

DISTRICT COURT, DENVER COUNTY,  
STATE OF COLORADO  
1437 Bannock St.  
Denver, CO 80202

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

Plaintiffs,

v.

GARY J. 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; OLSON REAL ESTATE SERVICES,  
LLC, a Colorado Limited Liability Company;  
JUNIPER CONSULTING GROUP, LLC, a  
Colorado limited liability company; JOHN AND  
JANE DOES 1-10; and XYZ CORPORATION 1-10,

Defendants.

Attorneys for Defendants  
Benjamin Kahn and  
The Conundrum Group, LLP  
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Case No: **2020 CV 30255**

Courtroom: **414**

**LAW FIRM'S ANSWER, AFFIRMATIVE DEFENSES,  
AND JURY DEMAND TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

Defendants Benjamin Kahn and The Conundrum Group, LLP (collectively, the “Law Firm”), through undersigned counsel, submit the following Answer, Affirmative Defenses, and Jury Demand in response to the First Amended Amended Complaint filed by plaintiff Harvey Sender in his capacity as the Receiver for Gary Dragul, GDA Real Estate Services, LLC (“GDA RES”) and GDA Real Estate Management, Inc. (“GDA REM”).

### **GENERAL ANSWER TO PLAINTIFF’S FIRST AMENDED AMENDED COMPLAINT**

This is a case about a Receiver who has drained the Receivership Estate to the tune of \$3M. With almost no money in the bank now after two years, the Receiver has filed this Amended Complaint. To date the Receiver has not paid a dime to any GDA RES investor or other equitable claimant.

The Receiver’s Amended Complaint is most notable in omission as he misrepresents the work of the Law Firm and avoids or overlooks the role of all the other involved professionals. The Law Firm never served as “general counsel” to GDA RES and 180 plus other entities as the Receiver now alleges. Indeed, other licensed professionals completed almost all of the work attributed to the Law Firm in plaintiff’s Amended Complaint. All told, the Receiver’s claims against the Law Firm are completely without merit.

The pleading deficiencies in the Amended Complaint regarding purported “Commissions” actually underscore how little the Receiver understands about GDA RES. The record reflects that the Receiver’s basic theory with respect to the Law Firm suffers from both a glaring lack of due diligence and a misunderstanding of GDA RES finances. Indeed, the Law Firm will be able to demonstrate that it applied any payments it received properly for actual work performed.

Moreover, the Receiver has cannibalized his damages claim by commingling the GDA RES related accounts. Indeed, the Receiver refuses to be restrained by the SPE limitations that he seeks to enforce. The Receiver has conflated the assets of GDA RES and any SPEs to facilitate his operating expenses, and is now unable to establish any SPE losses or damages as a result of the Law Firm’s payment application practices. The Receiver and his legal team makes it impossible for any SPEs to recover damages distinct from those held by GDA RES or the Receivership Estate.

## **SPECIFIC ANSWERS TO PLAINTIFF'S ALLEGATIONS**

The Law Firm submits the following detailed answers to the allegations in plaintiff's First Amended Amended Complaint:

1. In regard to the allegations in Paragraph 44 of plaintiff's Amended Complaint, the Law Firm admits that the State of Colorado began investigating Mr. Dragul and GDA RES in 2014 but allowed him to continue operating GDA RES for more than four years without restriction until August of 2018. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 44 of plaintiff's Amended Complaint that the State's securities investigation began as a result of investor Amended Complaints, or whether the investigation arose instead in response to the positions that GDA RES took in defending an active State environmental enforcement action and/or any GDA RES response to the DORA investigation and/or as a result of the personal animus or initiative of certain State employees. The Law Firm also is without knowledge or information sufficient to form a belief as to the truth of any remaining allegations in Paragraph 44 of plaintiff's Amended Complaint, and therefore denies them.

2. In response to the generalized allegations in Paragraphs 4, 34, 57 and 293 of plaintiff's Amended Complaint, the Law Firm specifically denies that it participated, assisted or otherwise engaged in a "fraudulent scheme," a "multi-million-dollar fraud," or a "Ponzi scheme" with the other Defendants. The Conundrum Group, LLP did not even exist in the time period prior to the formation of the SPEs listed and referenced in Paragraphs 55 and 57 of plaintiff's Amended Complaint. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraphs 4, 34, 57 and 293 of plaintiff's Amended Complaint, and therefore denies them.

3. In response to the "general counsel" allegations in Paragraphs 15 and 50 of plaintiff's Amended Complaint, the Law Firm denies that it played *any* such role for GDA RES or GDA REM. The Conundrum Group, LLP did not even exist as an entity or law firm until 2012, and approximately twenty-five of the SPEs cited in Paragraph 55 of plaintiff's Amended Complaint formed and funded prior to the inception of The Conundrum Group, LLP. The Law Firm further admits that based on the general counsel allegations in Paragraphs 15 and 50 of plaintiff's Amended Complaint, plaintiff still does not understand which lawyer or lawyers GDA RES and/or GDA REM utilized for general counsel purposes.

4. In response to the representation allegations in Paragraphs 15, 50, 161, 423, 428-429, 431, 433-437 and 438(c)-(e) of plaintiff's Amended Complaint that the Law Firm served as general counsel for or otherwise represented each of "the GDA Entities" and "the SPEs" or as defined, the Law Firm denies that it represented "the GDA Entities" and "the SPEs" as defined in *any* capacity. The Law Firm admits that plaintiff defines "the GDA Entities" as GDA RES, GDA REM "and related entities" without *any* further definition other than reference to the Stipulated Receivership Order in Paragraph 10, that plaintiff defines "SPEs" as nothing more than "numerous single purpose entities" in Paragraph 1 of plaintiff's Amended Complaint, and that the Receiver does not even assert claims against the Law Firm on behalf of any particular SPE. The Law Firm

submits that the Stipulated Receivership Order referenced in Paragraph 10 of plaintiff's Amended Complaint speaks for itself. The Law Firm denies any remaining allegations in Paragraphs 15, 423, 428-429, 433-434 and 436-437 of plaintiff's Amended Complaint.

5. In response to the representation allegations in Paragraphs 435, 438(d) and 439-440 of plaintiff's Amended Complaint that the Law Firm represented all the "investors" in dozens or hundreds of SPEs affiliated with GDA RES, the Law Firm denies that it represented any such investors with respect to such SPE membership interests. The Law Firm generally admits that it owes its clients duties consistent with the Colorado Rules of Professional Conduct. The Law Firm denies any remaining allegations in Paragraphs 435, 438(d) and 439-440 of plaintiff's Amended Complaint.

6. In response to the solicitation allegations in Paragraphs 1-2, 50, 53, 55, 87, and 331 of plaintiff's Amended Complaint, the Law Firm denies that it played *any* role in the solicitation of SPE investors or drafted *any* "solicitation documents" with respect to the SPEs or *any* portion of the \$52,490,479.00 in raised membership interest funds outlined in Paragraph 55. The Conundrum Group, LLP did not even exist as an entity or law firm when at least twenty-five of the SPEs cited in Paragraph 55 of plaintiff's Amended Complaint formed and funded, and the Amended Complaint referenced in Paragraph 55 speaks for itself. The Law Firm further admits that based on the solicitation allegations in Paragraphs 1-2, 50, 53, 55, 87 and 331 of plaintiff's Amended Complaint, plaintiff still has not reviewed outside counsel billing records and even today does not appear to understand that other lawyers represented GDA RES with respect to investor disclosures, investor acknowledgments, investor accreditations and compliance with any applicable securities law requirements. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 1-2, 53 and 55 with respect to Defendants other than the Law Firm, and denies the remaining allegations in Paragraphs 1-2, 53 and 55 of plaintiff's Amended Complaint regarding the Law Firm.

7. In response to the entity formation allegations in Paragraphs 50 and 430(a) that the Law Firm drafted "operating agreements" for GDA RES or any related SPEs and provided advice regarding "the formation and management of the SPEs," the Law Firm denies that it drafted *any* of the Operating Agreements for the SPEs detailed in Paragraphs 55 or 294 of plaintiff's Amended Complaint or otherwise for GDA RES, GDA REM or any related entities. In addition, the Law Firm denies that it played *any* role in entity formation, management entity formation, separateness or SPE operating or lending covenants, operating terms related to fee entitlements, operating terms related to promissory notes, entity filing and registration requirements, licensing needs, management agreements, tenant in common agreements or securities law requirements related to GDA RES, GDA REM or any related SPE entities. The Conundrum Group, LLP did not even exist as an entity or law firm when most of the SPEs cited in Paragraphs 55 and 294 of plaintiff's Amended Complaint confronted such entity conception issues and based on the entity allegations in Paragraph 50 of plaintiff's Amended Complaint, plaintiff never reviewed outside counsel billing records or the actual Operating Agreements involved and still does not understand that other lawyers drafted *every* Operating Agreement and other entity formation document at issue in plaintiff's Amended Complaint.

8. In response to the advisement allegations in Paragraph 161 of plaintiff's Amended Complaint that the Law Firm served as general counsel for any GDA RES affiliated SPEs with respect to "tax filings" and "reconciliations," the Law Firm denies that it played any such role. On information and belief, the Law Firm admits that GDA RES or any related entity would have retained other licensed accounting professionals to complete any such tax filings or any accounting reconciliations required for vendor 1099 or other entity tax filing purposes.

9. In response to the advisement allegations in Paragraphs 161 and 430(b) of plaintiff's Amended Complaint regarding the Law Firm's work related to the PMG property, the Law Firm denies that it played any role in PMG entity organization issues, served as counsel for any PMG related SPEs, worked on the PMG disposition transaction terms, advised Mr. Dragul regarding distribution needs associated with the PMG sale, or drafted PMG investor correspondence sent by Mr. Dragul. The Law Firm admits that GDA RES, GDA REM and/or one or more of the PMG related SPEs retained other counsel for entity organization, PMG SPE operating covenant, PMG conflict and entity representation, disposition transaction term, distribution obligation and investor notice needs. The Law Firm also admits that it participated in the drafting of proposed correspondence to PMG investors regarding the sale in the first week of August of 2018 and affirmatively provided a *draft* of that PMG investor correspondence to the Receiver on September 4, 2018, *i.e.*, within days of his appointment. On information and belief, neither Mr. Dragul nor the Receiver ever sent the PMG investor update that the Law Firm worked on to PMG investors. The Law Firm denies that it drafted any other PMG investor update materials and otherwise denies the remaining allegations in Paragraphs 161 and 430(b) of plaintiff's Amended Complaint.

10. In response to the other investor update advisement allegations in Paragraph 430(c) of plaintiff's Amended Complaint, the Law Firm admits that it contributed on occasion and on request to GDA RES property updates when legal advisement or input was necessary but otherwise denies the advisement allegations in Paragraph 430(c) of plaintiff's Amended Complaint.

11. In response to the other allegations in Paragraphs 8 and 50, the Law Firm does admit that it served as "outside counsel" for GDA RES on discrete matters, that it drafted "other legal documents" at times for GDA RES, and that it knew confidential information on occasion in its capacity as outside counsel for GDA RES. The Law Firm also admits that plaintiff does not define what "other legal documents" he is referring to in Paragraph 50 of the Amended Complaint or otherwise. The Law Firm denies any remaining allegations in Paragraph 50 of plaintiff's Amended Complaint that it has not otherwise admitted.

12. With respect to the allegations in Paragraphs 30 and 31 of plaintiff's Amended Complaint, the Law Firm admits that the Receiver failed to sue those responsible for most of the work attributed to the Law Firm in the Amended Complaint and that the unnamed Doe and XYZ Defendants may encompass individuals, corporation and other legal entities. The Law Firm, however, denies that the Receiver can simultaneously allege claims against unnamed Defendants "[u]pon information and belief" while professing total ignorance as to his involved targets as

alleged in Paragraphs 30 and 31 of plaintiff's Amended Complaint. The Law Firm specifically denies that the relevant "names and addresses are presently unknown" to the Receiver as alleged in Paragraphs 30 and 31, who has access to all GDA RES billing records and the work product of any involved lawyers and accounting professionals. On information and belief, the Receiver and his legal team have in fact identified one or more of the potential unnamed Defendants and simply made a conscious decision not to sue them at this time for strategic or collusive reasons. The Law Firm denies any remaining allegations in Paragraphs 30 and 31 of plaintiff's Amended Complaint.

13. The Law Firm denies that it received any "Commissions" as alleged in Paragraphs 87, 296-297, 431, 438(a), 443-444 and Exhibit 5 of plaintiff's Amended Complaint. The Law Firm admits that plaintiff recharacterizes and defines the Law Firm's earned professional fees as "Commissions" in Paragraph 149 of the Amended Complaint, and that none of the referenced or any other payment documents related to the Law Firm otherwise characterize its payments for legal services as "Commissions." The Law Firm specifically denies that it "did not provide reasonably equivalent value in exchange" for any professional services payments as alleged in Paragraph 265 of plaintiff's Amended Complaint, but admits that it provided reasonably equivalent value in exchange for any professional services payments and provided GDA RES with substantial pre and post-bill write offs of matter balances or amounts. The Law Firm also specifically denies that it would be unjust for it to retain payments for professional services rendered as alleged in Paragraph 268 of plaintiff's Amended Complaint. The Law Firm denies any other allegations in Paragraphs 87, 296, 431, 438(a) and 443-444 of plaintiff's Amended Complaint.

14. The Law Firm denies that it received *any* "Commissions from GDA Entities" as alleged in Paragraph 297 and on Exhibit 5 of plaintiff's Amended Complaint. The Law Firm admits that plaintiff is relying on an internal GDA RES "Cash Database" in outlining these supposed "Commissions from GDA Entities" and has not evaluated the Law Firm's application of any of the listed professional services payments. The Law Firm specifically denies that it cashed a purported August 10, 2018 "Commission from GDA Entities" listed on Exhibit 5 that plaintiff nevertheless now seeks to clawback and disgorge. The Law Firm admits that it applied any professional services payments it received that are listed on Exhibit 5 of plaintiff's Amended Complaint as "Commissions from GDA Entities" properly to open GDA RES matters, and specifically denies that it commingled any such payments. The Law Firm denies any remaining allegations regarding the Law Firm's purported "Commissions from GDA Entities" in Paragraphs 297 and on Exhibit 5 of plaintiff's Amended Complaint.

15. The Law Firm also denies that it received *any* "Commissions from Escrow" as alleged in Paragraphs 52, 89 and 297 of plaintiff's Amended Complaint and on Exhibit 5 of plaintiff's Amended Complaint. The Law Firm admits that plaintiff is relying on settlement statements in outlining these supposed "Commissions from Escrow" and has not evaluated actual wire transfer or 1099 records to ascertain who the payor in fact was. The Law Firm admits that it applied the professional services payments it received that are listed on Exhibit 5 of plaintiff's Amended Complaint as "Commissions from Escrow" properly to open GDA RES matters, and informed GDA RES regarding the payment applications. The Law Firm denies any remaining allegations regarding the Law Firm's purported "Commissions from Escrow" or otherwise in

Paragraphs 52, 89 and 297 of plaintiff's Amended Complaint and on Exhibit 5 of plaintiff's Amended Complaint.

16. The Law Firm further denies that it provided advice to Mr. Dragul "as to the impermissible and undisclosed comingling of investor dollars" as alleged in Paragraph 430(a) of plaintiff's Amended Complaint. The Law Firm denies that it knew or assisted in any diversion of money by Mr. Dragul or Ms. Markusch "from SPE accounts to GDA RES accounts and from there to [Mr.] Dragul's personal account," as alleged in Paragraph 56 of plaintiff's Amended Complaint. The Law Firm admits that it billed GDA RES by matter and provided GDA RES with regular updates regarding payment applications and account receivable balances. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 72, 294 and 430(a) that are not directed toward the Law Firm, and therefore denies them and any remaining allegations in Paragraphs 72, 294 and 430(a) of plaintiff's Amended Complaint.

17. With respect to the allegations in Paragraphs 74 and 295 of plaintiff's Amended Complaint that investor funds associated with GDA RES "have lost their identity and have become untraceable" due to the "commingling of funds" and the "vast commingling among the various Dragul accounts," the Law Firm is without knowledge or information sufficient to form a belief as to the truth of those allegations because neither the State nor the Receiver has ever produced a forensic accounting of GDA RES income and expenditures to the public. The Law Firm admits that the Stipulated Receivership Order did not include any such stipulated fact or conclusion and instead required the Receiver to account for receipts and disbursements of funds in accounts related to GDA RES or the Receivership Estate.

18. With respect to the commingling allegations in Paragraphs 74 and 295 of plaintiff's Amended Complaint, the Law Firm further admits that the State alleged in August of 2018 that "[n]one of the investor funds transferred in or out of any particular LLC Entity can be identified substantially as an asset of any LLC Entity, and as a result, the investor funds have lost their identity and become untraceable" -- but that the State's allegation has never been adjudicated in its favor or stipulated to by Mr. Dragul. On information and belief, the Receiver now is just parroting the State in alleging that investor funds associated with GDA RES "have lost their identity and have become untraceable" in Paragraph 74 of plaintiff's Amended Complaint and still has not completed a forensic accounting of funds and disbursements of the Receivership Estate.

19. With respect to the commingling allegations in Paragraphs 74 and 295 of plaintiff's Amended Complaint, the Law Firm also admits that the Receiver presumed he could not unravel GDA RES finances and immediately abandoned any distinctions between the legal entities subject to the Receivership Estate instead. This one assumption -- which violated the governing Operating Agreements and Stipulated Receivership Order -- has allowed the receivership team to:

- (a) simultaneously represent the interests of the Receiver, the Receivership Estate, Mr. Dragul, and the involved operating SPEs and other entities without attention to potential conflicts;

- (b) ignore the requirement in the Stipulated Receivership Order that required them to administer the Receivership Estate in accordance with any governing Operating Agreements or other entity governance documents;
- (c) ignore the requirements in the SPE Operating Agreements regarding separateness covenants and/or SPE limitations;
- (d) block bill the Receivership Estate without any attempt to track costs and fees by SPE, property or matter;
- (e) justify the commingling of SPE assets owned by Member investors for purposes unrelated to the SPE or underlying asset;
- (f) justify “subsidizing” certain SPE asset costs with unrelated investor funds and assets;
- (g) justify the application of professional fees generated through real estate closings to matters unrelated to the underlying property;
- (h) cement and insure that the GDA RES related accounts and investments are indeed now hopelessly commingled;
- (i) eliminate any accountability with respect to asset recovery or performance, as the block billing practices obscure how much the Receiver actually spent recovering discrete assets; and
- (j) create a fund for the payment of Receivership Estate operating expenses, including approximately \$2.6M in professional fees for the receivership team.

The Law Firm submits that the Receiver’s commingling of SPE and GDA RES assets also has eliminated the Receivership Estate’s ability to recover damages on behalf of any SPE for funds that otherwise inured to the benefit of GDA RES or any other entity within the Receivership Estate. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraphs 74 and 295 of plaintiff’s Amended Complaint. The Law Firm also denies the allegations in Paragraph 441 of plaintiff’s Amended Complaint, given the Receiver’s SPE entity cost subsidies and blending of SPE entity assets within the Receivership Estate.

20. The Law Firm denies the interference allegations in Paragraph 51 of plaintiff’s Amended Complaint that the Law Firm worked with Mr. Dragul and Ms. Markush “to transfer management rights and ownership interests in entities subject to the Receivership.” The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the related allegations in Paragraph 51 of plaintiff’s Amended Complaint exclusive to Mr. Dragul or Ms. Markusch, and therefore denies them.

21. The Law Firm denies the interference allegations in Paragraphs 8 and 51 of plaintiff’s Amended Complaint that Mr. Kahn “withheld documents and information from the Receiver and his team” and conspired with Mr. Dragul and Ms. Markush “to conceal documents and assets from the Receiver.” The Law Firm admits that the Amended Complaint does not contain a *single example* in support of these allegations and that the Receiver *never* requested GDA RES client materials from the Law Firm without an appropriate response. The Law Firm admits



that it affirmatively provided thousands of documents to the receivership team without any prompt or request or compensation, and offered the Receiver any and all of the Law Firm's file materials related to GDA RES in terminating the attorney-client relationship notwithstanding an open account balance. The Law Firm admits that Mr. Kahn is a friend of the Draguls, but the Law Firm denies the remaining allegations in Paragraphs 8 and 51 of plaintiff's Amended Complaint that are directed at the Law Firm. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 8 and 51 of plaintiff's Amended Complaint that are exclusive to Mr. Dragul or Ms. Markusch, and therefore denies them.

22. The Law Firm denies the interference allegations in Paragraph 430(e) of plaintiff's Amended Complaint that the Law Firm negligently advised, assisted or otherwise provided legal services to Mr. Dragul, Mrs. Markush, or anyone working for Mr. Dragul "regarding their continued violations of the Receivership Order." The Law Firm admits that the Amended Complaint does not contain a *single example* in support of this allegation. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the related allegations in Paragraph 430(e) of plaintiff's Amended Complaint exclusive to Mr. Dragul or Ms. Markusch, and therefore denies them.

23. The jurisdiction and venue allegations in Paragraphs 32 and 33 of plaintiff's Amended Complaint are legal conclusions that do not require a response from the Law Firm. The Law Firm specifically denies that it had ongoing and systematic contacts with Mr. Dragul or GDA RES in furtherance of a scheme to defraud investors, however, as alleged in Paragraph 32 of plaintiff's Amended Complaint. The Law Firm also is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 32 of plaintiff's Amended Complaint that any such investors were "innocent." The Law Firm admits that it offices in Colorado, and otherwise denies the other allegations in Paragraphs 32 and 33 of plaintiff's Amended Complaint.

24. The allegations in Paragraphs 333, 381, 388, 390-391, 394-395, 397-399, 401, 403-404 and 445-446 of plaintiff's Amended Complaint are legal conclusions that do not require a response from the Law Firm. To the extent that a response is necessary to the allegations and legal conclusions in Paragraphs 333, 381, 388, 390-391, 394-395, 397-399, 401, 403-404 and 445-446 of plaintiff's Amended Complaint, the Law Firm denies them.

25. With respect to the allegations in Paragraphs 3, 10-12, 45-46, 54-55, 80-82, 161-162, 222-224, 227-229, 231, 233-242, 247, 249, 256, 258, 262-263, 268, 272-273, 277-279, 315, 356, 361, 372, 379, 393, 422 and 427 of plaintiff's Amended Complaint, the Law Firm admits that the Stipulated Receivership Order and the other documents referenced in the Amended Complaint speak for themselves. The Law firm otherwise denies the paraphrasing and characterizations of the documents referenced in Paragraphs 3, 10-12, 45-46, 54-55, 80-82, 161-162, 222-224, 227-229, 231, 233-242, 247, 249, 256, 258, 262-263, 268, 272-273, 277-279, 315, 356, 361, 372, 379, 393, 422 and 427 of plaintiff's Amended Complaint and the remaining allegations therein.

26. The additional allegations in Paragraphs 5-7, 13-14, 17-28, 35-43, 47-49, 56, 58-64, 66-71, 73-79, 83-86, 88, 90-160, 163-221, 225-226, 230, 232, 245-246, 248, 250-255, 257, 259, 261, 264-265, 269-270, 275-276, 280-292, 295, 298-313, 316-346, 348-349, 351, 353, 357-359, 362-370, 380, 382, 384-387, 409-413 and 414-420 of plaintiff's Amended Complaint are not directed to the Law Firm and therefore do not require a response. To the extent that a response is necessary to the allegations in Paragraphs 5-7, 13-14, 17-28, 35-43, 47-49, 56, 58-64, 66-71, 73-79, 59-63 75-79, 83-86, 88, 90-160, 163-221, 225-226, 230, 232, 245-246, 248, 250-255, 257, 259, 261, 264-265, 269-270, 275-276, 280-292, 295, 298-313, 316-346, 348-349, 351, 353, 357-359, 362-370, 380, 382, 384-387, 409-413 and 414-420 of plaintiff's Amended Complaint, the Law Firm is without knowledge or information sufficient to form a belief as to the truth of the allegations therein that are not directed to the Law Firm and therefore denies them.

27. The Law firm denies the allegations in Paragraphs 9, 65, 244, 260, 267, 271, 274, 347, 350, 352, 354, 373-377, 383, 389, 396, 400, 402, 405-407, 424-425, 430, 438 and 448 of plaintiff's Amended Complaint and the Exhibits to plaintiff's Amended Complaint that are related to the Law Firm. The Law Firm is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 9, 65, 244, 260, 267, 271, 274, 347, 350, 352, 354, 373-377, 383, 389, 396, 400, 402, 405-407, 424-425, 430, 438 and 448 of plaintiff's Amended Complaint and the Exhibits to plaintiff's Amended Complaint that do not relate to the Law Firm, and therefore denies them.

28. The allegations in Paragraph 29 of plaintiff's Amended Complaint are definitional and therefore do not require a response from the Law Firm. To the extent that a response is necessary to the allegations in Paragraph 29, the Law Firm admits that the actual Defendants are listed in the caption of the Amended Complaint and otherwise denies Paragraph 29.

29. The plaintiff's Prayer for Relief in plaintiff's Amended Complaint contains legal conclusions and does not otherwise require a response from the Law Firm. To the extent that a response is necessary to the Prayer for Relief, the Law Firm denies that plaintiff is entitled to any of the requested relief.

30. The Law Firm incorporates its responses to the other allegations in plaintiff's Amended Complaint, in response to Paragraphs 314, 355, 360, 371, 378, 392, 408, 421, 426, 432, 442 and 447 of plaintiff's Amended Complaint.

31. The Law Firm admits the allegations in Paragraphs 16 and 243 of plaintiff's Amended Complaint.

32. The Law firm specifically denies any remaining allegations in plaintiff's Amended Complaint or the Exhibits thereto that it has not admitted or otherwise addressed.

## **AFFIRMATIVE DEFENSES**

1. *Comparative Allocation*: Although the Law Firm expressly denies any wrongdoing in this matter, pursuant to C.R.S. §13-21-111.5 any liability of the Law Firm is limited to the degree of negligence or fault attributable to the Law Firm and the Law Firm reserves the right to designate non-parties at fault. In the event of a settlement between plaintiff and any other alleged tortfeasor and/or a judgment against the Law Firm and any other Defendant, the Law Firm reserves its rights of contribution and/or statutory credit pursuant to C.R.S. §13-50.5-103 *et seq.*

2. *Comparative Negligence*: Plaintiff's damages, if any, are the result of plaintiff's own negligence, which bars or comparatively diminishes any right of recovery pursuant to C.R.S. §13-21-111.

3. *Conditions Precedent*: On information and belief, plaintiff failed to comply with the conditions precedent to assert these claims as outlined in Section 13 of the Stipulated Receivership Order in 2018CV33011.

4. *Consent*: Plaintiff consented to the actions of the Law Firm that form the basis for the allegations in the Amended Complaint, and therefore are barred from recovering associated damages.

5. *Exclusive Jurisdiction – Stipulated Receivership Order*: The Stipulated Receivership Order in 2018CV33011 applies to any interference claims. Section 19(d) expressly addresses potential GDA RES attorney interference issues, and Section 17 expressly addresses the remedies available in that forum for any such claims. In addition, Sections 11 and 12 include specific procedures for the resolution of any turnover related interference claims that differ from the prosecution rights reserved for plaintiff in Sections 13(n) – 13(o) and 13(s).

6. *Exclusive Jurisdiction – Federal Bankruptcy Court*: The federal Bankruptcy Court has exclusive jurisdiction over any alleged bankruptcy fraud or other issues involving the closed Prospect property bankruptcy proceedings referenced in plaintiff's Amended Complaint.

7. *Estoppel and Waiver*: Plaintiff, by words or conduct or both, caused any performance failures by the Law Firm as alleged. Plaintiff actually knew or knew there was a substantial likelihood that his words or conduct or both would have that result.

8. *Failure to Follow Professional Advice*: Plaintiff's damages, in whole or in part, are the proximate result of his failure to follow the professional advice and counsel of the Law Firm and plaintiff therefore is barred from recovering any such damages.

9. *Failure to Include Material Facts*: Plaintiff failed to account for the roles of other licensed professionals and payment applications by the Law Firm. As a result, the allegations in

Plaintiff's Amended Complaint are incomplete, inaccurate, omit material facts, and require amendment or withdrawal.

10. *Failure to Join Indispensable Parties:* Plaintiff failed to join indispensable parties with respect to the allegations and damages asserted in the Amended Complaint.

11. *Failure to State a Claim:* Plaintiff's Amended Complaint fails to state a claim against the Law Firm upon which relief can be granted, with respect to any claims by the "GDA Entities" or the "SPEs" or dependent on alleged duties to the "GDA Entities" or the "SPEs." Plaintiff's Amended Complaint also otherwise fails to state a claim against the Law Firm upon which relief can be granted as well.

12. *Failure to Mitigate:* Plaintiff failed to mitigate any damages associated with its interference claim, and any such mitigation failures caused plaintiff to incur avoidable damages, professional service fees and/or losses.

13. *Impossibility:* Plaintiff failed to abide by the terms of the SPE Operating Agreements and the Stipulated Receivership Order, and made it impossible to pursue damages on behalf of any SPE or to complete a proper accounting and reconciliation.

14. *Laches and Unclean Hands:* Plaintiff is not acting in good faith or in an equitable manner and plaintiff's claims therefore are barred by the doctrines of laches and unclean hands.

15. *Lack of Privity:* The Law Firm did not have an attorney-client relationship with the "GDA Entities" or the "SPEs" or any SPE investors, and plaintiff lacks standing and privity to make claims against the Law Firm in those capacities.

16. *Liability of Third Persons:* Although the Law Firm expressly denies any negligence, any such acts or omissions were secondary or incidental in comparison to the negligence and intentional acts or omissions on the part of third persons other than the Law Firm over whom the Law Firm exercised no control.

17. *Prevention of Performance by Plaintiff:* Plaintiff ignored the Law Firm's advice and otherwise impeded, hampered and/or prevented the Law Firm's complete performance of its duties to GDA RES.

18. *Real Party in Interest:* Plaintiff abandoned the YM Retail 07 A, LLC entity referenced in Paragraph 146 of plaintiff's Amended Complaint, is not the real party in interest with respect to any related fraudulent transfer claims, and lacks standing to assert any claims on behalf of the YM Retail 07 A, LLC entity.

19. *Set Offs:* Plaintiff's alleged damages, if any, must be offset by amounts owed to the Law Firm for professional services rendered.

20. *Statute of Limitations*: Plaintiff's claims are time-barred by the applicable statute of limitations in whole or in part.

21. *Unjustified Reliance*: Plaintiff's alleged reliance on the Law Firm as alleged was unreasonable, unjustified and unjustifiable.

22. *In Pari Delicto*: Plaintiff's claims are barred by the doctrine of *in pari delicto*.

23. *Reservation*: The Law Firm reserves the right to rely upon any defense raised by any other defendant or as supported by the evidence.

### **JURY DEMAND**

The Law Firm demands a jury trial on any issues so triable.

Dated this 6<sup>th</sup> day of July, 2020.

#### **GORDON & REES LLP**

*Pursuant to C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures shall be maintained by the undersigned and will be made available for inspection by other parties or the court, upon request.*

/s/ John M. Palmeri

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THE CONUNDRUM GROUP, LLP

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the above and foregoing was filed and served via the CO-Courts electronic filing system this 6<sup>th</sup> day of July, 2020, which will serve the following.

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