

DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

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

vs.

Defendants: GARY DRAGUL;
BENJAMIN KAHN; THE CONUNDRUM
GROUP, LLP; SUSAN MARKUSCH;
ALAN C. FOX; ACF PROPERTY
MANAGEMENT, INC.; MARLIN S.
HERSHEY; PERFORMANCE
HOLDINGS, INC.; OLSON REAL
ESTATE SERVICES, LLC; JUNIPER
CONSULTING GROUP, LLC; JOHN
AND JANE DOES 1-10; and XYZ
CORPORATIONS 1-10

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and Marlin Hershey*

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Case Number: 20CV30255

Courtroom: 414

**DEFENDANTS MARLIN S. HERSHEY'S AND PERFORMANCE HOLDINGS, INC.'S
MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and (5)**

Defendants Marlin S. Hershey and Performance Holdings, Inc. (collectively, “Hershey”) file their Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5) and, in support thereof, respectfully set forth as follows:

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

Prior to filing this Motion, the undersigned conferred with Rachel Sternlieb, counsel for the Receiver regarding the relief requested in this Motion. Ms. Sternlieb stated that the Receiver opposes the relief requested herein.

II. THE FIRST AMENDED COMPLAINT

A. Overview

On June 1, 2020, the Receiver filed his First Amended Complaint (the “Complaint”). In the Complaint, the Receiver alleges twelve (12) claims against ten (10) Defendants and up to twenty (20) unnamed parties based on an alleged fraudulent scheme perpetrated by Defendant Gary Dragul (“Dragul”). For the most part, the Receiver’s claims are not alleged on behalf of the receivership estate but rather on behalf of unidentified creditors of the receivership estate. This is absolutely true as to Hershey. The Receiver alleges eight (8) claims against Hershey – violations of the Colorado Securities Act, negligence, negligent misrepresentation, civil theft, violations of the Colorado Organized Crime Control Act (“COCCA”), aiding and abetting violations of the COCCA, fraudulent transfer, and unjust enrichment. (Complaint at ¶¶ 315, 356, 361, 372, 379, 393, 443, 448). With respect to each claim, the Receiver asserts that he has standing to prosecute the claim on behalf of unnamed creditors of the receivership estate.

B. Allegations Against Hershey

The Receiver generally alleges that Hershey furthered Dragul’s fraudulent scheme by identifying and soliciting investors for the scheme and participating in the drafting and sending of false communications to investors in the scheme. (Complaint at ¶¶ 41, 43). For his efforts, the Receiver alleges that Hershey was paid finder’s fees or commissions totaling \$3,175,655.54 from

January 19, 2001 through December 16, 2013. (Complaint at ¶¶ 42, 87, Ex. 7).

In support of his general allegations against Hershey, the Receiver specifically alleges that Hershey was involved in transactions involving four (4) properties/entities: The Market at Southpark in Littleton, Colorado, Plaza Mall of Georgia North in Buford, Georgia, a Whole Foods in Fort Collins, Colorado, and Prospect Square in Cincinnati, Ohio. (Complaint at ¶¶ 91-94, 97, 145, 148, 155, 173-177, 220-221). With respect to The Market at Southpark, the Receiver alleges that Hershey distributed solicitation materials to prospective investors in April 2010, Hershey distributed a property update to investors in August and November 2011, and investors were disgruntled and contacted Hershey in or about March 2012 “demanding answers and expressing concern that they had not been informed about the sale and asking why their distributions had been suspended for the past two months.” (Complaint at ¶¶ 91-93, 109-110, 115). As to Plaza Mall of Georgia North, the Receiver alleges that Hershey distributed solicitation materials to investors in 2013 to 2015 and that, in reliance on such materials, several investors acquired ownership interests in the entity that owned the Plaza Mall; however, according to Exhibit 33 to the Complaint, only four (4) investors “rolled over” their investments after January 1, 2014, the latest being April 1, 2016. (Complaint at ¶¶ 148, 155, Exhibit 33).

Regarding the Whole Foods in Fort Collins, Colorado, the Receiver alleges that, following its sale in 2005, Hershey solicited prospective investors to purchase membership interests in three (3) properties in which Fort Collins WF 02, LLC had an interest and, no later than early 2012, angry investors contacted both Hershey and Dragul expressing outrage over their investments. (Complaint at ¶¶ 173-175, 177, 184). Finally, with respect to Prospect Square, the Receiver alleges that Hershey solicited investors in 2007 and received a commission of \$306,000.00 for his efforts. (Complaint at ¶¶ 220-221). The Receiver does not allege that Hershey was involved in the Prospect Square transaction in any capacity after 2007.

III. STANDARD OF REVIEW

A complaint that states a plausible claim for relief survives a motion to dismiss. *Paradine v. Goei*, ___ P.3d ___, 2018 WL 1959474, *1 (Colo. App. April 19, 2018) (citing *Warne v. Hall*, 373 P.3d 588 (Colo. 2016)). “Under this standard, a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief.” *Id.* (citation omitted). In considering a motion to dismiss, a court must accept as true all of the factual allegations, but not the legal conclusions, contained in a complaint. *Id.* Because standing is a threshold legal issue that must be satisfied before a case may be decided on the merits, *Adams v. Land Services, Inc.*, 194 P.3d 429, 430 (Colo. App. 2008), the Court does not have to accept the Receiver’s legal conclusions that he has standing to pursue his claims set forth in the Complaint. Rather, whether the Receiver has standing to pursue his claims is determinative of the Court’s subject matter jurisdiction to adjudicate such claims. *Ferguson v. Spalding Rehabilitation, LLC*, 456 P.3d 59, 61 (Colo. App. 2019). If the Receiver lacks standing, the Court does not have subject matter jurisdiction and must dismiss the claims pursuant to C.R.C.P. 12(b)(1). *Ferguson*, 456 P.3d at 61.

In addition to challenging the Receiver’s standing to assert claims against him, Hershey also moves to dismiss some of the Receiver’s claims because the claims are time-barred. While such a determination is normally a question of fact, a court may grant a motion to dismiss based on the statute of limitations if the complaint shows on its face that the claim was not timely filed. *Bell v. Land Title Guarantee Co.*, 422 P.3d 613, 615 (Colo. App. 2018) (citing *SMLL, L.L.C. v. Peak Nat’l Bank*, 111 P.3d 563, 564-65 (Colo. App. 2005)). Hershey executed a Tolling Agreement on August 30, 2019 pursuant to which he agreed to toll statutes of limitations applicable to the Receiver’s claims against him from August 30, 2019 to March 31, 2020. (Exhibit A attached hereto). Accordingly, if on its face the Complaint shows that the statutes of limitations applicable to the Receiver’s claims against Hershey expired prior to August 30, 2019,

such claims are time-barred and may be dismissed. *Bell*, 422 P.3d at 615; (Exhibit A at p. 2, ¶ 1).

IV. ARGUMENT

A. The Receiver Lacks Standing to Pursue His Claims Against Hershey

The Receiver alleges all eight (8) claims against Hershey on behalf of unidentified creditors of the receivership estate rather than the receivership estate itself.¹ The Receiver asserts that he has authority to bring claims on behalf of creditors of the receivership estate based on paragraph 13(s) of the Receivership Order entered in *Chan v. Dragul, et al.*, Case No. 2018cv33011, District Court for the City and County of Denver. Paragraph 13(s) of the Receivership Order purports to give the Receiver the authority “[t]o prosecute claims and causes of action held by Creditors of Dragul, GDARES and GDAREM, and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors...”

However, as Defendants Drugal, Susan Markusch, Alan Fox, and ACF Property Management, Inc., have argued in their respective motions to dismiss previously filed in this case in response to the Receiver’s original complaint, regardless of the purported authority granted to the Receiver in paragraph 13(s) of the Receivership Order, the Receiver lacks standing to pursue claims on behalf of creditors of the receivership estate because “...generally a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve.” *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (“Since 1935 it has been well settled that ‘the plaintiff in

¹ The Receiver does not state the basis for his assertion that he has standing to pursue his fraudulent transfer and unjust enrichment claims although both claims are brought to address wrongs or inequities perpetrated on the creditors of the receivership estate, not the receivership estate itself. (Complaint at ¶¶ 443-444, 448). The Receiver also purports to bring his claims for civil theft and violations of COCCA on behalf of the receivership estate. However, these claims are solely creditor claims as the Receiver alleges injury for civil theft to the “GDA Entity Investors” and COCCA claims only can be brought by those injured by one or more predicate acts. C.R.S. § 18-17-106(7).

his capacity of receiver has no greater rights or powers than the corporation itself would have.”); *Scholes v. Schroeder*, 744 F.Supp. 1419, 1422 (N.D. Ill. 1990) (a receiver cannot pursue claims that belong not to the receivership estate but rather to those who may have an interest in the estate). Rather than repeat the standing arguments already competently briefed by Defendants Drugal, Susan Markusch, Alan Fox, and ACF Property Management, Hershey adopts such arguments as well as any supplements thereto and incorporates them herein by reference. *See* Defendants Alan C. Fox and ACF Property Management, Inc.’s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), 12(b)(5), and 9(b) filed on March 17, 2020 at pp. 8-12; Defendant Gary Dragal’s Motion to Dismiss filed on March 17, 2020 at pp. 5-8; Defendant Susan Markusch’s Motion to Dismiss filed on March 19, 2020 at pp. 3-4.

The Receiver no doubt will argue that he has standing to pursue claims on behalf of creditors of the receivership estate because the Receivership Order grants him such authority. While it is generally true that a receiver derives his authority from the order of appointment, *Francis v. Camel Point Ranch, Inc.*, ___ P.3d ___, 2019 WL 3227058, *2 (Colo. App. 2019), a court cannot exceed its power by conferring standing on a receiver that is prohibited by law. *Scholes*, 744 F.Supp. at 1422-1423. Yet, that is precisely the effect of paragraph 13(s) of the Receivership Order as it purportedly grants the Receiver authority to pursue claims on behalf of creditors of the receivership estate when it is settled law that a receiver cannot pursue such claims. *Scholes*, 744 F.Supp. at 1422 (citing *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 429-434 (1972)). In such case, this Court should not enforce that portion of the Receivership Order that improvidently and incorrectly grants standing to the Receiver to pursue claims of creditors of the receivership estate. *Id.* at 1422-1423; *see also Liberte Capital Group, LLC v. Capwill*, 248 Fed.Appx. 650, 659 (6th Cir. 2007) (receiver did not have authority to pursue claims of investors, and trial court exceeded its authority in allowing receiver to do so). Absent the unlawful authority granted him in paragraph 13(s) of the Receivership Order, the

Receiver lacks standing to pursue all of his claims against Hershey and, therefore, all eight (8) claims should be dismissed pursuant to C.R.C.P. 12(b)(1).

B. The Receiver Fails to State a Claim for Civil Theft

In paragraphs 372 through 377 of the Complaint, the Receiver mechanically recites the elements of a claim for civil theft under Colorado’s Rights in Stolen Property Statute, C.R.S. § 8-4-405 (mistakenly cited by the Receiver as C.R.S. § 18-4-401, which is the penal statute criminalizing theft). The Receiver asserts, *inter alia*, that Defendants, including Hershey, “knowingly exercised control over GDA Entity investors’ funds”, that “[w]ithout investors’ knowledge or authorization, Defendants exploited their control over those funds by causing them to be used for Defendants’ personal benefit”, and that “Defendants intended to permanently deprive investors of their investments.” (Complaint at ¶¶ 373-375). However, elsewhere, the Complaint is clear that Hershey did not receive money directly from investors or even from the closings on real estate in which the investors had invested. Rather, “the Hershey Defendants received commissions from Dragul separately, all based on an agreed percentage of the funds Dragul received from investors solicited by Hershey.” (Complaint at ¶310). The Receiver does not allege, nor conceivably could he, that any particular set or sets of funds are directly traceable from the investors to Dragul and then to Hershey. Indeed, the Receiver alleges that various funds allegedly stolen by Defendants were commingled. (Complaint at ¶ 387(c)).

A claim for civil theft does not lie against Hershey under these putative circumstances. An allegation of civil theft fails if “it does not allege an intent to deprive [plaintiff] . . . of specific funds.” *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 608 (Colo. 2016). C.R.S. § 18-4-405 “allows an owner to recover property ‘against any person in whose possession he finds the property’” but a civil theft claimant “may not ‘follow property into its product’”. *Id.* Thus, where a party who has received allegedly stolen money no longer has possession of that money, “having used it for matters relating to its business”, a civil theft claim under § 18-4-405 cannot be

maintained. *Cedar Lane Investments v. Am. Roofing Supply of Colorado Springs, Inc.*, 919 P.2d 879, 882 (Colo. App. 1996). Because the Complaint does not contain, and credibly could not contain, an allegation that Hershey has a specifically identifiable pot of money that was directly traceable back through Dragul or his entities to the investors, the civil theft claim against Hershey must be dismissed pursuant to C.R.C.P. 12(b)(5).

C. The Receiver Fails to State a Claim for Unjust Enrichment and/or the Receiver's Unjust Enrichment Claim Is Barred by the Defense of In Pari Delicto

To recover under an unjust enrichment theory requires a showing that (i) at plaintiff's expense, (ii) defendant received a benefit (iii) under circumstances that would make it unjust for defendant to retain the benefit without paying. *Dudding v. Norton Frickey & Assoc.*, 11 P.3d 441, 445 (Colo. 2000); *Redd Iron, Inc. v. International Sales and Services Corp.*, 200 P.3d 1133, 1136 (Colo. App. 2008). In support of his unjust enrichment claim against Hershey, the Receiver alleges that Hershey received benefits at the expense of the receivership estate. But, the Receiver does not allege any facts to support the conclusion that it would be unjust for Hershey to retain benefits provided to him by the receivership estate. In fact, the opposite is true as the Receiver acknowledges that Dragul, individually and through GDA RES and GDA REM, operated a Ponzi scheme that the Receiver globally refers to as the "Sham Business." (Complaint at ¶ 35). Thus, the Receiver admits that Dragul, GDA RES, and GDA REM were the primary participants in the allegedly fraudulent scheme in which he attempts to implicate Hershey and the other Defendants. In such circumstances, there is no basis to assert that Hershey was "unjustly enriched" at the expense of the receivership estate.

Moreover, even if the Receiver stated a plausible claim for unjust enrichment, the claim would be barred by the application of the doctrine of *in pari delicto*. According to such doctrine, in the case of equal or mutual fault, the position of the defending party is the better one. *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1275 (10th Cir. 2008). Thus, a plaintiff's

recovery may be barred by his own wrongful conduct. *Mosier*, 546 F.3d at 1275 (citing *Pinter v. Dahl*, 486 U.S. 622, 632 (1988)). Additionally, the doctrine of *in pari delicto* may bar an action by a bankruptcy trustee -and, by extension, a receiver – against third parties who participated in or facilitated wrongful conduct of the debtor. *Id.* at 1276. That is the case here as Dragul’s and his entities’ alleged wrongful conduct precludes the Receiver from pursuing claims against alleged participants based on the same wrongful conduct, including, without limitation, the Receiver’s claim against Hershey for unjust enrichment.

D. Certain of the Receiver’s Claims Are Time-Barred

1. The Receiver Steps Into the Shoes of the Creditors of the Receivership Estate on Whose Behalf He Asserts Claims

The Receiver purports to assert claims on behalf of creditors of the receivership estate. As argued above, the Receiver cannot do so as a matter of law. However, even if he can, the Receiver necessarily is the assignee of any such claims and, therefore, stands in the shoes of the creditors.² See *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994) (“As a general principle of common law, an assignee stands in the shoes of the assignor.”). As an assignee of the creditors’ claims, the Receiver “has the same rights as the assignor in determining whether a claim is barred by the statute of limitations.” *Tivoli Ventures*, 870 P.2d at 1248 (citations omitted). Thus, because the Receiver purports to supplant the creditors, he, as their assignee, may initiate an action so long as the creditors are not barred from doing so by the applicable statute of limitations. *Id.* at 1249.

2. The Receiver’s Colorado Securities Act Claims Are Barred By the Applicable Statute of Limitations or Statute of Repose

The Receiver alleges that Hershey violated two (2) sections of the Colorado Securities Act. First, he alleges that Hershey was not registered to sell securities but did so in violation of

² Tellingly, however, the Receiver does not assert that any creditor has assigned to the Receiver his/her/its claims against any of the Defendants.

C.R.S. § 11-51-401(1). (Complaint at ¶ 322). C.R.S. § 11-51-604(2)(a) sets forth the civil remedy for a violation of C.R.S. § 11-51-401. No person may sue under subsection (2) of C.R.S. § 11-51-604 “more than two years after the contract of sale...” C.R.S. § 11-51-604(8) (2020). As set forth above, according to the Receiver, the last purchase of any security involving Hershey was April 1, 2016. (Complaint at Exhibit 33). Accordingly, the last date on which any claim against Hershey for violation of C.R.S. § 11-51-401(1) could have been brought was April 1, 2018, well before the effective date of the Tolling Agreement of August 30, 2019. Accordingly, the Receiver’s claim against Hershey for violation of C.R.S. § 11-51-401(1) is time-barred.

Second, the Receiver alleges that Hershey substantially assisted Dragul with conduct that violated C.R.S. § 11-51-501(1). C.R.S. § 11-51-604(5)(c) sets forth the civil remedy for substantially assisting conduct that violates § 11-51-501(1). No person may sue under subsection 5(c) of C.R.S. § 11-51-604 “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 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) (2020). Pursuant to the five-year statute of repose in C.R.S. § 11-51-604(8), no claim based on a purchase or sale that occurred before August 29, 2014 exists. *See Friedlob v. Trustees of Alpine Mut. Fund Trust*, 905 F.Supp. 843, 852 (D. Colo. 1995) (under a statute of repose, “not only is a remedy barred after three years, but the liability is extinguished”). The Receiver only alleges that Hershey was involved in four (4) transactions after August 29, 2014 – the “rollovers” in connection with the Plaza Mall of Georgia North. (Complaint at ¶¶ 148, 155, Exhibit 33). Accordingly, liability with respect to all other transactions allegedly involving Hershey, including, without limitation, those transactions related to The Market at Southpark, Plaza Mall of Georgia North, a Whole Foods in Fort Collins, and Prospect Square, have been extinguished pursuant to C.R.S. § 11-51-604(8). Additionally, because the last finder’s fee or commission allegedly made to Hershey was on December 16,

2013 (Complaint at Exhibit 7), any claims under the Colorado Securities Act related to such payments also have been extinguished pursuant to the five-year statute of repose. C.R.S. § 11-51-604(8) (2020).

Because the Receiver generally alleges that the Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors (Complaint at ¶ 4), it also appears that even claims based on transactions occurring after 2014 were discovered or should have been discovered well before three (3) years before August 30, 2019. Accordingly, claims based on the alleged “rollovers” made in connection with the Plaza Mall of Georgia North in 2015 and 2016 also are time-barred. (Complaint at ¶¶ 148, 155, Exhibit 33).

3. The Receiver’s Negligence and Negligent Misrepresentation Claims Are Barred By the Applicable Statute of Limitations

The Receiver alleges claims against Hershey for negligence and negligent misrepresentation based on the supposedly inaccurate statements contained in certain solicitation materials distributed to investors. A negligence claim must be filed two years from the date on which it accrues. C.R.S. § 13-80-102 (2020). A negligence claim accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. C.R.S. § 13-80-108(1) (2020). A negligent misrepresentation claim must be filed three years from the date on which it accrues.³ C.R.S. § 13-80-101(1)(c) (2020); *Miller v. McCloud*, 2016 WL 524357, *4-5 (D. Colo. Feb. 10, 2016). A cause of action for misrepresentation accrues on the date the misrepresentation is discovered or should have been discovered by the exercise of reasonable diligence. C.R.S. § 13-80-108(3) (2020).

³ Other courts have held that a negligent misrepresentation claim is subject to a two-year statute of limitations. *Miller v. McCloud*, 2016 WL 524357, *4-5 (D. Colo. Feb. 10, 2016). For purposes of Hershey’s argument, though, it is immaterial whether the Receiver’s negligent misrepresentation is subject to a two-year or three-year statute of limitations as, in either case, the Receiver’s negligent misrepresentation claim, or at least the bulk of such claim, is time-barred.

The Receiver only identified four (4) transactions involving Hershey. (Complaint at ¶¶ 91-94, 97, 145, 148, 155, 173-177, 220-221). With respect to the The Market at Southpark and Fort Collins Whole Foods transactions, the Receiver acknowledges that investors were “disgruntled” or “outraged” about the transactions no later than 2012 (Complaint at ¶¶ 91-93, 109-110, 115, 173-175, 177, 184) and, therefore, clearly knew or should have known of the alleged negligence or misrepresentation at such time. As to the Prospect Square transaction, the Receiver only alleges Hershey’s involvement in 2007 and does not allege that Hershey was negligent toward or misrepresented anything to the Prospect Square investors. (Complaint at ¶¶ 220-221). Accordingly, the Receiver’s negligence and negligent misrepresentation claims against Hershey in connection with The Market at Southpark, Fort Collins Whole Foods, and Prospect Square transactions accrued no later than 2012 and, therefore, were time-barred as of 2104 and 2015, respectively.

Because the Receiver generally alleges that the Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors (Complaint at ¶ 4), it also appears that even claims based on transactions occurring after 2014 were discovered or should have been discovered well before three (3) years before August 30, 2019. Accordingly, claims based on the alleged “rollovers” made in connection with the Plaza Mall of Georgia North in 2015 and 2016 also are time-barred. (Complaint at ¶¶ 148, 155, Exhibit 33).

4. The Receiver’s COCCA Claims Are Barred By the Applicable Statute of Limitations

A claim for violation of COCCA must be filed within five (5) years after the cause of action accrues. A cause of action shall be deemed to have accrued at such time as the alleged offense or conduct giving rise to the claim was discovered. C.R.S. § 13-80-103.8 (2020). The Receiver’s COCCA claims against Hershey are largely time-barred for the exact reasons set forth

above – except for discrete conduct in which the Receiver alleges Hershey engaged in 2014 or 2015 with respect to the Plaza Mall of Georgia North, all of the wrongful conduct attributed to Hershey occurred in 2012 or earlier and was discovered by investors no later than 2012.

(Complaint at ¶¶ 91-93, 109-110, 115, 173-175, 177, 184, 220-221). Thus, the deadline to file the COCCA claims expired five (5) years thereafter, well before the effective date of the Tolling Agreement of August 30, 2019. Accordingly, as shown on the face of the Complaint, the Receiver’s COCCA claims based on all of Hershey’s alleged conduct except for the discrete conduct alleged in 2014 and 2015 are time-barred and must be dismissed.

E. The Receiver Fails to Allege His Fraud-Based Claims With Particularity

The Receiver alleges at least four (4) fraud-based claims against Hershey: violations of the Colorado Securities Act, negligent misrepresentation, and violations of COCCA.

Consequently, pursuant to C.R.C.P. 9(b), such claims must be alleged with particularity. To satisfy this requirement, “the complaint must sufficiently specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.” *State Farm Mut. Auto Ins. Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994).

A glaring weakness in the Receiver’s position that he can bring claims that belong to the creditors of the receivership estate is that the Receiver does not, and presumably cannot, identify the creditors on whose behalf he allegedly asserts claims. The Receiver’s fraud-based claims against Hershey simply are based on the Receiver’s speculation that fraud occurred but are unsupported by any specific facts establishing when, how, and to what extent the alleged fraud occurred. Thus, from Hershey’s perspective, it is impossible to know if he communicated with a creditor who alleges fraud, when he communicated with a creditor who alleges fraud, what he communicated to any creditor who alleges fraud, whether any such creditor relied on his

communication, or whether the creditor suffered some damage as a result of any such reliance. Accordingly, the Receiver has failed to meet the pleading requirements of C.R.C.P. 9(b), and, therefore, the Receiver's claims for violations of the Colorado Securities Act, negligent misrepresentation, and violations of COCCA must be dismissed.

F. Adoption of Other Defendants' Arguments in Support of Their Motions to Dismiss

It is Hershey's understanding that Defendants Dragul, Alan Fox/ACF Property Management, Inc., and Susan Markusch/Olson Real Estate Services, LLC also will be filing motions to dismiss some of all of the Receiver's claims alleged against them. To the extent that any of the above Defendants make arguments that also are applicable to the Receiver's claims alleged against Hershey, Hershey adopts such arguments and incorporates them herein by reference.

Respectfully submitted this 6th day of July 2020.

By: /s/Paul M. Grant
Paul M. Grant

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 6th day of July 2020:

Allen Vellone Wolf Helfrich and Factor PC

Michael Thomas Gilbert
Patrick D. Vellone
Rachel A. Sternlieb

Moye White

Eric Brian Liebman
Joyce Carmel Williams
Lucas Trask Ritchie

Gordon and Rees LLP

John M. Palmeri
Margaret Louise Boehmer

Jones & Keller PC

Christopher Stephen Mills
Paul Leo Vorndran

Thomas F. Quinn PC

Thomas Francis Quinn

/s/Paul M. Grant

Paul M. Grant

TOLLING AGREEMENT

This Tolling Agreement ("Agreement") is entered into on August __, 2019 (the "Effective Date"), by and between Marlin Hershey, Wendy Hershey, and Performance Holdings, Inc. ("You"), and Harvey Sender, the Receiver in the Receivership Action (the "Receiver"). Mr. Sender has been appointed Receiver for Gary J. Dragul, GDA Real Estate Services, LLC ("GDARES"), GDA Real Estate Management, LLC ("GDAREM"), and a number of related entities ("Dragul and the GDA Entities)." You and the Receiver are referred to in this Agreement as the "Parties," and each as a "Party."

RECITALS

A. On August 30, 2018, the Court in *Rome v. Gary Dragul, et al.*, Case No. 2018CV33011 Denver County District Court (the "Receivership Action"), entered a Stipulated Order Appointing Receiver ("Receivership Order") which appointed the Receiver.

B. The Receiver is investigating potential causes of action against You. The Receiver is forbearing at this time from bringing litigation against You and You are agreeing to the tolling period set forth in this Agreement.

C. In consideration for the Receiver agreeing to forebear from instituting litigation against You as provided herein, You are entering into this Agreement in order to provide the Receiver additional time to investigate potential claims against you, and for the Parties to discuss a potential resolution of any such claims without the burden and expense of litigation the Receiver may elect not to pursue, or which the Parties are able to resolve before a litigation becomes necessary.

D. For and in consideration of the mutual agreements and promises in this Agreement, and for other good and valuable consideration, the sufficiency of which is hereby conclusively acknowledged, it is hereby agreed by the Parties as follows:

AGREEMENT

1. **Tolling-period for all potentially applicable time-periods, including statutes of limitation and repose.** The Parties agree to extend the time-period within which the Receiver may institute an action or proceeding upon any cause of action against You and all other persons claiming by, through or under You, from the Effective Date of this Agreement through and including March 31, 2020 (the "Tolling Period"). All applicable statutes of limitation or repose, each and every statutory or common law time limitation respecting the commencement of an action, including without limitation any and all periods in

which claims or actions must be filed, served, prosecuted or brought to trial, and any other defense based on the passage of time, whether legal or equitable, including any applicable time-period for commencing an action under the Colorado Uniform Fraudulent Transfer Act (COLO. REV. STAT. § 38-8-101-112), pertaining to any claims that could be asserted by the Receiver against You and all other persons claiming by, through or under You, or any defenses that could be raised by You and all other persons claiming by, through or under You, hereby are and shall be tolled during the Tolling Period. Consequently, any action brought by the Receiver within the Tolling Period (or brought within any extensions as set forth in Paragraph 3 below) shall be deemed to have been filed and commenced on the Effective Date of this Agreement for the purposes of applying any applicable statutes of limitation, statutes of repose, or any other time-related defense. This Agreement does not revive any cause of action which, as of the Effective Date, was barred due to the passage of time.

2. **Agreement not to assert time-based defenses.** You hereby agree not to assert any time-based defense tolled pursuant to this Agreement as a defense in any action brought against you by the Receiver during the Tolling Period.

3. **Extension or termination of the Tolling Period.** The Tolling Period may be mutually extended by the written consent of the Parties. Either Party may terminate this Agreement and the Tolling Period by providing thirty days' written notice to the other Party addressed as follows:

<p>If to the Receiver:</p> <p>Harvey Sender Sender & Smiley, LLC 600 17th Street, Suite 2800 South Denver, CO 80202 hsender@sendersmiley.com</p> <p>With a copy to:</p> <p>Michael Gilbert Rachel Sternlieb Allen Vellone Wolf Helfrich & Factor P.C. 1600 Stout Street, Suite 1100 Denver, CO 80202 mgilbert@allen-vellone.com rsternlieb@allen-vellone.com</p>	<p>If to Marlin Hershey, Wendy Hershey, and/or Performance Holdings, Inc.:</p> <p>Richard F. Kronk Baucom, Claytor, Benton, Morgan & Wood P.A. 200 Providence Road, Suite 106 Charlotte, N.C. 28207</p>
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4. **Consideration.** The Parties agree this Agreement is supported by good and sufficient consideration, which includes the Receiver's agreement to forbear from commencing suit during the Tolling Period (as may be extended from time-to-time).

5. **No admission of liability.** This Agreement shall not operate as an admission of liability by any Party. Neither this Agreement nor any action taken pursuant to this Agreement shall be offered or received in evidence in any action or proceeding as an admission of liability or fact by any Party.

6. **Authority.** The undersigned represent and warrant they have capacity and authority to enter into this Agreement, which is proposed to You in good faith by the Receiver. Based upon the records in the Receiver's possession, the Receiver believes Marlin Hershey, Wendy Hershey, and Performance Holdings, Inc. are the accurate legal names or titles of the person or entity that invested or was otherwise involved with Dragul and/or the GDA Entities and received payments therefrom. By signing this Agreement, You certify You are the appropriate person or entity to execute this Agreement, and on your own behalf and on behalf of all other persons claiming by, through or under You, waive any defense predicated upon any error concerning the appropriate nominal designation of that party.

7. **Construction.** The Parties have either been represented by counsel or have had the opportunity to consult with counsel with respect to the negotiation of the terms and provisions of this Agreement. The Parties agree the judicial rule of construction requiring or allowing a document to be construed against the interests of the maker shall not apply to this Agreement.

8. **Governing law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado.


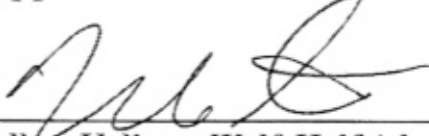
9. **Integration.** There are no other agreements or understandings, either oral or written, between the Parties concerning the subject matter of this Agreement.

10. **Successors and Assigns.** This Agreement and each term hereof shall bind and inure to the benefit of the principals, agents, employees, partners, representatives, trustees, heirs, successors, assigns, and legal representatives of the Parties hereto, and all other persons claiming by, through or under them.

11. **Signatures.** This Agreement may be executed in any number of counterparts with the same effect as if the signatures on each counterpart were upon a single document, and may be executed electronically by the Parties. All counterparts, taken together, shall constitute the Agreement. A signature

transmitted by email or facsimile shall be deemed to be, and shall have the effect of, an original signature for purposes of this Agreement.

AGREED AND ACCEPTED:

<p>RECEIVER:</p>  <hr/> <p>Harvey Sender, individually</p> <p>Dated: <u>8/30/19</u></p>	<p>Approved as to Form:</p>  <hr/> <p>Allen Vellone Wolf Helfrich & Factor, P.C. 1600 Stout Street, Suite 1100 Denver, CO 80202</p> <p>By: <u>Michael Gilbert</u></p> <p>Its: <u>Representative</u></p> <p>Dated: <u>8/30/19</u></p>
<p>Marlin Hershey</p> <hr/> <p>Dated: _____</p> <p>Wendy Hershey</p> <hr/> <p>Dated: _____</p> <p>Performance Holdings, Inc.</p> <hr/> <p>Its Representative</p> <p>Dated: _____</p>	<p>Approved as to Form:</p> <hr/> <p>Richard F. Kronk, Esq.</p> <p>Dated: _____</p>

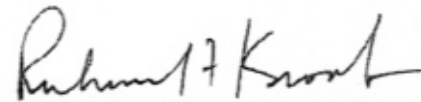
AGREED AND ACCEPTED:

<p>RECEIVER:</p>	<p>Approved as to Form:</p>
<p>Harvey Sender, individually Dated: _____</p>	<p>Allen Vellone Wolf Helfrich & Factor, P.C. 1600 Stout Street, Suite 1100 Denver, CO 80202 By: _____ Its: _____ Dated: _____</p>
<p>Marlin Hershey <i>Mark Henry</i></p>	<p>Approved as to Form:</p>
<p>Dated: <u>8/30/19</u></p>	<p>Richard F. Kronk, Esq. Dated: _____</p>
<p>Wendy Hershey <i>Wendy Hershey</i></p>	
<p>Dated: <u>8/30/19</u></p>	
<p>Performante Holdings, Inc. <i>Mark Henry</i></p>	
<p>Its Representative Dated: <u>8/30/19</u></p>	

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transmitted by email or facsimile shall be deemed to be, and shall have the effect of, an original signature for purposes of this Agreement.

AGREED AND ACCEPTED:

<p>RECEIVER:</p> <hr/> <p>Harvey Sender, individually</p> <p>Dated: _____</p>	<p>Approved as to Form:</p> <hr/> <p>Allen Vellone Wolf Helfrich & Factor, P.C. 1600 Stout Street, Suite 1100 Denver, CO 80202</p> <p>By: _____</p> <p>Its: _____</p> <p>Dated: _____</p>
<p>Marlin Hershey</p> <hr/> <p>Dated: _____</p> <p>Wendy Hershey</p> <hr/> <p>Dated: _____</p> <p>Performance Holdings, Inc.</p> <hr/> <p>Its Representative</p> <p>Dated: _____</p>	<p>Approved as to Form:</p> <p></p> <hr/> <p>Richard F. Kronk, Esq.</p> <p>Dated: <u>8/30/19</u></p> <p><i>Attorney Kronk is signing in his capacity to represent North Carolina clients as a duly licensed attorney in NC and is not doing so with the intent to act in the capacity of an attorney in Colorado.</i></p>