DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	
Plaintiff: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC v. **Defendants:** 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 CORPORATIONS 1 – 10.	▲ COURT USE ONLY ▲
Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2020CV30255 Courtroom: 414
DEFENDANT GARY DRAGUL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT	

In response to Defendant Gary Dragul's motion to dismiss the original complaint, the Plaintiff, Receiver Harvey Sender ("Receiver"), filed his 127-page First Amended Complaint ("Amended Complaint" or "FAC"). Despite the length, the Amended Complaint fails to remedy the defects in the original complaint. The Receiver, who was appointed Receiver *for* Mr. Dragul

and two of his entities, is still suing Mr. Dragul even though Mr. Dragul is part of the Receivership. But as a matter of law, he cannot sue the people or entities in receivership. Since he stands in their shoes, that would mean those people or entities are suing themselves.

The Receiver also still purports to assert investors' claims to recover their damages from an alleged fraudulent scheme undertaken by Mr. Dragul and the other Defendants. The Receiver cannot do that. His power is based upon the people and entities in receivership. He can control claims against those people and entities. He can also assert claims belonging to those people and entities against third parties. What he cannot do as a matter of law, however, is assert third parties' claims, including those of investors. He has no standing to do so. Additionally, many of the claims are time-barred, and the equitable claims cannot be pled when there is an adequate remedy at law, as there is here.

The Receiver's lack of standing, inability to assert claims against Mr. Dragul who is in receivership, and failure to assert claims before the limitations periods expired cannot be cured by repleading. The Court should dismiss the Amended Complaint with prejudice pursuant to C.R.C.P. 12(b)(1) and 12(b)(5).

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Gary J. Dragul conferred with counsel for the Receiver, and the Receiver opposes this Motion.

BACKGROUND

The Receiver alleges that, in 2014, the Colorado Securities Commissioner and Attorney General began investigating Mr. Dragul, GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, LLC ("GDAREM") (GDARES and GDAREM are collectively referred to as "GDA Entities") after purportedly receiving complaints from investors. (FAC ¶

44.) Four years later, on April 12, 2018, the State indicted Mr. Dragul on alleged securities fraud charges (though the State seems now to have abandoned that indictment). On August 15, 2018, the Commissioner filed a complaint for injunctive and other relief against Mr. Dragul and the GDA Entities (the "Receivership Action"; Case No. 2018CV33011). The Commissioner immediately moved to appoint a receiver over the GDA Entities *and* Mr. Dragul personally. Harvey Sender was appointed Receiver on August 30, 2018. (*See* FAC/Compl. Ex. 1, August 30, 2018 Receivership Order ("Receivership Order")). Since the indictment was hindering Mr. Dragul's ability to manage the properties in which investors had invested, and lenders were threating to declare default based on the indictment, Mr. Dragul believed a receivership would be the most effective way for investors to avoid losses. Thus, Mr. Dragul consented to the appointment of receiver expecting a cooperative process in which the Receiver, Mr. Dragul, and the GDA Entities would manage the properties to maximize investor recovery. When the Receiver was appointed on August 30, 2018, Mr. Dragul began to and then completed turning over all his assets that were derived directly or indirectly from investor funds or the alleged solicitation of securities. At the Receiver's request, Mr. Dragul also turned over the entire GDA server on which was saved not only information about the properties and investors, but all of Mr. Dragul's communications including his personal attorney-client privileged communications that Mr. Dragul had with counsel.

For a while, those involved in the receivership process did work cooperatively. Unfortunately, that changed. On January 21, 2020, the Receiver filed his original complaint. Mr. Dragul and several other Defendants moved to dismiss, and in response, the Receiver filed the Amended Complaint. The Amended Complaint asserts claims against Mr. Dragul for: (1) violations of the Colorado Securities Act, C.R.S. §§ 11-51-301, 11-51-401, 11-51-501, 11-51-

501(1)(a)-(c) and 11-51-604(1), (2)(A), (3), (4), and (5)(a)-(b); (2) negligence; (3) negligent misrepresentation; (4) civil theft, C.R.S. § 18-4-401; (5) COCCA violations, C.R.S. § 18-17-101, *et seq.*; (7)[1] breach of fiduciary duty; (11) fraudulent transfer, C.R.S. § 38-8-105(1)(a); and (12) unjust enrichment.

STANDARD

A motion to dismiss for lack of jurisdiction under C.R.C.P. 12(b)(1) is appropriately granted when the plaintiff lacks standing to assert the claims.[2] *Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011) (affirming district court's dismissal for lack of standing under C.R.C.P. 12(b)(1)). "If a court determines that standing does not exist, then it must dismiss the case." *Hickenlooper v. Freedom from Religion Found. Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

A motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim tests the formal sufficiency of a plaintiff's complaint. *Dwyer v. State*, 357 P.3d 185, 196 (Colo. 2015). Dismissal under Rule 12(b)(5) is appropriate when the allegations fail, as a matter of law, to support the claim for relief. *E.g., Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). The allegations must satisfy Colorado's "plausibility" standard. *Warne v. Hall*, 373 P.3d 588, 591, 595 (Colo. 2016). While the factual allegations in the complaint must generally be accepted as true, that does not apply to legal conclusions or

[1] The sixth, eight, ninth, and tenth claims are not asserted against Mr. Dragul, but against other defendants.

[2] A motion to dismiss for lack of jurisdiction under C.R.C.P. 12(b)(1) is limited to 25 pages. C.R.C.P. 121, § 1-15(1)(a).

conclusory factual allegations. *Warne*, 373 P.3d at 591, 594, 596; *see also Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (courts are "not required to accept as true legal conclusions that are couched as factual allegations."). Under *Warne*, conclusory allegations do not suffice, *id.* at 596, and instead, the factual allegations must contain sufficient detail to "raise the right to belief 'above the speculative level'", *Warne*, 373 P.3d at 591 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

ARGUMENT

I. The Receiver Lacks Standing to Assert Investors' Claims

A receiver's role is to gather and preserve the assets of the entities or people in receivership for later distribution to creditors of those same entities or people in receivership. Consistent with that role, a receiver is often authorized to prosecute claims *held by* the entities or people in receivership against third parties. The resulting recovery is then added to the asset pool for later distribution to creditors. The receiver's power to assert those claims stems from the receiver's control over those entities or people in receivership.

As a matter of law, however, a receiver lacks authority to assert claims held by entities or people who are not in the receivership. Here, that means the Receiver may not assert claims of the investors who are creditors of the Receivership Estate.

A. All of the Claims Here Are Investor-Creditor Claims

The Receiver asserts he has standing to prosecute the first claim for violations of the Colorado Securities Act ("CSA") on behalf of the Special Purpose Entities ("SPEs") and investors "all of whom are creditors of the Receivership Estate." (FAC ¶ 316.) And as a matter of law, only creditors, and not the Receiver, can bring such a claim. C.R.S. § 11-51-604(1) authorizes "the person buying the security"—not a receiver and not any person or entity in receivership—to sue for a failure to register under C.R.S. § 11-51-301. Similarly, C.R.S. § 11-

51-604(2)(a) only authorizes "the person buying the security[,]" and not a person or entity in receivership or a receiver, to assert a claim for failure to be licensed under C.R.S. § 11-51-401.

C.R.S. § 11-51-604(3) authorizes "the person buying or selling such security" and 11-51-604(4) authorizes "the person buying the security"—not a receiver and not any person or entity in receivership—to sue for selling or buying a security in violation of section 11-51-501(1) & 501(1)(b). And "control person liability" under C.R.S. §§ 11-51-604(5)(a) & (b) for control over persons violating the above sections provides for liability only "to the same extent as such controlled person" and thus fails for the same reasons—only the buyer or seller of the security has standing to sue for the underlying violation.

The Receiver similarly alleges the second claim for negligence on behalf of SPEs and investors, "all of whom are creditors of the Receivership Estate." (FAC ¶¶ 361.) And he alleges Mr. Dragul owed a duty of care "to investors and prospective investors"—not the Estate. (FAC ¶ 357.) The same is true for the third claim for negligent misrepresentation, which alleges that Mr. Dragul "negligently induced . . . investors to invest and/or to continue to invest" and that investors (only) sustained damages and losses. (*Id.* ¶¶ 362, 370.)

The Receiver alleges he has standing to prosecute the fourth claim for civil theft on behalf of the Estate, SPEs, and investors, the latter two of which he alleges are creditors. (*Id.* ¶ 372.) Contrary to the pleading standard under *Warne v. Hall*, 373 P.3d at 591, 594, 596, he alleges no facts to support that the Estate was injured by civil theft, and his allegations show it was not. The Receiver states Defendants "exercised control over GDA Entity *investors'* funds[,]" and without "*investors*' knowledge or authorization" controlled those *investors*' funds, with the intent to "permanently deprive *investors* of their investment[,]" that "*investors* were in

fact permanently deprived of their funds[,]" and that "*investors* have been damaged[.]" (FAC ¶¶ 372-77 (emphasis added).)

For the fifth claim for COCCA violations, the Receiver also alleges standing on behalf of the Estate, SPEs, and investors. (FAC ¶¶ 379.) But he alleges no facts to support the speculative assertion the Estate was injured—he asserts securities violations for making misrepresentations *to investors* (*id*. ¶¶ 383, 386(a), 387(a)), wire fraud and civil theft involving fraud on *investors* and *investors*' money (*id*. ¶¶ 386(b), 387(b), 387(c)), and bankruptcy fraud which defrauded *creditors* (*id*. ¶¶ 386(b), 387(d)).[3] Plus, the Receiver alleges that the purported scheme undertaken by the COCCA enterprise extended only "through August 2018" (FAC ¶ 383), meaning the Receiver could not have been injured by any COCCA violation since he was not appointed until August 30, 2018. And the GDA Entities also lack standing to sue an officer or director alleged to be a participant in the enterprise, such as Mr. Dragul, because, as a matter of law, they can show no injury proximately caused by the racketeering activity. *See Mendelovitz v. Vosicky*, 40 F.3d 182, 187 (7th Cir. 1994) ("Thus, under RICO, a corporation does not have standing to sue for damages allegedly accruing from the actions of its directors or officers against third parties, because there can be no proximate cause."); *see also New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1370 (Colo. App. 1993) (RICO cases instructive on similar provisions under COCCA). Thus, the COCCA claim is solely an investor-creditor claim too.

For the seventh claim for breach of fiduciary duty, the Receiver alleges that Mr. Dragul

[3] As Mr. Dragul noted in his first motion to dismiss, bankruptcy fraud under 18 U.S.C. § 157 is not a COCCA predicate act. C.R.S. §§ 18-17-103(5)(b) (not identifying 18 U.S.C. § 157), 103(5)(a) (incorporating RICO's predicate acts under 18 U.S.C. § 1961(1)(A), (B), (C), and (D)); 18 U.S.C. § 1961(1) (not identifying 18 U.S.C. § 157). In fact, bankruptcy fraud under 18 U.S.C. § 157 is expressly excluded from being a racketeering activity predicate act. 18 U.S.C. § 1961(1)(D).

owed a fiduciary duty to "the GDA Entities and their member investors," and simply asserts the duty to the GDA Entities was breached and the GDA Entities were injured. (FAC ¶¶ 409, 415-16, 418-20.) While he alleges the duty owed to investors and how investors were purportedly injured (*id*. ¶ 410, 412-415), he alleges no facts to demonstrate what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered, contrary to the *Warne v. Hall* pleading standard.

The Receiver alleges C.R.S. § 38-8-110(1)(a) entitles him to recover "illegal and undisclosed Commissions" under the eleventh claim for fraudulent transfer. (FAC ¶¶ 445.) That is incorrect as a matter of law and under the facts alleged. The Receiver alleges that transfers were made to defraud *creditors*, not the Receiver or anyone else. (*Id*. ¶¶ 443, 444). And CUFTA provides remedies only to *creditors.* C.R.S. §§ 38-8-105, 108. While CUFTA claims are commonly asserted by receivers, that is when the entity in receivership is the creditor who was injured by a fraudulent transfer to a third party. Here, the Receiver alleges third-party investor-creditors were defrauded (FAC ¶ 444 & paragraphs cited therein), not that Mr. Dragul or the GDA Entities were defrauded. Thus, the eleventh claim is also an investor-creditor claim.

And for the twelfth claim for unjust enrichment, the Receiver asserts that Mr. Dragul received benefits "at the Estate's expense and at the expense of other creditors" but alleges no facts to show what benefits Mr. Dragul received, or how they came at the Estate's expense, making this allegation pure speculation and the statement of a legal conclusion, contrary to *Warne v. Hall*. (*Id*. ¶ 448.)

Thus, all of the Receiver's claims against Mr. Dragul are actually investor-creditors' claims.

B. The Receiver Lacks Standing to Assert Creditor-Investor Claims

As a matter of law, the Receiver lacks standing to assert investor-creditor claims.[4] "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly*, 570 P.2d at 539. "Resolution of a standing issue presents two considerations: whether the complaining party has alleged an actual injury from the challenged action; and whether the injury is to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions." *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 781 (Colo. App 1997).

> The 'injury-in-fact' requirement is dictated by the need to assure that an actual controversy exists so that the matter is a proper one for judicial resolution, for consistent with the separation of powers doctrine embodied in Article III of the Colorado Constitution, '[c]ourts cannot, under the pretense of an actual case, assume powers vested in either the executive or legislative branches of government.'

Conrad v. City and Cty of Denver, 656 P.2d 662, 668 (Colo. 1982).

The Receiver in this matter has at least once before argued that he may assert creditors' claims. The court there rejected that argument. In *Sender v. Kidder Peabody*, 952 P.2d at 780,

[4] In support of his claimed authority to assert creditors' claims, the Receiver cites Paragraph 13(s) of the Receivership Order. (*Id.* ¶¶ 12, 315, 356, 361, 372, 379, 393, 422, 427.) But the Receivership Order may not grant the Receiver powers he cannot wield as a matter of law. A trial court lacks jurisdiction to expand its jurisdiction, or the jurisdiction of another trial court, by fiat. "[T]he appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990). "Granting a receiver authority to bring claims held by others would violate those limitations, as 'the ability to confer substantive legal rights that may create standing [under] Article III is vested in Congress and not the judiciary.'" *Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012) (quoting *Scholes*, 744 F. Supp. at 1421 n.6)). It is up to this Court to determine whether the Receiver has standing, and thus whether this Court has jurisdiction, according to the constitutional test for standing. Nor does it matter that the Receivership Order was stipulated. In Colorado, the issue of standing is jurisdictional. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Because standing is jurisdictional, it is not subject to waiver. *See, e.g.*, *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003).

the Receiver served as a bankruptcy trustee and filed a complaint alleging aiding and abetting breach of fiduciary duty, negligence, and breach of fiduciary duty against third-party financial institutions. The trial court granted summary judgment in favor of the defendants based on *in pari delicto* and lack of standing. The Receiver appealed, and the Colorado Court of Appeals affirmed, holding among other things that "[a] bankruptcy trustee cannot assert the claims of creditors or third parties but stands in the shoes of the debtor and may properly assert claims belonging to the debtor." *Id*. at 781 (citing *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996); *Miller v. Accelerated Bureau of Collections, Inc.*, 932 P.2d 824 (Colo. App. 1996)). Myriad other courts have similarly held that receivers and trustees lack standing to assert creditor claims. *See, e.g., In re M & L Business Machine Co., Inc.*, 160 B.R. 850, 851 (D. Colo. 1993) (holding that a bankruptcy trustee, analogous to the Receiver here, lacked standing to assert creditors' claims against third parties; collecting cases); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) ("[A]lthough 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."); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (An "equity receiver may sue only to redress injuries to the entity in receivership.").

"[G]enerally, 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. Department of Health*, 789 P.2d 423, 425 (Colo. App. 1989) (citing *Seckler v. J.I. Case Co.*, 348 P.2d 368 (Colo. 1960)); *see also Kelley*, 901 F. Supp. 2d at 1128 ("[A]n equity receiver may sue only on behalf of the entity (or person) in receivership, not third parties. This is because a receiver 'stands in the shoes' of the receivership entity.").

The office of a receiver is akin to that of a trustee. *See, e.g., Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 33 (Colo. 1931) ("[T]he office of receiver is in the nature of that of a trustee, and those who have lawful claims against the receivership estate are *cestuis que trustent*."); *see also Kelley*, 901 F. Supp. 2d at 1128 ("A federal equity receiver is akin to a bankruptcy trustee.") Just as a bankruptcy trustee may not assert creditors' claims, *Sender*, 952 P.2d at 779 (citing cases), a receiver may not assert creditors' claims, *Kelley*, 901 F. Supp. 2d at 1128. Federal courts have noted that the role of an equity receiver is "to maximize the receivership estates' assets for the benefit of creditors, . . . but contrary to [the receiver's] assertion it does *not* give him standing to sue on their behalf." *Kelley*, 901 F. Supp. 2d at 1128 (emphasis in original). Further, the Colorado Court of Appeals has stated:

> If a cause of action alleges only indirect harm to a creditor (that is, an injury that derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC, 166 P.3d 166, 180 (Colo. App. 2007).

The Receivership Order also demonstrates the Receiver may not assert creditors' claims. Paragraph 16 provides that "[a]ny parties holding claims against Dragul, GDARES and GDAREM or the Receivership Estate shall not be entitled to participate as creditors in the distribution of recoveries from the Receiver's administration of the Receivership Estate and collection and liquidation of the assets thereof, unless such parties agree not to file or prosecute independent claims such parties may have . . . against Dragul, GDARES and GDAREM[.]" Under the literal language of Paragraph 16, the Receiver is waiving those investors' rights to participate in the distribution of recoveries from the Receivership when he asserts those

creditors' claims. And since the money the Receiver seeks to recover through the Amended Complaint will go to the Receivership Estate first and not directly to those investors, that means the investors will have no recovery. The Receiver lacks authority to so waive those investors' claims and recovery. And doing so is contrary to the Receiver's purpose to collect Receivership Property in order to pay creditors. (Receivership Order ¶ 22(c), (e), (f).)

If the Receiver wanted to assert creditors' claims, he had an easy way to do so legitimately: get the creditors to assign their claims to him. He did not do that. In fact, it is unclear whether any investor-creditors even know the Receiver is asserting their claims. Since the claims of creditors are not claims held by the person or entities in receivership, and the Receivership Order precludes the Receiver from asserting creditors' claims, the Receiver lacks standing as a matter of law. Consequently, the claims against Mr. Dragul must be dismissed.

II. The Receiver May Not Sue Gary Dragul Because Mr. Dragul is In Receivership

A. As a Matter of Law, a Receiver May Not Sue a Person or Entity in Receivership

In *Sender v. Kidder Peabody*, 952 P.2d at 781—the case in which the Receiver here was also the plaintiff—the court held that a bankruptcy trustee "stands in the shoes of the debtor and may properly assert claims belonging to the debtor." The Receiver here stands in the shoes of the people and entities in receivership, and may properly assert their claims. Since Mr. Dragul is in receivership, the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. Mr. Dragul cannot sue himself. *See, e.g., BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013) (noting a party may not sue itself even if the party is serving in different legal capacities) (collecting cases).

Indeed, the court in *Sender v. Kidder Peabody* went further and held that because the trustee stands in the shoes of the debtor, the trustee may not even sue third parties with whom the

debtor coordinated. There, the court considered whether the trustee could sue third parties who allegedly participated in a Ponzi scheme with James Donahue, who was the principal of the debtors in bankruptcy (Donahue was not personally a debtor in the bankruptcy). 952 P.2d at 780-81. The trustee, Harvey Sender (the Receiver here), was alleging losses by the debtors (i.e., the parties for whom he was trustee) for which he might otherwise have standing. *Id*. at 781. But the court held that he lacked standing under the doctrine of *in pari delicto*. *Id*. at 781-82. Specifically, the court noted that while the losses were suffered by the debtors, they were caused by a scheme orchestrated by the debtors' principal, Donahue, and the defendants. *Id*. at 781. Citing authority, the court held that "a bankruptcy trustee does not have standing to pursue claims against a third party for injury to the debtor when the debtor has joined with the third party in defrauding its creditors." *Id*. at 782 (citing cases). This flows from "the principle . . . that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed *in pari delicto*, and the law will aid neither, but rather, will leave them where it finds them." *Id*. (citing cases). Thus, the court held that because the debtors "obtained the money they now seek to recover through fraudulent means, we conclude that Sender, standing in their shoes, cannot show injury to a legally protected right[,]" and the court therefore affirmed summary judgment against Sender for lack of standing. *Id*.

If a trustee, and by extension a receiver, cannot sue *third parties* who participated in the debtor's/person in receivership's scheme, it is untenable that the Receiver here could sue the actual person *in* receivership, Mr. Dragul, who the Receiver asserts not only participated in the scheme but was the central figure. Assuming the Amended Complaint's allegations of wrongdoing as true as required on a motion to dismiss, Mr. Dragul would have benefited—not

been injured—from this wrongdoing just like a third-party participant. Nor can the GDA Entities in receivership assert claims against Mr. Dragul, as under the holding in *Sender v. Kidder Peabody*, they were also part of the scheme and the Receiver lacks standing to assert their claims against Mr. Dragul. *Id*. at 782.

Moreover, under the reasoning in *Sender v. Kidder Peabody*, the Receiver is also barred from asserting claims against third parties whom the Receiver alleges participated in the purported fraudulent scheme with Mr. Dragul. *Id*. That means the Receiver is barred from asserting claims against all of the other defendants in this action.

B. Equitable Considerations and the Receivership Order Bar the Receiver from Suing Mr. Dragul

This rule that the receiver may not sue a person or entity in receivership is further supported by myriad equitable considerations and the Receivership Order itself.

As the Receiver alleges in Paragraph 12 of the Amended Complaint, the Receivership Order purports to authorize him to "prosecute claims and causes of action *against third parties*[.]" Mr. Dragul is not a third party.

Moreover, pursuant to Paragraph 26 of the Receivership Order, "all actions in equity or at law against the Receiver, *Dragul*, GDARES and GDAREM, or the Receivership Estate are hereby enjoined . . . pending further action by this Court." (emphasis added). Here, the Receiver sued Mr. Dragul. Under the plain language of Paragraph 26, the Receiver was enjoined from doing so without first seeking relief from the stay. The Receiver never sought relief from the stay, and thus he lacks authority to assert claims against Mr. Dragul here.

Paragraph 10 of the Receivership Order required Mr. Dragul to turn over to the Receiver all of his assets that related to, or directly or indirectly derived from, investor funds from the solicitation or sale of alleged securities (except Mr. Dragul's personal residence). While the

Receiver disputes that Mr. Dragul turned over everything and there may be disputes over what counts as related to such investor funds, Mr. Dragul did turn over all assets he believed subject to the Receivership Order. Those assets are intended to pay creditors' claims, meaning they are intended *to pay the very claims the Receiver brings here*. Thus, Mr. Dragul has already turned over the assets the Receiver seeks to recover by way of a judgment in this action. Consequently, if the Receiver obtains a judgment, one of two things will happen. Either the Receiver will receive a double-recovery from Mr. Dragul for the same creditor injuries, or the judgment must be paid out of the Receivership Estate. A double-recovery would be barred as a matter of law. *Andrews v. Picard*, 199 P.3d 6, 11 (Colo. App. 2007). And if the Receiver satisfies the judgment out of the Receivership Estate, there is no point in suing Mr. Dragul. The Receiver already has what he might receive from the judgment, and all he would accomplish with the lawsuit is depleting the funds in the Estate by prosecuting the case and increasing his own fees. (Even on contingency, the Receiver himself would incur fees even if his counsel would not, plus there would be costs—including significant expert costs—born by the Estate.)

The Receivership Order also required Mr. Dragul to turn over and/or give the Receiver access to all information related to the receivership property, investors and their investments, the operation and management of the GDA Entities, and virtually any other potentially relevant (and in many cases irrelevant) information. (Receivership Order ¶¶ 10, 13(d), 13(g), 28.) Specifically, Paragraph 10 required Mr. Dragul and two related entities to provide to the Receiver all documents related to the Receivership Action, along with explaining the operation, maintenance and management of companies at issue. In other words, the very information Mr. Dragul needs to defend himself against the criminal indictments and this civil suit. In accordance with the Receivership Order, Mr. Dragul gave the Receiver access to his and the

GDA Entities' entire server, which included *all* of Mr. Dragul's communications, including privileged communications he had with counsel. Per the Receivership Order, Mr. Dragul did so without attempting to invoke any of the rights under C.R.C.P. 26 or other discovery rules that any other litigant would have to narrow the scope of discovery or protect confidential *or privileged* information. Subsequently, the Receiver seized the server and denied Mr. Dragul access to it or a full copy.

Paragraph 7 of the Receivership Order provides that "[n]othing in the Order operates as a waiver or an abrogation of the attorney-client privilege held by Dragul in his personal capacity." With respect to "all privileges in connection with the professional representation of [Gary Dragul], . . . Dragul maintains all such privileges in his personal capacity." (Receivership Order ¶ 10.) And the Receiver's authority to take possession of Mr. Dragul's offices and limit access to the Receiver and his agents is expressly "subject to any privileges maintained by Dragul in his personal capacity[.]" (*Id*. ¶ 13(d).) Additionally, though the Receiver may seize information including computerized records, "information subject to the attorney-client privilege held by Dragul in his personal capacity shall remain privileged. Any such claimed privileged information, or information that may reasonably be considered privileged information, obtained by Receiver or commingled with other information shall be disgorged by the Receiver and notice given to Dragul regarding the privileged information and its disposition by the Receiver." (*Id*. ¶ 28.)

While the Receivership Order requires the Receiver to disgorge all of Mr. Dragul's attorney-client privileged information, the Receiver has never done so in this or the Receivership Action. Indeed, rather than disgorging, the fact that the Receiver here sues Mr. Dragul *and* Mr. Dragul's former counsel, Benjamin Kahn and the Conundrum Group, alleging a concerted

scheme, suggests the Receiver and his counsel are actively using that very information against Mr. Dragul here.

And even if the Receiver had disgorged the privileged information, the damage would be done. Receipt and review of the opposing party's privileged information is a bell that cannot be un-rung. Opposing counsel's receipt of a party's privileged information often irreparably taints the integrity of a judicial proceeding so severely that, even though it is an extreme remedy, disqualification of the offending counsel may be appropriate. *In re Estate of Meyers*, 130 P.3d 1023, 1025 (Colo. 2006) (citations omitted); *see also, MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991) (noting that "[e]ven the appearance of impropriety may, under the appropriate circumstances, require prompt remedial action [such as disqualification]" and "any doubt is to be resolved in favor of disqualification") (internal quotation omitted). For that reason, here, the Court would either need to disqualify the Receiver's counsel (and possibly the Receiver himself), or dismiss the Amended Complaint against Mr. Dragul. Since there are myriad other legal defects with the Amended Complaint, the fact that this case is irreparably tainted by the Receiver's and his counsel's possession of Mr. Dragul's privileged information, and the Receiver's seizing of the very information Mr. Dragul needs to defend himself, are but additional reasons the case must be dismissed.[5]

III. The Receiver's Counsel is Not Authorized to Prosecute Most of the Claims

The Receiver and his counsel converted their fee arrangement to contingency for work on

[5] Had Mr. Dragul known the Receiver would seize Mr. Dragul's information which he needs to defend, and would seize Mr. Dragul's attorney-client privileged information and not disgorge it, and then use all of that information to sue Mr. Dragul, he would not have stipulated to the Receivership Order.

this case, effective November 1, 2019. (Ex. A.)[6] However, paragraph 13(o) of the Receivership Order allows the Receiver to hire counsel on contingency only "to recover possession of the Receivership Property from any persons who may now or in the future be wrongfully possessing Receivership Property or any part thereof[.]" Receivership Property only encompasses assets related to or derived from investor funds (Rec. Order ¶ 9), not damages. The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, (and possibly the twelfth) claims either expressly or as a matter of law seek to recover damages, not Receivership Property. (FAC ¶¶ 320, 326, 338, 359, 370, 377, 391, 407, 420, 425, 431, 441, 448.) Thus, the Receiver may not assert these claims unless and until he either hires new counsel on an hourly basis or converts his current counsel to hourly. In the meantime, the claims must be dismissed for lack of authority.

IV. The Receiver's Claims are Time-Barred or Not Cognizable

A. The First Claim for Violation of the Colorado Securities Act is Time-Barred Under the 3-Year Statute of Limitations and 5-Year Statute of Repose

The Receiver's first claim for violations of the CSA is also time-barred. While C.R.S. § 11-51-604(1) & (2) authorizes investors to sue for failure to register the security or failure to be licensed under C.R.S. §§ 11-51-301 & 401, and subsection 604(5)(a) for control person liability for the same violations, C.R.S. § 11-51-604(8) bars such claims filed "more than two years after the contract of sale[.]" The same subsection also imposes a statute of limitation and statute of repose for claims for fraud, material misstatement or omission, and control person liability under C.R.S. §§ 11-51-501(3), (4), & (5)(b)-(c):

> No person may sue under subsection (3) or (4) or paragraph (b) or (c) of subsection (5) of this section more than three years after the discovery of the facts giving rise to a cause of action under subsection (3) or (4) of this section or after such discovery

[6] Pleadings filed in another court proceeding are subject to judicial notice and a court may consider them without converting a motion to dismiss into a motion for summary judgment. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006).

> should have been made by the exercise of reasonable diligence and in no event more than five years after the purchase or sale[.]

C.R.S. § 11-51-604(8).

"In the context of securities fraud, the Tenth Circuit has held that the statute of limitations begins to run 'once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.'" *In re Qwest Communications Intern., Inc. Securities Litigation*, 387 F. Supp. 2d 1130, 1141 (D. Colo. 2005) (quoting *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201 (10th Cir. 1998)).[7] "The standard outlined in *Sterlin* and similar cases is viewed often as a two-step process: 1) the date when the plaintiff was on 'inquiry notice' of the possibility of fraud; when there existed 'sufficient storm warnings' to alert a reasonable person to the possibility that misleading statements or significant omissions had been made; and 2) the period thereafter during which a diligent investor should have discovered the facts underlying the alleged fraud." *Id.* Notably, this test turns on when the investor knew or should have known of misleading statements or omissions, not when he or she knew or should have known he or she was injured.

While the statute of limitations or repose is generally an affirmative defense, under the CSA, the timeliness of the claim is an element the plaintiff must prove. "When a statute creates a right unknown at common law, and also establishes a time period within which the right may be asserted, the time limit is a substantive provision which qualifies or conditions the right, as distinguished from a statute of limitations which must be asserted as a defense." *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 861 (Colo. App. 1996) (citing *People v. Riley*, 708 P.2d 1359 (Colo. 1985) (federal securities law is highly

[7] The date the Receiver learned of the alleged wrongdoing (FAC ¶ 319) is of no import. Since, as addressed above, this claim is an investor-creditor claim, the claim accrued when the investor-creditors knew.

persuasive in interpreting the CSA); J. Hicks, *Civil Liabilities: Enforcement & Litigation Under the 1933 Act* § 6.01[1] at 6-274 (§ 13 is 'substantive, rather than procedure; it establishe[s] an essential ingredient to a private cause of action') (1989); *In re Longhorn Securities Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983) (Securities Act of 1933 includes statute of limitation and repose which constitute elements of the claim which must be pled in complaint; because statute of limitation is not included in Securities Exchange Act of 1934, it must be asserted as affirmative defense)). Relying on these cases, the court in *First Interstate Bank of Denver* held that the CSA's limitations and repose periods constitute a substantive element of a securities claim and do not implicate a court's subject matter jurisdiction. 937 P.2d at 861.

Thus, section 604(8) of the CSA provides both a limitation period and a period of repose that are substantive elements of the Receiver's claim that must be pled in the complaint. But here, the Receiver failed to plead that the investors on whose behalf he purports to assert the CSA claim first learned of the alleged violations within the limitations period. Instead, the Receiver asserts that "[t]he Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors" (Am. Comp. ¶ 44), indicating that the investors on whose behalf the Receiver apparently brings this action discovered the facts giving rise to the claim at least as early as 2014. Indeed, the Receiver alleges that the "Southpark Investors" complained about not being informed about property transactions in March 2012. (FAC ¶¶ 114-15.) And upon receiving an investor "update",[8] "FC Investors" complained to Hershey and Mr. Dragul in early 2012. (FAC ¶¶ 184-

[8] Which was not made in the connection with any offer of securities (FAC ¶ 183), and thus is not relevant to a securities fraud claim in any event. *E.g., In re JWP, Inc. Securities Litigation*, 928 F. Supp. 1239, 1253 (S.D.N.Y. 1996).

85.) Thus, not only does the Receiver fail to plead facts to show the claim is timely, but his allegations demonstrate it is time-barred.

With respect to the failure to register claim under C.R.S. § 11-51-301 and failure to be licensed claim under C.R.S. § 11-51-401, which are both subject to a two-year statute of repose running from the date the alleged security was sold under C.R.S. §§ 11-51-604(8), the Receiver asserts Mr. Dragul sold securities "between 2003 through August 2018[.]" (FAC ¶ 316.) But paragraph 321 (and the paragraphs reference therein), and his attached exhibits (s*ee* FAC Exs. 23, 25, 28, 33, 35, & 42), show there was not a single investment occurring within two years of the January 21, 2020 filing of the original complaint. Thus, all of subparts A and B of his first claim under the CSA are time-barred.

With respect to claims under C.R.S. §§ 11-51-501(1)-(c) and 604(3)-(4) for securities fraud or material statement or omission, and 11-51-604(5)(b) & (c) for control person liability for the same (denominated subparts C and D in the Amended Complaint), the Receiver's Exhibits show very few investments within the 5-year statute of repose under C.R.S. § 11-51-604(8):[9]

[9] The Receiver alleges that Mr. Dragul "solicited and received investment funds in Plainfield 09" from "approximately 2009 through 2014" (FAC ¶ 61; *id*. Ex. 23), so all securities claims based on the Plainfield Investors are facially time-barred. He alleges that "from 2007 through 2013" Dragul sold promissory notes solicited by Hershey (FAC ¶ 64; *see also id*. ¶ 65 (noting Dragul owed money on promissory notes "[b]y the end of 2012")), which is also facially time-barred. The Receiver alleges "in or about 2014" Dragul and Hershey solicited investment from the "High Street Investors" (FAC ¶ 67 & *id*. Ex. 25). The solicitation materials for the Market at Southpark property were allegedly sent in 2010. (FAC ¶¶ 90-95.) The Receiver alleges Mr. Dragul raised money from "Southpark Investors" "[b]etween June and August 2010" and possibly in 2012. (FAC ¶¶ 101, 125-28, 131; *id*. Exs. 28-30.) For the Fort Collins WF 02 properties, the Receiver alleges investor solicitation in 2008 and 2009, and communications to induce investors not to try to cash out in 2012. (FAC ¶¶ 172-76, 191, 195.) (Alleged attempts to induce investors not to withdraw investments are not actionable as securities fraud, and thus claims based on such allegations fail as a matter of law for that additional reason. *E.g.*, *Ashland Inc. v. Morgan Stanley & Co., Inc.*, 700 F. Supp. 2d 453, 467 (S.D.N.Y. 2010).) And the vast

RECEIVER EXHIBITS SHOWING ALL INVESTMENTS AND DATES	
EXHIBIT NUMBER	SHOWS INVESTMENTS THROUGH
23	2013
25	2014
28	2010
33	April 1, 2016
35	2009
42	May 1, 2017

Only Exhibits 33 and 42 show any investments that are not facially time-barred, and there are only seven post-dating January 21, 2015 in Exhibit 33, and only nine in Exhibit 42, for investments in Plaza Mall of Georgia North 08 A Junior LLC, and GDA PS Member, LLC for Prospect Square, respectively. But the rest of the Receiver's allegations show he fails to meet his burden to show the claims based on Plaza Mall and Prospect Square are timely under the three-year statute of limitations subject to the discovery rule. He alleges Mr. Dragul provided material to solicit investments in Plaza Mall of Georgia North "in or about 2008 and continuing through 2016" (FAC ¶ 143; *see also id*. ¶ 150), indicating the vast amount of alleged solicitation in that property is time-barred. But worse, the most recent of the solicitations the Receiver alleges Mr. Dragul provided to investors was provided only up until 2015 (FAC ¶ 148), and the alleged solicitation material itself shows *projections* starting in 2009, indicating it must have been prepared and circulated far earlier than the Receiver alleges. (FAC Ex. 32.)

The Receiver also alleges Mr. Dragul distributed false and misleading solicitation materials for the Prospect Property in 2007 and early 2016. (FAC ¶¶ 220, 251-53.) But the allegedly material misstatement in 2016 was that Mr. Dragul received an offer for vacating

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majority of the purported "impermissible" commissions pre-date five years before the complaint was filed as well (*see, e.g.*, FAC ¶ 87 & Exs. 3-7), though that is irrelevant since the statute of repose runs from the date of the sale of the security, not the date of the failure to disclose. Finally, the Receiver alleges the offer of promissory notes only through 2013 (FAC ¶ 332), which is facially time-barred.

tenant Kroger's space, which the Receiver alleges was false because when the Receiver was appointed, "Dragul had not identified a replacement tenant or re-leased the Kroger space." (FAC ¶¶ 252-53.) Those are not inconsistent—Mr. Dragul could have received an offer that was not acceptable, and still not have identified a replacement tenant or re-leased the property for that very reason.[10] The Receiver fails to meet his burden of demonstrating when the investors learned of any fraud or material misstatements or omissions, and his own allegations and exhibits demonstrate it was assuredly far earlier than three years before the complaint was filed on January 21, 2020.

Thus, the first claim is time-barred under both the statutes of repose and limitations.

B. The Eleventh Claim for Fraudulent Transfer is Time-Barred

Under C.R.S. § 38-8-110(1)(a), a claim for fraudulent transfer under C.R.S. § 38-8-105(1)(a), as the Receiver brings here, must be brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." Here, all alleged fraudulent transfers that were made before January 21, 2016 are time-barred unless the one-year discovery rule applies. And the vast majority of the transfers alleged—the "Commissions"—pre-dated January 21, 2016. (*See* FAC/Compl. Exs. 3-7; FAC ¶ 293 (alleging commissions from 2003 to August 2018).) Indeed, though the Receiver alleges Mr. Dragul took money from escrow of real

[10] Most of the factual assertions regarding the alleged misstatements or omissions fail under the very exhibits the Receiver points to for support. For example, not one of the exhibits he cites in paragraphs 331(f), (h), and (i) to support his allegations that Mr. Dragul made "untrue statements" that the investments and operating reserves would be "held in the specific Fox SPE or GDA entity associated bank accounts" and "not comingled" shows any statement that in any way suggests the investments and reserves would be held in specific Fox SPE or GDA bank accounts or not comingled. (*See* FAC Exs. 8, 12, 16, 20, 24, 29, 30, 31 & 35 (cited in ¶ 331(f)); Exs. 8, 12, 16, 20, 24, 29, 30, 31, 32, 36, & 39 (cited in ¶ 331(h)); & Exs. 8, 12, 16, 20, 29, 30, 36, & 39 (cited in ¶ 331(i)).)

estate closings from 2002 to 2018 in the Amended Complaint itself, the exhibit the Receiver cites in support shows payments to Mr. Dragul *only in 2008 and 2009*. (FAC ¶ 299; *id*. Ex. 3.) And the Receiver alleges the Mr. Dragul paid Hershey commissions from 2001 to 2014, but the Receiver's exhibit shows them only through 2013. (FAC ¶ 311; *id*. Ex. 7.)

Under the discovery rule, in *Lewis v. Taylor*, the Colorado Supreme Court noted that, "the transfer was or could reasonably have been discovered by the Receiver on the date of his appointment[.] Thus, section 38–8–110(1)(a) would bar any claim not filed by . . . one year after the [Receiver was appointed]." 375 P.3d 1205, 1207 (Colo. 2016). Thus, even under the discovery rule, any claim for a fraudulent transfer would have needed to be filed no later than one year after the Receiver was appointed—i.e., no later than August 30, 2019. And if one looks to when the investor-creditors knew or should have known of the allegedly fraudulent transfers, the claim is still time-barred as the filing of the preliminary injunction on August 15, 2018 in the Receivership Action and subsequent appointment of the Receiver on August 30, 2018 would have given them notice.

C. The Twelfth Claim for Unjust Enrichment is Time-Barred and Not Cognizable When Pled With a Fraudulent Transfer Claim

While equitable claims such as unjust enrichment are technically subject to equitable laches rather than statutes of limitation, courts generally apply the statute of limitations applicable to an analogous claim at law. *Sterenbuch v. Gross*, 266 P.3d 428, 436-37 (Colo. App. 2011). Here, the unjust enrichment claim seeks the same relief as the fraudulent transfer claim—that Mr. Dragul return to the Receivership Estate whatever he received at the Estate's or creditors' expense. Thus, the fraudulent transfer limitations period applies, and the unjust enrichment claim is time-barred for the same reasons the fraudulent transfer claim is time-barred.

Moreover, equitable claims are not available, and must be dismissed at the pleading stage, when there is an adequate remedy at law. *See Szaloczi v. John Behrmann Revocable Trust*, 90 P.3d 835, 842 (Colo. 2004) ("We have long held that equity will not act if there is a plain, speedy, adequate remedy at law."); *Kelley*, 901 F. Supp. 2d at 1132 (equitable claim must be dismissed at pleading stage when adequate legal remedy is available). Here, the fraudulent transfer claim provides an adequate remedy at law (in fact the same remedy), and the equitable unjust enrichment claim is not cognizable.

CONCLUSION

The Receiver here is trying to exercise power he does not have. His power derives from the people or entities in receivership. As a matter of law, he lacks standing to assert claims of creditors, who are not in receivership. Standing in the shoes of the people or entities in receivership, he also is barred as a matter of law from suing those same people or entities, as that would mean the person in receivership is suing himself for alleged wrongdoing from which he himself benefited. And many of the claims are time-barred or otherwise not cognizable.

The entire Amended Complaint fails as a matter of law and must be dismissed. Since repleading will not imbue the Receiver with standing he lacks as a matter of law or enable him to sue a person in the receivership such as Mr. Dragul, the Amended Complaint should be dismissed with prejudice.

Dated this 6th day of July, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills
Paul L. Vorndran, #22098
Christopher S. Mills, #42042

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via the Colorado Court E-filing system to the following:

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EXHIBIT A

District Court, Denver County, State of Colorado Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433	DATE FILED: May 11, 2020 9:57 AM FILING ID: 5A003475E0835 CASE NUMBER: 2018CV33011
Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado v. **Defendants:** Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC	▲COURT USE ONLY▲
Attorneys for 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 pvellone@allen-vellone.com mgilbert@allen-vellone.com rsternlieb@allen-vellone.com	Case Number: 2018CV33011 Division/Courtroom: 424

RECEIVER'S NOTICE CONCERNING REVISED COMPENSATION OF ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

Harvey Sender, the duly-appointed receiver ("Receiver") for Gary Dragul ("Dragul"), GDA Real Estate Services, LLC ("GDA RES"), GDA Real Estate Management, LLC ("GDA REM"), and related entities hereby gives notice of a change in the terms of compensation to be paid to the law firm of Allen Vellone Wolf Helfrich & Factor P.C. ("Allen Vellone").

1. On August 15, 2018, Gerald Rome, Securities Commissioner for the State of Colorado (the "Commissioner), filed his Complaint for Injunctive and Other Relief

and on August 30, 2018, the Court entered its Order Appointing Receiver ("Receivership Order") which appointed Harvey Sender receiver for Dragul and the DGA Entities, as well as for their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate" or the "Estate"). Receivership Order at p. 2, ¶ 5.

2. The Receivership Order gives the Receiver the authority to "hire and pay general counsel, accounting, and other professionals as may be reasonably necessary to the proper discharge of the Receiver's duties, and to hire, pay and discharge the personnel necessary to fulfill the obligations of the Receiver hereunder, including the retention of . . . other third parties to assist the Receiver in the performance of its duties hereunder, all within the Receiver's discretion[.]" Receivership Order at p. 9, ¶ 13(l).

3. On September 7, 2018, the Receiver provided notice that he had retained Allen Vellone as his counsel to assist in him in administering the Receivership Estate. To date, Allen Vellone has been compensated on an hourly basis.

4. The Receiver has filed the following two cases that remain pending:

(a) ***Sender v. Dragul, et al.***, 2019CV33373, Denver District Court. In this case, the Receiver seeks to recover fraudulent transfers Dragul made to his wife Shelly ($36,579,428.58), and his children Charli ($314,158.74), Samuel ($712,946.55), and Spencer ($543,083.86), a total of **$38,149,617.73**. The case is set for trial beginning in December 2020 (the "**Dragul Family Case**").

(b) ***Sender v. Dragul, et. al.,*** Denver District Court, Case No. 2020CV30255 (the "**Insider Case**"). Defendants in the Insider Case were Dragul insiders and co-conspirators and were involved in furthering Dragul's Ponzi scheme and profited from it. Among other things, the Complaint seeks to recover approximately $30 million.

5. The Receiver and Allen Vellone have agreed to modify their existing fee agreement, effective as of November 1, 2019, for work performed in the Insider and Dragul Family Cases so that Allen Vellone will be compensated on a contingent fee basis for work performed in those cases as follows: 25% of any recovery obtained in either case on or before September 5, 2020; 38% recovered after September 5, 2020, through the filing of any appeal, and 45% of the amount recovered after any appeal is filed. The Receivership Estate will pay the expenses incurred in both cases. The Commissioner has approved this agreement.

Dated: May 11, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: */s/ Michael T. Gilbert*

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, I served a true and correct copy of the foregoing **RECEIVER'S NOTICE CONCERNING REVISED COMPENSATION OF ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.** via CCE to the following:

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Counsel for Defendant Gary Dragul

CERTIFICATION OF E-SERVICE ON KNOWN CREDITORS

In accordance with this Court's February 1, 2019, Order clarifying notice procedures for this case, I also certify that a copy of the foregoing is being served by electronic mail on all currently known creditors of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.

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