims for relief, the Receiver improperly conflates these entities in a manner that prohibits the Law Firm from effectively responding to and defending against the Receiver’s allegations.

The Receiver identifies himself as representing “the Estate.” Compl., ¶ 9. As Receiver for the Estate, it is within the Receiver’s knowledge as to what companies comprise the “related entities.” Yet, the Receiver has failed to define what companies comprise the “GDA Entities” or the “SPEs” and to whom the Law Firm allegedly owed duties. As a result, the Complaint lacks sufficient definiteness and particularity to enable the Law Firm to respond to and defend against the alleged wrongdoing. C.R.C.P. 12(e); *Giduck v. Niblett*, 408 P.3d 856 (Colo. App. 2014).

Accordingly, the Law Firm requests the Court order the Receiver to provide a more definite statement regarding references to the “GDA Entities” or the “SPEs” in Paragraphs 1, 9, 14, 44, 101, 237, 242-243, 245, 247-250 and 252 and the Eighth, Ninth and Tenth Claims for Relief. Specifically, the Law Firm requests that the Court order the Receiver to provide detail relating to what companies comprise the “GDA Entities,” the “related entities,” and the “SPEs”; what company or companies the Law Firm owed a duty to in each instance of alleged wrongdoing; and, how the Law Firm actually breached the alleged duty.

WHEREFORE, Defendants Benjamin Kahn and The Conundrum Group, LLP request the Court to order Plaintiff to provide a more definite statement.

Dated this 17th day of March, 2020.

GORDON & REES LLP

Pursuant to C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures shall be maintained by the undersigned and will be made available for inspection by other parties or the court, upon request.

/s/ John M. Palmeri

John M. Palmeri, #14252

Edward J. Hafer, #40230

Margaret L. Boehmer, #45169

ATTORNEYS FOR DEFENDANTS
BENJAMIN KAHN and
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing was filed and served via the CO-Courts electronic filing system this 17th day of March, 2020, which will serve the following.

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