

<p>DISTRICT COURT, DENVER COUNTY, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>TUNG CHAN, 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>▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General ROBERT W. FINKE, 40756* First Assistant Attorney General JANNA K. FISCHER, 44952* Assistant Attorney General Ralph L. Carr Judicial Building 1300 Broadway, 8th Floor Denver, CO 80203 Tel: (720) 508-6000 robert.finke@coag.gov janna.fischer@coag.gov *Counsel of Record</p>	<p>Case No.: 2018CV33011</p> <p>Courtroom: 424</p>
<p align="center">AMENDED RESPONSE OF THE SECURITIES COMMISSIONER IN OPPOSITION TO MOTION TO INTERVENE</p>	

Plaintiff, Tung Chan, Securities Commissioner for the State of Colorado, hereby opposes the Motion to Intervene (“Motion”), filed March 31, 2020 by Marlin Hershey (“Hershey”) and Performance Holdings, Inc. (“PHI”) (collectively, “Movants”).

I. Introduction

Movants seek to use this case to improve their position in a related case filed by the appointed receiver in this case, Harvey Sender (“Receiver”).¹ Movants are not entitled to permissive intervention under C.R.C.P. 24(b), which they seek for the purpose of asking this Court for a declaratory judgment revoking a paragraph in the Order appointing the Receiver. *Stipulated Order Appointing Receiver* (Aug. 30, 2018) (“Receivership Order”).

Movants are defendants in *Sender v. Dragul et al.*, No. 2020CV30255, before Division 414 (The Honorable Robert L. McGahey Jr.) (“Insider Case”). In the Insider Case, the Receiver brings fourteen claims including securities fraud, breach of fiduciary duty, and fraudulent transfer under § 38-8-105(1), C.R.S. In addition to Movants, the Insider Case names as defendants Gary Dragul (“Dragul”), who is a Defendant in this case; Benjamin Kahn; the Conundrum Group; Susan Markusch; Alan C. Fox; and ACF Property Management (collectively, “Insider Case Defendants”). The Commissioner takes no position in this filing on the merits of the Complaint in the Insider Case.

The Insider Case Defendants all assisted with or benefited from the multimillion-dollar Ponzi scheme operated by Dragul and his businesses, GDA Real Estate Services, LLC and GDA Real Estate Management, Inc. (collectively, “GDA”). The Commissioner in 2018 filed a Complaint for Injunctive and Other Relief after receiving customer complaints and investigating Dragul and GDA’s investment

¹ The Receiver also opposes the Motion and files a separate Opposition.

offerings. *Complaint* (Aug. 15, 2018). Dragul and GDA stipulated to the appointment of the Receiver in this case, and this Court issued the Receivership Order.

With respect to the Movants, the complaint in the Insider Case alleges that Hershey, through PHI, funneled to himself commissions he received from Dragul and GDA after recruiting investors to the GDA Ponzi scheme. Hershey received a percentage of each investor's investment as an undisclosed commission. The U.S. Securities and Exchange Commission (SEC) has instituted an enforcement action against Hershey. *See SEC v. Bradley, Hershey, et al.*, Case No. 3:19-cv-00490 (W.D.N.C.).

The Receivership Order gives the Receiver the power to recover possession of Receivership Property² and to prosecute claims based on fraudulent transfer and similar theories. Receivership Order ¶ 13(o). It also gives the Receiver the power to prosecute claims and causes of action against third parties held by creditors of Dragul and GDA, and “any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors.” *Id.* ¶ 13(s).

Movants seek to intervene in this case because they want to request declaratory relief pursuant to C.R.C.P. 57 that would effectively nullify paragraph 13(s) of the Receivership Order. They contend that this Court erred by issuing the Receivership Order because the Receiver does not in fact have the power the

² Receivership Property is defined in the Receivership Order as assets “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.” Receivership Order ¶ 9.

Receivership Order expressly grants him. A receiver’s power, however, “is derived from the scope of the court’s order of appointment.” *Francis v. Camel Point Ranch, Inc.*, --- P.3d ---, 2019 COA 108M, ¶ 8, *as modified on denial of reh’g* (Sept. 19, 2019) (citing *NationsBank of Ga. v. Conifer Asset Mgmt. Ltd.*, 928 P.2d 760, 764 (Colo. App. 1996)). Because they do not agree with the Receiver’s powers derived from the Receivership Order, Movants want to change the scope of this Court’s order of appointment more than a year and a half after it was issued. Movants’ application is essentially an untimely motion for reconsideration that should be denied.

II. Argument

A. Movants Are Not Entitled to Permissive Intervention.³

1. No statute allows for intervention and it is at the Court’s discretion to allow intervention here.

There is no dispute that no statute allows for permissive intervention here under C.R.C.P. 24(b)(1). Movants thus seek intervention under C.R.C.P. 24(b)(2). C.R.C.P. 24(b)(2) gives the Court discretion to allow intervention “when an applicant’s claim or defense and the main action have a question of law or fact in common . . . the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” C.R.C.P. 24(b)(2) is a discretionary rule. “The denial of a motion for permissive intervention will seldom constitute an abuse of discretion.” *In re K.L.O-V.*, 151 P.3d 637, 642 (Colo. App. 2006) (dismissing appeal of decision denying grandparent’s motion to intervene in custody case). “The

³ Movants only request permissive intervention under C.R.C.P. 24(b), not intervention as of right under C.R.C.P. 24(a).

legal concept of intervention is based upon the natural right of a litigant to protect himself from the consequences of an action against one in whose cause he has an interest, or by the result of which he may be bound.” *Mauro ex rel. Mauro v. State Farm Mut. Auto. Ins. Co.*, 410 P.3d 495, 500 (Colo. App. 2013) (quoting *Grijalva v. Elkins*, 132 Colo. 315, 318, 287 P.2d 970, 972 (1955)). Here, the Movants will not be bound by the result of this case, in which the Defendants have stipulated to a preliminary injunction and the Receivership Order and the Receiver is determining the distribution of the Receivership Estate (as defined in the Receivership Order). Their entire remedy lies in the Insider Case, and this Court should not exercise its discretion to allow intervention here.

2. Other courts and this Court have denied intervention in cases brought by the Securities Commissioner.

The Colorado Supreme Court has ruled that investors and creditors do not have a right to intervene in a securities case where the Securities 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 here and are not investors or creditors, *Alexa* still shows that third-party intervention in a case brought by the Colorado Securities Commissioner is disfavored.

The Securities Commissioner has successfully opposed non-party intervention in other securities enforcement actions.⁴ Indeed, this Court denied two motions from

⁴ 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 1); Order Regarding Motion to Intervene of Applicants, *Joseph v. Mueller*, No. 2010 CV 3280 (Denver Dist. Ct. Nov. 23, 2010) (Exhibit 2).

parties who sought to intervene in this 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 co-defendant in an unrelated action).

3. This Court should not allow intervention because doing so would unduly prejudice the original parties.

Permissive intervention under C.R.C.P 24(b)(2) is appropriate when “an applicant’s claim and the original cause of action present common questions of law or fact, so long as the intervention will not unduly delay or prejudice the rights of the original parties.” *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998); *K.L.O-V.*, 151 P.3d at 642. Here, intervention will delay this matter and prejudice the adjudication of the rights of the original parties. Movants ask the Court to revisit the Receivership Order entered over a year and a half ago, to which Defendants (who are also Insider Case Defendants) agreed.⁵ The Receiver has been working on this matter since late 2018, expending a great deal of resources to seek value in the Receivership Estate for the benefit of creditors and investors. Revisiting the Receivership Order now will delay investors’ and creditors’ recovery.

The issue of whether the Receiver stated a claim that withstands a motion to dismiss in the Insider Case is best determined in that case, not this one. Movants seek to use this Court to bolster their argument in the Insider Case that the complaint

⁵ The Commissioner also opposes Dragul’s Motion for Clarification of Order Appointing Receiver and will file a separate response in opposition.

in that case should be dismissed because this Court somehow ignored or misunderstood paragraph 13(s) of the Receivership Order when the Court issued it. *See* Motion of Hershey Defendants to Stay Response to Complaint, No. 2020CV30255 (Denver Dist. Ct. Mar. 31, 2020) (Exhibit 3) (speculating that the Receivership Order “may not have received much scrutiny from Judge Egelhoff prior to issuance of the order”). If granted permission to intervene, Movants will seek relief through a request for declaratory judgment under C.R.C.P. 57 that effectively is a belated motion to reconsider the Receivership Order. Motions to reconsider a non-final order are “disfavored” and must be filed within fourteen days of the order. C.R.C.P. 121 § 1-15(11). Movants should not be able to intervene in this case to make a late collateral attack on the Receivership Order.

B. The Receiver’s powers are defined by the Receivership Order issued by the Court and consistent with a receiver’s powers generally.

1. Receivers typically have the power granted to them by the Court

“The measure of a receiver’s power is derived from the scope of the court’s order of appointment.” *Camel Point Ranch*, 2019 COA 108M, ¶ 8. “The receiver’s function is to collect the assets, obey the court's order, and in general to maintain and protect the property and the rights of the various parties.” *Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988); *see also Hart v. Ed-Ley*, 482 P.2d 421, 425 (Colo. App. 1971) (a receiver’s “responsibility is to the court to carry out the duties conferred upon him by that court”). The Receiver, by filing the Insider Case, is acting within the scope of the Receivership Order and consistent with his duty to protect the property and the rights of the various parties.

The powers in the Receivership Order are consistent with those typically held by receivers. Courts appoint receivers to protect the rights of parties to an underlying action. *Camel Point Ranch*, 2019 COA 108M, ¶ 7; *Zeligman*, 762 P.2d at 785. The supervision and disposition of the receivership estate lies within the appointing court’s jurisdiction. *Midland Bank v. Galley Co.*, 971 P.2d 273, 276-77 (Colo. App. 1998). The goal of a receivership is to safeguard estate assets and assist the court in achieving an equitable distribution of funds. *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2009).

Movants cite case law that does not support their position that paragraph 13(s) of the Receivership Order grants the Receiver power the Receiver should not have. The lone Colorado case cited analyzes a specific statutory provision, not applicable here, that authorized the receiver to collect Medicaid payments due a health care facility. *Good Shepherd Health Facilities of Colo., Inc. v. Dep’t of Health*, 789 P.2d 423, 425 (Colo. App. 1989). The single quote Movant lifted — “generally a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve” — is closely followed by the Court of Appeals’ explanation that in that case, the receiver could retain funds that the entity could not. *Id.* Movants also cite a 30-year-old federal case that, in agreement with Colorado authority, calls it “axiomatic that [a receiver’s] power is derived from and limited by the order of the court appointing him.” *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (addressing powers in a particular court’s receivership order and denying motion to intervene). Later federal

cases that distinguish *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).

Here, the Court in the Receivership Order granted the receiver the power to pursue claims for the benefit of creditors on behalf of the Receivership Estate. Movants seek to collaterally attack this Court’s order and remove that power, which would harm the parties to this case and the defrauded investors here.

2. The Receivership Order is consistent with other orders issued by Denver District Courts

The Receivership Order is consistent with receivership orders issued by other courts in this District in securities cases brought by the Commissioner. Although the language is not identical, recent receivership orders grant the receiver the power to pursue claims on behalf of the estate for the benefit of investors and creditors.

Paragraph 13(s) of the Receivership Order reads:

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;

Paragraphs from other receivership orders entered in securities cases brought by the Commissioner also grant the receiver power to bring legal actions the receiver deems necessary to enforce the receivership order and protect the receivership estate. In

the order appointing a receiver in *Myklebust v. Johnson et al.*, No. 2019 CV 33036 (Denver Dist. Ct. Aug. 15, 2019) (Exhibit 4), the Denver District Court granted the receiver the powers to

institute, prosecute, and continue the prosecution of such legal actions as the Receiver deems reasonably necessary, including actions necessary to enforce this Order, to collect accounts and debts, enforce agreements relating to the Estate, to protect the Estate, and to recover possession of the Estate and Estate Property from persons who may now or in the future be wrongfully possessing or occupying the Estate or Estate Property . . .

Id. at ¶ 10(u). Similarly, other courts in this District have granted receivers the power to

institute, prosecute, and continue the prosecution of such legal actions as the Receiver deems reasonably necessary, including actions necessary to enforce this Order, to collect accounts and debts, enforce agreements relating to the Estate, to protect the Estate, and to recover possession of the Estate from persons who may now or in the future be wrongfully possessing or occupying the Estate . . .

Order Appointing Receiver, ¶ 5(v), *Cheval v. Ray et al.*, No. 2019CV33770 (Denver Dist. Ct. Sept. 30, 2019) (Exhibit 5); *see also* Amended Order Appointing Receiver, ¶ 5(v), *Rome v. Ryan et al.*, No. 2017CV34027 (Denver Dist. Ct. Nov. 13, 2017) (identical paragraph) (Exhibit 6).

Here, the Receivership Order in this case similarly grants the Receiver the power to pursue claims for the benefit of creditors on behalf of the estate. The Receivership Order is consistent with other receivership orders granted in other securities cases in this District.

III. Conclusion

For the reasons stated above, the Court should deny the Motion to Intervene. If granted, the motion would allow Movants to collaterally attack the Receivership Order that has been in place for more than a year and a half and would harm the interests of the parties to this case and the investors.

Dated: April 30, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, I served a true and correct copy of the foregoing **AMENDED RESPONSE OF THE SECURITIES COMMISSIONER IN OPPOSITION TO MOTION TO INTERVENE** via CCE or first-class mail, postage prepaid, to the following:

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