

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433</p>	
<p>Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC</p>	
<p>Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1900 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 2018CV33011</p> <p>Division/Courtroom: 424</p>
<p>RECEIVER’S RESPONSE TO HERSHEY’S MOTION TO INTERVENE</p>	

Receiver, Harvey Sender, hereby responds to the Motion to Intervene (“Motion to Intervene”) filed March 31, 2020 by Marlin Hershey (“Hershey”) and Performance Holdings, Inc. (“PHI”) (jointly, “Movants”).

I. Introduction

Movants seek to intervene in this case permissively to obtain relief from this Court's August 30, 2018, Stipulated Order Appointing Receiver ("Receivership Order"), at least one provision of which Movants contend was entered "inadvertently or improvidently." Mot. at 4, ¶ 5. The Receivership Order grants the Receiver "all the powers and authority usually held by equity Receivers and reasonably necessary to accomplish the purposes stated herein, including"¹ the authority

To prosecute claims and causes of actions 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.

Receivership Order ¶ 13(s). This provision was included because individual creditors and investors often lack the resources necessary to prosecute claims, and to avoid a multiplicity of lawsuits by individuals seeking to benefit only themselves rather than creditors as a whole. It is customary and appropriate to centralize authority in a receiver who can assert claims for the benefit of all victims. *See, e.g., SEC v. Callahan*, 193 F. Supp. 3d 177, 206 (E.D.N.Y. 2016) (receiver charged with maximizing value of receivership assets for the benefit of all defrauded investors and creditors).

Movants are defendants in *Sender v. Dragul et al.*, No. 2020CV30255, before Division 414 (The Honorable Robert L. McGahey Jr.) (the "**Insider Case**"). They are also defendants in an SEC enforcement action in North Carolina, *SEC v. Bradley, et al.*, 3:19-cv-00490 (W.D.N.C. Compl. filed Sept. 30, 2019). Movants were Dragul

¹ Receivership Order ¶13(o).

insiders and conspired with him to perpetrate his Ponzi scheme. Both the Insider Case and the SEC action allege, *inter alia*, that Movants defrauded investors. Movants received more than \$2.8 million in undisclosed commissions from Dragul for their part in the Ponzi scheme.

The Commissioner filed this case on August 15, 2018, in part to shut down the scheme. Two weeks later, Dragul and GDA² stipulated to the appointment of the Receiver and entry of the Receivership Order. Movants incorrectly intimate that the Receivership Order was unilaterally imposed by the Commissioner. *See* Mot. at 3. To the contrary, it was negotiated with Dragul and his counsel, and Dragul and his counsel stipulated to it.

The Receivership Order was entered more than a year and seven months ago. Since September 2018, it has governed and guided the administration of this complex and contentious case. Relying in part on the authority granted in ¶ 13(s), the Receiver has invested significant resources investigating and bringing claims against Dragul's insiders/co-conspirators, including Movants. Faced now with litigation seeking to hold them accountable, Movants belatedly seek to intervene and file a declaratory judgment action to vacate a provision of the Receivership Order on which the Commissioner, the Receiver, and all parties-in-interest have relied for over eighteen months. Movants cite no authority to support overturning this Court's long-standing Receivership Order.

² GDA Real Estate Services, LLC and GDA Real Estate Management, Inc. (jointly "GDA").

II. Movants are not entitled to intervene.

A. The Motion to Intervene is untimely and intervention would prejudice the Estate and its creditors.

Under C.R.C.P. 24(b)(1), permissive intervention may be granted, at the Court's discretion, when a statute grants a conditional right to intervene, or under C.R.C.P. 24(b)(2) "when an applicant's claim or defense and the main action have a question of law or fact in common." Intervention under Rule 24(b)(2) is always discretionary. *In re K.L.O-V.*, 151 P.3d 637, 642 (Colo. App. 2006). But as explicitly provided in the Rule, it must be timely sought. *E.g., Grijalva v. Elkins*, 287 P.2d 970, 972 (1955). When exercising its discretion, the Court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."³ See *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998); *K.L.O-V.*, 151 P.3d at 642. Movants seek to intervene so they can file a new action seeking to overturn an essential provision of the Receivership Order they no longer find to their liking. Allowing intervention at this late date would delay this case and substantially prejudice the Estate and its creditors.

Although orders appointing receivers are not final, they are appealable by right, C.A.R. 1(a)(4), but appeals must generally be filed within 49 days. C.A.R. 4. Any motion seeking reconsideration of an order appointing a receiver must be filed within 14 days. C.R.C.P. 121, § 1-15(11). Having failed to avail themselves of these

³ Movants do not seek to intervene as of right under C.R.C.P. 24(a). Although they don't cite which subsection of Rule 24(b) they rely on, their failure to cite any statute allowing for permissive intervention indicates they rely on 24(b)(2).

challenges, Movants belatedly seek to intervene to do so. The time for Movants to challenge the Receivership Order has long-expired.

Movants have long been aware of the Receivership Order. On October 24, 2018, the Receiver filed his Motion to Establish Claims Administration Procedure and to Set Claims Bar Date. The Court granted that motion on November 13, 2018, and the Receiver thereafter sent notice of the claims bar date to all known creditors and parties-in-interest, including Movants.

On January 30, 2019, Hershey timely filed a claim against the Estate. **Exhibit 1.** Movants were aware of the Receivership Order and the claims administration process established under it and had no objection while the Order redounded to their benefit. Now, fourteen months after filing their claim, they want to overturn an essential provision of the Order upon which the Commissioner, the Receiver, and creditors have relied, and pursuant to which the Receiver has expended significant resources.

The Commissioner negotiated the Receivership Order *with* Dragul and his counsel, who had significant input into the Order, and stipulated to it. The Commissioner has relied on the specific grant of authority to the Receiver to pursue creditor claims as provided for in the Order by not investigating or pursuing independent claims under the Colorado Securities Act.

The Receiver has relied on the Order by expending significant resources investigating, bringing, and prosecuting claims for the benefit of creditors. Other creditors have also presumably relied on the Order and potentially refrained from

filing independent actions against Movants understanding the Receiver had been granted specific authority to do so. Movants are barred by laches from now belatedly challenging the Receivership Order. *See, e.g., Hickerson v. Vessels*, 2014 CO 2 ¶ 12, (essential element of laches is unconscionable delay in enforcing a right usually prejudicing another party).

Not only is the Motion to Intervene untimely, granting it would prejudice the existing parties and further delay this case. Movants have already asked Judge McGahey to stay the filing of their responsive pleadings in the Insider Case until their Motion to Intervene is decided and their complaint adjudicated. *See* Motion of Hershey Defendants to Stay Response to Complaint, No. 2020CV30255 (Denver Dist. Ct. Mar. 31, 2020) (**Exhibit 2**). A week later, Judge McGahey granted that stay motion. **Exhibit 3**. Allowing Movants to intervene will require them to serve their new complaint in this case on all creditors and parties-in-interest who must be given notice and an opportunity to be heard. Granting intervention will therefore substantially delay and interfere with the administration of this case and bring the entire Insider Case to a halt.

B. The fundamental premise of the Motion to Intervene is incorrect.

The substantive lynchpin of the Motion to Intervene is its incorrect assertion that the sole basis for the Receiver's standing in the Insider Case is paragraph 13(s) of the Receivership Order. Mot. at 2. Although this Court is not the appropriate forum to litigate this standing question – which has been raised in motions filed by *other defendants* in the Insider Case, but *not Movants* – the Receiver does have an

independent basis for standing there. *See, e.g., Wing v. Dockstader*, 482 F. App'x 361, 364-65 (10th Cir. 2012) (receiver had standing to pursue fraudulent transfer claims on behalf of creditors); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008) (same); *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995) (same); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at * 2-3 (D. Utah May 14, 2009) (same, citing cases); *see also Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1002 (8th Cir. 2007) (trustee has standing to assert professional negligence claims); *Marion v. TDI Inc.*, 591 F.3d 137, 148-9 (3rd Cir. 2010) (receiver had standing to bring aiding and abetting claims); *Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230, 237 (7th Cir. 2003) (receiver had standing bring claim for negligent supervision).

Movants cite cases that do not support their position that paragraph 13(s) of the Receivership Order grants the Receiver *ultra vires* powers. The only Colorado case Movants cite does not discuss a receiver standing at all and simply provides that “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 Colo., Inc. v. Dep't of Health*, 789 P.2d 423, 425 (Colo. App. 1989). Yet the Court of Appeals' affirmed the trial court's determination that the receiver *could* retain funds the entity in Receivership could not, and “that the receiver does not stand in the shoes” of the entity's operator. *Id.* at 426.

Movants also cite *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990), which does provide that an equity receiver lacks standing to assert investor claims, but it confirmed a receiver does have standing to bring claims on behalf of the

entities under receivership which were harmed by the fraud perpetrated by their operator. In the Insider Case, the Receiver brings claims to address harm to the Receivership entities and derivatively to their investors. Later federal cases distinguishing *Fleming* point out that a receiver “representing a corporate entity used to perpetrate a Ponzi scheme has standing to bring claims against third-party recipients of the entity’s assets that were wrongfully transferred by the Ponzi scheme’s principal.” *Ashmore for Wilson v. Dodds*, 262 F. Supp. 3d 341, 349 (D.S.C. 2017); *Quilling v. Grand St. Tr.*, No. 3:04 CV 251, 2005 WL 1983879, at *5 (W.D.N.C. Aug. 12, 2005) (receiver had standing to bring claims on behalf of entities for the benefit of investors).

But the nature of the claims asserted in the Insider Case, and the Receiver’s standing to assert them, must be addressed in the Insider Case, not here. Regardless of whether this Court grants leave to intervene, these issues will have to be decided in the Insider Case. For example, if this Court were to grant leave to intervene, and ultimately vacate ¶ 13(s), the Receiver will still argue in the Insider Case that he has standing based on the above and other authorities. And if the Court denies leave to intervene, the standing issue will still have to be decided in the Insider Case.⁴ So, granting leave to intervene will unnecessarily duplicate proceedings, delay both cases, and prejudice the parties here. The Court should therefore deny Movant’s belated request to intervene. *See Callahan*, 193 F. Supp. 3d at 202 (denying motion

⁴ Although the Receiver filed a Notice of Related Case in the Insider Case and this Case on January 22, 2020, the Insider Case remains before Division 414.

to intervene seeking to amend receivership order as untimely when filed one year and five months after order entered).

C. This Court and its sister divisions have denied intervention in similar cases.

The Colorado Supreme Court has determined that investors and creditors have no right to intervene in a securities case where the Commissioner can adequately protect their interests. *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 30 (Colo. 2001). Although Movants do not seek intervention as of right and are not investors or creditors, under *Alexa*, intervention in Commissioner cases is disfavored.

Indeed, the Commissioner has successfully opposed intervention in similar enforcement actions,⁵ and this Court has denied two such motions in this very case. *See* Order Vacating Order Granting Motion to Intervene (Jan. 15, 2019) (vacating order granting creditor's motion to intervene, which was erroneously filed as unopposed); Order Denying Motion by Aaron Metz to Intervene and to Lift Stay for Limited Purposes (Jan. 20, 2020) (denying motion to intervene filed by a defendant in an unrelated action). There is no reason to deviate from these previous decisions now.

⁵ *See, e.g.*, Order Denying Schott's Motion to Intervene for an Order Securing Funds, *Joseph v. Providence Fin. Servs., Inc.*, No. 2013 CV 31667 (Denver Dist. Ct. Jan. 9, 2014) (**Exhibit 4**); Order Regarding Motion to Intervene of Applicants, *Joseph v. Mueller*, No. 2010 CV 3280 (Denver Dist. Ct. Nov. 23, 2010) (**Exhibit 5**).

III. Conclusion

Granting leave to intervene here will result in duplicative litigation, the potential for inconsistent rulings, and will delay both this case and the Insider Case. The Court should therefore deny the Motion to Intervene.

Dated: April 27, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



/s/ Michael T. Gilbert

Patrick P. Vellone, #15284
Michael T. Gilbert, #15009
Rachel A. Sternlieb, #51404

Attorneys for Harvey Sender, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I served a true and correct copy of the foregoing **RECEIVER'S RESPONSE TO HERSHEY'S MOTION TO INTERVENE** via CCE or first-class mail, postage prepaid, to the following:

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*Counsel for Defendants, Gary Dragul,
GDA Real Estate
Services, LLC and GDA Real
Estate Management, LLC*

/s/ Salowa Khan
Allen Vellone Wolf Helfrich & Factor, P.C.

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	
Plaintiff: Gerald Rome, Securities Commissioner for the State of Colorado v. Defendants: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case Number: 2018CV33011 Division/Courtroom: 424
CLAIM FORM	

The undersigned Claimant hereby asserts a claim against the Receivership Estate of Gary J. Dragul (“Dragul”); GDA Real Estate Services, LLC; GDA Real Estate Management, LLC; and related entities (collectively, “Dragul and the GDA Entities” or the “Estate”).

1. Amount of Claim as it existed on August 30, 2018.

Claim is asserted against:	Summit 06 A, LLC and PR Investments, Inc.
Actual damages:	\$350,000.00
Consequential and other damages, if any:	
Interest, if any:	
Attorneys’ fees and costs, if any:	
Other:	
TOTAL:	\$350,000.00

2. The foregoing claim arose on **12/01/2018**, and is based upon the following events:

Attached please find copies of the K1's and agreements.

DOCUMENTS SUPPORTING THE CLAIM MUST BE ATTACHED TO THIS CLAIM FORM.

3. This claim is:

Secured by the following collateral or security:

Personal Guaranty by Gary Dragul

4. If the claim is secured, please identify the location of all collateral:

5. If the claim includes interest, please specify each of the reasons for such interest and the rate thereof (e.g. contract, statute, etc.):

6. The nature and value of any offset or counterclaim (i.e., money or property that you owe Dragul, the GDA Entities, or the Estate, or any claims that Dragul, the GDA Entities, or the Estate may have against you):

7. If you are represented by an attorney, please provide details:

Not represented by an attorney.

CLAIMANT HEREBY CERTIFIES THAT IT HAS DISMISSED ANY OTHER PENDING SUITS OR PROCEEDINGS IT HAS COMMENCED AGAINST DRAGUL, THE DRAGUL ENTITIES, OR THE RECEIVERSHIP ESTATE AND THAT IT WILL NOT FILE (OR RE-FILE) ANY SUIT OR PROCEEDING IN ANOTHER FORUM WITHOUT THE RECEIVER'S PERMISSION OR LEAVE OF THIS COURT.

8. I hereby certify and attest, under the penalty of perjury, that the information contained in the foregoing Claim Form is true and correct:

Claimant Name: Marlin Hershey

Claimant Address:

Street Address: 7930 W. Kenton Circle
City: Huntersville State: North Carolina
Zip Code: 28078

Claimant Phone Number: (704) 905-2931

Claimant Facsimile Number:

Claimant Email: marlin@performanceholdings.com

Marlin Hershey

Dated: 1/30/2019

DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

DATE FILED: March 31, 2020 2:57 PM
FILING ID: 720E2E989B59A
CASE NUMBER: 2020CV30255

▲ COURT USE ONLY ▲

Plaintiffs: HARVEY SENDER, AS
RECEIVER FOR GARY DRAGUL;
GDA REAL ESTATE SERVICES,
LLC; AND GDA REAL ESTATE
MANAGEMENT, LLC

Case Number: 20CV30255

vs.

Defendants: GARY 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

Courtroom: 414

Counsel for Defendants :

Thomas E. Goodreid
Paul M. Grant
Goodreid and Grant LLC
1801 Broadway, Suite 1400
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Atty. Reg. #: 25281 (Goodreid)
Atty. Reg. # 26517(Grant)

MOTION OF HERSHEY DEFENDANTS TO STAY RESPONSE TO COMPLAINT

Defendants Performance Holdings, Inc., and Marlin Hershey (collectively the “Hershey

Defendants”), through counsel, move for a stay¹ of their response to the Complaint, pending resolution of the Hershey Defendants’ Motion to Intervene in the related case² of Rome v. Dragul, et. al., Denver District Court Case No. 18CV33011, Division 424 (“Receivership Case”). In support of this Motion, the Hershey Defendants state as follows.

1. This action was filed on 21 January 2020. The Hershey Defendants were served with summonses and copies of the Complaint on 4 February 2020. By order of this Court dated 11 March 2020, the Hershey Defendants were given until 31 March 2020 to file a response to the Complaint.

2. Various co-Defendants have filed motions to dismiss the Complaint. As relevant here, co-Defendants Fox and Dragul have argued that the Complaint must be dismissed because the Plaintiff, Harvey Sender, as a receiver for Mr. Dragul and related corporate entities, lacks standing to pursue claims on behalf of creditors against Dragul and against Fox. Pointedly, Fox and Dragul contend that the law does not permit a receiver to be granted such authority. Their argument applies with equal force to the Hershey Defendants.

3. However, the lack of authority at common law for a receiver to pursue claims of creditors notwithstanding, there nonetheless is an extant Order from Courtroom 424 (“424 Order”) in the Receivership Case that states to the contrary (Exhibit A). To wit, paragraph 13(s) of the 424 Order states that:

[t]he Receiver shall have all the powers and authority usually held by equity receivers and reasonably necessary to accomplish the purposes stated herein, including, but not limited to, the following powers which the Receiver may execute without further order of this Court, except as expressly provided herein:
... (s) To prosecute claims and causes of actions 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;

4. This language is a small part of a 22 page order that had been stipulated to by the parties in the Receivership Case and therefore that may not have received much scrutiny from Judge Egelhoff prior to issuance of the order. Nonetheless, paragraph 13(s) (“The Paragraph”) stands as part of an Order from Courtroom 424. Plaintiff in this matter presumably will rely upon The Paragraph to rebut the arguments of Dragul and Fox that the Receiver has no standing to bring claims against them on behalf of creditors.

5. In their respective motions to dismiss, Fox and Dragul acknowledge the existence of the 424 Order but ask this Court to ignore the Order, contending, in effect, that the Order unlawfully confers standing (*i.e.*, subject matter jurisdiction) upon the Receiver, an act which was outside the authority of Judge Egelhoff. For their part, the Hershey defendants are uncomfortable with simply asking this Court to ignore the 424 Order, particularly in light of the Colorado Supreme Court’s ruling in State for Use of Dep’t of Corr. v. Pena, 911 P.2d 48 (Colo. 1996). Therein, this State’s High Court held that “[a] district court may not assume the authority or

¹ In conformity with C.R.C.P. 121 § 1-15(8), Mr. Grant co-counsel for the Hershey Defendants conferred regarding this Motion with Plaintiff’s counsel, who advised that the Plaintiff’s oppose the relief requested herein.

² Please see Plaintiff’s 22 January 2020 Notice of Related Case for additional details.

power to superintend or review the propriety of or supervise the judgment of another district court. . . ***Thus, even if a court enters an erroneous judgment, that judgment is not subject to collateral attack by another court of coordinate jurisdiction.***” *Id.* at 57. (emphasis added).

6. Fox and Dragul may contend that Pena is distinguishable and does not apply to the situation at hand. Nonetheless, to the extent that Pena does control the question of this Court’s stance on the 424 Order, this Court is powerless to ignore or override same. Moreover, even to the extent that Pena does not apply here, this Court nonetheless would be placed in the awkward position of reviewing the efficacy or validity of an Order issued by a fellow member of this same Court.

7. As such, the Hershey Defendants believe that the only sensible approach to this matter is to ask Judge Egelhoff to consider, with the benefit of full briefing this time around, the question of the legitimacy of a receiver’s standing to pursue claims of creditors of the receivership estate. To that end, the Hershey Defendants have filed earlier today a motion to intervene in The Receivership Case for the express purpose of challenging the efficacy of The Paragraph. If intervention by the Hershey Defendants is granted and the challenge to The Paragraph is successful, then Plaintiff’s standing to bring the claims in this case will be eliminated and dismissal of this action against at least the Hershey Defendants, Fox, and Dragul will be warranted. On the other hand, if the Hershey Defendants do not prevail on their challenge to The Paragraph in front of Judge Egelhoff, the Hershey Defendants can otherwise respond to the Complaint in this case.

8. Accordingly, the Hershey Defendants ask for a stay³ of their response to the Complaint until their motion to intervene and, if granted, their attack on The Paragraph, are resolved by Judge Egelhoff in the Receivership Case. The Hershey Defendants SO MOVE.

Dated this 31st day of March 2020.

Respectfully Submitted

S/Thomas E. Goodreid
Thomas E. Goodreid

³ If this Court should deny this request for stay, the Hershey Defendants respectfully request ten days from the date of the denial to file a response to the Complaint.

CERTIFICATE OF ELECTRONIC FILING

Pursuant to Colorado Rule of Civil Procedure 121 sec. 1-26(7), I hereby certify that an original of this **MOTION OF HERSHEY DEFENDANTS TO STAY RESPONSE TO COMPLAINT** (with original signatures), which was e-filed, is maintained by my office and is available for inspection by other parties or the Court upon request.

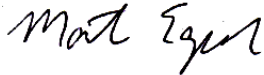
S/Thomas E. Goodreid
Thomas E. Goodreid

EXHIBIT A

DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	DATE FILED: August 30, 2018 8:37 AM CASE NUMBER: 2018CV33011 CASE NUMBER: 2020CV30255
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF v. Defendant(s) GARY DRAGUL et al.	△ COURT USE ONLY △ Case Number: 2018CV33011 Division: 424 Courtroom:
Order: (Proposed) Stipulated Order Appointing Receiver also filed on behalf of Defendants Gary Dragul and GDA Real Estate Service, and GDA Real Estate Management LLC)	

The motion/proposed order attached hereto: SO ORDERED.

Issue Date: 8/30/2018



MARTIN FOSTER EGELHOFF
District Court Judge

<p>DISTRICT COURT, DENVER COUNTY, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>GERALD ROME, Securities Commissioner for the State of Colorado,</p> <p>Plaintiff,</p> <p>v.</p> <p>GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>BY THE COURT</p>	<p>Case No.: 2018 CV 33011</p> <p>Courtroom: 424</p>
<p>STIPULATED ORDER APPOINTING RECEIVER</p>	

THIS MATTER having come before this Court on the Stipulated Motion to Appoint Receiver (the “Motion”) filed by the Plaintiff Gerald Rome, Securities Commissioner for the State of Colorado and Defendants Gary Dragul (“Dragul”), GDA Real Estate Services, LLC (“GDARES”), and GDA Real Estate Management, Inc. (“GDAREM”), and the Court, being otherwise fully advised in the premises,

HEREBY FINDS:

1. The Court has jurisdiction and venue is proper pursuant to C.R.C.P. 98(a).
2. Dragul is an individual and a resident of Colorado, and the manager of

GDARES and GDAREM, among other businesses.

3. GDARES is a Colorado limited liability company with its principal place of business at 5690 DTC Blvd., Suite 515, Greenwood Village, Colorado 80111.

4. GDAREM is a Colorado corporation with its principal place of business at 5690 DTC Blvd., Suite 515, Greenwood Village, Colorado 80111.

5. The Parties have stipulated to the appointment of a Receiver without bond or other security for Dragul, GDARES, and GDAREM, as well as for their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses as set forth herein.

6. The appointment of a receiver is reasonable and necessary for the protection of the assets and the rights of the parties in this case. Based on the standards set forth in C.R.C.P. 66 and case law thereunder, the Parties have stipulated that the Commissioner is entitled to entry of this Order.

7. Nothing in this stipulated Order shall be deemed an admission by Dragul to any allegations or as a waiver of any defenses thereto or limit Dragul's 4th, 5th, or 6th Amendment rights or other Constitutional and statutory protections and privileges afforded to any criminal defendant, or prevent him from invoking such rights in his personal capacity. Nothing in this Order operates as a waiver or an abrogation of the attorney-client privilege held by Dragul in his personal capacity.

8. Harvey Sender of Sender & Smiley LLC, has been determined to be suitable to serve as Receiver for Dragul (as such term is defined below in this

Order), GDARES and GDAREM, as set forth in this Order. Mr. Sender's business address is 600 17th Street, Suite 2800, Denver, Colorado 80202.

IT IS THEREFORE ORDERED THAT:

9. Harvey Sender ("the Receiver") is hereby appointed as Receiver for Dragul (limited to the definition of the "Receivership Property" or "Receivership Estate" as defined herein), GDARES, GDAREM, and all of their assets, including, but not limited to, all real and personal property, including tangible and intangible assets, their interests in any subsidiaries or related companies, management and control rights, claims, and causes of action, wherever located, including without limitation the "LLC Entities" identified in the Commissioner's Motion and Complaint for Injunctive and Other Relief, or assets (including those of Dragul) of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the Complaint, or derived indirectly or indirectly from investor funds (the "Receivership Property," and altogether this "Receivership Estate"). Except that the personal residence of Dragul, located at 10 Cherry Vale Drive, Englewood, Colorado 80113, shall not be considered "Receivership Property" or part of the "Receivership Estate," unless the Receiver determines that an improvement to or increase in equity in such residence is directly related to the proceeds from the sale of the securities or matters referenced in the Complaint, in which case the improvements or equity shall be considered "Receivership Property" or part of the "Receivership Estate." Consistent with

Colorado's dissolution statutes and applicable law, and as set forth in greater detail below, the Receiver may, in the exercise of his reasonable judgment, investigate any claims and causes of action which may be pursued for the benefit of Dragul, GDARES, GDAREM, their creditors, members, and equity holders, and make recommendations to interested parties and this Court regarding the prosecution of any such claims and causes of action; establish a process for the assertion of claims against the Receivership Estate; make recommendations to this Court for the allowance and payment of such claims; and investigate and make recommendations to this Court for the ongoing operation, sale or distribution of any remaining Receivership Property, or the proceeds thereof, pursuant to the terms hereof.

10. Dragul, GDARES, and GDAREM, and all persons in active participation them, including without limitation, their officers and directors, partners, managers, employees, agents, representatives, attorneys, accountants, banks, contractors, subcontractors, and all who claim under them (collectively, the "Representatives"), are hereby ordered to deliver immediately to the Receiver or his agents all of the Receivership Property and to fully cooperate with the Receiver including, but not limited to, providing the Receiver all reasonably requested documents, records, bank accounts, trust accounts, deposit accounts, savings accounts, money market accounts, and all other demand deposit accounts, inventory, supplies, contracts, accounts receivable, computer databases, sales and marketing materials; together with stock certificates or other indicia of

ownership of any subsidiaries or related companies, and any and all reasonably requested documents, records, bank accounts, trust accounts, deposit accounts, savings accounts, money market accounts, and all other demand deposit accounts, inventory, supplies, contracts, accounts receivable, computer databases, sales and marketing materials, related to the operation of any subsidiaries or related companies. Dragul, GDARES, and GDAREM and their Representatives, when necessary or when requested (subject to Dragul's Constitutional protections, including the Fifth Amendment), shall explain the operation, maintenance and management of the Receivership Property, including any subsidiaries or related entities or companies, to the Receiver or his agents, without compensation therefor. Any claims for nonpayment for services shall not be used as a defense to turning over Receivership Property. All privileges in connection with professional representation of GDARES and GDAREM shall accrue to the sole benefit of the Receiver and the Receivership Estate and may only be waived by the Receiver, except that Dragul maintains all such privileges in his personal capacity. The Receiver may request supplemental authority from this Court upon proper motion, if necessary, to obtain the cooperation of any Representatives or any other foregoing persons acting on behalf of or for Dragul, GDARES and GDAREM, to comply fully and completely with this Order.

11. Any creditors of Dragul, GDARES or GDAREM that are in the possession of, or have taken any action to seize any books, records, or assets of the Receivership Estate (hereinafter called "Creditors") and all persons in active

participation with such Creditors, including without limitation, such Creditors' officers, managers, members, employees, agents, representatives, attorneys, accountants, banks, contractors, subcontractors, and all who claim under them (hereafter called "Creditors' Representatives") are hereby ordered to deliver immediately to the Receiver all of the Receivership Property in such Creditors' or Creditors' Representatives' possession, and to fully cooperate with the Receiver in connection with such turnover. Any claims against Dragul, GDARES or GDAREM shall not be used as a defense to turning over as set forth in this paragraph. The Receiver may request supplemental authority from this Court upon proper motion, if necessary, to obtain the cooperation of Creditors or Creditors' Representatives or any other foregoing persons acting on behalf of or for the Creditors to comply fully and completely with this Order.

12. If the Receiver determines, after reasonable inquiry that a person or entity is in violation of the turnover provisions set forth in Paragraphs 9 and 10 of this Order, the Receiver is instructed to give written notice thereof to the person or entity violating such provisions, with a copy of this Order attached, demanding turnover of such Receivership Property. If the person or entity in possession fails or refuses to turn over the Receivership Property after receiving notice, the Receiver shall file a Request for an Order to Show Cause with this Court.

13. The Receiver shall have all the powers and authority usually held by equity receivers and reasonably necessary to accomplish the purposes stated

herein, including, but not limited to, the following powers which the Receiver may execute without further order of this Court, except as expressly provided herein:

(a) To take from Dragul's, GDARES' and GDAREM's Representatives, and all persons acting in participation with Dragul, GDARES and GDAREM, and from Creditors and Creditors' Representatives, immediate possession and control of all of the assets of Dragul, GDARES and GDAREM, including the Receivership Property, to the exclusion of Dragul, GDARES and GDAREM, and their Representatives or all persons acting in participation with Dragul, GDARES and GDAREM, and Creditors and Creditors' Representatives;

(b) To exercise such control over all subsidiaries and related companies owned or managed by Dragul, GDARES and GDAREM, consistent with the governance documents or operating agreements applicable to the subsidiaries and related companies, including to exercise all rights of Dragul, GDARES and GDAREM to elect new officers, directors, or management of the subsidiaries and related companies, in their respective capacities and not as an assignee;

(c) To take charge of the subject Receivership Property, regardless of where such property is located, including, but not limited to, bank accounts, cash, checks, drafts, notes, security deposits, bonds, books, records, contracts, claims, leases, files, furniture, certificates, licenses, fixtures and equipment, property located in any real property either owned or leased by Dragul, GDARES and GDAREM and any personal property located in storage facilities;

(d) As appropriate, to take possession of offices of Dragul, GDARES

and GDAREM and to change any and all locks on such offices and to limit access to such offices to the Receiver and his agents, subject to any privileges maintained by Dragul in his personal capacity;

(e) To collect in a timely fashion all accounts receivable and other obligations due to Dragul, GDARES and GDAREM, including, as necessary to negotiate and deposit checks made payable to them into accounts maintained by the Receiver and as necessary to review mail directed to Dragul, GDARES and GDAREM and their Representatives in order to collect incoming accounts receivable and other obligations due and owing to Dragul, GDARES and GDAREM;

(f) To contract for and obtain such services as utilities, supplies, equipment and goods as is reasonably necessary to manage, preserve, and protect the Receivership Property as the Receiver may reasonably deem necessary; however, no contract shall extend beyond the termination of the Receivership without the permission of the Court;

(g) To obtain, review and analyze Dragul, GDARES and GDAREM books and records relating to the Receivership Property, including without limitation accounting records, banking records, tax records, and any other books or documents necessary to perform the duties of the Receiver;

(h) To pay, at the Receiver's discretion, any obligations incurred by Dragul, GDARES and GDAREM prior to the appointment of the Receiver that are deemed by the Receiver to be necessary or advisable for the preservation or protection of the Receivership Property;

(i) To borrow from third parties on such reasonable terms as may be acceptable to the Receiver, such funds that may be required for the fulfillment of the Receiver's obligations hereunder, and to meet the needs of the Receivership Estate in excess of the income from the Receivership Estate. The Receiver may issue Receiver's Certificates secured by all assets of the Receivership Estate, including, but not limited to, all claims on insurance policies, surety bonds, and similar assets of the Receivership Estate, in exchange for funds advanced during the term of this receivership, and such Receiver Certificates shall be a first and prior lien and preference claim upon the Receivership Property or a portion of it at the Receiver's election;

(j) To open and maintain accounts at a financial institution insured by the federal government in the name of the Receiver and to deposit all sums received by the Receiver into such account and to make such withdrawals as are necessary to pay the reasonable costs and expenses incurred by the Receiver;

(k) To exercise all rights of an owner incidental to the ownership of the Receivership Property;

(l) To hire and pay general counsel, accounting, and other professionals as may be reasonably necessary to the proper discharge of the Receiver's duties, and to hire, pay and discharge the personnel necessary to fulfill the obligations of the Receiver hereunder, including the retention of companies affiliated with the Receiver, or other third parties to assist the Receiver in the performance of its duties hereunder, all within the Receiver's discretion;

(m) In the Receiver's discretion as appropriate, to hire and pay employees with the necessary skills and experience to operate GDARES and GDAREM efficiently and with least amount of cost or expense, and to preserve the assets of GDARES and GDAREM and the Receivership Estate.

(n) After consultation with the Commissioner and agreement on the amount and funding of a budget related thereto, to institute such legal actions as the Receiver deems reasonably necessary, including actions necessary to enforce this Order to protect the Receivership Property, and to prosecute causes of action of Dragul, GDARES and GDAREM against third parties in this or any other jurisdictions, including foreign countries;

(o) After consultation with the Commissioner and agreement on the amount and funding of a budget related to anticipated out of pocket expenses related thereto, to retain special counsel, and other professionals as needed, on a contingency fee basis containing commercially reasonable terms, as determined by the Receiver in the exercise of his reasonable business judgment, to recover possession of the Receivership Property from any persons who may now or in the future be wrongfully possessing Receivership Property or any part thereof, including claims premised on fraudulent transfer or similar theories, in this or any other jurisdictions, including foreign countries;

(p) To notify any and all insurers under insurance policies and issuers of surety bonds affecting the Receivership Property of the pendency of these proceedings, and that any proceeds paid under any such insurance policy or surety

bond shall be paid to the Receiver to be administered for the benefit of all creditors of Dragul, GDARES and GDAREM;

(q) To pay, at the Receiver's discretion, any obligations incurred by Dragul, GDARES and GDAREM prior to the appointment of the Receiver that are deemed by the Receiver to be necessary or advisable for the preservation or protection of the Receivership Property;

(r) To notify and make demands on any insurers under insurance policies and issuers of any such policies or surety bonds affecting Receivership Property for the turnover and payment of proceeds to the Receiver for the benefit of Creditors, and as necessary, and after consultation with Plaintiffs and agreement on the amount and funding of a budget related thereto, commence litigation against such insurers and/or sureties in order to recover the proceeds of such insurance policies and surety bonds for the benefit of Dragul, GDARES and GDAREM and their creditors; and further provided that, in connection with any such claims or causes of action, the Receiver shall not be deemed to be asserting claims of Dragul, GDARES and GDAREM pursuant to any "insured vs. insured" exclusions that may be set forth in such insurance policies or surety bonds, but rather shall, in accordance with subparagraph (p) below, be deemed to be prosecuting claims of creditors of Dragul, GDARES and GDAREM in connection therewith;

(s) To prosecute claims and causes of actions 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:

(t) In the Receiver's discretion as appropriate, to consider the potential sale of assets of Dragul, GARDES, and GARDEM to a third-party or to sell or otherwise dispose of any personal property of the Receivership Estate, provided that Court approval shall not be required of any sale or disposition of any property being sold for a sales price of less than \$10,000;

(u) To establish a procedure for the assertion of claims against Dragul, GDARES and GDAREM or the Receivership Property, for the resolution of any disputes regarding such claims, and for the distribution of the proceeds of the Receivership Property;

(v) To issue subpoenas, institute, prosecute, defend, compromise, or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as may in his discretion be advisable or proper for the protection, preservation and maintenance of the Receivership Assets or proceeds therefrom;

(w) To do such other and further lawful acts as the Receiver reasonably deems necessary for the effective recovery of the Receivership Property, and to perform such other functions and duties as may from time to time be required and authorized by this Court, by the laws of the State of Colorado, or the laws of the United States; and

(x) To do any and all acts necessary, convenient or incidental to the foregoing provisions of this Order and this equity receivership.

14. The Receiver is further directed to review the books and records of Dragul, GDARES and GDAREM, to account for receipts and disbursements of their funds, and to provide a report and accounting of their operations, for a period of time determined by the Receiver to be reasonable under the circumstances, to this Court and to the Commissioner, and any parties that have filed an entry of appearance herein. An initial report shall be filed with the Court within ninety (90) days of entry of this Order. In such report, the Receiver shall identify any claims and causes of action of Dragul, GDARES and GDAREM, identified as of the date of such report, including under insurance policies, on surety bonds, against any of their representatives or third parties, or arising under the Uniform Fraudulent Transfer Act, or any similar statute; and the Receiver's recommendations related thereto. The Receiver shall be authorized to act on his recommendations upon agreement with the Commissioner regarding budgets related to the prosecution thereof, and funding of such litigation, as set forth in this Order.

15. To the extent they have not already done so, Dragul, GDARES and GDAREM and their representatives, Creditors, and Creditors' Representatives, and their agents, are ordered to deliver over immediately to the Receiver, or his agents, all Receivership Property, including, but not limited to, unpaid bills, bank accounts, cash, checks, drafts, notes, security deposits, books, records, contracts, claims, leases, deeds, files, furniture, certificates, licenses, fixtures, escrow, sales contracts, equipment, and stock certificates or other evidence of ownership related to the Subsidiaries, relating to the Receivership Property and shall continue to

deliver immediately to the Receiver any such property received at any time in the future.

16. Any 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: (I) agree not to file or prosecute independent claims such parties may have (a) on insurance policies and surety bonds issued in connection with Dragul, GDARES and GDAREM operations, or (b) against Dragul, GDARES and GDAREM or any of their Representatives, and (II) promptly dismiss any lawsuits currently pending in connection therewith.

17. If necessary, the Receiver may request of this Court letters rogatory or commissions or supplemental orders as necessary to require out-of-state directors, officers, employees, agents, representatives, managers, attorneys, accountants, banks, contractors, or any other person acting in t participation with Dragul, GDARES and GDAREM and their Representatives, through the appropriate court of appropriate jurisdiction, to comply with any of the Orders of this Court.

18. The Receiver shall be compensated for his services at the rate of \$400 per hour, together with reimbursement for all reasonable costs and expenses incurred in connection with his duties, which compensation and reimbursement shall be paid from the assets of the Receivership Estate, proceeds of the disposition of Receivership Property, or the proceeds of loans secured by the Receiver.

19. Except as may be expressly authorized by the Court, Dragul, GDARES and GDAREM and all persons in active participation them, including without limitation, their officers and directors, partners, managers, employees, agents, representatives, attorneys, accountants, banks, contractors, subcontractors, and all who claim under them, are enjoined from:

- (a) Collecting any revenues from the Receivership Property, or withdrawing funds from any bank or other depository account relating to the Receivership Property;
- (b) Binding, or purporting to bind, Dragul, GDARES and GDAREM or the Receivership Estate, to any contract or other obligation;
- (c) Holding themselves out as, or acting or attempting to take any and all actions of any kind or nature as Representatives of Dragul, GDARES and GDAREM, or subsidiary entities they own or control, or in any other purported capacity, except with the permission of the Receiver or by further order of this Court; and
- (d) Otherwise interfering with the operation of the Receivership Property, or the Receiver's discharge of his duties hereunder.

20. Upon receipt of a copy of this Order, or upon actual knowledge of the entry of this Order, any other person or business entity shall also be bound by this Order.

21. Should the Receiver determine that tax returns were not filed for periods prior to the entry of this Order for which tax returns were required of

Dragul, GDARES and GDAREM, as funds are available in the Receivership Estate, the Receiver shall use reasonable efforts to have prepared and filed tax returns for any missing periods prior to the entry of this Order. To the extent it is determined that any outstanding tax obligations are due to the Internal Revenue Service, the Colorado Department of Revenue, or any other taxing authorities for any period of time prior to the entry of this Order, such taxes shall be paid, as funds are available in the Receivership Estate. The Receiver shall not be considered a responsible person, or otherwise have any personal liability, for any unpaid tax obligations of Dragul, GDARES and GDAREM (including for any trust fund taxes, such as payroll or sales tax) withheld but not paid to the proper taxing authority for any period prior to the entry of this Order. The Receiver shall file tax returns for periods commencing on the date of the entry of this Order through completion of the dissolution of Dragul, GDARES and GDAREM and discharge of the Receiver, as required by applicable federal, state, or local law.

22. The Receiver is directed and empowered to apply revenues, incomes and sales proceeds collected by the Receiver:

(a) First, to payment of costs and expenses of the Receivership Estate, and including the costs and expenses of preserving and liquidating the Receivership Property, taxes incurred from the appointment of the Receiver through the conclusion of the Receivership Proceeding and discharge of the Receiver, and to compensation due the Receiver and any employees, consultants, or professionals retained by the Receiver or employed by the Receiver to operate

GDARES or GDAREM;

(b) Second, to the payment of any outstanding Receiver's

Certificates;

(c) Third, to creditors holding obligations secured by the Receivership Property, in the order of their priority of record;

(d) Fourth, to the payment of any unsecured tax obligations determined to be due for periods prior to the entry of this Order, pursuant to the tax filing obligations imposed on the Receiver;

(e) Fifth, to the payment of unsecured creditors determined to hold legitimate claims against Dragul, GDARES and GDAREM pursuant to the claims administration procedure adopted by the Receiver, in their legal order of priority; and

(f) Sixth, to the preferred and common partners, members, or other equity interest holders of Dragul, GDARES and GDAREM, as their rights are defined in their governing documents, with the exception of any rights or interests held or owned by or for the benefit of Dragul, GDARES or GDAREM, or any insiders or related parties, with all such rights or interests to be determined by the Court.

23. The debts or liabilities incurred by the Receiver in the course of his operation and management of the Receivership Property, whether in the Receiver's name or in the name of the Receivership Property, shall be the debts and

obligations of the Receivership Estate only, and not of the Receiver in a personal capacity.

24. The Receiver shall enjoy and have the judicial immunity usually applicable to receivers in law and equity. All who are acting, or have acted, on behalf of the Receiver at the request of the Receiver are protected and privileged with the same judicial immunity as the Receiver has under this Order.

25. Nothing herein contained shall be construed as interfering with or invalidating any lawful lien or claim by any person or entity.

26. It is further Ordered that all actions in equity or at law against the Receiver, Dragul, GDARES and GDAREM, or the Receivership Estate are hereby enjoined (and any actions already pending are hereby stayed), pending further action by this Court. The Receiver is instructed to file a request for an Order to Show Cause if any business, entity, or person commences or continues the prosecution of any action in any other court seeking relief in equity or at law against the Receiver, Dragul, GDARES and GDAREM or the Receivership Estate without first seeking relief from this stay of proceedings.

27. The Receiver shall continue in possession of the Receivership Property until the completion of the disposition of this litigation which may anticipate the wind-up of the affairs of Dragul, GDARES and GDAREM.

28. Dragul, GDARES and GDAREM, and their Representatives, or anyone else in possession of records related to the Receivership Property, shall respond in a timely fashion to requests and inquiries from the Receiver concerning

such records, record keeping protocols, filing systems, information sources, algorithms and processes used to store, compile, organize, or manipulate data, and similar matters. With respect to any information or records stored in computer-readable form or located on computers Dragul, GDARES and GDAREM, and their Representatives, the person in possession of such information or records shall provide the Receiver full access to all media on which such records are located and all computers and the necessary application, system, and other software necessary to review, understand, print, and otherwise deal with such computerized records and all passwords and security codes necessary to access such computerized records, regardless of whether such records are separate or commingled with other information, except that information subject to the attorney-client privilege held by Dragul in his personal capacity shall remain privileged. Any such claimed privileged information, or information that may reasonably be considered to be privileged information, obtained by Receiver or commingled with other information shall be disgorged by the Receiver and notice given to Dragul regarding the privileged information and its disposition by the Receiver. In the event that the Receiver questions or disputes that any such information is privileged, the dispute shall be submitted to the Court, together with the disputed information for in camera review.

29. The Receiver may at any time, on proper and sufficient notice to all parties who have appeared in this action, apply to this Court for further

instructions whenever such instructions shall be deemed to be necessary to enable the Receiver to perform the duties of his office properly.

30. Notwithstanding anything to the contrary contained in this Order, the Receiver shall not take any action with regard to ownership, operation, control, storage, generation, or disposal of (a) any substance deemed a "hazardous substance", "pollutant," "contaminant", or similar substance under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675, the Conservation and Recovery Act of 1976, the Solid Waste Amendments of 1984, the Superfund Amendments and Reauthorization Act of 1986, and any other amendments; or (b) any other chemical, toxin, pollutant or substance defined as hazardous or dangerous to human health under any other federal, state or local law, regulation, rule or ordinance, including, without limitation thereto, petroleum, crude oil, or any fraction thereof (all collectively referred to herein as "Hazardous Substances"), without first applying for an obtaining an Order of this Court specifically setting forth the action or actions proposed to be taken and to be taken by the Receiver. Without first applying for and obtaining such an Order of this Court, the Receiver shall have no ownership, control, authority or power (neither shall receiver have any obligation to exercise ownership, control, authorize or power) over the operation, storage, generation or disposal of any Hazardous Substance. All decisions relating to the ownership, operation, control, storage, generation and disposal of any Hazardous Substances shall be resolved by this Court.

31. The Receiver shall take appropriate action as necessary with respect to the January 20, 2015 "CDPHE Stipulation and Order," as defined and with background provided in the Motion Appointing Receiver.

32. Pursuant to C.R.C.P. 66(d)(3), the Receiver shall provide written notice of this action and entry of this Order to any persons in possession of Receivership Property or otherwise affected by this Order, including all known Creditors of Dragul, GDARES and GDAREM, subsidiaries and any their respective Representatives.

33. After the initial report required pursuant to this Order, the Receiver shall make periodic reports of the condition of the Receivership Estate on intervals to be agreed to by the Receiver and the Commissioner as is reasonably necessary to provide timely reporting of the operations of the Receivership Estate to all interested parties, without imposing undue burden and expense on the Receivership Estate. The Receiver shall not be required to, but as reasonably necessary, may follow generally accepted accounting principles or use auditors or accountants in the preparation of his reports to the Court.

34. Court approval of any motion filed by the Receiver shall be given as a matter of course, unless any party objects to the request for Court approval within ten (10) days after service by the Receiver or written notice of such request. Service of motions by facsimile and electronic transmission is acceptable.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this action for all purposes. The Receiver is hereby authorized, empowered and

directed to apply to this Court, with notice to the Commissioner for issuance of such other Orders as may be necessary and appropriate in order to carry out the mandate of this Court.

IT IS FURTHER ORDERED that this Order shall be effective immediately and will remain in effect until terminated or modified by further Order of this Court.

DATED this _____ day of August, 2018.

BY THE COURT:

MARTIN F. EGELHOFF
Denver District Court Judge

Attachment to Order - 2018CV32011

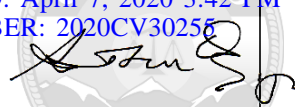
<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, CO 80202</p> <hr/> <p>Plaintiffs: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>vs.</p> <p>Defendants: GARY DRAGUL, an individual; 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 CORPORAT</p>	<p>DATE FILED: March 31, 2020 2:57 PM FILING ID: 720E2E989B59A CASE NUMBER: 2020CV30255</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 20CV30255</p> <p>Courtroom: 414</p>
<p>ORDER</p>	

The Court, having reviewed the Motion of Hershey Defendants to Stay Response to Complaint, and being advised in the premises therein, hereby GRANTS the Motion. Accordingly:

1. Defendants Marlin Hershey and Performance Holdings, Inc. (“Hershey Defendants”), shall not be required to file a response to the Complaint until the resolution of their Motion to Intervene in 18CV33011 (“the Receivership Case”), and, if that motion is granted, until the resolution of their challenge in that case to the lawfulness of paragraph 13(s) of the Court’s 30 August 2018 “Stipulated Order Appointing Receiver also filed on behalf of Defendants Gary Dragul and GDA Real Estate Service, and GDA Real Estate Management LLC.”
2. The Hershey Defendants shall keep this Court apprised of the status of their involvement in the Receivership Case by filing a report every 60 days from the date of this Order.

IT IS SO ORDERED THIS _____ day of _____, 2020.

Robert Lewis Mogahey Jr.
District Court Judge

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO</p> <p>Court Address: 1437 Bannock Street Denver, CO 80202</p> <hr/> <p>Plaintiffs: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>vs.</p> <p>Defendants: GARY 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 CORPORAT</p>	<p style="text-align: center;">SO ORDERED BY COURT</p> <p style="text-align: center;">04/07/2020 DATE FILED: April 7, 2020 3:42 PM CASE NUMBER: 2020CV30255</p> <p style="text-align: center;"></p> <p style="text-align: center;">ROBERT LEWIS MCGAHEY JR District Court Judge</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 20CV30255</p> <p>Courtroom: 414</p>
<p>ORDER</p>	

The Court, having reviewed the Motion of Hershey Defendants to Stay Response to Complaint, and being advised in the premises therein, hereby GRANTS the Motion. Accordingly:

1. Defendants Marlin Hershey and Performance Holdings, Inc. (“Hershey Defendants”), shall not be required to file a response to the Complaint until the resolution of their Motion to Intervene in 18CV33011 (“the Receivership Case”), and, if that motion is granted, until the resolution of their challenge in that case to the lawfulness of paragraph 13(s) of the Court’s 30 August 2018 “Stipulated Order Appointing Receiver also filed on behalf of Defendants Gary Dragul and GDA Real Estate Service, and GDA Real Estate Management LLC.”
2. The Hershey Defendants shall keep this Court apprised of the status of their involvement in the Receivership Case by filing a report every 60 days from the date of this Order.

IT IS SO ORDERED THIS _____ day of _____, 2020.

Robert Lewis Mogahey Jr.
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Denver, CO 80202	
Plaintiff: FRED J. JOSEPH, Securities Commissioner for the State of Colorado v. Defendant: PROVIDENCE FINANCIAL SERVICES, INC., et al.,	DATE FILED: January 9, 2014 CASE NUMBER: 2013CV31667 COURT USE ONLY ▲ <hr/> Case No: 13CV31667 Courtroom: 269
ORDER RE: JEAN A. SCHOTT'S MOTION TO INTERVENE FOR AN ORDER SECURING FUNDS AND OPPOSITION TO PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AND LIFT FREEZE ORDER	

THIS MATTER is before the Court on Jean A. Schott's Motion to Intervene for an Order Securing Funds and Opposition to Plaintiff's Motion to Approve Settlement and Lift Freeze Order filed on December 10, 2013. The Court, having reviewed all of the briefing filed in connection with Schott's Motion, and being fully advised, hereby enters the following findings and order:

Schott's Motion is **DENIED**. A receiver will be appointed, Schott's litigation will be stayed, Schott may not secure her funds, and Schott has no right to intervene in the pending action.

I. BACKGROUND

Perry Sawano ("Defendant") is an investment adviser accused of misusing funds from approximately twenty-six clients. (Complaint at 2). The Securities Commissioner alleges that Sawano used his firm, Providence Financial Services, d/b/a Integrity Financial Consulting, to purportedly invest a total of \$2.7 million dollars in "alternative investments" mostly unbeknownst to his clients. (Complaint at 2). The Commissioner alleges that Defendant was engaging in a classic Ponzi strategy of using new clients' money to pay off or pay back previous clients. (Complaint at 2).

Jean A. Schott ("Schott") was one of the investors whose \$500,000 was allegedly misappropriated by Defendant. (Schott's Motion to Intervene at 2). While most of the other clients' funds have been completely commingled, Schott's funds are at least partially traceable. (Schott's Motion to Intervene at 2).

On November 21, 2013, this Court approved the settlement agreements between Defendant and Plaintiff and lifted the freeze order on Defendant's accounts. Schott filed a motion to intervene for an order securing funds and to oppose the appointment of a receiver.

II. DISCUSSION

Schott asserts that she should be able to prevent a receiver from being appointed, secure her funds, and to intervene in this case. The Court disagrees.

A. Appointing a receiver and staying litigation

Schott objects to the appointment of a receiver and the staying of her current lawsuits against the Defendant and the other investors. (Schott's Opposition at 4). However the Court finds that a receiver is warranted in this case. Whether to appoint a receiver is within the discretion of the trial court, and the decision will not be overturned unless the trial court's actions were manifestly arbitrary, unreasonable or unfair. *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 512 (Colo. App. 2006). A court may appoint a receiver at any time after one party:

[E]stablishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired.
C.R.C.P. 66(a)(1).

Appointing a receiver is a drastic measure and should only be undertaken when a receiver is integral to protecting property rights. *Eureka Coal Co. v. McGowan*, 212 P. 521, 521 (Colo. 1922). A receiver is warranted in cases of fraudulent conduct or when the assets are in danger of dissipation or loss. *Savageau v. J. & R. A. Savageau, Inc.*, 285 P.2d 810, 813 (1955). When determining whether to appoint a receiver, the court should consider the totality of the circumstances including: (1) the existence of a valid claim by the moving party; (2) the probability that fraudulent conduct has occurred or will occur to frustrate the claim; (3) imminent danger that property will be lost, concealed, or diminished in value; (4) inadequacy of available legal remedies; (5) lack of a less drastic equitable remedy; and (6) the likelihood that appointment of a receiver will do more harm than good. *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998); *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 520 (Colo. App. 2006).

Defendant's pattern of fraudulent conduct and pending litigation create a substantial danger, here, that the funds will be dissipated or lost. Schott does not dispute the existence of a valid claim by the moving party, or the probability that fraudulent conduct occurred. Rather, Schott asserts her right to reclaim her own assets, thereby diminishing the funds and contributing to the need for a receiver. Schott argues that the appointment of a receiver may diminish the amount of her eventual recovery, not that a receiver would do more harm than good for the investors, generally. Considering the totality of the circumstances, the Court finds that a receiver should be appointed, and Schott's litigation stayed.

B. Right of Intervention

Schott claims to have the right to intervene in this case to protect her interests. (Schott's Motion to Intervene at 7). The Court disagrees.

An individual has a right to intervene:

[W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
C.R.C.P. 24

A party's interest is impaired when the resolution of the pending action will prevent the party from pursuing the party's interest in the future and when the party's interests are not adequately represented in the pending action. *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 30-1 (Colo. 2001). In actions by the State Securities Commissioner against fraudulent brokers, investors' interests are considered adequately represented by the Commissioner, who has a duty to protect investors from fraud in the securities market. *Feigin*, 19 P.3d 23 at 31-2. When a Commissioner is representing the investors, parties must make a compelling showing to the court to demonstrate that the party's interests are not being protected. *Feigin*, 19 P.3d 23 at 31-2.

In *Feigin*, the Colorado Supreme Court held that "investors are not entitled to intervene as a matter of right under Rule 24(a)(2) in the commissioner's civil enforcement action." *Feigin*, 19 P.3d 23 at 32. In that case, defrauded investors who objected to a provision of the Colorado Securities Commissioner's settlement plan tried to intervene. *Feigin*, 19 P.3d 23 at 30-32. The Court found that because the investors were not forced to participate in the plan but, rather, retained the ability to bring independent causes of action, the investors' rights were neither impaired nor impeded and the investors had no right to intervene. *Feigin*, 19 P.3d 23 at 30-32.

Here, Schott states her interests are not shared by the Commissioner because a Commissioner may seek to combine Schott's funds into the general pool and later disburse them equally among the investors. (Schott's Motion to Intervene at 7). The pending action does not preclude Schott from objecting to the receiver's plan later in the proceedings. Moreover, Schott retains the right to file an independent cause of action. Nowhere in Schott's briefs on this matter does Schott differentiate her situation from that of the investors in *Feigin*. Accordingly, the Court finds that Schott has failed to make a compelling showing that her interests are not adequately represented by the Commissioner and, therefore, Schott has no right to intervene in the present case.

C. Securing Funds

Schott asserts that because her money is still traceable, it has not been fully commingled with the assets of Defendant's other victims, and, therefore, she should be entitled to recover such identifiable funds before a receiver is appointed. (Schott's Motion to Intervene). The Court disagrees.

Schott has cited no case law for her position. (Schott's Motion to Intervene at 1-7). Instead, Schott states that because her funds were stolen and traceable, she should be allowed to recover her assets directly. (Schott's Motion to Intervene at 2-7). Schott asserts that her funds are traceable even though the Defendant deposited Schott's funds into accounts that contained other funds. (Schott's Motion to Intervene at 5-6).

It is inequitable to allow one investor to secure her funds once they have been commingled with the funds of others. While there is little Colorado case law on the subject of

receiverships and pro rata distribution, the Court finds federal case law to be persuasive. In a receivership case such as this one, where the investors were the victims of a Ponzi scheme, pro rata distribution is the favored and fairest way to distribute the funds. *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 176-77 (S.D.N.Y. 2009). The goal of a receivership is to safeguard the assets, and assist the court in achieving an equitable distribution of the funds. *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2009). Investors who object to the receiver's plan for distribution may object after the plan's formulation and before the assets are distributed. *Vescor.*, 599 F.3d 1189 at 1194-5. A plan may be equitable, even if it does not provide for all of the investors to recover all of their funds. *Vescor.*, 599 F.3d 1189 at 1195.


In Schott's case, while some of her funds may be traceable, they are commingled. (Schott's Motion to Intervene at 5-6). Any commingling of funds is enough that courts should treat the entire fund as tainted. *Byers*, 637 F. Supp. 2d 166 at 177. In the interests of providing an equitable remedy for all of the investors regardless of when they began investing with Defendant, this Court holds that Schott may not secure her commingled funds separately from those of other investors.

III. CONCLUSION

Schott's Motion is DENIED. A receiver will be appointed, Schott's litigation will be stayed, Schott may not secure her funds, and Schott has no right to intervene in the pending action.

SO ORDERED this 9th day of January 2014.

BY THE COURT:



ANN B. FRICK
DISTRICT JUDGE



DENIED

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

Dated: Nov 23, 2010

Brian Whitney
District Court Judge

DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301	<p style="text-align: center;">↑ COURT USE ONLY ↑</p>
<p>IN RE APPLICATION FOR INTERVENTION:</p> <p>Applicants: JOHN ELWAY and MITCHELL D. PIERCE</p> <p>Applicants for Intervention</p> <p>Plaintiff: FRED J. JOSEPH, Securities Commissioner for the State of Colorado,</p> <p>v.</p> <p>Defendants:</p> <p>SEAN MICHAEL MUELLER, MUELLER CAPITAL MANAGEMENT, LLC, and MUELLER OVER UNDER FUND, LP.</p>	
<p>ORDER REGARDING MOTION TO INTERVENE OF APPLICANTS</p>	

Applicants for Intervention, John Elway (“Elway”) and Mitchell D. Pierce (“Pierce”) (collectively “Applicants”), having filed their Motion to Intervene, and the Court having considered the same and being duly advised in the premises, hereby FINDS that the Motion is meritorious and should therefore be GRANTED:

IT IS THEREFORE ORDERED that Applicants are now a party to this action, and shall formally file and serve their Complaint in this matter within ten (10) days of this Order.

DONE this ____ day of October, 2010.

BY THE COURT:

District Court Judge

Court Authorizer
Comments:

Movants have failed to demonstrate how their interests are not sufficiently protected by the Court ordered receiver and its process of review. Each argument made concerning priority rights can be sufficiently addressed in the claims process. If an equitable trust exists, the Receiver, as an extension of the Court, can take that into consideration in its processing and evaluating duties. Further, movants seem to rely on what information was given to them at the time of their investment rather than what actually occurred. The Receiver, in its objection, informs the Court that the priority of claims is belied by the actual use of the proceeds. While the Court is not making this as a finding of fact, it is sufficient cause to deny intervention at this juncture.