DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	DATE FILED: April 21, 2020 7:53 PM FILING ID: CB07B24B66D34 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	▲ COURT USE ONLY ▲
Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2018CV33011 Courtroom: 424

DEFENDANT GARY DRAGUL'S MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER THAT RECEIVER LACKS STANDING TO ASSERT CLAIMS OF INVESTORS/CREDITORS

On January 21, 2020, Harvey Sender, who was appointed Receiver *for* Defendant Gary J. Dragul and two of his entities, filed a separate complaint ("Complaint") against Mr. Dragul and myriad other defendants (Case No. 2020CV30255, hereafter "2020 Action"). In the 2020 Action, the Receiver alleges a vast scheme, undertaken by Mr. Dragul, his prior attorney, and several investors, to defraud other investors (whom the Receiver never identifies). He purports to bring the claims on behalf of those unnamed investors to recover their damages from the alleged fraud. The Receiver lacks this power under the Colorado Constitution and applicable

case law. 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. Thus, Mr. Dragul, through counsel Jones & Keller, P.C., moves for an order from this Court clarifying that the order appointing the Receiver in this action does not vest the Receiver with standing to assert claims of investors/creditors of the Receivership Estate. In support of this motion ("Motion"), Mr. Dragul states as follows:

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Gary J. Dragul conferred with counsel for the Plaintiff Commissioner and counsel for the Receiver. The Commissioner stated that he will likely oppose, but wishes to first review this Motion to determine the grounds. The Receiver opposes this Motion.

BACKGROUND

On August 15, 2018, the Colorado Securities Commissioner filed a complaint for injunctive and other relief against 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"). The Commissioner immediately moved to appoint a receiver over the GDA Entities and Mr. Dragul personally. Harvey Sender was appointed Receiver on August 30, 2018. (*See* August 30, 2018 Receivership Order ("Receivership Order")).

On January 21, 2020, the Receiver filed the Complaint in the 2020 Action alleging claims 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.*; (6) aiding and abetting COCCA violations; (7) breach of fiduciary duty; (8) aiding and abetting breach of fiduciary duty; (9) negligence; (10) breach of fiduciary duty; (11) fraudulent transfer, C.R.S. § 38-8-105(1)(a); (12) constructive fraud; (13) unjust enrichment; and (14) turnover.[1] (*See* Compl., attached as Ex. 1.) In the Complaint, the Receiver expressly acknowledges that most of the claims are investors' claims. The rest are entirely based on alleged wrongful acts causing harm to investors. The Receiver relies on the Receivership Order to authorize him to assert investors' claims. However, as a matter of law, the Receiver lacks standing to assert investors' claims, and the Receivership Order cannot confer such standing upon him.

Mr. Dragul and several other defendants in the 2020 Action filed motions to dismiss arguing, in part, that the Receiver lacks standing to assert investors' claims. However, two of the defendants in that action, Marlin Hershey and Performance Holdings, Inc. (collectively, "Hershey Defendants"), moved to stay their deadline to respond to that Complaint. They also filed a motion to intervene in this action, seeking to assert a claim for declaratory relief that the Receivership Order does not vest the Receiver with standing to assert creditors' claims. However, the Court may resolve this issue more efficiently by clarifying the Receivership Order. In so doing, the Court need not decide the broader issues of intervention and a separate claim for

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

declaratory relief. Hence, Mr. Dragul files this Motion respectfully requesting that the Court clarify that the Receivership Order, consistent with well-established standing law, does not imbue the Receiver with standing to assert third parties' claims.

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 investors who have claims against, and are therefore 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." (Ex. 1, 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 in claim twelve (*id*. ¶¶ 262-263). He alleges the defendants received benefits at

the expense of creditors in the thirteenth claim for unjust enrichment. (*Id*. ¶ 268.)[2] Indeed, all of the alleged wrongful acts there—failure to disclose, collecting commissions out of investor funds, etc.—could only have injured the investors. But as a legal matter, the Receiver lacks standing to assert investors' claims.

"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). "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 argued that he may assert creditors' claims. The court rejected that argument. 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

[2] 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 Receivership Estate existed.

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 receivers and 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) (holding that a bankruptcy trustee, analogous to the Receiver here, lacked standing to assert creditors' claims against third parties; collecting cases); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) ("[A]lthough the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors."); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (An "equity receiver may sue only to redress injuries to the entity in receivership.").

"[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) (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 akin to 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).

II. The Receivership Order Cannot Create Standing Where None Exists

In support of his claimed authority to assert creditors' claims, the Receiver cites Paragraph 13(s) of the Receivership Order. (Ex. 1, Compl. ¶¶ 167, 177, 182, 193, 200, 214, 236, 241.) Paragraph 13(s) provides that the Receiver has the authority "[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." Read literally, Paragraph 13(s) appears to authorize the Receiver to assert certain

creditors' claims. But the Receivership Order may not grant the Receiver standing he lacks as a matter of law. "[T]he appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990). "Granting a receiver authority to bring claims held by others would violate those limitations, as 'the ability to confer substantive legal rights that may create standing [under] Article III is vested in Congress and not the judiciary.'" *Kelley*, 901 F. Supp. 2d at 1129 (quoting *Scholes*, 744 F. Supp. at 1421 n.6)). The *Kelley* court explained:

> [I]f 'a district court could confer individual creditors' standing on a receiver simply by ordering it so, such an exception would completely swallow the general rule that receivers may only sue on behalf of the entity they are appointed to represent, not on behalf of creditors . . . directly.' Simply put, 'in attempting to recover on behalf of [creditors], the Receiver purports to assert rights of third parties . . . [T]he Receiver lacks standing to do so.'

Id. (quoting *Liberte Capital Grp. v. Capwill*, 248 Fed. Appx. 650, 657-58 (6th Cir. 2007); *In re Wiand*, Civ. No. 8:05-1856, 2007 WL 963165, at *2 (M.D. Fla. Mar. 27, 2007)); *see also Scholes v. Schroeder*, 744 F. Supp. at 1421 ("To the extent that the orders [appointing receiver]. . . purport to authorize suit on behalf of the investors, those orders are at odds with the fundamental command of Article III."); *see also id.* at 1420-23 (additional discussion re same); *Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 24-25 (1st Cir. 1990) (although the district court empowered the receiver "to prevent irreparable loss, damage and injury to commodity customers and clients," the receiver lacked standing to sue for claims belonging to investors); *B.E.L.T., Inc. v. Lacrad Intern. Corp.*, No. 01 C 4296, 2002 WL 1905389, at *1–2 (N.D. Ill. Aug. 19, 2002) (receiver had no standing to sue for, inter alia, receipt of funds fraudulently obtained, fraud, and unjust enrichment even though he was appointed "on behalf of all the creditors," because those were claims of the creditors, not of the debtor); *Marwil v. Farah*, No. 1:03–CV–0482–DFH,

2003 WL 23095657, at *7 (S.D. Ind. Dec.11, 2003) (receiver lacked standing to sue on behalf of investors notwithstanding the language of the receivership court order that purported to enable him to do so because the court lacked the authority to transfer property—including causes of action—from the investors to the receiver).

Like federal courts, the Colorado Supreme Court has expressly held that state courts may not confer standing where Colorado's legislative and executive branches have not otherwise conferred it:

> Although state courts are not subject to the provisions of Article III of the United States Constitution, similar considerations operate to require state courts to apply the standing doctrine. In Colorado, Article III of the Colorado Constitution prohibits any branch of government from assuming the powers of another branch. Courts cannot, under the pretense of an actual case, assume powers vested in either the executive or the legislative branches of government.

Wimberly v. Ettenberg, 570 P.2d 535, 538 (Colo. 1977) (holding that a county court's formulation of bail bond procedures could not confer standing on plaintiff bail bondsmen where they otherwise failed to establish injury to a legal right protected by any statutory or constitutional provision); see also *id*. at 539 (noting that "[a]part from this constitutional underpinning, judicial self-restraint, based upon considerations of judicial efficiency and economy, also supports the [standing] doctrine."). The Receivership Order cannot create jurisdiction over investors' claims where none exists.[3]

[3] Nor does it matter that the Receivership Order was stipulated. In Colorado, the issue of standing is jurisdictional. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Because standing is jurisdictional, it is not subject to waiver. *See, e.g.*, *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003). Both Federal Rule of Civil Procedure 12(h)(3) and its Colorado counterpart provide that, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." (emphasis added). Thus, "[e]ven where the parties agree that a plaintiff has Constitutional standing, courts must satisfy themselves that the jurisdictional

Asserting creditors' claims also conflicts with other parts of the Receivership Order. 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[.]" Under the literal language of Paragraph 16, the Receiver is waiving those investors' rights to participate in the distribution of recoveries from the Receivership when he asserts those creditors' claims. 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. And doing so is contrary to the Receiver's purpose to collect Receivership Property in order to pay creditors. (Receivership Order ¶ 22(c), (e), (f).) This untenable result is easily avoided by clarifying that the Receiver lacks authority to assert creditors' claims.

Since the claims of creditors are not claims held by the person or entities in receivership, the Receiver lacks standing to assert their claims as a matter of law. The Court should clarify that Paragraph 13(s) does not authorize the Receiver to assert creditors' claims. Rather, Paragraph 13(s) should be clarified 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."

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requirement is met." *Id.* (citing *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); Fed. R. Civ. P. 12(h)(3)).

CONCLUSION

The Receiver here seeks to exercise power he does not have. His power derives from the people or entities in receivership. He lacks standing to assert claims of creditors, who are not in receivership. The Court should clarify that the Receivership Order does not vest the Receiver with standing he lacks as a matter of law.

Respectfully submitted this 21st day of April, 2020.

JONES & KELLER, P.C.

/s/ Christopher S. Mills

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ATTORNEYS FOR DEFENDANT GARY DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER THAT RECEIVER LACKS STANDING TO ASSERT CLAIMS OF INVESTORS/CREDITORS** was filed and served via the ICCES e-file system on this 21st day of April 2020 to all counsel of record for the parties to the action, including the following:

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Christopher S. Mills

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Exhibit 1

DATE FILED: January 21, 2020 2:03 PM
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CASE NUMBER: 2020CV30255

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	
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.	▲COURT USE ONLY▲
Attorneys for Plaintiff: Patrick D. Vellone, #15284 Rachel A. Sternlieb, #51404 Michael T. Gilbert, #15009 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Phone Number: (303) 534-4499 pvellone@allen-vellone.com rsternlieb@allen-vellone.com mgilbert@allen-vellone.com	Case Number: Division/Courtroom:

COMPLAINT

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Plaintiff, Harvey Sender, solely in his capacity as Receiver for the "Estate" described below (the "Receiver") brings the following Complaint.

I. INTRODUCTION

1. This case arises from a fraudulent commercial real estate scheme orchestrated by Gary Dragul in concert with Marlin Hershey, Alan Fox, Susan Markusch, and Benjamin Kahn, in which investors lost millions of dollars. Dragul, in concert with the other defendants solicited more than $52 million from hundreds of investors purportedly to purchase ownership interests in numerous single purpose entities ("**SPEs**").

2. Dragul and the other Defendants lured investors into investing millions under false and misleading pretenses. Adopting strategies he learned from his mentor and former business partner, Alan Fox, Dragul stole millions from investors who, in some instances, invested their entire savings to support his extravagant lifestyle.

3. Dragul, who has been indicted on fourteen counts of securities fraud, is the defendant in a pending civil enforcement action brought by the Securities Commissioner for the State of Colorado, and he consented to the appointment of a receiver in that action.

4. Dragul was able to carry on this fraudulent scheme for more than 20 years as a direct result of the participation, assistance, and efforts of the other

defendants in this action. Each defendant played a distinct and important role in carrying out Dragul's fraudulent scheme.

5. Hershey – who is currently embroiled in civil litigation brought against him, his partner, and their various entities, by the Securities Exchange Commission (the "**SEC**"), for violating federal securities laws – solicited individual investors for Dragul and earned illegal and undisclosed commissions.

6. Alan Fox, Dragul's mentor and former business partner, has been sued by numerous investors in California for engaging in the same type of fraudulent conduct for which Dragul has been indicted. Like Hershey, Fox and his company ACF Property Management, Inc., received undisclosed and illegal commissions. Fox and Dragul also transferred investor properties between the two of them and improperly inflated transfer prices to obtain undisclosed and fraudulent commissions.

7. Markusch, Dragul's loyal and most trusted employee, effected the illegal and undisclosed comingling of millions of investor dollars. In addition to the handsome salary Dragul paid her, Markusch profited from undisclosed and illegal real estate commissions.

8. Finally, Benjamin Kahn, Dragul's long-standing ally, co-conspirator and GDA's outside counsel, participated in and profited from Dragul's fraudulent scheme. Demonstrating their unwavering loyalty to Dragul, Kahn, and Markusch also withheld documents and information from the Receiver and his team while doing all

they could behind the scenes to continue stealing whatever money they could from the Estate and interfering in the Receiver's efforts to liquidate Estate assets.

II. PARTIES

9. On August 30, 2018, the Court in *Cheval v. Dragul, et al.* Case No. 2018CV33011, District Court, Denver, Colorado (the "**Receivership Court**") entered a Stipulated Order Appointing Receiver (the "**Receivership Order**") appointing Harvey Sender of Sender & Smiley, LLC as receiver for Gary Dragul ("**Dragul**"), GDA Real Estate Services, LLC ("**GDA RES**"), GDA Real Estate Management, LLC ("**GDA REM**"), and related entities (collectively, "**Dragul and the GDA Entities**"), and their assets, interests, and management rights in related affiliated and subsidiary businesses (the "**Receivership Estate**" or the "**Estate**"). A copy of the Receivership Order is attached as **Exhibit 1.**

10. The Receivership Order grants the Receiver the authority to recover possession of Receivership Property from any persons who may wrongfully possess it and to prosecute claims premised on fraudulent transfer and similar theories. **Ex. 1**, at ¶ 13(o).

11. The Receivership Order also grants the Receiver the authority to prosecute claims and causes of action against third parties held by creditors of Dragul and the GDA Entitles, and any subsidiary entities for the benefit of creditors of the Estate, "in order to assure the equal treatment of all similarly situated creditors." **Ex. 1**, at ¶ 13(s).

12. The Receiver's principal place of business is at 600 17th Street, Suite 2800, Denver, CO 80202.

13. Defendant Gary Dragul is an individual who is a resident of the State of Colorado. His present address is unknown.

14. Defendant Benjamin Kahn ("**Kahn**") is an individual who resides at 229 ½ F Street, Salida, Colorado 81201. At all relevant times, Kahn was general counsel for GDA REM and GDA RES, and the GDA Entities.

15. Defendant the Conundrum Group, LLP ("**CG**") is a Colorado Limited Liability Partnership with its principal place of business 229 1/2 F Street, Salida, CO 81201. Its registered agent is Megan Rae Kahn, at the same address. (Kahn and CG are referred to as the "**Kahn Defendants**"). At all relevant times, Kahn was an agent of Defendant CG.

16. Defendant Susan Markusch, ("**Markusch**") resides at 6321 South Geneva Circle, Englewood, CO 80111. At all relevant times, Markusch was the controller and chief financial officer of GDA RES, GDA REM, and the GDA Entities.

17. Defendant Alan C. Fox ("**Fox**") is an individual who resides at 2081 Jeremy Lane, Escondido, California 92027-1159.

18. Defendant ACF Property Management, Inc. ("**ACF**") is a California corporation with its principal place of business located at 12411 Ventura Boulevard, Studio City, California, 91604. At all relevant times, ACF was registered to do business in the State of Colorado. ACF's registered agent is Moye White, LLP:

Registered Agent Department, at 1400 16th Street, 6th Floor, Denver, Colorado, 80202. (Fox and ACF are referred to as the "**Fox Defendants**").

19. At all relevant times, Fox owned and controlled ACF, the entity through which he funneled commissions and other payments from Dragul and the GDA Entities.

20. Neither Fox nor ACF were licensed or registered brokers with the Financial Industry Regulatory Authority ("**FINRA**"), the State of Colorado or the SEC; nor were they affiliated or associated with a FINRA or SEC licensed or registered broker-dealer for any time period relevant to the allegations in this Complaint.

21. Defendant Marlin Hershey ("**Hershey**") is an individual who resides at 15514 Fisherman's Rest Ct., Cornelius, North Carolina 28031-7646.

22. Defendant Performance Holdings, Inc. ("**PHI**") is a Florida corporation with its principal place of business in Huntersville, North Carolina (Hershey and PHI are referred to as the "**Hershey Defendants**").

23. At all relevant times, Hershey owned and controlled PHI through which he funneled commissions from Dragul and the GDA Entities.

24. Neither Hershey nor PHI were licensed or registered brokers with FINRA, the State of Colorado or the SEC; nor were they affiliated or associated with a FINRA or SEC licensed or broker-dealer for any time period relevant to the allegations in this Complaint.

25. Dragul, Kahn, CG, Markusch, Fox, ACF, Hershey, and PHI are collectively referred to as the "**Defendants**."

26. Upon information and belief, John and Jane Does 1 – 10 are individuals whose names and addresses are presently unknown.

27. Upon information and belief, XYZ Corporations 1 – 10 are corporations and other legal entities, the names and addresses of which are presently unknown.

III. JURISDICTION AND VENUE

28. Jurisdiction is proper under COLO. REV. STAT. § 13-1-124 and the Colorado Constitution, Article VI, Section 9, because, since 2007, Defendants have had ongoing and systematic contacts with Dragul and the GDA Entities in Colorado in furtherance of a scheme to defraud innocent investors.

29. Venue is proper under C.R.C.P. 98(c), because the Receiver's principal place of business is in the City and County of Denver and service can be made on one or more of the Defendants in the City and County of Denver.

IV. GENERAL ALLEGATIONS

A. General Factual Background – Key Players in the Fraudulent Scheme

30. This action arises from a multi-million-dollar fraud and Ponzi scheme perpetrated by Dragul in concert with the other Defendants in violation of the Colorado Securities Act (the "**Act**").

31. From 1995 through 2018, Dragul as the President of GDA RES and GDA REM (jointly, "GDA"), operated a real estate investment business through the use of

a variety of investment vehicles in which various persons and entities invested (the "**Sham Business**").

32. Since approximately 1996, Dragul's mentor and former joint venture business partner, Fox, has operated a similar real estate investment business, ACF Property Management, Inc., in Ventura, California.

33. For more than 20 years, Markusch worked with Dragul as GDA's controller and CFO. Markusch's duties as controller and CFO entailed oversight and management of all accounting, bookkeeping, banking, financial reporting and recordkeeping, taxes and the like, as well as office manager of the GDA Entities.

34. As controller and CFO of the GDA Entities, Markusch was a signatory and authorized user of all GDA and SPE bank accounts, and thus had full control, authority, and access to funds therein.

35. The Hershey Defendants furthered Dragul's fraudulent scheme by identifying and soliciting investors to for the Sham Business.

36. For his successful solicitation efforts, Hershey received a percentage of the total investment made by each investor as an undisclosed and illegal finder's fee or commission.

37. Hershey was directly involved in, and in some instances, drafted false and misleading communications Dragul sent to investors.

38. The Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors.

39. On April 12, 2018, Dragul was indicted by a Colorado State Grand Jury on nine counts of securities fraud (the "**First Indictment**").

40. On March 1, 2019, Gary Dragul was indicted by a Colorado State Grand Jury on an additional five counts of securities fraud (the "**Second Indictment**").

41. In or about March 2018, one month before Dragul's First Indictment, Markusch began maintaining all accounting reconciliations for all GDA Entities in handwritten notes, as opposed to electronically stored information maintained on the company's servers as had been GDA's practice before the indictments.

42. In or about April 2019, the Receiver executed a writ of assistance at Markusch's home, where 11 boxes of Estate documents and records were discovered, including over 100 pages of handwritten reconciliations for accounts in Dragul and the GDA Entities names.

43. Upon information and belief, Markusch removed the 11 boxes of documents from GDA and stored them at her home to conceal them from the Receiver and the Commissioner.

44. Kahn has served as outside general counsel to the GDA Entities and the SPEs for numerous years, and drafted solicitation documents, operating agreements,

and other legal documents for Dragul and the GDA Entities, and for the SPEs, and in that capacity knew confidential information.

45. Since the Receiver's appointment, Kahn has conspired with Dragul and Markusch to conceal documents and assets from the Receiver, and to transfer management rights and ownership interests in entities subject to the Receivership.

46. Without disclosure to investors, Kahn was also paid legal fees from the escrow of certain properties for work unrelated to the specific SPEs from which the funds were paid.

B. Dragul's Ponzi Scheme

47. Dragul, in active concert with the other Defendants (collectively, the "**Non-Dragul Defendants**"), solicited investors to purchase membership interests in various limited liability companies/SPEs that were engaged in the business of acquiring and managing commercial real estate, primarily retail shopping malls.

48. According to the Complaint for Injunctive and Other Relief filed on behalf of the Commissioner, from January 2008 until December 2015, Dragul, through GDA, sold more than $52 million worth of interests in 14 SPEs to approximately 175 investors. A copy of the Commissioner's complaint is attached as **Exhibit 2.**

49. The following is a list of the 14 SPEs included in the Commissioner's Complaint with the amount raised for each by Dragul from investors:

Property	SPE Owner(s) of the Property	Bank Accounts Associated with Offering	Amount Raised
Broomfield	Broomfield Shopping Center 09 A, LLC	GDA Broomfield 09, LLC	$800,000
Clearwater	Clearwater Collection 15 LLC; Clearwater Plainfield 15, LLC	Clearwater Collection 15, LLC; GDA Clearwater 15, LLC	$6,224,904
Crosspointe	Crosspointe 08 A, LLC	Crosspointe 08 A, LLC	$4,519,667
Fort Collins	Highlands Ranch Village Center II (HR II 05 A, LLC)	Fort Collins WF 02, LLC	$2,679,669
	Southwest Commons 05 A, LLC		
	Meadows Shopping Center 05 A, LLC		
	Laveen Ranch Marketplace 12, LLC		
	Trophy Club 12, LLC		
GDA Market at Southpark	Market at Southpark 09, LLC	GDA Market at Southpark LLC; Market at Southpark 09, LLC	$255,000
High Street Condos	2321 S High Street, LLC	2321 South High Street, LLC	$1,000,000
	2329 S High Street, LLC	2329 South High Street, LLC	
PMG (Plaza Mall of Georgia North)	Plaza Mall North 08 B Junior, LLC	Plaza Mall North 08 A Junior, LLC; Plaza Mall North 08 B Junior, LLC	$9,025,765
Plainfield	Plainfield 09 A, LLC	Plainfield 09 A, LLC	$2,598,750
Prospect Square	Prospect Square 07 A, LLC, Prospect Square 07 B, LLC, Prospect Square 07 C, LLC, Prospect Square 07 D, LLC, PS 16, LLC	Prospect Square 07 A, LLC; GDA PS Member LLC; GDA PS16 Member LLC; PS 16 LLC	$4,890,079
Rose	Rose, LLC	Rose, LLC /Rose, LLC (Not a duplicate - two different accounts)	$4,980,830
Syracuse	Syracuse Property 06, LLC	Syracuse Property 06, LLC	$2,625,000
Village Crossroads	Village Crossroads 09, LLC	GDA Village Crossroads LLC	$1,707,100
Walden	Walden 08 A, LLC	Walden 08 A, LLC; Walden 08 A, LLC; Walden 08 A, LLC (not duplicates - three different accounts)	$4,705,000

Property	SPE Owner(s) of the Property	Bank Accounts Associated with Offering	Amount Raised
Windsor	Windsor 15, LLC	GDA Windsor Member LLC; Windsor 15 LLC; Windsor 15 LLC (not a duplicate)	$6,478,715
TOTAL AMOUNT RAISED			**$52,490,479.00**

50. The above-listed SPEs and amounts raised therefor represent only a portion of the SPEs for which Dragul solicited and raised investor funds. Dragul and the GDA Entities solicited and raised a substantial amount from investors for SPE properties outside of the Commissioner's period of review.

51. These SPEs were only Dragul's most recent investment vehicles. Before forming these SPEs, Dragul, in concert with Non-Dragul Defendants, used multiple other SPE investment vehicles to defraud investors.

C. The Financial Operations of GDA

52. Upon receiving investor funds or at closing of real estate purchases made by the SPEs, Markusch, as CFO of the GDA Entities, transferred funds that should have been segregated in SPE accounts typically first into GDA RES accounts and then into to accounts held in Dragul's name, individually. The shortfalls were financed by mortgage loans. In some instances, the SPEs were unable to reduce even the principal amount of those mortgage loans, since the SPE's cash flows were insufficient to cover the operating expenses and fictitious returns paid to investors.

53. Over time, if a particular SPE was either suffering losses or disposed of by Dragul for personal profit, rather than paying investors their pro rata share of

profits, or allocating pro rata losses to them, Dragul would "rollover" investors' equity positions into a newly formed SPE, and would induce investors to contribute additional funds for their new equity position in the rollover SPE. In this manner, Dragul sold more than 100% of the equity interests in at least one SPE, and perhaps more.

54. Dragul also used promissory notes to further his fraudulent enterprise and Ponzi scheme. When he was unable to repay the promissory notes as they became due, he would either extend the notes or convert them to equity positions in SPEs without contributions of additional capital. This effectively diluted existing investors' interests without notice to them and without any benefit to the particular SPE.

55. Dragul also obtained personal loans from investors and secured them with real property owned by various SPEs. In some cases, this was done in violation of express provisions of the governing operating agreements and loan agreements. Dragul represented to investors who purchased promissory notes that their funds would be used for particular purposes related to SPE real estate assets, when in fact Dragul used those funds to support his extravagant lifestyle.

56. Instead of treating the SPEs as separate legal entities, Dragul and Markusch, with the Kahn Defendants' knowledge and active assistance, routinely diverted money from SPE accounts to GDA RES accounts and from there to Dragul's personal account. Markusch effected the transfers. Dragul and Markush thus

commingled SPE funds with other SPE accounts, Dragul's personal funds, and funds of Dragul's family members.

57. Dragul and Markusch routinely reversed the comingling process and transferred money from Dragul's personal account to GDA RES and then to SPE accounts at the end of financial reporting periods so they could falsely represent to investors the financial condition of the various SPEs. Immediately after such reporting, Dragul and Markusch transferred the funds once again, but this time, out of the SPE accounts, and would then begin the churning process anew.

58. This scheme resulted in investors not having their funds held or invested in the particular projects and properties where Dragul represented they would be held or invested. Dragul and Markusch used the GDA RES account and the SPE accounts as if they were interchangeable. This commingling of funds was one of the mechanisms Dragul and Markusch used to defraud investors. None of the investor funds transferred in or out of any particular SPE can be identified substantially as an asset of any SPE, and as a result, the investor funds have lost their identity and have become untraceable. There was no legitimate business reason for this comingling, which was undertaken to such an extent that it is impossible to know the true ownership of the commingled funds.

59. From GDA's inception in 1995, Dragul's investment scheme was insolvent, due to Dragul's pilfering of the SPEs and in his unauthorized and

undisclosed use of investor funds for his personal benefit, and for the benefit of his employees and family.

60. While Dragul created SPEs did generate income, the income was not sufficient to pay investors the promised returns. Dragul and Markusch diverted investor funds to Dragul and his family's personal use and to pay fictitious returns or redemptions to other investors.

61. Commencing at least by 2007 and continuing through 2018, Dragul was operating his entire business enterprise as a Ponzi scheme. Dragul and Markusch concealed this ongoing fraud in an effort to hinder, delay, and defraud other current and prospective investors and creditors from discovering the fraud. Money Dragul received from investors was used to make distributions to, or payments on behalf of, earlier investors. Funds provided to Dragul as loans and for investment purposes were used to keep the operation afloat and enrich Dragul and others.

D. Solicitation of Investor Funds – Private Offerings

62. Dragul, together with the Fox and Hershey Defendants, solicited funds from investors for the stated purpose of purchasing and operating specific commercial properties, primarily retail shopping centers. Each SPE was purportedly a separate legal entity in which investors were promised profits from the operation, leasing, and eventual sale of the property.

63. Upon information and belief, Fox, has orchestrated a virtually identical fraudulent scheme for many years. As a result, a judgment for approximately $14

million was recently entered in California against the Fox Defendants, and there are other claims pending against them in California arising from the same pattern of deceit.

64. The SEC has instituted a civil enforcement action against Hershey, his business partner, Dana Bradley, PHI, and a number of their other joint venture entities for violations Section 17(a) of the Securities Exchange Act of 1993 [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. §78j(b)] and Rule 10b-5 thereunder [17 C.F.R. §240.10b-5], and Section 15(a)(1) of the Exchange Act [15 U.S.C. § 78(o)(a)(1)]. *See SEC v. Bradley, Hershey*, et al.; Case No. 3:19-cv-00490 (U.S. District Court, W.D. N.C., Charlotte Division). The conduct for which the Receiver asserts claims against the Hershey Defendants is substantially similar to the conduct that forms the basis of the claims asserted by the SEC: fraudulently solicitating investors and pocketing millions in undisclosed and illegal commissions.

65. To solicit investor funds, Dragul, in concert with the Fox and Hershey Defendants, sent prospective investors offering materials that contained executive summaries, financial projections, and other information (collectively, the "**Solicitation Materials**"), which purportedly provided investors with the material information needed to evaluate whether or not to invest in Dragul's Sham Business.

66. Generally, the Solicitation Materials sent to prospective investors were created by or at the direction of Dragul and his staff, and in some instances the Fox Defendants.

67. The Solicitation Materials contained information material to prospective investors, including historical information about the property, the cost of acquiring the property, the amount of the down payment, the amount to be borrowed, the anticipated closing costs, and the amount needed to be raised from investors for any particular offering. The financial projections included projections of acquisition costs and expenses.

68. The Solicitation Materials contained false and misleading information, including inflated purchase prices and inflated closing costs for the properties.

69. In soliciting investments, Dragul and the other Defendants, told prospective investors that the properties to be acquired cost substantially more than they actually did. These misrepresentations about purchase price were designed to

allow Dragul, the Fox Defendants and the Hershey Defendants to pay themselves impermissible commissions and fees as set forth below:

Defendant	Total Commissions Received
Gary Dragul	$19,148,047.10
Susan Markusch	$310,196.67
Kahn Defendants	$1,701,441.92
Fox Defendants	$6,420,291.00
Hershey Defendants	$3,175,655.54

Summary charts reflecting the above commissions are attached as **Exhibits 3, 4, 5, 6** and **7**.[1]

70. The undisclosed and illegal fees Dragul, Markusch, the Kahn Defendants, the Fox Defendants and the Hershey Defendants received in connection with this scheme were deducted as closing costs; some fees were charged during the ownership of the property, typically during refinancing; and some were charged in connection with the sale of certain properties as reflected in the following two examples:

i. The Market at Southpark (7901-8051 S. Broadway, Littleton, CO)

71. On or about January 26, 2010, Fox sent Dragul Solicitation Materials prepared by ACF to solicit investment funds for a property known as the Market at Southpark.

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[1] Markusch received commissions and fees directly and through her wholly-owned entities Olson Real Estate Services, LLC and Juniper Consulting Group, LLC.

72. The Executive Summary prepared by the Fox Defendants and distributed to prospective investors by both Dragul and Hershey, stated that the purchase price for the property was $24,750,000, and that it would be necessary to raise $10,500,000 from investors. *See* Market at Southpark Solicitation Materials, attached as **Exhibit 8.**

73. Once received from Fox, Dragul forwarded the Market at Southpark Solicitation Materials to Hershey to distribute to prospective investors.

74. Hershey distributed the Market at Southpark Solicitation Materials to prospective investors, who relied on them for their investment decision.

75. By distributing the Solicitation Materials to induce investors and prospective investors, Hershey deliberately withheld or failed to disclose material information to prospective investors concerning the Market at Southpark including the actual purchase price, estimated closing costs, material financial information, and that the Hershey Defendants stood to profit from any investment they would make in the SPE.

76. At or about the same time, and with the actual intent to induce investors to invest in the property, Dragul sent the Market at Southpark investors written financial projections stating that the purchase price was $24,750,000 and closing costs were estimated to be $300,000, and that he would establish an operating reserve of $950,000. *See* **Ex. 8**.

77. In fact, the purchase price of Market at Southpark was $22,000,000, $2.75 million less than Dragul and the Fox and Hershey Defendants represented to investors. *See* 4/11/2009 Market at Southpark Buyer's Settlement Statement, attached as **Exhibit 9**.

78. On August 11, 2009, Market at Southpark 09, LLC, an entity owned and/or controlled by the Fox Defendants, purchased the Southpark property for $22 million. At closing, ACF received a $950,000 "consulting fee," Dragul, through GDA received $300,000 as a "consideration fee," and through his SSC 02, LLC entity, another $50,000 in fees. **Ex. 9**.

79. On May 17, 2011, Dragul as manager of GDA Market at Southpark, LLC executed a ballot authorizing ACF to sell the property "for a net price of not less than $28,350,000.00 before paying off the loan."

80. As was common practice, Dragul and his staff sent periodic updates for investors that provided leasing and income information for each property. For properties for which Hershey solicited and raised investor funds, Dragul allowed and even invited Hershey to edit and comment on property updates before sending them to investors.

81. Both the August and November 2011 Market at Southpark property updates drafted by Dragul with input from Hershey that were sent to investors did not include any mention of a plan to market and sell the property or Dragul's decision

to do so as manager of the SPE owner. The August and November 2011 Property Update letters are attached as **Exhibit 10A** and **10B**, respectively.

82. Both Dragul and Hershey knew of the plan to sell the property, as the transaction was pending when the November 2011 property update was prepared, but that information was concealed from investors, and Dragul continued to make distributions to them for their Market at Southpark investment.

83. On November 15, 2011, five days after Dragul sent the November 2011 Property Update letter to investors, Dragul and the Fox Defendants sold the Market at Southpark property for $30 million. At closing, Defendants ACF and Dragul (through GDA) received commissions of $600,000.00 and $300,000, respectively. *See* 11/15/2011 Market at Southpark Seller's Settlement Statement is attached hereto as **Exhibit 11**.

84. Notwithstanding the $13,038,594.47 net proceeds received at closing, Dragul and the Fox Defendants required the Market at Southpark investors to "roll up" their investments into another property, Village Crossroads, rather than allowing them to cash out by collecting this pro rata share of the sales proceeds.

85. Dragul and the Fox Defendants received at least $2.2 million in undisclosed fees in connection with the acquisition and sale of the Market at Southpark, which were never disclosed to investors. The misrepresentations as to the purchase price of the property disguised these undisclosed fees and commissions.

86. Moreover, upon information and belief, Dragul and the Fox Defendants stole more money from investors and the property than is represented on the settlement statements, through additional undisclosed fees and/or secret profits.

ii. Plaza Mall of Georgia North (3410 & 3420 Buford Drive, Buford, Georgia, 30519)

87. In or about 2008, Dragul provided prospective investors with an Executive Summary and Financial Projections for a property in Buford, Georgia known as Plaza Mall of Georgia, North ("PMG"). A copy of the PMG Solicitation Materials is attached as **Exhibit 12**.

88. The Executive Summary prepared by Dragul and distributed to prospective investors represented that the purchase price for the property was $26,979,567.00, and that it would be necessary to raise $7,667,346.00 from investors. *See* **Ex. 12**, at 1.

89. Dragul forwarded the PMG Solicitation Materials to Hershey, who sent them to prospective investors.

90. At or about the same time, and with the actual intent to induce investors to invest in the property, Dragul sent prospective PMG investors written financial projections for the property confirming the $26,979,567 purchase price and representing that loan and closing costs were estimated at $300,000, and providing for an operating reserve of $950,000 and loans payable in the amount of $19,930,221. *See* **Ex. 12**, at 2.

91. In fact, the purchase price of PMG was only $25.92 million, or $1,059,567 less than Dragul represented in the Solicitation Materials. *See* 12/24/2008 PMG Buyer's Settlement Statement, attached as **Exhibit 13**.

92. On December 24, 2008, Dragul, through Plaza Mall North 08 B Junior, LLC ("North 08 B"), purchased the PMG Property from Windward Star Associates, LLC ("Windward") for $25.92 million, $1.06 million less than the amount Dragul had represented in the Solicitation Materials. *See* **Ex. 13**.

93. Dragul also created a separate entity, Plaza Mall North 08 A Junior, LLC ("North 08 A") which became a member of North 08 B, the owner of the Plaza Mall property. The operating agreement for North 08 B stated that North 08 A made an initial capital contribution of $4.766 million to the company; Windward, which also became of a member of North 08 A, was credited with a contribution of $1.204 million, an amount reflecting $5.17 million in equity minus a distribution of $3.966 million. *See* **Ex. 2**, at ¶ 14; *see also* **Ex. 13**.

94. Upon completion of the transaction, North 08 A and Windward received 76.7% and 23.3% interests, respectively, in North 08 B, and thus, the property. *Id*.

95. Through the escrow for Dragul's purchase of PMG, Defendant ACF was paid a "consulting fee" of $500,000.00; Defendant GDA was paid a fee of $300,000.00 with Dragul's "SSC" entity receiving another $75,000 in fees. *See* **Ex. 13**.

96. Between late 2008 and 2015, Dragul with the assistance of the Non-Dragul Defendants, raised approximately $9,858,000 ($7,583,000 in new investor

dollars and $413,000 of "rolled-over" investor dollars) to purchase an ownership interest in the North 08 B entity, and thus, the PMG property. Included in the $9,858,000 used to buy the interest, Fox through an irrevocable trust (the "**Fox Trust**") contributed $5.2 million, $990,000 of which was subsequently paid back to Fox a few months later, making the Fox Trust's net investment in North 08A, and thus the property, $4.21 million.

97. On or about March 29, 2016 April 1, 2016, the Fox Trust entered into an agreement to sell its entire interest in North 08 A to another newly-formed Dragul SPE, Plaza Mall North 16, LLC ("North 16"). At that time, the Fox Trust held a 45.098% interest in North 08 A, which represented a 34.56% interest in the North 08 B entity and thus, the PMG property. *See* **Ex. 2**, at ¶ 18.

98. The funding for Dragul's purchase of the Fox Trust's interest in North 08 A came from Hagshama, an Israeli real estate investment company, which contributed capital through two SPEs: Hagshama Atlanta 19 Buford, LLC and CoFund 3, LLC. In exchange for Hagshama's payment of $4.6 million ($2,631,579 from Hagshama Atlanta and $2 million from CoFund 3), the Fox Trust transferred its 45.098% interest in North 08 A to North 16. As a result, Hagshama, through its interest in North 16, obtained a 34.59% ownership interest in North 08 B. The transaction closed on April 1, 2016, and from escrow, GDA received an "acquisition fee" of $100,000, a $24,600.00 "fee" paid to CG despite $100,000 already paid in legal

fees to a different law firm, and $25,400 was paid to Markusch in fees. *See* 4/01/2016 North 16 Settlement Statement, attached as **Exhibit 14**; *see also* Ex**. 2**, at ¶ 18.

99. On April 27, 2017, Dragul, through North 08 B, sold the PMG property (*via* transfer of the entirety of North 08 B's interest in the property to an unrelated third-party buyer) for $32 million. At closing, GDA received a "fee" of $560,000, Windward was paid $1.204 million for its membership interest, and other expenses were deducted. The net sales proceeds were $9.867 million. *See* 4/27/2017 PMG Seller's Settlement Statement, attached as **Exhibit 15.**

100. Of the $9.867 million in net sale proceeds, the two largest investors were paid first: CoFund 3 received $2.447 million and Hagshama Atlanta received $3.22 million. For its part, GDA received $4.191 million, an amount sufficient to repay less than half of what Dragul raised from his smaller, non-preferred investors. However, not only did Dragul not notify those investors the PMG property had been sold, he continued to make monthly payments to them as though the property were still owned by North 08 A and under his control.

101. In his capacity as general counsel for the GDA Entities, Kahn provided consultation and legal advice to Dragul regarding investor distributions from PMG sales proceeds, tax filings, reconciliations, and even drafted investor correspondence sent under Dragul's signature regarding PMG.

E. Real Estate Transfers Between Dragul and Fox – Prospect Square

102. The Fox Defendants and Dragul routinely transferred SPE properties to each other at inflated prices in order to pay themselves undisclosed fees at the expense of investors.

103. For example, in or about October 11, 2007, Dragul, through his newly created SPE, Prospect Square 07 A, LLC, purchased a shopping center located at 9690 Colerain Avenue, Cincinnati, Ohio known as Prospect Square (the "Prospect Property").

104. The purchase of the Prospect Property was financed with a $12.9 million loan from Royal Bank of Canada, evidenced by an October 10, 2007, promissory note, which was subsequently assigned and transferred three times before MSCI 2007-IQ16 Retail 9654, LLC (the "Prospect Lender") acquired it.

105. The Prospect Property was owned as tenants-in-common by five different SPEs – Prospect Square 07 A, LLC (57.35%), Prospect Square 07 B, LLC (2.21%), Prospect Square 07 C, LLC (5.54%), Prospect Square 07 D, LLC (4.16%), and Prospect Square 07 E, LLC (30.74%). The foregoing entities are referred to as the "Prospect SPE's).

106. In the Solicitation Materials prepared by Dragul and provided to prospective investors, he represented the purchase price for the property was $18.33 million, when in fact he purchased the property for $16 million, $2.33 million less

than represented to investors. A copy of the 2007 Prospect Square Solicitation Materials is attached as **Exhibit 16.**

107. In reliance on the false and misleading Solicitation Materials, investors ultimately contributed approximately $5 million through their purchase of ownership interests in the SPE that owned the Prospect Property.

108. Hershey was paid $306,000 at the Prospect closing as undisclosed and illegal "commissions." *See* 11/27/2007 Prospect Square Buyer's Closing Settlement Statement, attached as **Exhibit 17.**

109. On January 29, 2014, Dragul on behalf of the five Prospect SPEs filed petitions for bankruptcy under chapter 11 of the U.S. Bankruptcy Code (all five cases were consolidated into Case No. 14-10896-EEB, U.S. Bankruptcy Court, District of Colorado).

110. On October 1, 2014, the Prospect SPE debtors filed a motion seeking bankruptcy court approval of a purchase and sale agreement for the sale of the Prospect Property to Park City Commercial Properties, LLC ("Park City") for $16.15 million (the "First Prospect PSA"). *See* Dkt. No. 171 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

111. In connection with the prospective sale of the Prospect Property, the Prospect SPE debtors entered into a stipulation and settlement agreement with the Prospect Lender whereby the Lender agreed to accept a reduced payoff amount on its

loan, which was in default, provided it was paid by December 1, 2014. *See* Dkt. No. 174 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

112. Edward Delava, the managing member and signatory for the Park City purchaser in First Prospect PSA, had been Defendant ACF's CFO since the 1990's.

113. Neither the Prospect SPE debtors nor the prospective buyer disclosed the insider relationship among Delava, Fox, and ACF to either the bankruptcy court or the Prospect Lender.

114. The bankruptcy court approved both the settlement agreement with the Prospect Lender and the First Prospect PSA on October 21, 2014. *See* Dkt. No. 182 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

115. On January 5, 2015, the Prospect Lender filed a Motion for Relief from the Automatic Stay seeking to foreclose on the Prospect Property because the sale to Park City had not closed. The Prospect SPE debtors had not provided notice to the bankruptcy court of the failed sale. *See* Dkt. No. 196 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

116. In response to the Prospect Lender's foregoing motion, the Prospect SPE debtors objected to the motion for relief from stay citing extenuating circumstances beyond the debtors' control that had prevented the sale from closing:

> After entering into the settlement agreement and a third-party sale agreement that both depended on the current tenant make-up and rental income stream, the anchor tenant Kroger announced its intention to expand and relocate elsewhere. The result was immediate uncertainty as to the future tenant income stream, and the possibility

> that retail income from the property and associated valuations could drop precipitously. This dramatic turn of events spooked Debtors' buyer and the lending community in the immediate term and will require the Debtors to engage in rehabilitative leasing and tenant improvement efforts related to Kroger space. Until the Debtors have completed such transitional needs, the valuation, sale and financing opportunities for the property are compromised or worse.

See Dkt. No. 202 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 9.

117. Upon information and belief, Dragul and his GDA employees, including Markusch, knew about Kroger's desire to expand and intention not to renew its lease upon its expiration in February 2018 at the time of the First Prospect PSA.

118. Notwithstanding this, Dragul, on behalf of the Prospect SPEs, represented to the bankruptcy court in the objection to the Lender's motion for relief from stay that he had no knowledge of this material fact when the settlement agreement with the Lender and the First Prospect PSA were executed. *See* Dkt. No. 202 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

119. Upon information and belief, the First Prospect PSA was a "stalking-horse" bid from a related party to the ultimate purchaser – the Fox Defendants – both of whom were intimately connected to Dragul and the GDA Entities.

120. The Prospect SPE Debtors contended that Kroger's decision not to renew its lease, the term of which was set to expire in February 2018, resulted in a significant decrease in the fair market value of the Prospect Property and that finding

a suitable replacement anchor tenant would take time and money. *See* Dkt. No. 202 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

121. In February 2015, the parties eventually reached an agreement pursuant to which the Prospect Lender was granted leave from the automatic stay to have a receiver appointed pursuant to its loan documents, among other terms. *See* Dkt. No. 204 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

122. On June 30, 2015, the Prospect Lender and the SPE debtors entered into a second settlement agreement, pursuant to which, the Lender agreed to accept a discounted amount of $12.2 million in satisfaction of the $12,418,135.53 outstanding balance on its loan. *See* Dkt. No. 230 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

123. On July 2, 2015, the Prospect SPE debtors filed a motion seeking bankruptcy court approval of a second purchase and sale agreement for the sale of the Prospect Property to Defendant ACF, for a significantly reduced price of $12.2 million, $3.95 million less than the First Prospect PSA (the "Second Prospect PSA"). *See* Dkt. No. 227 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

124. Under the terms of the Second Prospect PSA, the Prospect SPE debtors provided an $800,000 credit to the buyer (*i.e.* ACF), for "Seller's reasonable transaction costs," including *inter alia,* $350,0000 in attorney's fees to Defendant CG. This amount was deducted from the reduced payoff amount agreed to by the Lender. *Id*.

125. Again, nowhere in the motion seeking bankruptcy court approval of the Second Prospect PSA are the Fox Defendants' long-standing relationship and business dealings with Dragul disclosed.

126. On July 31, 2015, following ACF's assignment of the purchase and sale agreement to his newly created SPE, Prospect Square 15, LLC, the sale of the Prospect Property closed for a total sale price of $12.2 million. A copy of the July 31, 2015, Prospect Square Settlement Statement is attached as **Exhibit 18.**

127. A total of $818,645.61 for "additional charges" was paid at the closing of ACF's July 31, 2015 purchase of the Prospect Property from the chapter 11 bankruptcy estate:

PAYEE	CATEGORY	AMOUNT
Legal Fees from Escrow:		
Brownstein Hyatt Farber Schreck, LLP	Legal fees	$164,588.36
Seygarth Shaw LLP	Lender's legal fees	$26,200.00
Robins Calley Patterson & Tucker	Legal fees	$18,885.26
Kutner, Brinen, Garber P.C.	Debtors' (sellers) legal fees	$39,073.99
The Conundrum Group	Legal fees	$350,000.00
Strauss Troy Co.	Local legal opinion	$4,600.00
Keating Meuthing & Klekamp	Lender local legal fees	$1,663.00
Brownstein Hyatt Farber Schreck, LLP	Additional legal fee	$32,100.00
Legal fees from escrow sub-total		**$637,110.61**
Other Fees:		
Hanley Investment Group	Consulting services fee	$110,000.00
Indigo Consulting Services dba Indigo Management Services	Consulting services fee	$5,500.00
Transpacific Real Estate Consultants	Consulting services fee	$35,000.00
Global Realty Services Group	Environmental & Phase I Reports	$2,250.00
The Planning and Zoning Resource Company	Zoning Report	$985.00
Thomas Graham & Associates	Survey	$2,800.00
Park City Commercial Properties	Commission	$25,000.00
Other fees sub-total		**$181,535.00**
TOTAL ADDITIONAL CHARGES FROM ESCROW		**$818,645.61**

See **Ex. 18**.

128. Defendant CG received $350,000 from escrow for a purported "legal fee," notwithstanding that approximately $637,110.61 was taken from escrow to pay at least five other law firms for legal fees. *See* **Ex. 18**.

129. While the Prospect SPE debtors filed an application to employ the Kahn Defendants, there is no description or statement as to precisely what legal services Kahn would provide to the debtors – "The Debtors desire to employ the services of [the Kahn Defendants] to continue its non-bankruptcy legal services, including general corporate and business matters." *See* Dkt. No. 89 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 10.

130. When the Prospect SPE debtors filed their bankruptcy petitions, the Kahn Defendants held a general unsecured claim of $27,277.83 for prior legal services. *Id* at ¶ 5.

131. Upon information and belief, the Kahn Defendants did no legal work in connection with the sale of the property for which legal fees would have been warranted or properly due and owing from the escrowed funds, and as such, engaged in self-dealing.

132. The initial stalking-horse buyer of the Prospect Property, Park City Commercial Properties, which was owned and managed by ACF's CFO Delava, received a "commission" of $25,000.00 at closing.

133. Upon information and belief, neither Park City nor Delava were licensed real estate agents entitled to receive such a commission, nor was such commission disclosed to the bankruptcy court.

134. The Prospect Square chapter 11 bankruptcy case was closed on November 4, 2015.

135. On January 22, 2016, nearly six months after the Fox Defendants' purchase of the Prospect Property, through a newly created SPE, PS 16, LLC, Dragul repurchased the Prospect Property for $13.8 million, giving the Fox Defendants a profit of approximately $1.6 million for holding the property for less than six months. A copy of the 7/31/2015 Buyer's Settlement Statement is attached as **Exhibit 18**.

136. At the closing on Dragul's repurchase of the Prospect Property, GDA received $207,000.00, purportedly to reimburse its "due diligence" expenses and earnest money deposits, Defendant CG received $31,727, again, under the guise of legal fees, and Delava's entity, Park City, received another $25,0000 "commission." **Ex. 18**.

137. Dragul's repurchase of the Prospect Property was financed with a new $12.97 million loan, $4.335 million from Dragul's institutional investor, Hagshama and $481,675 in funds ultimately contributed by investors.

138. Even though Dragul's second purchase of the Prospect Property closed in January 2016, beginning in or about February 2016, Dragul and the GDA Entities sent Solicitation Materials to prospective investors seeking investments in the newly

created Prospect SPE. A copy of the February 2016 Prospect Solicitation Materials is attached as **Exhibit 20**.

139. In these Prospect Solicitation Materials, Dragul made the following material misrepresentations to prospective investors:

> The 66,846 square foot Kroger store currently does extremely well with sales in excess of $700 per square foot which equates to well over $46,000,000 per year. Kroger is currently paying $7.75 per square foot and their lease expires February 28, 2018. We have received word that they plan to move to a much larger newly developed store across the intersection. The ownership welcomes the opportunity to have Kroger's space back as market rent for this space is upward of $13.75 per square foot. In fact, the ownership has already received an offer on the space. Furthering the strength of this property is the lack of available commercial land in the submarket limiting competition and allowing an investor to benefit from rising market rental rates.

Ex. 20, at 1.

140. Dragul informed the Prospect Lender in or about January 2018, that he would not be able to pay the $12.97 million loan he obtained to finance the purchase of the Property, which was due in February 2018.

141. As of the date of the Receiver's appointment Kroger provided notice of intention to terminate the lease early and as a result, paid $1.75 million as an early termination fee, which amount was credited towards the defaulted loan balance.

142. Dragul and the Prospect lender executed a forbearance agreement on January 31, 2018, pursuant to which the lender agreed to forebear exercising its default remedies until May 1, 2018 to allow Dragul time to obtain refinancing.

143. On the heels of Dragul's First Indictment, he was unable to refinance the Property, and defaulted on the forbearance agreement by failing to make May, June, July, and August 2018 payments.

144. On November 29, 2018 the Prospect Property lender instituted a civil action in Ohio state court seeking to foreclose on the Property notwithstanding the stay provisions contained in the Receivership Order.

F. Payment of Unauthorized Commissions

145. According to Dragul's records, from 2003 through August 2018, Dragul, in active concert with the other Defendants, stole over $20.2 million from investors which was used, *inter alia*, to pay almost $9 million in personal gambling debts, to impermissibly pay millions to Dragul's family members and the Non-Dragul Defendants, and to fund the extravagant lifestyles of Dragul, his family, coworkers and those Dragul designated as "friends of the house."

146. Various SPEs were used to fraudulently transfer funds to Defendants, including, but not limited to, AP Plaza 07 A, LLC, Fort Collins WF 02, LLC, GDA Clearwater 15, LLC, Crosspointe 08 A, LLC, GDA Hickory 17, LLC, GDA Housing, LLC, GDA PS Member, LLC, GDA Windsor Member, LLC, Grandview 06 A, LLC, HC Shoppes 18 A, LLC, Market at Southpark 09, LLC, Plainfield 09 A, LLC, Plaza Mall North 08 A Junior, LLC, Plaza Mall North 08 B, LLC, Prospect Square 07 A, LLC, Rose, LLC, Southlake 07 A, LLC SSC 02, LLC, Standley Lake 07 A, LLC, Syracuse Property 06 A, LLC, Summit 06, A, LLC, Village Crossroads 09, LLC,

Walden 08 A, LLC, West Creek 06 A, LLC, Yale & Monaco 02, LLC and YM Retail 07 A, LLC. These SPEs were funded with money Defendants obtained by defrauding investors.

147. The Receiver's forensic analysis has been hampered by Dragul's concealment of records, his use of SPEs to channel funds under the guise of purported "commissions" and other fees to the Defendants, and the vast commingling among the various Dragul accounts. The Receiver reserves the right to recover additional commissions that may be uncovered in discovery and proven at trial.

148. All of the commissions set forth below represent the transfer of funds Defendants obtained by fraud from investors who invested money by purchasing ownership interests in SPEs. These investment vehicles were used to fraudulently transfer funds masked as illegal and undisclosed "commissions" to Dragul, the Kahn Defendants, Markusch, and the Fox and Hershey Defendants.

149. Dragul and the Non-Dragul Defendants paid each other millions of dollars in unauthorized, undisclosed and illegal commissions from escrow of real estate closings and from the SPE accounts as follows (collectively, the "Commissions"):

Defendant	Commissions from Escrow	Commissions from GDA Entities	Total Commissions Received
Gary Dragul	$18,822,421.55	$325,625.55	$19,148,047.10
Susan Markusch	$212,796.67	$97,300.00	$310,196.67
Kahn Defendants	$661,026.87	$1,040,415.05	$1,701,441.92
Fox Defendants	$5,934,791.00	$485,500.00	$6,420,291.00
Hershey Defendants	$578,500.00	$2,597,155.54	$3,175,655.54

See **Exs. 3**, **4**, **5**, **6**, and **7**.

iii. The Dragul and Fox Commissions

150. As detailed and set forth in the chart above, Dragul took millions of dollars in unauthorized, undisclosed, and illegal commissions from the closing and refinance of numerous properties (the "Dragul Commissions"). *See* **Ex. 3.**

151. From 2002 to 2018, Dragul took approximately $18.6 million from the escrow of real estate closings (both purchases and sales) of various SPE associated properties both in GDA and ACF's portfolios, to which neither he nor any GDA Entity was entitled. *See* **Ex. 3.**

152. Not only did Dragul fail to disclose these illegal and unauthorized commissions to investors in the Solicitation Materials, he also failed to disclose, and actually concealed them in the information provided to investors regarding the sale of at least one SPE associated property in which they had invested – PMG.

153. Dragul likewise paid the Fox Defendants over $5.9 million in "commissions" at the closing on various Dragul properties, and another $485,500 for purported commissions from the GDA Entities' bank accounts (the "Fox Commissions"). *See* **Ex. 6.**

154. The Dragul and Fox Commissions were illegal because neither Fox nor Dragul was a licensed real estate agent entitled to receive them.

iv. The Markusch Commissions

155. For her role as CFO and controller of GDA, Markusch received a sizeable salary, not including bonuses and benefits.

156. In addition to her sizeable salary and benefits, Markush also received undisclosed and illegal commissions from the closing on both commercial and residential properties through two entities, which she is the sole member: Juniper Consulting Group, LLC and Olson Real Estate, LLC (the "Markusch Commissions"). *See* **Ex. 4.**

157. From 2014 through 2018, Markusch received approximately $284,796.67 in undisclosed and illegal commissions from GDA and the SPE entities, through her wholly-owned entities. *See* **Ex. 4.**

158. In at least four instances, Markusch's commissions were taken from the closing of various properties in which defrauded investors made investments in reliance on the Solicitation Materials – Rose, LLC, Upper High Street 15, LLC, AP Plaza 07 A, LLC and Summit 06 A, LLC. *See* **Ex. 4.**

159. Like the Dragul and Fox Commissions, the Markusch Commissions were never disclosed to prospective investors.

160. Neither Markusch nor either of her entities were licensed or registered brokers with FINRA, the State of Colorado or the SEC, nor associated with a FINRA or Commission-registered broker-dealer at any time relevant herein.

161. Likewise, upon information and belief Markusch is not and has never been a licensed real estate agent in Colorado or any state entitling her to receive commissions from the closing of real estate transactions.

v. The Hershey Commissions

162. Rather than taking "commissions" from the closing on a property, the Hershey Defendants received commissions from Dragul separately, all of which were a certain agreed upon percentage of the funds Dragul received from investors solicited by Hershey.

163. As set forth in the table above, from 2001 to 2014 the Hershey Defendants received approximately $2,891,155.54 in purported commissions for funds solicited by Hershey from investors. *See* **Ex. 7.**

164. In addition to these commissions, Dragul paid the Hershey Defendants $194,000 in "commissions" from the sales of properties owned by AP Plaza 07 A, LLC and Grandview 06 A, LLC (collectively referred to as the "Hershey Commissions"). *See* **Ex. 7.**

165. The Hershey Defendants were not licensed or registered brokers with FINRA, the State of Colorado or the SEC, nor associated with a FINRA or Commission-registered broker-dealer at any time relevant herein.

V. FIRST CLAIM FOR RELIEF:
Violations of the Colorado Securities Act
Colo. Rev. Stat. §§ 11-51-501 and 11-51-604(3)
(against Dragul and the Hershey and Fox Defendants)

166. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

167. The Receiver has standing to prosecute this claim both on behalf of the SPEs and the GDA Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

168. As set forth above, Dragul and the Hershey and Fox Defendants, in connection with the offer, sale, or purchase of securities, employed a device, scheme, or artifice to defraud investors and prospective investors and engaged in acts, practices and a course of business which operated as fraud or deceit upon investors and prospective investors. C.R.S. §§ 11-51-501(1)(a) and (c).

169. As alleged in the preceding paragraphs, Dragul and the Hershey and Fox Defendants employed a fraudulent transfer scheme in which unauthorized and illegal commissions were paid from investor funds that were improperly and extensively comingled as part of the Sham Business (the "Scheme"). The Scheme effectively defrauded GDA Entity investors and prospective investors by making false and misleading material misrepresentations to induce the purchase of purported ownership interests in SPEs, which are considered securities. The GDA Entity investors relied on the representations made both in the Solicitation Materials and directly by Dragul and the Fox and Hershey Defendants in soliciting their

investments. The funds ultimately invested by the GDA Entity investors in reliance on Defendants' representations were either transferred into Dragul's personal accounts, used to pay undisclosed and illegal commissions, and/or to pay off old debts, without the authority or knowledge of those investors. *See* ¶¶ 1-8, 30-32, 35-37, 47-63, 65-101, 106-108, 138-139, and 145-165, *supra.*

170. Dragul and the Hershey and Fox Defendants perpetuated this fraud by soliciting investors to purchase membership interests in various SPEs for the stated purpose of purchasing and operating commercial properties. However, Defendants did not invest funds where investors intended them to be invested, but instead used those funds to pay down other debt and for Defendants' own personal benefit. *See* ¶¶ 1-8, 30-32, 35-37, 47-51, 56-101, and 145-165, *supra.*

171. The above-detailed Scheme was carried out by Dragul and the Fox and Hershey Defendants from approximately 2003 through August 2018.

172. Dragul and the Hershey and Fox Defendants, in connection with the offer, sale, or purchase of securities, made untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. C.R.S. § 11-51-501(a)(2).

173. In connection with the offer, purchase, and sale of securities, including North 08, GDA Market at Southpark, LLC, and others, Dragul, and the Hershey and Fox Defendants, either directly or indirectly, made untrue statements of material fact

or failed to disclosure to investors material facts which were necessary to make the statements made to investors, under the circumstances in which they were made, not misleading. The omitted and untrue statements of material fact that investors did not know included, but were not limited to the following:

a. That the properties would be operated with profits being distributed to investors on a monthly basis and upon a sale, when in truth, Defendants did not make investors aware of the sale of the PMG property and did not return their capital consistent with the governing documents;

b. That the investor funds in the Market at Southpark, PMG, Prospect Square and other SPE-owned properties would not be comingled with the funds of other investors in unrelated ventures and/or with the funds of other investors in unrelated ventures and/or with Dragul's own personal funds, when in truth they were commingled and treated as fungible;

c. That investor funds would be used to improperly pay commissions to GDA and the Hershey and Fox entities;

d. Misrepresentation of the purchase price of various properties and their closing costs in the Solicitation Materials;

e. That unauthorized and illegal commissions and fees would be taken from escrow of the purchase of various properties by Dragul, the GDA entities, and the Fox, Hershey, and Kahn Defendants.

174. The acts, actions, practices and omissions of Dragul and the Hershey and Fox Defendants substantially harmed investors, prospective investors, and the Estate.

175. As a direct and proximate result of Dragul and the Hershey and Fox Defendants' acts and omissions, the Estate and investors sustained significant damages.

VI. SECOND CLAIM FOR RELIEF: Negligence *(against Dragul and the Fox and Hershey Defendants)*

176. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

177. The Receiver has standing to prosecute these claims both on behalf of the SPEs and on behalf of the GDA Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

178. Dragul, the Fox and the Hershey Defendants each owed a duty of care to investors and prospective investors.

179. These defendants failed to exercise reasonable care or competence in preparing and distributing Solicitation Materials to prospective GDA Entity investors and in making representations to investors.

180. These defendants' negligence was a cause of Plaintiff's injuries and injuries to investors.

VII. THIRD CLAIM FOR RELIEF:
Negligent Misrepresentation
(against Dragul and the Fox and Hershey Defendants)

181. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

182. The Receiver has standing to prosecute these claims on behalf of the GDA Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

183. Through Dragul's fraudulent Scheme, Dragul and the Fox and Hershey Defendants negligently induced the GDA Entity investors to invest significant sums of money in various SPE Entities by making misrepresentations of material fact concerning the investments.

184. More specifically, Dragul, and the Fox and Hershey Defendants made false and misleading material misrepresentations concerning the source and use of funds to induce investors and prospective investors to purchase purported ownership interests in SPEs, including but not limited to those set forth in ¶¶ 47-50, 62-101, 106-108, and 138-39, above.

185. These defendants gave such information to investors in the course of their business and in connection with transactions in which they had a financial interest.

186. These defendants gave the false and misleading information to investors for the investors' use in business transactions, and these defendants were negligent in obtaining or communicating the information.

187. The GDA Entity investors relied on the representations made both in the Solicitation Materials and directly by Dragul and the Fox and Hershey Defendants in soliciting their investments. The funds ultimately invested by the GDA Entity investors in reliance on these defendants' representations were either transferred into Dragul's personal accounts, used to make undisclosed and illegal commissions, and/or to pay off old debts, without the authority or knowledge of those investors. *See* ¶¶ 1-4, 47-61, 70, and 145-165, *supra.*

188. The negligent misrepresentations made by Dragul and the Fox and Hershey were material and were made without reasonable care for the guidance of others, namely the GDA Entity investors.

189. Dragul and the Fox and Hershey Defendants provided materially misleading information intending or knowing GDA investors would reasonably rely upon those negligent misrepresentations in investing in the SPE entities. *See* ¶¶ 47-50, 62-101, 106-108, and 138-39, *supra.*

190. GDA Entity investors reasonably and justifiably relied upon the negligent misrepresentations of these defendants in making their decision to invest in the GDA Entities.

191. As a direct and proximate cause of their reliance on these defendants' negligent misrepresentations, the GDA Entity investors sustained substantial damages and losses.

VIII. FOURTH CLAIM FOR RELIEF: Civil Theft -- Colo. Rev. Stat. § 18-4-401 *(against All Defendants)*

192. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

193. The Receiver has standing to prosecute these claims on behalf of the SPE Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

194. Defendants knowingly exercised control over GDA Entity investors' funds.

195. Without investors' knowledge or authorization, Defendants exploited their control over those funds by causing them to be used for Defendants' personal benefit. *See* ¶¶ 1-2, 47-53, 56-61, 70, 78, 85-86, 95-96, 99, 102-108, 124-128, 135-137, and 145-165, *supra.*

196. Defendants intended to permanently deprive investors of their investments.

197. GDA Entity investors were in fact permanently deprived of their funds.

198. GDA Entity investors have been damaged by Defendants' theft in an amount to be proven at trial and are therefore entitled to treble damages, costs, and reasonable attorney's fees.

IX. FIFTH CLAIM FOR RELIEF: Violations of the Colorado Organized Crime Control Act Colo. Rev. Stat. § 18-17-101, *et seq.* *(against All Defendants)*

199. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

200. The Receiver has standing to prosecute these claims both on behalf of the SPEs and on behalf of the SPE Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

201. At all relevant times, Defendants were considered "persons" within the meaning of the Colorado Organized Crime Control Act ("COCCA"), C.R.S. § 18-17-103(4).

202. At all relevant times, the Estate and GDA Entity investors were considered "persons" aggrieved or injured within the meaning of COCCA, C.R.S. §§ 18-17-106(6) and (7).

203. At all relevant times, Defendants formed an association-in-fact for the purpose of defrauding the Estate and GDA Entity investors and prospective investors. *See* ¶¶ 1-8 and 30-60, *supra.*

204. Defendants' fraudulent Scheme consisted of soliciting investors to purchase membership interests in various SPEs that were engaged in the business

of acquiring commercial real estate. Defendants did not, however, invest those funds where the investors intended them to be invested and instead used those funds to pay down other debt and/or for Defendants' own personal benefit, as set forth in ¶¶ 1-2, 47-53, 56-61, 70, 78, 85-86, 95-96, 99, 102-108, 124-128, 135-137, and 145-165, above.

205. This association-in-fact was an "enterprise" within the meaning of COCCA, C.R.S. § 18-17-103(2).

206. Defendants conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a "pattern of racketeering activity" within the meaning of COCCA, C.R.S. § 18-17-103(3), in violation of COCCA, C.R.S. § 18-17-104(3) to further their Scheme and plans related thereto, and where all such schemes, devices, and actions were related to the conduct and in furtherance of their enterprise.

207. Specifically, as alleged herein, Defendants committed at least two violations of the Colorado Securities Act, under C.R.S. §§ 11-21-501(1) and 11-51-604; at least two predicate acts of wire fraud, under 18 U.S.C. § 1343; at least two predicate acts of civil theft under C.R.S. § 18-4-401; and/or at least two predicate acts of bankruptcy fraud under 18 U.S.C. § 157. Each of these crimes are incorporated into COCCA by C.R.S. § 18-17-103(5).

208. As set forth in detail above, the Defendants directly participated in the affairs of the enterprise and committed a pattern of racketeering in the following non-exclusive respects:

a. Defendants violated the Colorado Securities Act when from 2006 through 2018, in connection with the offer, sale, or purchase of securities, they employed a devise, scheme, or artifice to defraud the GDA Entity investors, the Estate's creditors and other parties in interest. As set forth above, Dragul, Markusch, the Hershey and the Fox Defendants provided false and misleading Solicitation Materials to prospective investors to induce investments in SPEs owned and controlled by Dragul and/or the Fox Defendants. Additionally, all Defendants received illegal and undisclosed commissions from the sales of properties and/or the SPE accounts. The Scheme involved the investment of money in a common enterprise with profits that were wrongfully derived solely from the efforts of others, namely GDA Entity investors, the Estate's creditors and other parties in interest. C.R.S. §§ 11-21-501(1) and 11-51-604. *See* ¶¶1-8, 30-32, 35-43, 47-101, 106-108, 138-139, and 145-165, *supra*.

b. Defendants committed wire fraud under 18 U.S.C. § 1343 from 2006 through 2018, when they knowingly devised or intended to devise a Scheme to defraud and to obtain money from investors under false pretenses, representations and promises, including material misrepresentations and omissions in the Solicitation Materials concerning the investment, payment of illegal and undisclosed commissions, and improperly comingling and stealing funds. Defendants used interstate or foreign wire communications to carry out the Scheme with the intent to defraud and obtain money through false

pretenses, misrepresentations or promises, which in fact deprived innocent investors of their money. This Scheme was reasonably calculated to deceive persons of ordinary prudence or comprehension. *See* ¶¶ 1-8, 20, 24, 30-37, 45-86, 95-101, 102-108, 126-128, 132, 135-137, 145-165, *supra*.

c. Defendants committed theft under C.R.S. § 18-4-401, and thus engaged in racketeering activity from 2006 through 2018 when each of them knowingly and without authorization took illegal and undisclosed commissions from escrow upon the purchase or sale of various SPE properties and the comingled GDA Entity bank accounts, through deceptive and material misstatements. Defendants intended to permanently deprive the GDA Entity investors of such funds, notwithstanding that such funds were property of the GDA Entity investors. *See* ¶¶ 20, 24, 36, 46, 52-53, 56, 61, 64, 70, 78, 83, 85, 92, 95, 99-100, 108, 124, 127-133, 136, and 145-165 *supra*.

d. Dragul, the Fox and the Kahn Defendants committed bankruptcy fraud under 18 U.S.C. § 157 and thus, engaged in racketeering activity by intentionally devising a scheme or plan to defraud the Prospect SPEs' creditors by intentionally making false and misleading representations and omissions to the bankruptcy court and the Prospect SPEs' creditors regarding the sale of the Prospect Property. The Prospect Debtors' declaration of bankruptcy served as the tool to execute a fraudulent scheme that was designed to and did defraud innocent GDA Entity investors. *See* ¶¶ 102-144, *supra*.

209. These acts of racketeering, which occurred within ten years of each another, constitute a "pattern of racketeering activity" per C.R.S. § 18-17-103(3).

210. The above acts committed as part of the scheme to defraud investors, the Estate's creditors and interested parties, were related to each other by virtue of common participants, a common class of victims, a common method of commission (solicitation of investments based on false representations), and the common purpose and common result was to defraud GDA Entity investors, to the benefit of Defendants.

211. It is unlawful for any person employed by or associated with an enterprise to conduct the affairs of an enterprise through a pattern of racketeering, or for any person to conspire or endeavor to commit a violation of COCCA, C.R.S. §§ 18-17-104(3) and (4).

212. As a direct and proximate result of Defendants' COCCA violations, Defendants pilfered the SPEs thereby damaging the GDA Entity investors, the Estate and its creditors, who are entitled to treble damages, costs, and reasonable attorney's fees pursuant to C.R.S. § 18-17-106(7).

X. SIXTH CLAIM FOR RELIEF:
Aiding and Abetting Violations of COCCA
Colo. Rev. Stat. § 18-17-101 *et seq*.
(against Kahn, CG, Markusch, Fox, ACF, Hershey, and PHI)

213. The Receiver incorporates by reference the previous allegations of the Complaint as if fully set forth herein.

214. The Receiver has standing to prosecute these claims both on behalf of the SPEs and on behalf of the SPE Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

215. At all relevant times, the Non-Dragul Defendants were "persons" within the meaning COCCA, C.R.S. §§ 18-17-103(4).

216. At all relevant times, the GDA Entity investors, the Receivership Estate's creditors and parties in interest, were considered "persons" aggrieved or injured within the meaning of COCCA, C.R.S. §§ 18-17-106(6) and (7).

217. At all relevant times, Dragul together with the Non-Dragul Defendants formed an association-in-fact for the purpose of defrauding GDA Entity investors, the Estate's creditors and other parties in interest, while directly benefiting all Defendants. This association-in-fact was an "enterprise" within the meaning of COCCA, C.R.S. § 18-17-103(2). *See* ¶¶ 1-8 and 30-60, *supra*.

218. Defendants conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a "pattern of racketeering activity" within the meaning of COCCA, C.R.S. § 18-17-103(3), in violation of COCCA, C.R.S. § 18-17-104(3) to further the fraudulent scheme set forth herein and plans related thereto,

and where all such schemes, devices, and actions were related to the conduct and in furtherance of their enterprise. *See* ¶¶ 1-8 and 30-60, *supra*.

219. Specifically, at all relevant times, the Defendants, through aiding and abetting, engaged in racketeering within the meaning of C.R.S. § 18-17-103(5), when they conspired to commit and did commit violations of the Colorado Securities Act, under C.R.S. §§ 11-21-501(1) and 11-51-604; wire fraud, under 18 U.S.C. § 1343; theft under C.R.S. § 18-4-401; and/or bankruptcy fraud under 18 U.S.C. § 157.

220. Defendants participated in the affairs of the enterprise and committed a pattern of racketeering including but not limited to those set forth in ¶¶ 1-8, 30-32, 35-43, 47-101, 106-108, 138-139, and 145-165, above.

221. These detailed acts of racketeering occurred within ten years of one another and constitute a pattern of racketeering activity within the meaning of C.R.S. § 18-17-103(3).

222. The above-detailed acts committed as part of Dragul's fraudulent scheme were related to each other by virtue of common participants, a common class of victims (*i.e.*, the GDA Entity investors, the Estate's creditors and other parties in interest), a common method of commission (several years' worth of unauthorized transfers of investor funds for Defendants' use and benefit), and the common purpose and common result was to defraud the GDA Entity investors, and the Estate's creditors, to the benefit of Defendants.

223. It is unlawful for any person employed by or associated with an enterprise to conduct the affairs of an enterprise through a pattern of racketeering, or for any person to conspire or endeavor to commit a violation of COCCA, C.R.S. §§ 18-17-104(3) and (4).

224. In violation of C.R.S. § 18-17-104(3), the Non-Dragul Defendants conspired with and endeavored to violate the provisions of COCCA, C.R.S. § 18-17-104(3), by aiding and abetting Dragul as described in ¶¶ 1-8, 30-37, 41-108, 110-113, 117-119, 122-136, and 145-165, above.

225. As set forth above, Defendants conspired with the common purpose of fraudulently, illegally, and without authorization, misappropriating funds through a series of fraudulent representations, inducements, transactions, and wire transfers among and between the GDA Entity bank accounts, Defendants' personal bank accounts, and title company escrow accounts. *Id*.

226. Through their fraudulent Scheme, Defendants pilfered the SPEs for their own benefit and thus, have injured the GDA Entity investors and the Receivership Estate, including its creditors and parties in interest.

227. As a direct and proximate result of the Non-Dragul Defendants' aiding and abetting, participating in, and conspiring with Dragul to violate COCCA, C.R.S. § 18-17-104(3), the SPEs and thus, the GDA Entity investors and the Estate, including its creditors and parties in interest, have been damaged and are therefore

entitled to treble damages, costs, and reasonable attorney's fees to C.R.S. § 18-17-106(7).

XI. SEVENTH CLAIM FOR RELIEF: Breach Of Fiduciary Duty *(against Dragul)*

228. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

229. As manager of the GDA Entities, Dragul a fiduciary duty to the GDA Entities and their member investors, which required him to use reasonable care and skill in managing the properties and associated SPEs.

230. Dragul also owed a fiduciary duty to the GDA Entity investors to ensure the truth and accuracy of the representations made prior to and during the GDA Entities' ownership of the associated properties and to ensure that those representations remained true throughout the ownership of the properties.

231. Dragul breached his fiduciary duties as set forth above, and in the following non-exclusive respects, as set forth in ¶¶ 8, 44-46, 56, 101, 124, 127-131, 136, and 145-149, above:

a. Failing to provide honest and accurate material information to the investors prior to and during ownership of the associated properties;

b. Failing to disclose that he and the Non-Dragul Defendants received illegal and unauthorized Commissions from escrow of the sale of SPE properties and from the SPE accounts;

c. Receiving undisclosed and unearned commissions and/or payments from escrow of closing on the sale of certain SPE properties and from the SPE accounts;

d. Placing his own and the Non-Dragul Defendants' financial interests above the GDA Entities and their investors;

e. Failing to act in the best interest of the GDA Entities and instead placing his own interests and the Non-Dragul Defendants' interests above those of the GDA Entities; and

f. Other acts or omissions which may be identified through discovery and shown at trial.

232. Dragul's acts or omissions as described in the allegations and claims for relief set forth herein were breaches of the fiduciary duties he owed to the GDA Entities and their member investors, and were intentional, willful, and wanton.

233. Dragul's actions or omissions were intentionally designed to enrich himself to the detriment of the GDA Entities and their member investors, and were intentionally designed to conceal material information from the GDA Entity investors, all to their detriment.

234. As a proximate cause of the Dragul's breaches of his fiduciary duties, the Estate suffered damages and losses.

XII. EIGHTH CLAIM FOR RELIEF:
Aiding and Abetting Dragul's Breach of Fiduciary Duties
(against the Kahn Defendants)

235. The Receiver incorporates by reference the previous allegations of the Complaint as if fully set forth herein.

236. The Receiver has standing to prosecute these claims both on behalf of the SPEs and on behalf of the SPE Entity investors, all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

237. The Kahn Defendants, in their capacity as counsel for the GDA Entities, aided and abetted Dragul's breach of the fiduciary duties he owed to the GDA Entities and their member investors for the purpose of advancing their own interests over those of the investors.

238. As set forth above, the Kahn Defendants obtained direct financial benefits from colluding in or aiding and abetting Dragul's breaches.

239. As a direct and proximate result of the Kahn Defendants' aiding and abetting, participating in, and conspiring with Dragul to breach the fiduciary duties that he owed to the GDA Entities and their member investors, the SPEs and thus, the GDA Entity investors and the Estate, including its creditors and parties in interest, have been damaged.

XIII. NINTH CLAIM FOR RELIEF:
Negligence
(against the Kahn Defendants)

240. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

241. The Receiver has standing to prosecute these claims on behalf of the SPEs all of whom are creditors of the Receivership Estate. *See* **Ex. 1,** at ¶ 13(s).

242. The Kahn Defendants represented the GDA Entities, which included handling general representation and litigation matters for each of the GDA Entities.

243. In doing so, the Kahn Defendants owed the GDA Entities a duty to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out services for their clients.

244. The Kahn Defendants were negligent in the following non-exclusive respects, as set forth in ¶¶ 8, 44-46, 56, 101, 124, 127-131, 136, and 145-149, above:

a. Negligently providing legal advice to Dragul as to the impermissible and undisclosed comingling of investor dollars and the formation and management of the SPEs;

b. Negligently providing legal advice to Dragul upon the sale of PMG concerning the failure to pay distributions to investors and concealing from investors the fact that the property had been sold but instead of distributing funds to investors, Dragul kept those proceeds for his own use;

c. Negligently preparing or assisting in the preparation of false and misleading updates to investors;

d. Negligently advising, assisting, and otherwise providing legal services to Dragul and his staff, including Markusch, regarding their continued violations of the Receivership Order, and

e. All other acts which may be uncovered through discovery and which may be shown at trial.

245. The Kahn Defendants' failure to exercise the requisite due care in representing the GDA Entities, including providing legal advice and assisting to effect Dragul's fraudulent scheme and taking undisclosed and illegal commissions, was a proximate cause of the Estate damages and losses.

XIV. TENTH CLAIM FOR RELIEF: Breach of Fiduciary Duty *(against the Kahn Defendants)*

246. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

247. The Kahn Defendants represented the GDA Entities, which included handling general representation and litigation matters for them.

248. The Kahn Defendants owed the GDA Entities fiduciary duties of loyalty and due care.

249. The fiduciary duty of loyalty required the Kahn Defendants to place the interests of the clients – *i.e.*, the GDA Entities, including the investors therein – over

the interests of themselves or Dragul, and further required the Kahn Defendants to communicate honestly and truthfully with the GDA Entity investors.

250. The Kahn Defendants' duty of loyalty and duty to provide conflict-free representation, required them to exercise independent professional judgment on behalf of the GDA Entities to determine if Dragul's decisions or instructions were adverse to, or not in the best interest of the GDA Entities and the investors.

251. In addition to the fiduciary duty of loyalty and duty to provide conflict-free representation the Kahn Defendants owed fiduciary duties of utmost candor, communication, and utmost honesty.

252. The Kahn Defendants breached their fiduciary duties as set forth above, and in the following non-exclusive respects, as set forth in ¶¶ 8, 44-46, 56, 101, 124, 127-131, 136, and 145-149, above:

a. Failing to disclose their receipt of unearned and undisclosed commissions and/or payment on fees from escrow of the sale of SPE Properties, including PMG, the Prospect Property, Grandview Marketplace, AP Plaza, and Standley Lake, and from the SPE associated accounts;

b. Failing to advise the GDA Entities that Dragul's interests were adverse to those of the Entities;

c. Placing their own and Dragul's financial interests above the GDA Entities and their investors;

d. Failing to act in the best interest of the GDA Entities and instead placing the Kahn Defendants' interests and Dragul's interests above those of the GDA Entities; and

e. Other acts or omissions which may be identified through discovery and shown at trial.

253. The Kahn Defendants' acts or omissions as described in this claim for relief were breaches of the fiduciary duties described above that they owed to the GDA Entity investors and were intentional as well as willful and wanton.

254. The Kahn Defendants' actions or omissions were intentionally designed to enrich themselves to the detriment of the GDA Entity investors and were intentionally designed to conceal material information from the GDA Entity investors, all to their detriment.

255. As a proximate cause of the Kahn Defendants' breaches of their fiduciary duties, the Estate suffered damages and losses.

XV. ELEVENTH CLAIM FOR RELIEF: Fraudulent Transfer – Colo. Rev. Stat. § 38-8-105(1)(A) *(against all Defendants)*

256. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

257. At all times relevant hereto, and with respect to the illegal and undisclosed Commissions, there existed one or more creditors whose claims arose either before or after their payment.

258. The Commissions were transfers made in furtherance of Dragul's Ponzi scheme with the actual intent to hinder, delay, and defraud creditors. *See* ¶¶ 20, 24, 36, 46, 52-53, 56, 61, 64, 70, 78, 83, 85, 92, 95, 99-100, 108, 124, 127-133, 136, and 145-165, *supra*.

259. Pursuant to C.R.S. § 38-8-110(1)(a), the Receiver is entitled to recover the entire amount of the illegal and undisclosed Commissions.

260. Pursuant to C.R.S. §§ 38-8-108(1)(a) and 38-8-109(2), the Receiver is entitled to a judgment avoiding the payment of all Commissions to Defendants, directing the Commissions be set aside, and recovering the Commissions, or the value thereof, from Defendants for the benefit of the Estate.

XVI. TWELFTH CLAIM FOR RELIEF: Constructive Fraud – Colo. Rev. Stat. § 38-8-105(1)(B) *(against all Defendants)*

261. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

262. At all relevant times, and with respect to the Commissions, there existed one or more creditors whose claims arose either before or after payment of those Commissions.

263. Defendants did not provide reasonably equivalent value in exchange for the Commissions. *See* ¶¶ 20, 24, 36, 46, 52-53, 56, 61, 64, 70, 78, 83, 85, 92, 95, 99-100, 108, 124, 127-133, 136, and 145-165, *supra*.

264. At the time of the Commissions, the Sham Business was engaged or about to engage in a business or a transaction for which its remaining assets were unreasonably small in relation to the business or transaction.

265. At the time of the Commissions, the Sham Business intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due.

266. As a result of the foregoing, pursuant to C.R.S. § §§ 38-8-108(1)(a) and 38-8-109(2), the Receiver is entitled to a judgment for the amount of the Commissions that were made within four years of the date this Complaint is filed, directing that those Commissions be set aside, and recovering those Commissions, or the value thereof, for the benefit of the Estate.

XVII. THIRTEENTH CLAIM FOR RELIEF:
Unjust Enrichment
(against all Defendants)

267. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

268. By virtue of the Commissions, Defendants have each received benefits at the Estate's expense and at the expense of other creditors that would make it unjust for them to retain those benefits without paying the Estate the value thereof.

XVIII. FOURTEENTH CLAIM FOR RELIEF:
Turnover
(against All Defendants)

269. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

270. Pursuant to paragraphs 10 and 11 of the Receivership Order, all persons in active participation with, or creditors of, Dragul and the GDA Entities or who hold property of the Estate have been "ordered to deliver immediately to the Receiver all of the Receivership Property." *See* **Ex. 1**, at ¶¶ 10 – 11.

271. The Commissions are property of the Estate subject to recovery by the Receiver under the Receivership Order which have not been turned over to the Receiver.

PRAYER FOR RELIEF

The Receiver requests that judgment enter in his favor and against Defendants for:

A. compensatory damages to Plaintiff and the Receivership Estate or, alternatively, requiring Defendants to disgorge or pay restitution of their ill-gotten gains;

B. awarding treble damages pursuant to COCCA, C.R.S. § 18-17-106(7) and C.R.S. § 18-4-405 (civil theft).

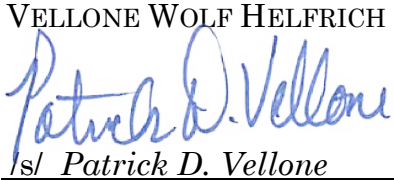
C. Pre- and post-judgment interest from the date of each undisclosed and illegal Commission paid to Defendants, and costs; and

D. Reasonable and necessary attorney's fees and costs; and

E. For such other relief as may be just and proper in the circumstances.

Dated: January 21, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



By: */s/ Patrick D. Vellone*

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