

DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

Plaintiffs: HARVEY SENDER, AS
RECEIVER FOR GARY DRAGUL;
GDA REAL ESTATE SERVICES,
LLC; AND GDA REAL ESTATE
MANAGEMENT, LLC

vs.

Defendants: GARY 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

Counsel for Defendants Performance Holdings, Inc.
and Marlin Hershey:

Thomas E. Goodreid
Paul M. Grant
Goodreid and 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)

▲ COURT USE ONLY ▲

Case Number: 20CV30255

Courtroom: 414

**DEFENDANTS MARLIN HERSHEY'S AND PERFORMANCE HOLDINGS, INC.'S
STATUS REPORT**

As required by the Court in its April 7, 2020 Order granting Defendants Marlin Hershey's

and Performance Holdings, Inc.’s (together, the “Hershey Defendants”) Motion of Hershey Defendants to Stay Response to Complaint, the Hershey Defendants file the following Status Report regarding their involvement in *Chan v. Dragul, et al.*, Case No. 2018cv33011, Denver District Court (the “Receivership Case”):

1. On March 31, 2020, the Hershey Defendants filed their Motion to Intervene in the Receivership Case for the purpose of seeking declaratory relief regarding the lawfulness of paragraph 13(s) of the Stipulated Order Appointing Receiver entered on August 30, 2018 in the Receivership Case.

2. Following the completion of briefing on the Hershey Defendants’ Motion to Intervene, on May 14, 2020, the court in the Receivership Case denied the Motion to Intervene in a one-sentence order, a true and correct copy of which is attached hereto as Exhibit A.

3. Since the Court granted the Motion of Hershey Defendants to Stay Response to Complaint, the Receiver has represented that it will file an amended complaint and has obtained an extension of time until May 31, 2020 to do so.

4. Given the Receiver’s imminent filing of his amended complaint, the Hershey Defendants intend to respond to the amended complaint rather than to the Receiver’s soon-to-be-superseded original complaint. In their response to the amended complaint, the Hershey Defendants anticipate asking this Court to determine whether paragraph 13(s) of the Receivership Order lawfully provides the Receiver with standing to bring the claims that he alleges in this case against the Hershey Defendants. The Receiver agrees that this Court should address the standing issue as, in its Response to Hershey’s Motion to Intervene, he stated as follows:

But the nature of the claims asserted in [Case No. 20cv30255], and the Receiver’s standing to assert them, must be addressed in [Case No. 20cv30255], not [in the Receivership Case]. Regardless of whether this Court grants leave to intervene, these issues will have to be decided in [Case No. 20cv30255].

Receiver’s Response to Hershey’s Motion to Intervene, filed on April 27, 2020, at p. 8, a true and

correct copy of which is attached hereto as Exhibit B (exhibits excluded).

Respectfully submitted this 21st 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 Defendants 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 21st 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

Gordon and Rees LLP

John M. Palmeri
Margaret Louise Boehmer

Jones & Keller PC

Christopher Stephen Mills
Paul Leo Vorndran

Thomas F. Quinn PC

Thomas Francis Quinn

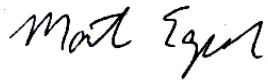
/s/Paul M. Grant
Paul M. Grant

DISTRICT COURT, DENVER COUNTY, COLORADO		
Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202		
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF et al. v. Defendant(s) GARY DRAGUL et al.		DATE FILED: May 14, 2020 9:57 AM CASE NUMBER: 2018CV33011
		△ COURT USE ONLY △
		Case Number: 2018CV33011 Division: 424 Courtroom:
Order: Motion to Intervene Pursuant to C.R.C.P. 24(b) w/ Attach		

The motion/proposed order attached hereto: DENIED.

The motion is denied for the reasons stated in the response.

Issue Date: 5/14/2020



MARTIN FOSTER EGELHOFF
District Court Judge

<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: DAVID S. CHEVAL, Acting 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>MOTION TO INTERVENE PURSUANT TO C.R.C.P. 24(b)</p>	

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

I. C.R.C.P. 121, § 1-15(8) CERTIFICATION

1. Prior to filing this Motion, the undersigned conferred with counsel for Plaintiff and counsel for the Receiver appointed for Defendants. Counsel for Plaintiff, Robert Finke, and counsel for the Receiver, Michael Gilbert, stated that they oppose the relief requested herein.

II. BACKGROUND

2. On August 15, 2018, Plaintiff filed his Complaint for Injunctive and Other Relief against Defendants pursuant to which he sought injunctive and other equitable relief resulting from Defendants' alleged violations of the Colorado Securities Act. On the same day, Plaintiff filed his *Ex Parte* Motion for Appointment of Receiver. Defendants stipulated to the Order Appointing Receiver, and the Court entered such Order on August 30, 2018 (the "Receivership Order").

3. Paragraph 13(s) of the Receivership Order purports to authorize the Receiver "[t]o prosecute claims and causes of action 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..." On January 21, 2020, the Receiver filed his Complaint in Denver District Court, Courtroom 414, Case No. 2020cv30255 (the "Receiver Lawsuit") in which he alleged fourteen (14) claims against numerous defendants, including Movants, based on an alleged "fraudulent commercial real estate scheme orchestrated by Gary Dragul..." The Receiver asserts twelve (12) of the fourteen (14) claims on behalf of the investors/creditors of Defendants and/or entities affiliated with Defendants. With respect to each of these twelve (12) claims, the Receiver's sole basis for his standing to assert claims on behalf of investors/creditors of Defendants is paragraph 13(s) of the Receivership Order.

III. ARGUMENT

4. 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." *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. 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).

5. Nonetheless, contrary to established law precluding a receiver from bringing claims on behalf of creditors or investors of a receivership estate, the Plaintiff included just such a provision in the Receivership Order. More egregiously, with knowledge that he does not have the power that paragraph 13(s) of the Receivership Order purports to give to him, the Receiver has 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). *See Scholes*, 744 F.Supp. at 1423 (order purporting to confer power on receiver to pursue claims on behalf of investors of receivership estate exceeded the power of the judiciary and would not be enforced). Whether the Receiver can pursue claims on behalf of the investors/creditors of the receivership estate is potentially

dispositive of twelve (12) of the fourteen (14) claims alleged by the Receiver, including all of the claims alleged against Movants. Accordingly, as set forth in detail in the Claim for Declaratory Relief attached hereto as Exhibit A, Movants seek a declaration that paragraph 13(s) was inadvertently or improvidently included in the Receivership Order and that the Receiver does not have authority to pursue claims on behalf of investors/creditors of Defendants and/or entities affiliated with Defendants.

6. To obtain such relief, Movants first must intervene in this case pursuant to C.R.C.P. 24(b) which permits intervention “when an applicant’s claim or defense and the main action have a question of law or fact in common.” *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998). The Court has considerable discretion in determining motions to intervene. *Id.* Here, intervention is appropriate and necessary because Movants are requesting relief in connection with the Receivership Order which, in turn, could be dispositive of virtually the entire Receiver Lawsuit. Movants’ lack of standing defense to the claims alleged against them in the Receiver Lawsuit involves an issue of law common to this case, and, accordingly, the most efficient and economical manner in which to seek declaratory relief with respect to the Receiver’s standing to pursue claims in the Receiver Lawsuit is to intervene in this case in order to seek clarity from the Court on paragraph 13(s) of the Receivership Order.

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 31st day of March 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 31st day of March 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

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433</p>	<p>DATE FILED: April 27, 2020 3:58 PM FILING ID: 6ABCAF0588776 CASE NUMBER: 2018CV33011</p>
<p>Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1900 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com</p>	<p>Case Number: 2018CV33011</p> <p>Division/Courtroom: 424</p>
<p style="text-align: center;">RECEIVER’S RESPONSE TO HERSHEY’S MOTION TO INTERVENE</p>	

Receiver, Harvey Sender, hereby responds to the Motion to Intervene (“Motion to Intervene”) filed March 31, 2020 by Marlin Hershey (“Hershey”) and Performance Holdings, Inc. (“PHI”) (jointly, “Movants”).

I. Introduction

Movants seek to intervene in this case permissively to obtain relief from this Court's August 30, 2018, Stipulated Order Appointing Receiver ("Receivership Order"), at least one provision of which Movants contend was entered "inadvertently or improvidently." Mot. at 4, ¶ 5. The Receivership Order grants the Receiver "all the powers and authority usually held by equity Receivers and reasonably necessary to accomplish the purposes stated herein, including"¹ the authority

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.

Receivership Order ¶ 13(s). This provision was included because individual creditors and investors often lack the resources necessary to prosecute claims, and to avoid a multiplicity of lawsuits by individuals seeking to benefit only themselves rather than creditors as a whole. It is customary and appropriate to centralize authority in a receiver who can assert claims for the benefit of all victims. *See, e.g., SEC v. Callahan*, 193 F. Supp. 3d 177, 206 (E.D.N.Y. 2016) (receiver charged with maximizing value of receivership assets for the benefit of all defrauded investors and creditors).

Movants are defendants in *Sender v. Dragul et al.*, No. 2020CV30255, before Division 414 (The Honorable Robert L. McGahey Jr.) (the "**Insider Case**"). They are also defendants in an SEC enforcement action in North Carolina, *SEC v. Bradley, et al.*, 3:19-cv-00490 (W.D.N.C. Compl. filed Sept. 30, 2019). Movants were Dragul

¹ Receivership Order ¶13(o).

insiders and conspired with him to perpetrate his Ponzi scheme. Both the Insider Case and the SEC action allege, *inter alia*, that Movants defrauded investors. Movants received more than \$2.8 million in undisclosed commissions from Dragul for their part in the Ponzi scheme.

The Commissioner filed this case on August 15, 2018, in part to shut down the scheme. Two weeks later, Dragul and GDA² stipulated to the appointment of the Receiver and entry of the Receivership Order. Movants incorrectly intimate that the Receivership Order was unilaterally imposed by the Commissioner. *See* Mot. at 3. To the contrary, it was negotiated with Dragul and his counsel, and Dragul and his counsel stipulated to it.

The Receivership Order was entered more than a year and seven months ago. Since September 2018, it has governed and guided the administration of this complex and contentious case. Relying in part on the authority granted in ¶ 13(s), the Receiver has invested significant resources investigating and bringing claims against Dragul's insiders/co-conspirators, including Movants. Faced now with litigation seeking to hold them accountable, Movants belatedly seek to intervene and file a declaratory judgment action to vacate a provision of the Receivership Order on which the Commissioner, the Receiver, and all parties-in-interest have relied for over eighteen months. Movants cite no authority to support overturning this Court's long-standing Receivership Order.

² GDA Real Estate Services, LLC and GDA Real Estate Management, Inc. (jointly "GDA").

II. Movants are not entitled to intervene.

A. The Motion to Intervene is untimely and intervention would prejudice the Estate and its creditors.

Under C.R.C.P. 24(b)(1), permissive intervention may be granted, at the Court's discretion, when a statute grants a conditional right to intervene, or under C.R.C.P. 24(b)(2) "when an applicant's claim or defense and the main action have a question of law or fact in common." Intervention under Rule 24(b)(2) is always discretionary. *In re K.L.O-V.*, 151 P.3d 637, 642 (Colo. App. 2006). But as explicitly provided in the Rule, it must be timely sought. *E.g., Grijalva v. Elkins*, 287 P.2d 970, 972 (1955). When exercising its discretion, the Court must "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."³ See *In re Marriage of Paul*, 978 P.2d 136, 139 (Colo. App. 1998); *K.L.O-V.*, 151 P.3d at 642. Movants seek to intervene so they can file a new action seeking to overturn an essential provision of the Receivership Order they no longer find to their liking. Allowing intervention at this late date would delay this case and substantially prejudice the Estate and its creditors.

Although orders appointing receivers are not final, they are appealable by right, C.A.R. 1(a)(4), but appeals must generally be filed within 49 days. C.A.R. 4. Any motion seeking reconsideration of an order appointing a receiver must be filed within 14 days. C.R.C.P. 121, § 1-15(11). Having failed to avail themselves of these

³ Movants do not seek to intervene as of right under C.R.C.P. 24(a). Although they don't cite which subsection of Rule 24(b) they rely on, their failure to cite any statute allowing for permissive intervention indicates they rely on 24(b)(2).

challenges, Movants belatedly seek to intervene to do so. The time for Movants to challenge the Receivership Order has long-expired.

Movants have long been aware of the Receivership Order. On October 24, 2018, the Receiver filed his Motion to Establish Claims Administration Procedure and to Set Claims Bar Date. The Court granted that motion on November 13, 2018, and the Receiver thereafter sent notice of the claims bar date to all known creditors and parties-in-interest, including Movants.

On January 30, 2019, Hershey timely filed a claim against the Estate. **Exhibit 1.** Movants were aware of the Receivership Order and the claims administration process established under it and had no objection while the Order redounded to their benefit. Now, fourteen months after filing their claim, they want to overturn an essential provision of the Order upon which the Commissioner, the Receiver, and creditors have relied, and pursuant to which the Receiver has expended significant resources.

The Commissioner negotiated the Receivership Order *with* Dragul and his counsel, who had significant input into the Order, and stipulated to it. The Commissioner has relied on the specific grant of authority to the Receiver to pursue creditor claims as provided for in the Order by not investigating or pursuing independent claims under the Colorado Securities Act.

The Receiver has relied on the Order by expending significant resources investigating, bringing, and prosecuting claims for the benefit of creditors. Other creditors have also presumably relied on the Order and potentially refrained from

filing independent actions against Movants understanding the Receiver had been granted specific authority to do so. Movants are barred by laches from now belatedly challenging the Receivership Order. *See, e.g., Hickerson v. Vessels*, 2014 CO 2 ¶ 12, (essential element of laches is unconscionable delay in enforcing a right usually prejudicing another party).

Not only is the Motion to Intervene untimely, granting it would prejudice the existing parties and further delay this case. Movants have already asked Judge McGahey to stay the filing of their responsive pleadings in the Insider Case until their Motion to Intervene is decided and their complaint adjudicated. *See* Motion of Hershey Defendants to Stay Response to Complaint, No. 2020CV30255 (Denver Dist. Ct. Mar. 31, 2020) (**Exhibit 2**). A week later, Judge McGahey granted that stay motion. **Exhibit 3**. Allowing Movants to intervene will require them to serve their new complaint in this case on all creditors and parties-in-interest who must be given notice and an opportunity to be heard. Granting intervention will therefore substantially delay and interfere with the administration of this case and bring the entire Insider Case to a halt.

B. The fundamental premise of the Motion to Intervene is incorrect.

The substantive lynchpin of the Motion to Intervene is its incorrect assertion that the sole basis for the Receiver's standing in the Insider Case is paragraph 13(s) of the Receivership Order. Mot. at 2. Although this Court is not the appropriate forum to litigate this standing question – which has been raised in motions filed by *other defendants* in the Insider Case, but *not Movants* – the Receiver does have an

independent basis for standing there. *See, e.g., Wing v. Dockstader*, 482 F. App'x 361, 364-65 (10th Cir. 2012) (receiver had standing to pursue fraudulent transfer claims on behalf of creditors); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008) (same); *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995) (same); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at * 2-3 (D. Utah May 14, 2009) (same, citing cases); *see also Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1002 (8th Cir. 2007) (trustee has standing to assert professional negligence claims); *Marion v. TDI Inc.*, 591 F.3d 137, 148-9 (3rd Cir. 2010) (receiver had standing to bring aiding and abetting claims); *Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230, 237 (7th Cir. 2003) (receiver had standing bring claim for negligent supervision).

Movants cite cases that do not support their position that paragraph 13(s) of the Receivership Order grants the Receiver *ultra vires* powers. The only Colorado case Movants cite does not discuss a receiver standing at all and simply provides that “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.” *Good Shepherd Health Facilities of Colo., Inc. v. Dep't of Health*, 789 P.2d 423, 425 (Colo. App. 1989). Yet the Court of Appeals' affirmed the trial court's determination that the receiver *could* retain funds the entity in Receivership could not, and “that the receiver does not stand in the shoes” of the entity's operator. *Id.* at 426.

Movants also cite *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990), which does provide that an equity receiver lacks standing to assert investor claims, but it confirmed a receiver does have standing to bring claims on behalf of the

entities under receivership which were harmed by the fraud perpetrated by their operator. In the Insider Case, the Receiver brings claims to address harm to the Receivership entities and derivatively to their investors. Later federal cases distinguishing *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).

But the nature of the claims asserted in the Insider Case, and the Receiver’s standing to assert them, must be addressed in the Insider Case, not here. Regardless of whether this Court grants leave to intervene, these issues will have to be decided in the Insider Case. For example, if this Court were to grant leave to intervene, and ultimately vacate ¶ 13(s), the Receiver will still argue in the Insider Case that he has standing based on the above and other authorities. And if the Court denies leave to intervene, the standing issue will still have to be decided in the Insider Case.⁴ So, granting leave to intervene will unnecessarily duplicate proceedings, delay both cases, and prejudice the parties here. The Court should therefore deny Movant’s belated request to intervene. *See Callahan*, 193 F. Supp. 3d at 202 (denying motion

⁴ Although the Receiver filed a Notice of Related Case in the Insider Case and this Case on January 22, 2020, the Insider Case remains before Division 414.

to intervene seeking to amend receivership order as untimely when filed one year and five months after order entered).

C. This Court and its sister divisions have denied intervention in similar cases.

The Colorado Supreme Court has determined that investors and creditors have no right to intervene in a securities case where the 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 and are not investors or creditors, under *Alexa*, intervention in Commissioner cases is disfavored.

Indeed, the Commissioner has successfully opposed intervention in similar enforcement actions,⁵ and this Court has denied two such motions in this very 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 defendant in an unrelated action). There is no reason to deviate from these previous decisions now.

⁵ *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 4**); Order Regarding Motion to Intervene of Applicants, *Joseph v. Mueller*, No. 2010 CV 3280 (Denver Dist. Ct. Nov. 23, 2010) (**Exhibit 5**).

III. Conclusion

Granting leave to intervene here will result in duplicative litigation, the potential for inconsistent rulings, and will delay both this case and the Insider Case. The Court should therefore deny the Motion to Intervene.

Dated: April 27, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



/s/ Michael T. Gilbert

Patrick P. Vellone, #15284
Michael T. Gilbert, #15009
Rachel A. Sternlieb, #51404

Attorneys for Harvey Sender, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, I served a true and correct copy of the foregoing **RECEIVER'S RESPONSE TO HERSHEY'S MOTION TO INTERVENE** via CCE or first-class mail, postage prepaid, to the following:

Robert W. Finke
Janna K. Fischer
Ralph L. Carr Judicial Building
1300 Broadway, 8th Floor
Denver, Colorado 80203
Robert.Finke@coag.gov
Janna.Fischer@coag.gov

*Counsel for Tung Chan, Securities
Commissioner for the State of Colorado*

Thomas E. Goodreid
Paul M. Grant
GOODREID & GRANT LLC
1801 Broadway, Suite 1400
Denver, Colorado 80202

*Counsel for Marlin Hershey and
Performance Holdings, Inc.*

Paul L. Vorndran
Christopher S. Mills
JONES & KELLER, P.C.
1999 Broadway, Suite 3150
Denver, CO 80202

*Counsel for Defendants, Gary Dragul,
GDA Real Estate
Services, LLC and GDA Real
Estate Management, LLC*

/s/ Salowa Khan
Allen Vellone Wolf Helfrich & Factor, P.C.