

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, Colorado 80202</p>	<p style="text-align: center;">ΔCOURT USE ONLYΔ</p>
<p>Plaintiff: TUNG CHAN, Securities Commissioner for the State of Colorado</p> <p style="text-align: center;">v.</p> <p>Defendants: GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC</p>	
<p><i>Attorneys for Movants Marlin Hershey and Performance Holdings, Inc.</i></p> <p>Thomas E. Goodreid Paul M. Grant Goodreid & Grant LLC 1801 Broadway, Suite 1400 Denver, Colorado 80202 Phone #: 303-296-2048x136 (Goodreid) Phone #: 720-810-4235 (Grant) E-mail: t.goodreid@comcast.net E-mail: pgrant@goodreidgrant.com Atty. Reg. #: 25281 (Goodreid) Atty. Reg. # 26517(Grant)</p>	<p>Case No. 2018cv33011</p> <p>Ctrm. 414</p>
<p>MARLIN HERSHEY’S AND PERFORMANCE HOLDINGS, INC.’S REPLY IN SUPPORT OF MOTION TO INTERVENE PURSUANT TO C.R.C.P. 24(b)</p>	

Proposed Intervenors Marlin Hershey and Performance Holdings, Inc. (together, “Movants”) file their Reply in Support of Motion to Intervene Pursuant to C.R.C.P. 24(b) and, in support thereof, respectfully set forth as follows:

I. BACKGROUND

1. On March 31, 2020, Movants filed their Motion to Intervene (the “Motion”), pursuant to which they seek to intervene in this case to assert a claim for declaratory relief with respect to Paragraph 13(s) (the “Paragraph”) of the Order Appointing Receiver (the “Receivership Order”), a provision that purports to authorize the Receiver to prosecute claims and causes of action held by the creditors of the Defendants and their subsidiaries. As set forth in the Motion, irrespective of whether the Paragraph was inadvertently or improvidently included in the Receivership Order, the Paragraph became a material and threshold issue for Movants and others when the Receiver relied upon it to assert twelve (12) of his fourteen (14) claims in *Sender v. Dragul, et al.*, Denver District Court, Courtroom 414, Case No. 2020cv30255 (the “Receiver Lawsuit”).

2. On April 27, 2020, both the Receiver and the Securities Commissioner filed responses to the Motion.¹ Although they filed separate responses to the Motion, the Receiver and the Securities Commissioner appear to have coordinated their efforts, as their arguments and legal citations are very similar. Given the consistencies in the responses to the Motion, Movants address both responses in this Reply.

3. In their responses, the Receiver and the Securities Commissioner argue that (i) the Motion is untimely, (ii) intervention is unnecessary because the Movants can seek relief in the Receiver Lawsuit, (iii) the Receivership Estate and its creditors will be prejudiced if the

¹ The Securities Commissioner subsequently filed an Amended Response of the Securities Commissioner in Opposition to Motion to Intervene on April 30, 2020.

Paragraph is stricken from the Receivership Order, and (iv) this case would be delayed by the Movants' intervention. In addition, both the Receiver and the Securities Commissioner prematurely argue the merits of the claim for declaratory relief that Movants seek to pursue in this case, tautologically asserting that the Receiver has the authority to bring claims on behalf of creditors of the Receivership Estate because the Receivership Order gives the Receiver such authority. Of course, whether the Receivership Order *should include* this broad grant of authority is the precise question to which Movants seek an answer.

II. ARGUMENT

A. Movants Timely Filed the Motion

4. C.R.C.P. 24(b) permits intervention “[u]pon timely application...when an applicant’s claim or defense and the main action have a question of law or fact in common.” C.R.C.P. 24(b)(2) (2020). “[W]hen intervention is sought, the issue of timeliness is a threshold question.” *Law Offices of Andrew L. Quiat v. Ellithorpe*, 917 P.2d 300, 303 (Colo. App. 1995); *see also Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987) (same). “The determination of the timeliness of a motion to intervene is a matter which rests within the sound discretion of the trial court, which must weigh the lapse of time in light of all circumstances of the case, including whether the applicant was in a position to seek intervention at an earlier stage in the case.” *Law Offices of Andrew L. Quiat*, 917 P.2d at 303.

5. The Securities Commissioner and the Receiver argue that the Motion “is a belated motion to reconsider the Receivership Order” under C.R.C.P. 121 § 1-15(11) or an untimely

appeal of the Receivership Order.² The Motion obviously is neither as only a party can move for reconsideration or file an appeal of an interlocutory order, and Movants are not and never were parties in this case. *See* C.R.C.P. 121 § 1-15(11) (2020) (“A party moving to reconsider...” (emphasis added); C.A.R. 4(a) (2020) (“...[T]he notice of appeal...shall be filed with the appellate court...within 49 days of the date of entry of the judgment, decree, or order from which the party appeals.”) (emphasis added). Thus, Movants necessarily could not have moved for reconsideration of or appealed the Receivership Order.

6. However, as soon as Movants were served with the Complaint in the Receiver Lawsuit and learned that the Receiver intended to rely upon the Paragraph to assert multiple claims against them, they promptly filed the Motion. They could not have done so any sooner as, until the Receiver initiated the Receiver Lawsuit, Movants were not adversely affected by the Paragraph and, therefore, would not have had standing to bring a claim for declaratory relief with respect to the Paragraph or a basis to intervene in this case to assert such a claim.³ *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992) (first requirement of standing is that the plaintiff must have suffered an injury “which is concrete and particularized” and “actual or imminent, not conjectural or hypothetical”). The time gap between entry of the Receivership Order and the filing of the Motion resulted from the Receiver’s decision to file the Receiver Lawsuit seventeen (17) months following entry of the Receivership Order, not from any dilatory

² The Receiver incorrectly implies that an appeal of the Receivership Order had to be taken within 49 days of the date of the Receivership Order. As the Receiver acknowledges, the Receivership Order is an interlocutory order and, therefore, it may be appealed both within 49 days of the date of the Order or upon the entry of final judgment in this case. C.A.R. 1(a)(4) (2020); *Francis v. Camel Point Ranch, Inc.*, __ P.3d __, 2019 WL 3227058, *3 (Colo. App. Sept. 18, 2019).

conduct of Movants. The Motion was timely filed, and the Receiver's and the Securities Commissioner's argument otherwise lacks any support. *See Diamond Lumber*, 746 P.2d at 78 (motion to intervene filed sixteen months after filing of lawsuit was timely where intervenors moved to intervene "upon learning that their interests were not being adequately represented").

B. This Court Should Determine the Propriety of the Paragraph

7. Both the Receiver and the Securities Commissioner assert that the propriety of the Paragraph should be addressed in the Receiver Lawsuit, not in this case.⁴ However, because the Receivership Order is an interlocutory order, this Court retains the power to reconsider it. *Pearson v. District Court*, 924 P.2d 512, 515 (Colo. 1996) (citing 1B James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 0.404[4.-1] at II-2 (2d ed. 1995)). Moreover, as set forth in Movants' Motion to Stay Response to Complaint filed in the Receiver Lawsuit, the court in the Receiver Lawsuit may not have the right to review the propriety of the Receivership Order and, even if the court does, may find it awkward to do so. Ex. 2 to Receiver's Response to Motion to Intervene at ¶¶ 5-6. Finally, as a practical matter, by granting Movants' Motion to Stay Response to Complaint, Judge MCGahey in the Receiver Lawsuit appears to have agreed that this Court should decide the propriety of the Paragraph. Ex. 3 to Receiver's Response to Motion to Intervene. Thus, contrary to the Receiver's and the Securities Commissioner's contentions to the contrary, this Court has the right to review the Receivership Order and is the

³ Filing a creditor's claim in this case did not trigger an injury to Movants and, therefore, did not provide them with a basis to file the Motion or to assert standing to bring a claim for declaratory relief with respect to the Receivership Order.

⁴ The Securities Commissioner's averment that "Movants will not be bound by the result of this case.." is inconsistent with its argument that the Receiver has standing to assert claims of the creditors of the Receivership Estate against Movants because the Receivership Order provides the Receiver with such standing. In making this

more appropriate tribunal to do so. The Motion and accompanying claim for declaratory relief provides this Court with the procedural means to review the Paragraph. Accordingly, the Court should grant the Motion and allow Movants to intervene so that they can challenge the propriety of the Paragraph.⁵

C. The Securities Commissioner and Receiver Cannot Use the Paragraph as Both Sword and Shield

8. Regardless of the propriety of the Paragraph, the Receiver and the Securities Commissioner argue that, because the Receiver relied upon the authority provided by the Paragraph to file the Receiver Lawsuit and apparently “invested significant resources” in doing so, this Court should not review the Paragraph. In making this argument, the Receiver and Securities Commissioner attempt to use the Paragraph as both sword and shield. The Receiver utilizes the Paragraph offensively to assert twelve (12) of his fourteen (14) claims in the Receiver Lawsuit. Because he relied upon the Paragraph to assert such claims in the Receiver Lawsuit, the Receiver argues that Movants should be precluded from challenging the propriety of the Paragraph in this case.

9. The Receiver and the Securities Commissioner cannot have it both ways. Given that they chose to include the Paragraph in the Receivership Order and that the Receiver chose to rely upon the grant of authority contained therein to file the Receiver Lawsuit, they necessarily

argument, the Securities Commissioner necessarily assumes that Movants are bound by the grant of authority in the Receivership Order.

⁵ The Securities Commissioner erroneously cites *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001), for the proposition that “third-party intervention in a case brought by the Colorado Securities Commissioner is disfavored.” The *Feigin* court actually held no such thing. Rather, in considering a motion to intervene *as of right* filed by investors, the Court concluded that the investors did not have a right to intervene because they could not meet the standard for intervention as of right set forth in C.R.C.P. 24(a)(2). *Feigin*, 19 P.3d at 30-32. Contrary to the Securities Commissioner’s argument, there is in fact not a presumption against intervention in a case filed by the Securities Commissioner.

invited challenges to the propriety of the Paragraph both here and in the Receiver Lawsuit. When the Receiver and Securities Commissioner intentionally expanded the authority of a Receiver by including the Paragraph in the Receivership Order, relied upon the expansive provision, and putatively “invested significant resources” in relying on the provision, they did so at their own risk and certainly cannot be rewarded with immunity from their own mistakes or lapses in judgment. Indeed, the Receiver is an officer of this Court, and, therefore, this Court retains jurisdiction to supervise the Receiver until the order discharging the Receiver is entered. *Midland Bank v. Galley Co.*, 971 P.2d 273, 276-277 (Colo. App. 1998). The Court’s oversight includes examining whether the Receivership Order inadvertently or improvidently granted excessive and unlawful authority to the Receiver.

D. Allegations of Delay Are Misdirected

10. The Receiver’s and Securities Commissioner’s claim that permitting Movants to intervene in this case will “substantially delay and interfere with the administration of this case” is misdirected. As both the Receiver and the Securities Commissioner acknowledge, this case was filed nearly twenty-one (21) months ago and the Receiver was appointed over twenty (20) months ago. Since November 19, 2018, the Securities Commissioner has requested and obtained a stay of its duty to prosecute this case, and the current stay order is in effect through June 2020. Accordingly, the Securities Commissioner has delayed this case voluntarily for the indefinite future. Even if the Securities Commissioner intended to expeditiously prosecute this case – which it clearly does not - the limited purpose for which Movants seek to intervene will not delay the efforts of the Securities Commissioner. In fact, because the declaratory relief sought by Movants effectively may curtail the Receiver Lawsuit by drastically limiting the claims and

parties that the Receiver may pursue, allowing Movants to intervene to assert their claim for declaratory relief actually may expedite the prosecution of this case and the administration of the Receivership Estate.⁶

E. The Receiver Does Not Have the Authority to Bring Claims on Behalf of Creditors of the Receivership Estate

11. Although it is premature at this juncture to address the merits of the declaratory relief claim that Movants seek to pursue in this case should the Court grant their Motion, both the Receiver and the Securities Commissioner argue the merits of the claim and, therefore, Movants feel compelled to respond at least in part. As noted in the Motion, in the Receiver Lawsuit, Defendants Gary Drugal, Susan Markusch, Alan Fox, and ACF Property Management, Inc., have filed motions to dismiss in which they have argued, *inter alia*, that the Receiver lacks standing to pursue claims on behalf of investors/creditors of Defendants and/or entities affiliated with Defendants because “...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.”⁷ *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (“Since 1935 it has been well settled that ‘the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.’”); *Scholes v. Schroeder*, 744 F.Supp.

⁶ To the extent that the Receiver accuses Movants of delaying the Receiver Case by filing their Motion to Stay Response to Complaint, such accusation also is misplaced as it is the Receiver, if anyone, who has delayed that case by filing a Complaint with multiple fatal deficiencies and seeking and obtaining an extension of nearly two months to respond to the motions to dismiss and file its amended complaint.

⁷ The Receiver attaches some importance to the fact that, in the Receiver Lawsuit, Movants have not filed a motion to dismiss in which they challenge the Receiver’s standing. While true, it is of no import as Movants have not filed a substantive response to the Receiver’s complaint in the Receiver Lawsuit but, instead, filed their Motion to Stay Response to Complaint in order to allow them to challenge the propriety of Paragraph 13(s) of the Receivership Lawsuit in this case.

1419, 1422 (N.D. Ill. 1990) (a receiver cannot pursue claims that belong not to the receivership estate but rather to those who may have an interest in the estate). As Defendants Alan Fox and ACF Property Management, Inc. argued in their motion to dismiss:

A receiver “stand[s] in the shoes of the entity in receivership.” *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009) (citations omitted). Accordingly, a receiver “lack[s] standing to bring suit unless the receivership entity could have brought the same action.” *Id.* In other words, “although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors.” *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) (citations omitted); *see also Scholes v. Lehmann*, 56 F.3d 750,753 (7th Cir. 1995) (“equity receiver may sue only to redress injuries to the entity in receivership.”). As one court put it, “the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have. A receiver may commence lawsuits, but stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted.” *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008) (citations and quotation marks omitted).

Defendants Alan C. Fox and ACF Property Management, Inc.’s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), 12(b)(5) and 9(b) filed on March 17, 2020 in Receiver Lawsuit.

12. None of the cases cited by the Receiver or the Securities Commissioner in support of the propriety of the Paragraph holds that a Receiver has the authority to pursue claims belonging to creditors of the Receivership Estate. *See, e.g., Francis*, 2019 WL 3227058 at *2 (“A court’s appointment of a receiver places a corporation in the court’s exclusive custody and control, giving the receiver dispositional authority over *the corporation and its assets.*”) (emphasis added); *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F.3d 230, 236 (7th Cir. 2003) (“[T]he receiver of a corporation is bound precisely as it is bound and occupies the relation to the stockholders that the corporation itself, if waging the suit in its own person, would occupy. This is true, although the receiver represents the creditors as well as the stockholders.”). In fact, the Securities Commissioner’s citations to other receivership orders from cases in this

judicial district are telling as neither contains the excessive and unlawful grant of authority found in the Paragraph. Rather, both cited orders only permit the respective receivers to prosecute legal actions to recover possession of estate property from persons “wrongfully possessing or occupying the Estate or Estate Property,” but not to assert claims on behalf of creditors to recover property that may belong to such creditors. In attempting to equate those orders with the Paragraph, the Securities Commissioner and, by extension, the Receiver confuse the Receiver’s objective to preserve the estate for its creditors with the authority to pursue claims belonging to creditors, authority that a Receiver clearly does not have. *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003).

13. Nonetheless, contrary to established law precluding a receiver from bringing claims on behalf of creditors or investors of a receivership estate, the Securities Commissioner and Receiver included just such a provision in the Receivership Order. Empowered by this unlawful grant of authority, the Receiver filed the Receiver Lawsuit and alleged that he has standing to pursue twelve (12) of his fourteen (14) claims solely based on paragraph 13(s) of the Receivership Order. For the reasons set forth in the Motion and herein, this Court should grant the Motion to allow Movants to intervene to challenge the propriety of the Paragraph.

WHEREFORE, Movants respectfully request that the Court permit them to intervene in this case for the purpose set forth herein and provide such other and further relief to which Movants may be justly entitled.

Respectfully submitted this 4th day of May 2020.

By: /s/Paul M. Grant
Paul M. Grant
Goodreid & Grant LLC
1801 Broadway, Suite 1400
Denver, CO 80202
Telephone: (720) 810-4235
pgrant@goodreidgrant.com

*Attorneys for Movants Performance
Holdings, Inc. and Marlin Hershey*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 4th day of May 2020:

Allen Vellone Wolf Helfrich and Factor PC

Michael Thomas Gilbert
Patrick D. Vellone
Rachel A. Sternlieb

Moye White

Eric Brian Liebman
Joyce Carmel Williams
Lucas Trask Ritchie

Jones & Keller PC

Christopher Stephen Mills
Paul Leo Vorndran

State of Colorado

Robert Finke
Janna Fischer

/s/Paul M. Grant
Paul M. Grant