

I. C.R.C.P. 121, § 1-15(8) CERTIFICATION

1. Prior to filing this Motion, the undersigned conferred with counsel for Plaintiff and counsel for the Receiver appointed for Defendants. Counsel for Plaintiff, Robert Finke, and counsel for the Receiver, Michael Gilbert, stated that they oppose the relief requested herein.

II. BACKGROUND

2. On August 15, 2018, Plaintiff filed his Complaint for Injunctive and Other Relief against Defendants pursuant to which he sought injunctive and other equitable relief resulting from Defendants' alleged violations of the Colorado Securities Act. On the same day, Plaintiff filed his *Ex Parte* Motion for Appointment of Receiver. Defendants stipulated to the Order Appointing Receiver, and the Court entered such Order on August 30, 2018 (the "Receivership Order").

3. Paragraph 13(s) of the Receivership Order purports to authorize the Receiver "[t]o prosecute claims and causes of action held by Creditors of Dragul, GDARES and GDAREM, and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors..." On January 21, 2020, the Receiver filed his Complaint in Denver District Court, Courtroom 414, Case No. 2020cv30255 (the "Receiver Lawsuit") in which he alleged fourteen (14) claims against numerous defendants, including Movants, based on an alleged "fraudulent commercial real estate scheme orchestrated by Gary Dragul..." The Receiver asserts twelve (12) of the fourteen (14) claims on behalf of the investors/creditors of Defendants and/or entities affiliated with Defendants. With respect to each of these twelve (12) claims, the Receiver's sole basis for his standing to assert claims on behalf of investors/creditors of Defendants is paragraph 13(s) of the Receivership Order.

III. ARGUMENT

4. In the Receiver Lawsuit, Defendants Gary Drugal, Susan Markusch, Alan Fox, and ACF Property Management, Inc. have filed motions to dismiss in which they have argued, *inter alia*, that the Receiver lacks standing to pursue claims on behalf of investors/creditors of Defendants and/or entities affiliated with Defendants because “...generally 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. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (“Since 1935 it has been well settled that ‘the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.’”); *Scholes v. Schroeder*, 744 F.Supp. 1419, 1422 (N.D. Ill. 1990) (a receiver cannot pursue claims that belong not to the receivership estate but rather to those who may have an interest in the estate).

5. Nonetheless, contrary to established law precluding a receiver from bringing claims on behalf of creditors or investors of a receivership estate, the Plaintiff included just such a provision in the Receivership Order. More egregiously, with knowledge that he does not have the power that paragraph 13(s) of the Receivership Order purports to give to him, the Receiver has filed the Receiver Lawsuit and alleged that he has standing to pursue twelve (12) of his fourteen (14) claims solely based on paragraph 13(s). *See Scholes*, 744 F.Supp. at 1423 (order purporting to confer power on receiver to pursue claims on behalf of investors of receivership estate exceeded the power of the judiciary and would not be enforced). Whether the Receiver can pursue claims on behalf of the investors/creditors of the receivership estate is potentially

dispositive of twelve (12) of the fourteen (14) claims alleged by the Receiver, including all of the claims alleged against Movants. Accordingly, as set forth in detail in the Claim for Declaratory Relief attached hereto as Exhibit A, Movants seek a declaration that paragraph 13(s) was inadvertently or improvidently included in the Receivership Order and that the Receiver does not have authority to pursue claims on behalf of investors/creditors of Defendants and/or entities affiliated with Defendants.

6. To obtain such relief, Movants first must intervene in this case pursuant to C.R.C.P. 24(b) which permits intervention “when an applicant’s claim or defense and the main action have a question of law or fact in common.” *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998). The Court has considerable discretion in determining motions to intervene. *Id.* Here, intervention is appropriate and necessary because Movants are requesting relief in connection with the Receivership Order which, in turn, could be dispositive of virtually the entire Receiver Lawsuit. Movants’ lack of standing defense to the claims alleged against them in the Receiver Lawsuit involves an issue of law common to this case, and, accordingly, the most efficient and economical manner in which to seek declaratory relief with respect to the Receiver’s standing to pursue claims in the Receiver Lawsuit is to intervene in this case in order to seek clarity from the Court on paragraph 13(s) of the Receivership Order.

WHEREFORE, Movants respectfully request that the Court permit them to intervene in this case for the purpose set forth herein and provide such other and further relief to which Movants may be justly entitled.

Respectfully submitted this 31st day of March 2020.

By: /s/Paul M. Grant
Paul M. Grant
Goodreid & Grant LLC
1801 Broadway, Suite 1400
Denver, CO 80202
Telephone: (720) 810-4235
pgrant@goodreidgrant.com

*Attorneys for Movants Performance
Holdings, Inc. and Marlin Hershey*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 31st day of March 2020:

Allen Vellone Wolf Helfrich and Factor PC

Michael Thomas Gilbert
Patrick D. Vellone
Rachel A. Sternlieb

Moye White

Eric Brian Liebman
Joyce Carmel Williams
Lucas Trask Ritchie

Jones & Keller PC

Christopher Stephen Mills
Paul Leo Vorndran

State of Colorado

Robert Finke
Janna Fischer

/s/Paul M. Grant
Paul M. Grant

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: March 31, 2020 1:44 PM FILING ID: 8A2608CEE16E2 CASE NUMBER: 2018CV33011
Plaintiff: DAVID S. CHEVAL, Acting Securities Commissioner for the State of Colorado v. Defendants: GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC	ΔCOURT USE ONLYΔ
<i>Attorneys for Intervenors Marlin Hershey and Performance Holdings, Inc.</i> Thomas E. Goodreid Paul M. Grant Goodreid & Grant LLC 1801 Broadway, Suite 1400 Denver, Colorado 80202 Phone #: 303-296-2048x136 (Goodreid) Phone #: 720-810-4235 (Grant) E-mail: t.goodreid@comcast.net E-mail: pgrant@goodreidgrant.com Atty. Reg. #: 25281 (Goodreid) Atty. Reg. # 26517(Grant)	Case No. 2018cv33011 Ctrm. 414
<p style="text-align: center;">MARLIN HERSHEY’S AND PERFORMANCE HOLDINGS, INC.’S CLAIM FOR DECLARATORY RELIEF PURSUANT TO C.R.C.P. 57</p>	

Intervenors Marlin Hershey (“Hershey”) and Performance Holdings, Inc. (“PHI”) file their Claim for Declaratory Relief Pursuant to C.R.C.P. 57 as follows:

1. On August 15, 2018, Plaintiff filed his Complaint for Injunctive and Other Relief against Defendants pursuant to which he sought injunctive and other equitable relief resulting

from Defendants' alleged violations of the Colorado Securities Act. On the same day, Plaintiff filed his *Ex Parte* Motion for Appointment of Receiver. Defendants stipulated to the Order Appointing Receiver, and the Court entered such Order on August 30, 2018 (the "Receivership Order").

2. Paragraph 13(s) of the Receivership Order purports to authorize the Receiver "[t]o prosecute claims and causes of action held by Creditors of Dragul, GDARES and GDAREM, and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors..."

3. On January 21, 2020, the Receiver filed his Complaint in Denver District Court, Courtroom 414, Case No. 2020cv30255 (the "Receiver Lawsuit") in which he alleged fourteen (14) claims against numerous defendants, including Hershey and PHI, based on an alleged "fraudulent commercial real estate scheme orchestrated by Gary Dragul..." The Receiver asserts twelve (12) of the fourteen (14) claims on behalf of the investors/creditors of Defendants and/or entities affiliated with Defendants. With respect to each of these twelve (12) claims, the Receiver's sole basis for his standing to assert claims on behalf of investors/creditors of Defendants is paragraph 13(s) of the Receivership Order.

4. A receiver stands in the shoes of the entity or entities in receivership and, therefore, can assert only those claims which the receivership entity or entities could have asserted, not the claims of creditors of the receivership entity or entities.

5. Contrary to the common law on the authority of receivers to assert claims on behalf of creditors, here the Receivership Order purportedly gives the Receiver the extraordinary authority to pursue claims on behalf of investors/creditors of the receivership estate.

6. Pursuant to C.R.C.P. 57, this Court has the power to declare the rights of the Receiver under the Receivership Order as such rights relate to Hershey and PHI because Hershey and PHI are parties affected by the Receiver's exercise of his purported rights under paragraph 13(s) of the Receivership Order. A declaration that the Receiver does not, in fact, have the authority purportedly granted to him under paragraph 13(s) of the Receivership Order will be dispositive of twelve (12) of the fourteen (14) claims alleged by the Receiver in the Receiver Lawsuit. Accordingly, such a declaration either will terminate that controversy or remove uncertainty regarding the Receiver's right to pursue his twelve (12) claims on behalf of investors/creditors of the receivership estate.

7. Since the Receiver's sole basis for his standing to pursue claims against Hershey and PHI in the Receiver Lawsuit is the extraordinary grant of authority in paragraph 13(s) of the Receivership Order, Hershey and PHI seek and are entitled to a declaratory judgment pursuant to C.R.C.P. 57 that the Receiver does not have the authority to pursue claims on behalf of the investors/creditors of the receivership estate and that paragraph 13(s) of the Receivership Order was inadvertently or improvidently included in the Receivership Order.

WHEREFORE, Hershey and PHI respectfully request that the Court declare that the Receiver does not have authority to pursue claims on behalf of investors/creditors of the receivership estate, declare that paragraph 13(s) was inadvertently or improvidently included in the Receivership Order, and provide such other and further relief to which Hershey and PHI may be justly entitled.

Respectfully submitted this 31st day of March 2020.

By: /s/Paul M. Grant
Paul M. Grant
Goodreid & Grant LLC
1801 Broadway, Suite 1400
Denver, CO 80202
Telephone: (720) 810-4235
pgrant@goodreidgrant.com

*Attorneys for Defendants Performance
Holdings, Inc. and Marlin Hershey*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 31st day of March 2020:

Allen Vellone Wolf Helfrich and Factor PC

Michael Thomas Gilbert
Patrick D. Vellone
Rachel A. Sternlieb

Moye White

Eric Brian Liebman
Joyce Carmel Williams
Lucas Trask Ritchie

Jones & Keller PC

Christopher Stephen Mills
Paul Leo Vorndran

State of Colorado

Robert Finke
Janna Fischer

/s/Paul M. Grant _____

Paul M. Grant