

<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>DATE FILED: May 12, 2020 7:45 AM FILING ID: 4FD610C8154B3 CASE NUMBER: 2018CV33011</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p>RESPONSE OF THE SECURITIES COMMISSIONER IN OPPOSITION TO MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER</p>	

Plaintiff, Tung Chan, Securities Commissioner for the State of Colorado, hereby opposes the Motion for Clarification of Order Appointing Receiver That Receiver Lacks Standing to Assert Claims of Investors/Creditors (“Motion”), filed April 21, 2020 by Defendant Gary Dragul (“Dragul”).

I. Introduction

Dragul raises a standing defense in this case that properly should be brought in *Sender v. Dragul et al.*, No. 2020CV30255, before Division 414 (The Honorable

Robert L. McGahey Jr.) (“Insider Case”). Dragul asks for a belated reconsideration of the order appointing the receiver, which he negotiated with counsel and to which he stipulated. *Stipulated Order Appointing Receiver* (Aug. 30, 2018) (“Receivership Order”). Dragul would have this Court determine whether Harvey Sender, the receiver in this case (“Receiver”), has the standing to pursue claims in a different case before another division of the Denver District Court. His request is untimely, it is barred because he now takes an inconsistent position to the position he took earlier in this case, and it should also be denied because he raises the standing issue in the wrong case and the Receivership Order grants the receiver appropriate powers.

II. Background

This case stems from a 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 offerings. *Complaint* (Aug. 15, 2018). The Commissioner simultaneously sought the appointment of a receiver and an order freezing the assets of Dragul and GDA. Weeks later, Dragul agreed to both the appointment of the Receiver and to the Receivership Order. Dragul and his counsel were involved in the drafting of the Receivership Order and had the opportunity to review its language. The Receivership Order has been in effect for more than a year and a half.

The Receiver recently filed the 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 Dragul, the Insider Case names as defendants Benjamin Kahn; the Conundrum Group; Susan Markusch; Alan C. Fox; ACF Property Management; Marlin Hershey; and Performance Holdings, Inc. (collectively, “Insider Case Defendants”). Because the Commissioner is not a party to the Insider Case, the Commissioner takes no position in this filing on the merits of the Complaint in the Insider Case or the Receiver’s standing in the Insider Case. But the Commissioner has an interest in holding Dragul to the Receivership Order to which he agreed and that contains language he and his counsel had the opportunity to negotiate. Two defendants in the Insider Case, Marlin Hershey and Performance Holdings, Inc., seek to intervene in this case for the purposes of seeking a similar reconsideration of the Receivership Order to the one Dragul requests. The Commissioner also opposes that motion and has filed a separate response, which she incorporates here by reference.

The Receivership Order gives the Receiver the power to recover possession of Receivership Property¹ 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

¹ 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.

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).

Dragul, twenty months after stipulating to the Receivership Order, now seeks a “clarification” because he no longer likes the order he agreed to. But a receiver’s power “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)). Dragul wants to change the scope of this Court’s order of appointment—to which he stipulated—more than a year and a half after it was issued. His Motion, which is essentially an untimely motion for reconsideration, is barred by his earlier agreement to the Receivership Order.

III. Argument

A. Dragul advances an inconsistent position in his challenge to the Receivership Order, to which he stipulated.

Dragul admits that he stipulated to the Receivership Order, including the provision in paragraph 13(s).² (Motion at 9 n.3.) He now takes an inconsistent position and challenges paragraph 13(s) because Dragul is also a defendant in the Insider Case and he seeks to bolster his position there.

A party may not “simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced

² Dragul contends that his stipulation to the Receivership Order, including the provision that the Receiver has the powers in paragraph 13(s), does not matter because he is raising a standing issue. (Mot. at 9 n.3.) But Dragul’s standing arguments do not apply in this case and should be litigated in the Insider Case.

in the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749, (2001). This doctrine, known as judicial estoppel, prevents a party from asserting an inconsistent position in the same or a later proceeding if the party successfully maintained the first position and gained a benefit from the court. *Id.*; *Estate of Burford v. Burford*, 935 P.2d 943, 948 (Colo. 1997); *see also In re Crossover Fin. I, LLC*, 477 B.R. 196, 204, 204 n.19 (Bankr. D. Colo. 2012) (rejecting party’s argument because it was based on a conflicting position taken in other litigation).

Here, Dragul agreed to paragraph 13(s) of the Receivership Order and stipulated that the Receiver has the power to bring claims on behalf of creditors. Because Dragul stipulated to the Receivership Order and the Receiver took over the management of the Receivership Estate, the Commissioner agreed to stay prosecution of the securities fraud claims. Now, having gained the benefit of not litigating the securities fraud claims against him over the last twenty months, Dragul takes the inconsistent position that the Receiver’s powers should be limited. He should not be allowed to reverse the position he took in stipulating to the Receivership Order. *See People v. Shell*, 148 P.3d 162, 175 (Colo. 2006) (ruling that judicial estoppel prevented party from arguing she was entitled to practice law when she previously stipulated that she was not); *Fiedler v. Fiedler*, 879 P.2d 675, 679 (Mont. 1994) (party could not argue that real property was not partnership property when he previously stipulated that it was partnership property). Judicial estoppel alone warrants the denial of Dragul’s Motion.

B. Dragul’s Motion should also be denied because he requests an untimely reconsideration of the Receivership Order.

Even if judicial estoppel did not bar Dragul from challenging the Receivership Order, his Motion should be denied because Dragul did not seek an interlocutory appeal of the Receivership Order or ask this Court to reconsider it within the time he could do so. A litigant may appeal an order appointing a receiver within 49 days of its issue. C.A.R. 1(a)(4); C.A.R. 4. Motions to reconsider a non-final order, which are “disfavored,” must be filed within fourteen days of the order. C.R.C.P. 121 § 1-15(11). Dragul’s Motion, which was filed 615 days after the issue of the Receivership Order, is essentially a much-belated motion to reconsider the Receivership Order.

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

Finally, even if Dragul was not challenging an order he negotiated and to which he stipulated, and even if his Motion was timely, the Receivership Order grants the Receiver powers that are consistent with those typically held by a receiver.

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).

Here, the Court in the Receivership Order granted the receiver the power in paragraph 13(s). Dragul, after agreeing to the Receivership Order, now attacks this Court's order and wants to remove that power because he no longer agrees with it.

2. The powers in the Receivership Order are legal.

The Receivership Order grants the Receiver legal powers. The case law that Dragul cites regarding his standing argument—which, again, does not apply to this case—does not refute that.

*Sender v. Kidder Peabody & Co.*³ affirmed a trial court's decision that a bankruptcy trustee could not pursue claims against third parties on behalf of a debtor where the debtor acted in concert with the third parties and was thus *in pari delicto*

³ As Dragul notes, the Receiver, Harvey Sender, was a party to *Kidder Peabody*. Dragul requested Sender be appointed as the Receiver for this case and the Commissioner agreed to Dragul's request.

with the wrongdoers. 952 P.2d 779, 782 (Colo. App. 1997). But because a receiver represents the interests of a receiver’s creditors, not just the entity in receivership, the party who acted in concert with the party who conducted fraud disappears and “the person who is *in pari delicto* is eliminated.” *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) (holding that receiver had standing to bring claims on behalf of creditors); *see also Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013) (holding receiver had standing to pursue claims); *S.E.C. v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (same). *In re M&L Business Machine Co.* is inapposite here because is rooted in bankruptcy law and discusses the statutory powers of a bankruptcy trustee. 160 B.R. 850, 851 (D. Colo. 1993).

Good Shepherd 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 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.* Dragul also cites 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).

Even cases that note that “receivers may only sue to redress injuries to the entity in receivership, and not directly on behalf of the entity’s creditors” nonetheless determine that the receiver has standing to bring claims that injured the entity in receivership because the defendant defrauded the entity’s creditors. *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015) (collecting cases, holding that receiver had standing to bring a fraudulent transfer claim that injured a defrauded creditor entity); *see also First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 182 (Colo. App. 2007), *as modified on denial of reh’g* (June 14, 2007) (analyzing Delaware law and concluding that creditor of a bankrupt company had standing to bring one claim but not others).

The powers granted in paragraph 13(s) of the Receivership Order are consistent with those commonly granted to a receiver.

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

As the Commissioner explained in detail in her response to Hershey's Motion to Intervene, 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. (*See Response of the Securities Commissioner In Opposition to Motion to Intervene* at 9–10 (Apr. 27, 2020).) The Commissioner incorporates that response here and notes that the Receivership Order is consistent with other receivership orders granted in other securities cases in this District.

IV. Conclusion

For the reasons stated above, the Court should deny the Motion to Clarify. Dragul stipulated to the Receivership Order that he now seeks to rewrite, and judicial estoppel bars him from doing so.

Dated: May 12, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I served a true and correct copy of the foregoing **RESPONSE OF THE SECURITIES COMMISSIONER IN OPPOSITION TO MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER** via CCE or first-class mail, postage prepaid, to the following:

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