DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado v. **Defendants**: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	▲ COURT USE ONLY ▲
Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2018CV33011 Courtroom: 424

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

On April 27, 2020—15 days early—the Receiver filed his "Preliminary" response ("Preliminary Response") to Defendant Gary Dragul's Motion for Clarification of Order Appointing Receiver that Receiver Lacks Standing to Assert Claims of Investors/Creditors ("Motion"). In the Preliminary Response, the Receiver does not address the substantive matter at issue in the Motion—whether the Receiver has standing to assert claims of creditors/investors. Instead, he argues this Court should not address it because the same legal issue is before Judge McGahey in Case No. 2020CV30255 ("2020 Action"), that the Receiver's reliance on his belief

that he has such standing should mean he in fact has it, and that Mr. Dragul stipulated to the Receivership Order, so he is estopped from seeking to clarify it now. The Receiver also requests the Court grant him an additional 21 days to file a substantive response if the Court decides to consider the merits of the Motion. None of these arguments should deter the Court from granting the Motion.

As an initial matter, the Receiver relies on a strawman by characterizing the Motion as one to vacate the Receivership Order, or to seek its reconsideration. (Prelim. Resp. 2-3.) As is apparent just from the title of the Motion, it seeks for the Court to clarify one provision in the Receivership Order as it relates to the Receiver's standing to assert creditors' claims. There is nothing unusual or remarkable about that. "A receiver is an officer of the trial court exercising jurisdiction over a receivership estate. . . . Accordingly, supervision and disposition of the receivership estate lie within the trial court's jurisdiction. Hence, the court has the duty to resolve disputed issues of law and fact pertaining to the receivership." *Midland Bank v. Galley Co.*, 971 P.2d 273 (Colo. App. 1998) ((citing *Marker v. City Savings, Building & Loan Ass'n*, 101 Colo. 302, 73 P.2d 991 (1937); *Interlake Co. v. Von Hake*, 697 P.2d 238 (Utah 1985); *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992)).

Since the court that has jurisdiction over the receivership estate has the duty to resolve disputed issues of law pertaining to the receivership, it seems appropriate that Mr. Dragul would file the Motion here. The fact that the motions to dismiss before Judge McGahey challenge whether the Receiver has standing to assert creditors' claims does not mean the parties are "duplicating and draining party and judicial resources, and creating a risk of inconsistent rulings[,]" as the Receiver contends. (Prelim. Resp. 3.) For one, Judge McGahey granted the

Hershey Defendants' motion to stay their response to the complaint in that action, suggesting that Judge McGahey would prefer to have this Court first address whether the Receivership Order can imbue the Receiver with standing he otherwise lacks as a matter of law. Plus, after receiving two extensions, the Receiver intends to file an amended complaint at the end of May. Unless he drops all claims he asserts on behalf of creditors—which appears doubtful because most or all of them are creditors' claims—the defendants will file another round of motions to dismiss. Judge McGahey is unlikely to rule on the standing issue for many weeks, or even months. And if he were presented with the question of whether the Receivership Order can grant the Receiver standing to assert creditors' claims without this Court first clarifying that the Receivership Order does not do so, Judge McGahey might fear that ruling that the Receiver lacks such standing[1] could itself create an inconsistent ruling by appearing inconsistent with the Receivership Order. This Court's ruling on the Motion would assist Judge McGahey, not harm him.

The Receiver also argues that Mr. Dragul is estopped from asserting this standing argument because Mr. Dragul stipulated to the Receivership Order. (Prelim. Resp. 3-4.) Mr. Dragul's footnote 3 in the Motion already addressed this issue.[2] Because standing is jurisdictional, *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004), it is not subject to waiver, *see, e.g., Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill.

[1] As Mr. Dragul believes he will for the reasons (among others) articulated in the Motion: a court order cannot create standing where none exists—a court lacks jurisdiction to expand its or another court's jurisdiction.

[2] In the Preliminary Response, the Receiver acknowledges this footnote, but mistakenly refers to it as footnote 5. (Prelim. Resp. 3.) He also does not address the substantive argument or law in that footnote.

2003). "Even where the parties agree that a plaintiff has Constitutional standing, courts must satisfy themselves that the jurisdictional requirement is met." *Id.* (citing *Rhodes v. Johnson*, 153 F.3d 785, 787 (7th Cir. 1998); Fed. R. Civ. P. 12(h)(3)). The parties cannot stipulate that a plaintiff has standing and thereby expand the court's jurisdiction by agreement, even if they wanted to. Thus, the doctrine of estoppel has no application here—even if Mr. Dragul could not raise this issue (though he can), the Court must still determine on its own if the Receiver has standing to assert creditors' claims.

For the same reason, the Receiver's argument that the parties and others have relied on their belief that the Receiver has standing to assert creditors' claims, even if true, is of no import. (Prelim. Resp. 2.) The Receiver cites no authority to suggest reliance will create standing that otherwise does not exist, and Mr. Dragul is aware of none. Since a court must always determine whether it has jurisdiction regardless of what the parties do, reliance plays no role.

In the Preliminary Response, the Receiver does not address the legal question at issue in the Motion—whether the Receivership Order can grant the Receiver standing to assert creditors' claims that he otherwise lacks as a matter of law. He does address it in his response to the Hershey Defendants' motion to intervene, however. The Commissioner similarly addresses this issue in her response to the motion to intervene. In addition to repeating the reliance argument addressed above,[3] the Receiver argues that paragraph 13(s) in the Receivership Order, upon which he relies for standing to assert creditors' claims, "was included because individual creditors and investors often lack the resources necessary to prosecute claims, and to avoid a multitude of lawsuits by individuals seeking to benefit only themselves rather than creditors as a

[3] The Commissioner also asserted reliance. (Comm'r Intervention Resp. 6.)

whole." (Rec'r Intervention Resp. 2.) He does not explain why or provide any authority to support that creditors' or investors' lack of resources can create standing where none otherwise exists. He also does not explain why his ability to force creditors/investors to choose between asserting an equitable claim in receivership or asserting their own claim in a separate action cannot deal with the problem of a multitude of lawsuits that do not benefit creditors as a whole.

Both the Receiver and Commissioner argue that the Receivership Order may grant the Receiver standing to assert *creditors' claims* because it is well understood that Receivers may assert claims against third parties *for the benefit of* creditors. (Rec'r Intervention Resp. 5, 7-8; Comm'r Intevention Resp. 8-10.)[4] That is not the same thing. No one is disputing that the Receiver may assert claims belonging to the people or entities in receivership *for the benefit of* creditors. The matter at issue here is whether the Receiver can assert claims *belonging to* creditors. He cannot. (*See* Mot. 5-9 (collecting and discussing cases).)

The Receiver also cites several cases he asserts stand for the proposition that a receiver may assert creditors' claims. (Rec'r Intervention Resp. 7 (citing *Wing v. Dockstader*, 482 F. App'x 361, 364-65 (10th Cir. 2012); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008); *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at * 2-3 (D. Utah May 14, 2009)).)[5] But those cases held that a receiver has standing to assert fraudulent transfer claims *belonging to the entity in receivership*.

[4] The Commissioner also argues that a receiver's power is derived from the scope of the court's order appointing him. (Comm'r Intervention Resp. 4, 7-8.) That may be true, but it does not mean the powers a court may grant a receiver are without limits. A court lacks jurisdiction to expand its own jurisdiction by granting a party standing it otherwise lacks.

[5] Since the Receiver was able to marshal such case law and assert this argument in response to the intervention motion, it is unclear why he was unable to do so in his Preliminary Response to Mr. Dragul's Motion.

Wing v. Dockstader, 482 F. App'x at 364-65 (relying on *Scholes*, holding receiver had standing to recover fraudulent transfers on behalf of entity in receivership *as though* the receiver were a creditor of scheme); *Donell*, 533 F.3d at 777 (applying *Scholes* and expressly holding that "[t]he Receiver has standing to bring this suit because, although the losing investors will ultimately benefit from the asset recovery, the Receiver is in fact suing to redress injuries that [the entity in receivership] Wallenbrock suffered when its managers caused Wallenbrock to commit waste and fraud."); *Scholes*, 56 F.3d at 753-55 (receiver had standing to recover fraudulent transfers because the entity in receivership was distinct from the wrongdoer who formerly controlled it, and the entity was harmed by the fraud—thus the receiver brought the entity's claims, not creditors'/investors' claims); *Wing v. Hammons*, 2009 WL 1362389, at * 2-3 (relying on *Scholes* to hold entity in receivership was harmed by fraudulent transfer and receiver was thus asserting its claim, not claims of creditors).[6]

The idea captured in all of these cases is that, once a receiver takes over an entity, it no longer is associated with the perpetrator of the scheme, so when funds the entity received from, say, investors or creditors, were transferred out of the entity to the person who orchestrated the

[6] The other cases the Receiver cites, *Marion v. TDI Inc.*, 591 F.3d 137 (3rd Cir. 2010), *Knauer v. Jonathan Roberts Fin Grp., Inc.*, 348 F.3d 230 (7th Cir. 2003), *Ashmore for Wilson v. Dodds*, 262 F. Supp. 3d 341 (D.S.C. 2017), and *Quinn v. Grand St. Tr.*, No. 3:04 CV 251, 2005 WL 1983879 (W.D.N.C. Aug. 12, 2005), similarly held that the receiver could assert the claims at issue because they were claims of the entity in receivership, not investors'/creditors' claims. *Marion*, 591 F.3d at 148-49 (claim belonged to entity in receivership); *Knauer*, 348 F.3d at 235-38 (holding that claim belonged to entity in receivership, but was barred by *in pari delicto*); *Ashmore*, 262 F. Supp. 3d at 347-51 (receiver could bring claim because it belonged to entity in receivership); *Quinn*, 2005 WL 1983879, at *5-6 (same). And *Good Shepherd Health Facilities of Colorado, Inc. v. Department of Health*, 789 P.2d 423, 425-26 (Colo. App. 1989), noted a receiver may only assert claims belonging to the entity in receivership; to the extent it addressed funds of others the receiver could retain, it did so under a specific statute for Medicaid payments, C.R.S. § 25-3-108, subject to different rules.

wrongdoing, the entity was deemed harmed and could assert fraudulent transfer claims. What these cases did not hold, however, was that the receiver could assert creditors' claims. The Receiver attempts to conflate an *in pari delicto* defense with the issue of standing, which one of the cases the Receiver himself cites expressly criticizes. *See In re Senior Cottages of America, LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (holding malpractice claim belonged to entity in receivership and could be asserted by receiver, and that *in pari delicto* defense was wholly different matter).

Plus, the cases the Receiver relies on are not controlling in Colorado. Applicable Colorado authority holds that a receiver lacks standing to assert creditors'/investors' claims. *E.g.*, *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 780-81 (Colo. App. 1997) (holding that Harvey Sender, the same Receiver here, could not assert creditors' claims when serving as a bankruptcy trustee); *Good Shepherd*, 789 P.2d at 425; *First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC*, 166 P.3d 166, 180 (Colo. App. 2007). And many cases outside Colorado also reach a different conclusion than those cited by the Receiver. (*See* cases cited in Mot. 5-9.)

In order to take advantage of the inapposite case law he cites, the Receiver tries to recast his claims in the 2020 Action as claims "to address harm to the Receivership entities and derivatively to their investors." (Rec'r Intervention Resp. 8.) That is not what the Receiver expressly said in the 2020 Complaint, however, and is not born out by the facts alleged there. (*See* Mot. 4-5.)

Finally, if the Court decides to hear the Motion on the merits, the Receiver asks for another 21 days following that decision to file a second response. (Prelim. Resp. 4.) The

Receiver did not meet and confer about such relief, and it is unclear whether the Receiver would be entitled to a second response to the same Motion. Since the Receiver had until May 12th to file a response to the Motion, it is also unclear why he did not simply use the time allotted to him to draft and file a response that addressed both the issues in his Preliminary Response and the underlying merits of the Motion. In any event, if the Receiver files a second response, Mr. Dragul respectfully reserves his right to oppose, and to file a second reply if necessary.

CONCLUSION

As a matter of law, the Receiver lacks standing to assert creditors' claims. The Court should clarify the Receivership Order so that the Receiver may no longer misuse it to expand his powers beyond those he may constitutionally hold.

Respectfully submitted this 4th day of May, 2020.

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ATTORNEYS FOR DEFENDANT GARY DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PRELIMINARY REPLY IN SUPPORT OF DEFENDANT GARY DRAGUL'S MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER THAT RECEIVER LACKS STANDING TO ASSERT CLAIMS OF INVESTORS/CREDITORS** was filed and served via the ICCES e-file system on this 4th day of May, 2020 to all counsel of record for the parties to the action, including the following:

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