

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: April 30, 2020 4:47 PM FILING ID: DEDB8DF45E525 CASE NUMBER: 2020CV30255
<p><b>Plaintiff:</b> HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p><b>Defendants:</b> 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.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><b>Attorneys for Plaintiff:</b>          Patrick D. Vellone, #15284          Rachel A. Sternlieb, #51404          Michael T. Gilbert, #15009          ALLEN VELLONE WOLF HELFRICH &amp; FACTOR P.C.          1600 Stout Street, Suite 1900          Denver, Colorado 80202          Phone (303) 534-4499          pvellone@allen-vellone.com          rsternlieb@allen-vellone.com          mgilbert@allen-vellone.com</p>	<p>Case Number: 2020CV30255</p> <p>Division/Courtroom: 414</p>
<p><b>RECEIVER’S SECOND <u>UNOPPOSED</u> MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO DEFENDANTS’ MOTIONS TO DISMISS</b></p>	

Harvey Sender, the duly-appointed receiver (the “Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities (collectively, “Dragul and the GDA Entities”), pursuant to C.R.C.P.

6(b), hereby moves for a second enlargement of time to respond to the Defendants' Motions to Dismiss and Motion for a More Definite Statement.

### **Certificate of conferral**

Counsel for the Receiver has conferred with the Defendants who do not oppose the requested enlargement of time.

### **Motion for enlargement of time**

1. On August 15, 2018, Gerald Rome, the then Securities Commissioner for the State of Colorado (Rome and his three successors are collectively the "Commissioner"), filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities, *Chan v. Dragul, et al.*, Case No. 2018CV33011 (the "Receivership Action").

2. On August 29, 2018, the Commissioner, Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver in the Receivership Action, consenting to the appointment of a receiver over Dragul and the GDA Entities pursuant to C.R.S. § 11-51-602(1) and C.R.C.P. 66.

3. On August 30, 2018, the Receivership Court entered a Stipulated Order Appointing Receiver (the "Receivership Order"), appointing Harvey Sender receiver for Dragul and the GDA Entities and their respective properties and assets, as well as their interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate" or the "Estate"). Receivership Order at 2, ¶ 5.

4. On January 21, 2020, the Receiver filed his Complaint commencing this case against the above-captioned Defendants.

5. On March 17, 2020, Defendants Gary J. Dragul, Alan C. Fox and ACF Property Management, Inc. filed motions to dismiss arguing, among other things, that the Receiver failed to plead fraud claims with the requisite specificity and lacked standing to pursue all of his claims here. On the same day, Defendants Benjamin Kahn and The Conundrum Group, LLP (the “Kahn Defendants”) filed a motion for a more definite statement and separately filed their Answer and Jury Demand.<sup>1</sup> Responses to those motions were due April 7, 2020.

6. On March 19, 2020, Defendant Susan Markusch filed a motion to dismiss raising the same arguments. The Receiver’s response to Markusch’s motion was due April 9, 2020.

7. On March 31, 2020, Defendants Performance Holdings, Inc. and Marlin Hershey (jointly, “Hershey”) filed a motion to stay their responsive pleading here until a motion to intervene they simultaneously filed in the Receivership Action has been decided. The Court granted Hershey’s stay motion on April 7, 2020.

8. On April 21, 2020, Dragul filed a Motion for Clarification in the Receivership Action seeking essentially the same relief Hershey seeks in his Motion to Intervene – a declaration that the Receivership Court erred in including within the

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<sup>1</sup> The Kahn Defendants subsequently joined portions of the motions to dismiss filed by the other defendants.

Receivership Order a provision specifically granting the Receiver standing to pursue investor claims. Defendants all argue here that without this provision, the Receiver lacks standing to prosecute the claims in this case.

9. The Receiver and the Commissioner filed responses to Hershey's Motion to Intervene on April 27, 2020, and the Receiver filed a preliminary response to Dragul's Motion for Clarification that same day. Neither Hershey nor Dragul have replied, and the Receivership Court has not yet ruled on those pending motions.

10. Presently there is no definitive date by which Hershey is required to respond to the Receiver's Complaint here, and therefore this case will not be at issue at least until Judge Eglehoff decides the pending motions to intervene and for clarification Hersey and Dragul filed in the Receivership Case.

11. On April 6, 2020, the Receiver filed his Unopposed Motion for Enlargement of time to respond to the Defendant's pending motions directed to the sufficiency of the Complaint. The Court granted that motion on April 7th and allowed the Receiver until May 1, 2020, to respond.

12. On April 14, 2020, Defendants filed their Unopposed Motion for Extension of Time to File Nonparty at Fault Designations; on April 20th, the Court granted that motion thereby extending the time for Defendants to file nonparty designations until 30 days after this case is at issue.

13. Although the Receiver anticipated filing an Amended Complaint that would moot Defendant's motions to dismiss by May 1, 2020, due to business

disruptions caused by the Coronavirus, the press of matters in other cases, the sheer volume of data in this case (more than 1.5 terabytes), and the pending Hershey and Dragul motions in the Receivership Action, the Receiver requests additional time through May 31, 2020, to file his Amended Complaint.

14. The Receiver may amend as a matter of right under C.R.C.P. 15(a) as to all Defendants other than the Kahn Defendants because motions to dismiss and motions to stay do not constitute “responsive pleadings.” *See Davis v. Paolino*, 21 P.3d 870, 873 (Colo. App. 2001). The Kahn Defendants have agreed not to oppose a motion to amend the Complaint.

15. The Receiver respectfully requests an enlargement of time, through and including May 31, 2020, to file his Amended Complaint. Given this Court’s stay order and the pending related proceedings in the Receivership Action, no party will be prejudiced by the requested extension, which is not made for an improper purpose, such as to delay the proceedings.

16. Pursuant to C.R.C.P. 121, §1-11, the undersigned certifies that a copy of this motion was served on the Receiver.

WHEREFORE, the Receiver requests an enlargement of time in which to respond to Defendants’ pending motions through and including May 31, 2020, at which time the Receiver intends to file an Amended Complaint.

Dated: April 30, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: s/ Rachel A. Sternlieb *Rachel A. Sternlieb*  
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ATTORNEYS FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

I certify that on April 30, 2020, a true and correct copy of the **Receiver's Second Unopposed Motion For Enlargement Of Time To Respond To Defendants' Motions To Dismiss** was filed and served via the Colorado Courts E-Filing system to the following:

<p>Paul L. Vorndran Christopher S. Mills Jones Keller, P.C. 1999 Broadway Street Suite 3150 Denver, CO 80202 pvorndran@joneskeller.com pmills@joneskeller.com</p> <p><b><i>Counsel for Defendant, Gary Dragul</i></b></p>	<p>Lucas T. Ritchie Eric B. Liebman Joyce C. Williams Moye White LLP 1400 16th Street, 6th Floor Denver, CO 80202-1486 Luke.Ritchie@moyewhite.com Eric.Liebman@moyewhite.com Joyce.Williams@moyewhite.com</p> <p><b><i>Counsel for Defendants, Alan C. Fox and ACF Property Management, Inc.</i></b></p>
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*s/ Christina A. Clerihue*  
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Allen Vellone Wolf Helfrich & Factor P.C.

*In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*