

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.

**Attorney for Defendant Susan Markusch and Olson
Real Estate Services, LLC:**

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▲ COURT USE ONLY ▲

Case Number:2020CV30255

MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants Susan Markusch and Olson Real Estate Services, LLC (the Markusch Defendants”) , by and through their undersigned counsel, hereby move the Court under Rule 12 (b) (1) (5) and (6) for an Order dismissing Plaintiff’s First Amended Complaint as against her.

As grounds for the requested relief, Defendant states as follows:

C.R.C.P. 121 § 1-15, ¶ 8 CERTIFICATE REGARDING CONFERRAL

Ms. Markusch's undersigned counsel consulted with counsel for Plaintiff prior to filing her Motion to Dismiss, and was advised that Plaintiff would oppose the relief requested in this Motion. Each of the other Defendants who have heretofore filed motions to dismiss the First Amended Complaint have consulted with counsel for Plaintiff before filing those motions, and were advised that Plaintiff would oppose dismissal of the First Amended Complaint. Accordingly, the Markusch Defendants submit that further consultation with Plaintiff's counsel regarding the relief requested in this Motion would be futile.

INTRODUCTION

On August 30, 2018, the Plaintiff Harvey Sender was appointed as Receiver for Gary Dragul, GDA Real Estate Services LLC and GDA Real Estate Management a civil enforcement action captioned *Gerald Rome v. Gary Dragul et al.*, Denver District Court case number 2018CV33011 ("Receivership Action"), asserted by the Colorado Securities Commissioner against Gary Dragul, GDA Real Estate Services LLC and GDA Real Estate Management. Ms Markusch was not and is not a party to the Receivership Action.

On January 21, 2020, Plaintiff commenced this action by filing his Complaint. Ms. Markusch and other Defendants filed separate motions to dismiss the Complaint on a variety of grounds. Rather than respond to those Motions, Plaintiff elected to amend his complaint. Plaintiff filed his First Amended Complaint on June 1, 2020. The Markusch Defendants assert that the First

Amended Complaint fails to cure the fatal defects in the Complaint, and accordingly, should be dismissed as against them.

ALLEGATIONS OF THE First Amended Complaint

Plaintiff alleges that Defendant Gary Dragul operated a Ponzi scheme through various special purpose entities (“SPEs”) engaged in acquiring and managing commercial real estate, commingled investor funds, and diverted them to his personal accounts. Plaintiff alleges that Defendant Dragul was unable to pay investors promised returns, he used new investments to pay fictitious returns and employed other means to conceal the actual performance of the investments. .

Plaintiff’s Claims are not all asserted against the Markusch Defendants. Plaintiff’s claims against the Markusch Defendants fall into two general categories: (1) excessive or unearned “commissions;” and (2) aiding and abetting the alleged Ponzi scheme.

DEFENDANT’S MOTION

Ms Markusch moves the Court for order dismissing the First Amended Complaint in its entirety as against her. The grounds for the relief requested are as follows: (1) lack of standing on the part of the Trustee to bring the claims in a representative capacity; (2) failure to state the claims against Ms Markusch; and (3) failure to join indispensable parties. These grounds are more fully set forth below.

1. THE RECEIVER LACKS STANDING TO BRING THE CLAIMS IN A REPRESENTATIVE CAPACITY.

Plaintiff’s First Amended Complaint asserts fourteen claims for relief against eight named Defendants (including the Markusch Defendants) and up to twenty John Doe and XYZ Corporations.

Plaintiff asserts that he has standing to bring each of the Claims for Relief as a representative of creditors of the Receivership Estate (First Amended Complaint, ¶¶ 315, 356, 361, 372, 379, 393, 422, and 427. Plaintiff does not allege any claim for relief other than in a representative capacity or any direct harm to the receivership entities. A party must have standing to assert claims, or the Court lacks jurisdiction to hear them and they must be dismissed pursuant to Rule 12(b)(1). *Ferguson v. Spalding Rehab., LLC*, 456 P.3d 59, 61 (Colo. App. 2019). “Standing is a threshold issue that must be satisfied before a case may be decided on the merits. To establish standing, a plaintiff must show that he has suffered an injury in fact to a legally protected interest.” *Adams v. Land Services, Inc.*, 194 P.3d 429, 430 (Colo. App. 2008).

Defendants Gary Dragul, Alan C. Fox And ACF Property Management, Inc .and the Hershey Defendants have each filed Motions to Dismiss the First Amended Complaint thoroughly supporting the proposition that Plaintiff Receiver lacks standing to bring claims in a representative capacity. The Markusch Defendants adopt those Motions and the arguments set forth therein as their own, in support of this Motion. The Markusch Defendants reserve the right to independently respond to any argument in opposition to that proposition that the Plaintiff may make.

2. PLAINTIFF’S FIRST AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF AGAINST MS MARKUSCH WITH THE PARTICULARITY REQUIRED UNDER RULE 9 (b) C.R.C.P.

The First Amended Complaint contains 126 pages, divided into 448 paragraphs. Starting on page 39, Plaintiff provides headings of the Claims for Relief which identify the parties against whom the Claim is asserted, as well as the legal theory upon which the Claim is brought, as follows:

Page 125

ELEVENTH CLAIM FOR RELIEF
Fraudulent Transfer– C R.S. 38-8-105 (1) (A)
(against all Defendnats [sic])

Page 126

TWELFTH CLAIM FOR RELIEF
Unjust Enrichment
(against all Defendants)

The effect of these headings is to create the impression of specificity. But as to the Markusch Defendants the specificity is only an illusion. “Defendants” is defined to include Defendants Gary Dragul, Concundrum Group, Alan C. Fox, ACF Property Management, Marlin S. Hershey, and Performance Holdings, Olson Real Estate Holdings, LLC and Ms. Markusch.¹ . First Amended Complaint, ¶ 29. In the first eighty-four pages of the First Amended Complaint, Plaintiff paints a lurid picture of fraud and representation by “Defendants.” But Plaintiff provides scant information as to the specific conduct of either of the Markusch Defendants in furtherance of the alleged scheme. For example, the Receiver alleges in a conclusory manner that in soliciting investments Dragul acted “in concert with,” or “with the assistance of” the “Non-Dragul Defendants.” The lack of specificity of allegations against the Markusch Defendants is compounded by the fact that these “General Allegations” are incorporated by reference in every one of the twelve supposedly separate claims for relief, only four of which are labeled as claims against either or bot of the Markusch Defendants.

The particularity requirement imposed by Rule 9 applies to all claims “sounding in fraud,” regardless of the label that a party attaches fo a particular claim. *State Farm Mutual Auto Ins. Co.*

¹ No explanation is given for not includng Defendant Juniper Consulting Group in the defined term “Defendants.” That omission appears to be inadvertent.

v. Parrish, 899 P.2d 285 (Colo. App. 1994). Clearly, all of the Receiver’s claims “sound in fraud”. But the First Amended Complaint does not allege with specificity who was defrauded, the dates and statements (or omissions) alleged to have been made or omitted by Ms Markusch to such person, when those events occurred, or what action was taken on the basis of the alleged fraud. Co-mingling the conduct of Ms Markusch (who had a very specific and limited role), with the conduct of the other “Defendants” deprives Ms Markusch of any reasonable opportunity to defend. To satisfy Rule 9(b)’s particularity requirement, Plaintiff must allege specifically what conduct is attributed to each defendant. *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1237 (10th Cir. 2000) (plaintiff “failed to identify any specific Defendant who made these alleged fraudulent misrepresentations or omissions.”); *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1304 (D. Colo. 1998) (under the requirement that fraud be plead with particularity, “[t]he lumping together of defendants in allegations of fact is impermissible.”). The particularity requirements of Rule 9(b) apply to each element of the claims *Kinsey v. Preeson*, 746 P.2d 542, 550 (Colo. 1987). These elements include: (1) a false representation of a material fact; (2) knowledge that it is false; (3) ignorance on the part of the one to whom the representation is made of the falsity; (4) representation made with intention that it be acted upon; (5) resulting damage.

Specificity in pleading is also necessary for determination of statute of limitations defenses,, assessment of the actuality and reasonableness of reliance upon the alleged fraud and other defenses and elements.

Even as to the claim that Ms Markusch received unreasonable and unlawful “commissions,” the First Amended Complaint lacks necessary specificity. Plaintiff alleges that Ms Markusch received

“undisclosed and illegal commissions” from Closings. First Amended Complaint ¶ 304. and that that the payments were made through Olsen Real Estate ,LLC and Juniper Consulting Group. First Amended Complaint ¶ 304.

the Markush Defendants also received undisclosed and illegal commissions from the closing on both commercial and residential properties through Juniper and Olson RES, which is the sole member (the “Markusch Commissions”) [*sic*]
First Amended Complaint, ¶ 304.

Yet the several settlement statements attached to the First Amended Complaint do not reveal any “commissions” paid to either of those entities. The only payment for which detail is shown is on Exhibit 14, which discloses a payment of \$15,200 for “Consulting Fee/ Loan Assumption to Juniper Consulting Services. Ms Markusch denies ownership or control of Juniper Consulting Group, or receipt of any payment from that entity. Denial of facts alleged in the Complaint is beyond the scope of this Motion, but the existence of this dispute illustrates the necessity of specific allegations. Further, the single example of a transaction document refutes on its face the Plaintiff’s characterization of payments as “commissions.” It is only a construct of the Plaintiff made to create the semblance of factual support for the Plaintiffs otherwise unsupported allegation that Ms Markusch received unlawful payments.

3. PLAINTIFF HAS FAILED TO JOIN INDISPENSABLE PARTIES.

Rule 19 requires a Plaintiff to join all persons subject to service of process to be joined in an action if leaving such persons absent may subject a party (here, Ms Markusch) subject to double, multiple or otherwise inconsistent obligations. The Plaintiff has brought this action against Ms Markusch, purportedly in a representative capacity — on behalf of unnamed investors or creditors

of the Receivership Defendants. Proceeding with this case without joinder of the investors or creditors on whose behalf the claims are brought exposes Ms Markusch to double liability, once to the Receiver, and a second time to the unnamed investors and/or creditors. No evidence or allegation has been made that such persons are unknown or unavailable. Under the facts presented, joinder of the unnamed parties for whom the Plaintiff brings this action is mandatory. *Potts v. Gordon*, 34 Colo App. 128, 525 P. 2d 500 (1974).

REQUEST FOR RELIEF

For the foregoing reasons, Defendant Susan Markusch requests the Court to dismiss the First Amended Complaint in its entirety. A proposed order granting that dismissal is filed herewith.

Date: July 31, 2020

THOMAS F. QUINN, P.C.

Original signed copy of this pleading on file at the offices of Thomas F. Quinn, P. C.

/s/ Thomas F. Quinn

By: _____

Thomas F. Quinn, Esq., Reg No. 5887
Attorney for Defendants Susan Markusch and
Olson Real Estate Services, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 31,2020 a true and correct copy of the foregoing pleading was provided to ICCES, with copies to be furnished, to all counsel of record in the case.

/s/ Thomas F. Quinn

Thomas F. Quinn