DATE FILED: August 17, 2020 6:11 PM
FILING ID: 59781EAFEAE91
CASE NUMBER: 2020CV30255

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 (303) 606-2429	
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 Plaintiff: Patrick D. Vellone, #15284 Matthew M. Wolf, #33198 Rachel A. Sternlieb, #51404 Michael T. Gilbert, #15009 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout Street, Suite 1900 Denver, Colorado 80202 Phone (303) 534-4499 pvellone@allen-vellone.com mwolf@allen-vellone.com rsternlieb@allen-vellone.com mgilbert@allen-vellone.com	Case Number: 2020CV30255 Division/Courtroom: 414

RECEIVER'S OMNIBUS RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LAW AND ARGUMENT 1

A. The Receiver has Standing to Pursue His Claims. 1

1. The Receiver has Standing Pursuant to the Colorado Securities Act and the Receivership Order 2
2. Defendants Cite No Colorado Authority to Support their Argument that this Court Should Disregard the Receivership Order's Grant of Standing. 5
3. *Kidder Peabody* Improperly Conflated Standing with *in pari delicto*. 7
4. *In pari delicto* Does Not Bar the Receiver's Claims. 8
5. The Federal Cases Defendants' Rely On Are Not Controlling. 10
6. The Receiver Has Standing to Assert the Specific Claims Alleged in the Amended Complaint. 13
   - i. Claim I – Violations of the Colorado Securities Act 13
   - ii. Claims II and III – Negligence and Negligent Misrepresentation 14
   - iii. Claim IV -- Civil theft 14
   - iv. Claim V – Violations of the Colorado Organized Crime Control Act ("COCCA") 15
   - v. Claim VII – Breach of Fiduciary Duty 17
   - vi. Claim XI – Fraudulent Transfer 17
   - vii. Claim XII -- Unjust Enrichment 19

B. Dragul is Not Immune from Suit. 19

C. The Receiver has Pled Viable Claims Pursuant to C.R.C.P. 9(b) and 12(b)(5) 24

1. The Receiver has Alleged Fraud with the Requisite Particularity. 27
   - i. The Amended Complaint Does Not Contain Impermissible "Group Allegations". 28
   - ii. The Receiver's Allegations Made "Upon Information and Belief" are Proper. 29
2. The Receiver Adequately Alleges Violations of the Colorado Securities Act. 31
   - i. Claim I.C. – Securities Fraud in Violation of C.R.S. §§ 11-51-604(3)-(4) and 11-51-501(a)-(c). 32
3. The Receiver Adequately Alleges ACF's Control and Provision of Substantial Assistance to GDA. 35
4. The Amended Complaint States a Claims for Civil Theft against the Hershey Defendants. 35

5. The Amended Complaint States a Plausible Claim for Relief Against Dragul and the Fox and Hershey Defendants both for direct COCCA Violations and for Indirect Violations by Aiding and Abetting. 36
6. The Receiver Sufficiently Alleges an Enterprise under C.R.S. § 18-17-104(3). 37
7. The Receiver Adequately Alleges Predicate Acts of Five Types of Violations of the CSA, Wire Fraud, and Bankruptcy Fraud. 38
   i. Violations of the CSA 39
   ii. Wire Fraud (18 U.S.C. § 1343) 39
   iii. Civil Theft (C.R.S. § 18-4-401) 40
   iv. The Predicate Acts Pleaded Are Not Time-barred. 40
8. The Receiver Adequately Alleges ACF Conducted or Participated in the Racketeering Enterprise 40
9. The Receiver Adequately Alleges Aiding and Abetting Liability. 42
10. The Receiver has Sufficiently Pled a Claim for Unjust Enrichment. 42

D. The Receiver's Claims Are Not Time Barred. 44
1. The First Claim for Violation of the CSA is Not Time Barred by Either the Five-Year Statute of Repose or the Three-Year Statute of Limitations. 45
   i. Statute of Repose 46
   ii. Statute of Limitations. 48
   iii. Statute of Repose for Securities Registration and Licensing Violations. 50
2. The Second and Third Claims for Negligence and Negligent Misrepresentation Against the Hershey Defendants are Timely. 51
3. The Fifth and Sixth Claims for Violation of and Aiding and Abetting Violations of COCCA are Timely. 52
4. The Eleventh Claim for Fraudulent Transfer is Timely. 53
5. The Twelfth Claim for Unjust Enrichment is Timely 54

III. CONCLUSION 54

Harvey Sender, the duly-appointed receiver (the "Receiver") for Gary Dragul ("Dragul"), GDA Real Estate Services, LLC, GDA Real Estate Management, Inc., and related entities (collectively, "Dragul and the GDA Entities"), hereby responds to the Motions to Dismiss filed by Dragul,[1] Fox,[2] Hershey,[3] and Markusch[4] (collectively, "Movants").

I. INTRODUCTION

This case stems from a complex Ponzi scheme in which investors lost more than $70 million. The scheme was orchestrated by Dragul, who has been indicted on 14 counts of securities fraud. As set forth in the Amended Complaint, Movants each played an integral role in the scheme. Dragul, with the assistance of his co-conspirators solicited investments from investors by distributing false and misleading offering materials. Fictitious profits were paid to investors to allow the scheme to remain undetected for years while Dragul stole millions. After Dragul was indicted, the Receiver was appointed to administer the Dragul and the GDA Entities'[5] assets for the benefit of the defrauded creditors.

II. LAW AND ARGUMENT

A. The Receiver has Standing to Pursue His Claims.

Relying on inapplicable and inapposite authority, Movants argue the Receiver lacks standing to pursue *any* of the claims asserted in the Amended Complaint. Those arguments, if

[1] Defendant Gary Dragul's Motion to Dismiss First Amended Complaint ("Dragul MTD").

[2] Defendants ACF Property Management, Inc. ("ACF") and Alan C. Fox's ("Fox") Motion to Dismiss pursuant to C.R.C.P. 12(b)(1), 12(b(5), and 9(b) ("Fox MTD").

[3] Defendants Marlin S. Hershey's and Performance Holdings, Inc.'s ("Hershey") Motion to Dismiss pursuant to C.R.C.P. 12(b)(1) and (5) ("Hershey MTD").

[4] Defendant Susan Markush's ("Markusch") Motion to Dismiss First Amended Complaint ("Markusch MTD").

[5] Capitalized terms not defined here are defined in the Amended Complaint.

adopted by the Court, would render a receiver appointed by Colorado's Securities Commissioner (the "Commissioner") powerless to redress the very wrongs he was appointed to remedy. To determine whether the Receiver has standing, the Court must ascertain whether he has alleged an actual injury to a legally protected right or cognizable interest, and must accept as true the well-pleaded allegations of the Amended Complaint. *See, e.g.*, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992). Based upon the allegations in the Amended Complaint, the Receiver has standing to assert his claims.

1. The Receiver has Standing Pursuant to the Colorado Securities Act and the Receivership Order

"A receiver is a fiduciary of the court and of the persons interested in the estate of which he is the receiver." *Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988) "The receiver's function is to collect the assets, obey the court's order, and in general to maintain and protect the property and the rights of the various parties." *Hart v. Ed-Ley Corp.*, 482 P.2d 421, 425 (Colo. App. 1971) (NSOP).

There is no dispute that a receiver's authority is derived from and defined by the Receivership Order. *See, e.g., Zeligman*, 762 P.2d at 785. Multiple provisions of the Receivership Order, as set forth in the Amended Complaint, authorize the Receiver to bring claims on behalf of the GDA Entities in Receivership *and* their creditors, members, and equity holders.[6] Particularly, ¶ 13(s), with which Movants take issue, grants the Receiver the authority "[t]o prosecute claims

[6] *See* Rcvrshp. Order at ¶ 9 (Receivership property includes claims and causes of action held by all Estate LLC entities; authorizing Receiver to pursue claims for the benefit of GDA Entities and their *creditors, members, and equity holders*); ¶ 13(o) (Receiver given express authority to pursue claims based on fraudulent transfer or similar theories)

and causes of action held by Creditors of Dragul [and the GDA Entities] for the benefit of Creditors, in order to assure the equal treatment of similarly situated Creditors[.]"

The plain language of the Receivership Order, combined with the nature of the Receiver's authority as a matter of Colorado statute and equity, unequivocally refutes Movants' standing defenses. The Receiver's authority derives from the Commissioner and the broad remedial provisions of the Colorado Securities Act ("CSA"). Section 602 of which provides, in pertinent part:

> [U]pon sufficient evidence satisfactory to the securities commissioner that any person has engaged in […] a violation of any provision of this article, the securities commissioner may apply to the district court of the city and county of Denver to temporarily restrain or preliminarily or permanently enjoin the act or practice in question and to enforce compliance with this article or any rule or order under this article.

C.R.S. § 11-51-602(1). In any action brought pursuant to § 602(1), the "securities commissioner may include […] a claim for damages under section 11-51-604 or restitution, disgorgement, or other equitable relief *on behalf of some or all of the persons injured by the act* or practice constituting the subject matter of the action[.]" C.R.S. § 11-51-602(2) (emphasis added).

The Receiver's authority also derives from equity. *See, e.g.*, *Erwin v. West*, 99 P.2d 201, 204 (Colo. 1939); *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 519 (Colo. App. 2006). In equity Ponzi scheme receiverships, "the interests of the Receiver are very broad and include not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy." *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1197 (10th Cir. 2010) (citation omitted). The Receiver plays a critical role in Ponzi scheme receiverships where, as here, there are a large number of defrauded investors who, individually, lack the

resources or capacity necessary to pursue recovery. Indeed, Dragul admits he stipulated to the Receivership Order because he "believed a receivership would be the most effective way for investors to avoid losses." Dragul MTD at 3. The Receiver, who was appointed to represent the interests of **all** creditors, is uniquely positioned to marshal the Estate's assets for their benefit.

Dragul ignores that both he and his counsel negotiated the Receivership Order and all of its provisions – including its grant of standing to pursue creditor claims – with the Commissioner. Dragul MTD at 9, n. 4. The Receiver, on the other hand, had no involvement in the negotiation or drafting of the Receivership Order. Having negotiated the terms of the Order, stipulated to its entry, and after it has been relied upon by the Commissioner, the Receiver, and all creditors of the Estate, Dragul should be estopped from now objecting to the very provisions he negotiated. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."); *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008) (judicial estoppel prcludes a party from taking a position in a case that is totally inconsistent with a position it successfully took in an earlier, related proceeding in an intentional effort to mislead the court); *Fiedler v. Fiedler*, 879 P.2d 675, (Mont. 1994) (judicial estoppel precluded party from contravening previous stipulation).

Significantly, Dragul argues that if "the Receiver wanted to assert creditors' claims, he had an easy way to do it: get creditors to assign their claims to him." Dragul MTD at 12. The Fox Defendants, too, argue that because "Dragul's creditors have not assigned" their claims to the Receiver, they "are entirely capable of representing their own interests." Fox MTD at 10-11. Both

arguments, however, disregard the fact that *every* creditor claim filed in the Estate contains the following attestation under the penalty of perjury:

> **CLAIMANT HEREBY CERTIFIES THAT IT HAS DISMISSED ANY OTHER PENDING SUITS OR PROCEEDINGS IT HAS COMMENCED AGAINST DRAGUL, THE DRAGUL ENTITIES, OR THE RECEIVERSHIP ESTATE AND THAT IT WILL NOT FILE (OR RE-FILE) ANY SUIT OR PROCEEDING IN ANOTHER FORUM WITHOUT THE RECEIVER'S PERMISSION OR LEAVE OF THIS COURT.**

(bold and caps in original). Indeed, *the Fox Defendants filed 15 different claims against the Estate, each of which contains this very certification*.

Dragul's investors have already suffered significant financial harm. Justifiably relying on the Receivership Order, when they filed claims against the Estate, they agreed not to pursue individual claims, in effect assigning them to the Receiver. It would be inequitable to dismiss the Receiver's "investor claims" and force investors at this late stage to bring individual claims, which Defendants would certainly move to dismiss (as they have serially done here) as barred by the statute of limitations.

2. Defendants Cite No Colorado Authority to Support their Argument that this Court Should Disregard the Receivership Order's Grant of Standing.

Movants argue this Court should disregard the grant of standing in ¶13(s) of the Receivership Order because it was beyond the Receivership Court's power to bestow. They do not, however, address the other provisions of the Order authorizing the Receiver to pursue creditor claims. The Fox Defendants rely exclusively on federal cases. *See* Fox MTD at 13. Dragul and the

Hershey Defendants, too, rely almost exclusively on federal cases,[7] and the scant Colorado authority they cite is neither on point nor controlling.

The only Colorado case the Hershey Defendants cite is *Francis v. Camel Point Ranch, Inc.,* 2019 COA 108M, *as modified on denial of reh'g* (Sept. 19, 2019), for a proposition with which the Receiver agrees: A receiver's authority is derived from the order of appointment. Hershey MTD at 6. *Francis* does not discuss whether a receiver has standing to assert creditor claims, or whether an appointing court can authorize them to do so, and therefore, is not instructive here.

Dragul cites *Good Shepherd Health Facilities of Colo., Inc. v. Dep't of Health*, 789 P.2d 423 (Colo. App. 1989), for the proposition that "a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve." *Good Shepard*, however, does not address standing. It ultimately held the receiver *could* retain funds that the entity in receivership could not; seemingly rejecting *in pari delicto*, the court held "that the receiver does *not* stand in the shoes" of the entity's operator. *Id*. at 426 (italics added). Dragul also goes on to quote *First Horizon Merchant Servs., Inc. v. Wellspring Capital Mgm't, LLC*, 166 P.3d 166 (Colo. App. 2007) in support of his argument. Dragul MTD at 11. But *First Horizon* was neither a receivership nor a bankruptcy case; it addressed only a creditor's standing to pursue claims against a bankrupt's officers and directors. These cases simply do not support Movants.

---

[7] *See* Dragul MTD at 9, n.4; Hershey MTD at 6. The federal cases are discussed below in section II, A, 4. Markusch simply incorporates the standing arguments made by the other Movants.

3. *Kidder Peabody* Improperly Conflated Standing with *in pari delicto*.

Dragul relies heavily on *Sender v. Kidder Peabody & Co.*, 952 P.2d 779 (Colo. App. 1975), for two propositions: (1) the Receiver lacks standing to assert *any* claim against *any* Defendant because all such claims belong to investors (Dragul MTD, § I, B at 9-12); and (2) the Receiver's claims against him personally are barred by *in pari delicto* (Dragul MTD, § II, A at 12-14). *Kidder Peabody* is distinguishable.

First, in *Kidder Peabody*, a chapter 7 bankruptcy trustee asserted claims for, *inter alia,* negligence and breach of fiduciary duty against brokers employed by several of the debtor's related entities that the debtor's principal had operated as a Ponzi scheme. *Id.* at 780. The appellate court affirmed the trial court's dismissal of the trustee's claims on the basis of the affirmative defense of *in pari delicto*, improperly conflating that affirmative defense with standing. *Kidder Peabody,* 952 P.2d at 782. The prevailing view, however, is that "[a]n analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*." *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d Cir. 2001). "Whether a party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms." *Id.; see also Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (agreeing with the First, Third, Fifth, and Eleventh Circuits that *in pari delicto* and standing are separate and distinct issues).[8]

Second, in *Kidder Peabody,* the claims were asserted by a bankruptcy trustee, not a receiver. As the Tenth Circuit observed in another case Ponzi scheme case, bankruptcy

[8] *See also Nisselson v. Lernout*, 469 F.3d 143, 150-51 (1st Cir. 2006); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006); *Terlecky v. Hurd (In re Dublin Sec. Inc.)*, 133 F.3d 377, 380 (6th Cir. 1997).

proceedings are governed by the Bankruptcy Code, they do "not implicate the law of receivership," and nothing therein should be construed to apply to receiverships. *Sender v. Buchanan (In re Hedged-Invs. Assocs., Inc.)*, 84 F.3d 1281, 1285 n. 5 (10th Cir. 1996).

Indeed, another division of this Court rejected an identical standing argument in *Joseph v. Mueller*, 2010 CV 3280. *Mueller*, like this case, involved a Ponzi scheme receivership similarly initiated by the Commissioner. In that case, Judge Bronfin declined to follow *Kidder Peabody*, and instead applied the holding and reasoning from the bellwether receivership case, *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995), in which Judge Posner rejected the *in pari delicto* defense. *See* Order re Mot. to Lift Stay at 3, Oct. 10, 2012 (attached as **Exhibit 1**).

Third, as Judge Bronfin observed, by the time the bankruptcy trustee filed suit in *Kidder Peabody*, the brokers had already paid $50 million to settle individual claims asserted by most investors. *Kidder Peabody*, 952 P.2d at 781. Allowing the bankruptcy trustee to pursue additional claims raised the specter of duplicative liability, concerns not present here where investors, in reliance on the Receivership Order and the court-approved claims process, have submitted claims against the Estate authorizing the Receiver to pursue claims on their behalf.

4. *In pari delicto* Does Not Bar the Receiver's Claims.

Contrary to Dragul's second argument, the Receiver's claims are not barred by *in pari delicto*. Perhaps because it involved claims asserted by a bankruptcy trustee and not a receiver, *Kidder Peabody* did not cite the seminal *receivership* case of *Scholes v. Lehmann*, 56 F.3d 750. *Scholes* and its vast progeny hold that *in pari delicto* does not apply to receivers appointed in the wake of Ponzi schemes. As Judge Posner described it, during the operation of the scheme, the

corporations created by the scheme operator are "robotic tools," but "nevertheless in the eyes of the law separate legal entities." Once the Ponzi scheme collapses,

> [t]he appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the operator's] evil zombies. Freed from his spell they became entitled to the return of the moneys—for the benefit not of [the operator] but of innocent investors—that [the operator] had made the corporations divert to unauthorized purposes.

Id. at 754. Therefore, "the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Id. Scholes* was cited with approval by the Colorado Supreme Court in *Lewis v. Taylor*, 2018 CO 76, ¶ 23, which held that a receiver can recover fraudulent Ponzi scheme transfers. *Scholes'* reasoning is fleshed out in *In Re: NJ Affordable Homes Corp*, 2013 WL 6048836 (Bankr. D.N.J. Nov. 8, 2013), which rejected the *in pari delicto* defense against a receiver:

> A corporate receiver represents not only the corporation but all of its creditors; in order to secure all the assets available, the receiver succeeds to their rights and has all the powers to enforce such rights that the creditors before the appointment had in their own behalf, even though such powers are beyond those which the receiver has as the representative of the corporation alone. 65 Am. Jur. 2d § 371 n. 3.
>
> However, while any defense good against the original party is generally good against the receiver, the rule is subject to exceptions, since, for example, defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver. So when an act has been done in fraud of the rights of the creditors of an insolvent corporation, the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself. *Id.*
>
> * * * *
>
> While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on

> a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law.
>
> A receiver, like a bankruptcy trustee and unlike a normal successor in interest, does not voluntarily step into the shoes of the [entity]; it is thrust into those shoes. It was neither a party to the original inequitable conduct nor is it in a position to take action prior to assuming the [entity's] assets to cure any associated defects....
>
> Also significant is the fact that the receiver becomes [the entity's] successor as part of an intricate regulatory scheme designed to protect the interests of third parties who also were not privy to the [entity's] inequitable conduct. That scheme would be frustrated by imputing the [entity's] inequitable conduct to the receiver, thereby diminishing the value of the asset pool held by the receiver and limiting the receiver's discretion in disposing of the assets.

Id. at *24-25, 28 (quoting *F.D.I.C. v. O'Melveny & Myers,* 61 F.3d 17, 19 (9th Cir. 1995) ("defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver. […] To hold otherwise would be to elevate form over substance—something courts sitting in equity traditionally will not do.") (emphasis added; some internal citations omitted)); *Jones v. Wells Fargo Bank, N.A.,* 666 F.3d 955, 966 (5th Cir. 2012) ("The Receiver brought this suit on behalf of [the estate] to recover funds for defrauded investors and other innocent victims. Application of *in pari delicto* would undermine one of the primary purposes of the receivership established in this case, and would thus be inconsistent with the purposes of this doctrine."); *Grant Thornton, LLP v. F.D.I.C.,* 435 F. App'x 188, 200-01 (4th Cir. 2011) (receiver's claims not barred by *in pari delicto* because this defense would prevent the receiver from "vindicat[ing] the rights of the public.").

5. The Federal Cases Defendants' Rely On Are Not Controlling.

Movants cite *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), which provides it is "black-letter law that federal subject matter jurisdiction extends to *causes of action,* not to entire

cases as such.*" *Id.* at 1420 (italics in original). So, "every asserted claim must be looked at separately, rather than tossing them all into the same basket[.]" *Id.* Yet, Movants toss all the Receiver's claims into a single basket and argue the Receiver lacks standing to assert *any* of them because they all *belong* to creditors.

As discussed in detail below, the Receiver's claims do not ***all*** belong to creditors. The Receiver seeks to recover for harm caused both to creditors ***and*** to the GDA Entities in Receivership. The Receiver's claims are largely predicated on Defendants' diversion of assets that should have been paid to and held by the GDA Entities, claims that are indisputably the Receiver's to bring. Moreover, because standing here must rest on Colorado law and not the federal constitution, federal law is not controlling. *See, e.g.*, *Marks v. Gessler*, 350 P.3d 883, 900 (Colo. App. 2013).

Dragul and the Fox Defendants both rely on *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003) to challenge the Receiver's standing.[9] But, *Javitch* held only that a receiver was bound to arbitrate claims against the brokers he was suing, and "did not squarely confront a standing problem because the Receiver undeniably had standing" to bring his claims. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009).

The Fox Defendants also rely on *Eberhard v. Marcu*, 530 F.3d 122 (2nd Cir. 2008); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20 (1st Cir. 1990); and *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1481 (10th Cir. 1983), which are all distinguishable. In *Eberhard*, the court held that a receiver appointed for an individual lacked standing to bring fraudulent conveyance claims under New York law because a transferor cannot

[9] *See* ACF MTD at 9; Dragul MTD at 10.

sue to avoid his own fraudulent conveyance. *Eberhard*, 530 F.3d at 134. *Eberhard* is unique and distinguishable because the receiver there was appointed over only an individual's assets, not the assets of the companies he ran. The *Eberhard* court acknowledged that a different result would follow had the receiver been appointed over the companies' assets as well, in which case (as here), the companies would be creditors whose assets were depleted by the fraudulent conveyances and the receiver free to pursue them. *Id.; see also Federal Nat'l Mortg. Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011) (*Eberhard* simply does not apply where wrongdoer conveyed away assets to the corporation's detriment.)

Fleming upheld dismissal of a receiver's claims against a commodities broker under F.R.C.P. 12(b)(6) (not 12(b)(1) as Movants rely on here) because the receiver did not allege harm to the entities in receivership. And unlike here, the receivership order in that case did *not* grant the receiver authority to prosecute investor claims. *Fleming*, 922 F.2d at 24-5.

Dragul also banks on *Kelly v. College of St. Benedict*, 901 F. Supp. 2d 1123 (D. Minn. 2012). The court in *Kelly* held that a receiver lacked standing to assert claims under the Fair Debt Collection Procedures Act because the Act authorizes only the United States to assert claims to collect governmental debts. *Id.* at 1130. The Receiver here is not asserting claims under the FDCPA, so this case is equally inapplicable.

Finally, Dragul and the Fox Defendants cite *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), which addressed pleading deficiencies in a receiver's complaint, but ultimately confirmed that a receiver may bring claims for securities fraud, common law fraud, fraudulent transfer, and breach of contract alleging harm to the corporation in receivership. *Id.* at 1424-25. None of these authorities support the blanket dismissal Movants urge.

6. The Receiver Has Standing to Assert the Specific Claims Alleged in the Amended Complaint.

Under the Receivership Order, the Receiver has standing to pursue creditor claims. But even if this Court disregards that grant of standing, the Receiver has standing to pursue the claims alleged in the Amended Complaint because they allege harm to the entities in Receivership, which the Receiver indisputably has standing to bring.

i. Claim I – Violations of the Colorado Securities Act

The Receiver's first claim asserts five different violations of the CSA. Movants argue the Receiver lacks standing to bring claims under C.R.S. §§ 11-51-604(2)(a) and 401 (against Dragul and the Fox and Hershey Defendants) for licensing and notice violations (Amd. Compl. ¶¶ 321-326) and C.R.S. §§ 11-51-604(3)-(4) and 501(a)-(c) (against Dragul and the Fox Defendants) for securities fraud (Amd. Compl. ¶¶ 327-338). *See, e.g.*, Dragul MTD at 5-6; Fox MTD at 10. Movants argue that § 11-51-604(2)(a) and (5)(a) claims can only be brought by a person buying a security under C.R.S. § 11-51-501(1) & 501(1)(b). These arguments also fail. First, with respect to the claims stemming from the Fox-owned SPEs, the Receiver asserts these claims on behalf of the GDA Entities, which were purchasers of securities (*i.e.*, membership interests in the Fox SPEs that owned the respective properties) and as to those stemming from the GDA-managed properties and sale of promissory notes, the Receiver asserts those claims on behalf of the individual investors. The Receivership Order expressly vests the Receiver with authority to pursue the claims of both the GDA Entities and the individual investors, and as such, has standing. *See* Rcvrshp. O. ¶¶ 9 and 13(s).

ii. Claims II and III – Negligence and Negligent Misrepresentation

The Receiver's second and third claims assert that Dragul, and the Fox and Hershey Defendants failed to exercise reasonable care in preparing or distributing solicitation materials to investors and made negligent misrepresentations to investors to induce them to invest. (Amd. Compl. ¶¶ 355-370). These claims are based on harm to investors which the Receivership Order specifically authorizes the Receiver to pursue. Rcvrshp. Order ¶ 13(s). Members and managers of a limited liability company such as the GDA Entities owe fiduciary duties to each other. *See LaFond v. Sweeney*, 343 P.3d 939 (Colo. 2015). Under governing law, Dragul owed the SPEs and the GDA Entity Investors the common law duties of loyalty, good faith and fair dealing, and due care. The specific duties that Dragul owed both to the SPEs and the GDA Entity Investors need not be specifically alleged, but instead may be inferred from the circumstances alleged in the Amended Complaint. For instance, a manager's use of the entity's funds for his own personal benefit without repaying the entity is an actionable breach of fiduciary duty. Dragul's comingling and theft of investor funds described in the Amended Complaint is but one of many examples of his breaches of duties of loyalty, good faith and due care. *See Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 405 (Colo. App. 2000).

iii. Claim IV -- Civil theft

The fourth claim is for civil theft under C.R.S. § 18-4-405 against all defendants. Dragul and the Fox Defendants argue the Receiver lacks standing to bring this claim because it alleges only harm to investors.[10] Both ignore numerous allegations in the Amended Complaint that they

[10] Fox MTD at 10; Dragul MTD at 6. Hershey does not argue standing, but does move to dismiss the civil theft claim for failure to state a claim. He points out that the Amended Complaint mistakenly refers to C.R.S. § 18-4-401, the criminal civil theft statute, rather than the civil Rights in Stolen Property Statute,

diverted Estate assets causing harm to the GDA Entities themselves. For example, the Receiver alleges Dragul and the Fox Defendants received undisclosed and illegal commissions in connection with the purchase and sale of various SPE properties. (Amd. Compl. ¶¶ 61, 62, 100, 153, 171, 180, 193, 197, and 201). These are funds which should have been retained by the SPEs, used in operations, and ultimately distributed to investors.

The Receiver also alleges Dragul diverted more than $20 million of investor funds from the SPEs (Amd. Compl. ¶¶ 293-294); that more than $34 million in illegal commissions were paid harming the GDA Entities (Amd. Compl. ¶¶ 297); and that Defendants pilfered SPE assets causing damaging to the GDA Entities and the Estate (Amd. Compl. ¶¶ 391, 406). The Complaint asserts that, even after the Receiver was appointed, Fox and Dragul conspired to remove SSC 02 assets from the Estate (Amd. Compl. ¶¶ 277-280), and that Dragul, the Fox and Kahn Defendants engaged in a similar conspiracy to abscond with the Estate's interest in an airplane (Amd. Compl. ¶¶ 266, 270). The Receiver plainly has standing to pursue this claim.

iv. Claim V – Violations of the Colorado Organized Crime Control Act ("COCCA")

The fifth claim asserts COCCA violations against Dragul, and the Fox and Hershey Defendants. In their motions, Dragul and the Fox Defendants argue the Receiver lacks standing to bring this claim. The Fox Defendants argue the Receiver has not alleged any injury to the GDA Entities. Fox MTD at 10. Dragul contends (1) the enterprise is alleged to have terminated when the Receiver was appointed so *the Receiver* could not have been injured by it, and (2) the Receiver

C.R.S. § 18-4-405, which Hershey mistakenly cites as C.R.S. § 8-4-405. Hershey MTD at 7. Regardless, it is apparent from the Motions to Dismiss that Movants are aware of the basis of the Receiver's civil theft claim against them.

for the GDA Entities cannot sue their principal because as a matter of law they cannot show an injury proximately caused by the racketeering activity. Dragul MTD at 7.

With respect to the Fox Defendants' argument, as discussed, the Receiver has alleged the GDA Entities were harmed by the COCCA conspiracy by depriving them of funds earmarked for their use, but which Defendants diverted to their own use.

Dragul's first argument – that the Receiver cannot show injury because the COCCA conspiracy terminated when he was appointed – is specious at best. The Receiver is not alleging that *he personally* was harmed by the COCCA conspiracy; he alleges *the GDA Entities* were harmed. Dragul's reliance on *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994), to support his position that a receiver lacks standing to sue officers or directors of an entity in receivership is misplaced. In *Mendelovitz*, a shareholder brought a derivative RICO action on behalf of a corporation against its directors. The court upheld dismissal of the shareholder's RICO claim because the damages alleged were speculative and remote, and depended on the "actions and decisions of third parties before coming into being." *Id.* at 185. Significantly, *Mendelovitz* was *not* a receivership case and did *not* involve claims brought by a receiver.

In contrast, *Larsen v. Lauriel Inv., Inc.*, 161 F. Supp. 2d 1029, 1046 (D. Ariz. 2001), held that a corporate receiver did have standing to bring RICO claims against the company's president for harm to the entity. *See also A. Farber & Partners, Inc. v. Garber*, 305 F. App'x 489, 491 (9th Cir. 2008) (receiver had standing bring RICO claim against corporate principals); *Dale v. ALA Acquisitions, Inc.*, 203 F. Supp. 2d 694, 703-04 (S.D. Miss. 2002) (receiver had standing to sue principal involved in Ponzi scheme); *Dale v. Frankel*, 131 F. Supp. 2d 852, 854 (S.D. Miss. 2001) (recognizing receiver's RICO claim against corporate principal).

v. Claim VII – Breach of Fiduciary Duty

Dragul next contends the Receiver has not alleged facts demonstrating what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered. Dragul MTD at 7-8. For the reasons discussed in section II. A. 6. ii., above, this argument also fails.

vi. Claim XI – Fraudulent Transfer

The eleventh claim seeks to recover fraudulent transfers under Colorado's Uniform Fraudulent Transfer Act, C.R.S. § 38-8-101-113 ("CUFTA") against all Defendants. For at least 35 years, it has been almost universally recognized that receivers have standing to bring claims under the UFTA to recover Ponzi scheme transfers. That fundamental principal is explicated in *Scholes v. Lehmann*, 56 F.3d 750, which held that receivers *do* have standing to recover fraudulent Ponzi scheme transfers because the transfers harm the entity in receivership. *Id.* at 754. As noted, the Colorado Supreme Court cited *Scholes* with approval in *Lewis v. Taylor*, 2018 CO 76, ¶ 23, and it has been followed by many other courts as well. *E.g., Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 192 (5th Cir. 2013); *Wing v. Dockstader*, 482 F. App'x 361, 364-65 (10th Cir. 2012); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at * 2-3 (D. Utah May 14, 2009) (citing cases).

Nevertheless, Dragul and the Fox Defendants argue the Receiver lacks standing to assert fraudulent transfer claims because they belong exclusively to creditors. Fox MTD at 11; and Dragul MTD at 8. Both ignore the allegations in the Complaint that the GDA Entities were harmed when Dragul and the Fox Defendants (as well as the other named Defendants) paid themselves illegal and undisclosed commissions and otherwise fraudulently depleted the assets of the SPEs.

Dragul cites no case law to support his argument; the Fox Defendants rely on *Eberhard v. Marcu*;[11] *Troelstrup v. Index Futures Grp., Inc.*, 130 F.3d 1274 (7th Cir. 1997); and *Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230 (7th Cir. 2003). Fox MTD at 11-12. These cases, however, support the Receiver, not Movants. As discussed, the general rule of *Scholes v. Lehmann* is that a receiver has standing to pursue fraudulent transfer claims to recover transfers made by the entities placed into receivership. *Scholes* did not consider whether the general rule would apply if the Ponzi schemer "operated as a sole proprietorship rather than through corporations or other legally distinct entities." *Scholes*, 56 F.3d at 755. The Seventh Circuit addressed that issue in *Troelstrup,* where the receiver was appointed solely over the assets of the Ponzi scheme operator, not the corporate entities used in his scheme. *Troelstrup,* 130 F.3d 1274. The *Troelstrup* court ultimately held that the receiver could not sue a broker for negligence in facilitating the operator's fraud because the operator himself had not been damaged. *Id.* at 1276-77. Importantly, however, *Troelstrup* reaffirms *Scholes*' holding that a Ponzi scheme receiver has standing to pursue fraudulent transfer claims for funds wrongfully diverted from corporate entities. *Id.* at 1277. Finally, *Knauer* affirmed *Scholes*' holding that receivers have standing to recover funds wrongfully diverted from receivership entities. *Knauer*, 348 F.3d at 236. Contrary to the Fox Defendants' attempt to characterize the Receiver's claims as being based solely on the fraudulent solicitation of investors, the Receiver seeks to recover transfers of assets that Dragul, the Fox Defendants and their cohorts embezzled from the GDA Entities.

[11] Discussed and distinguished above in section II, A, 4.

vii. Claim XII -- Unjust Enrichment

Finally, Dragul and the Fox Defendants contend that the Receiver lacks standing to bring his twelfth claim for unjust enrichment. *See* Fox MTD at 11; Dragul MTD at 8. Neither cites any authority in support, they merely reiterate *their conclusion* that this claim does not belong to the Estate, but to its creditors.[12] Their failure to cite any authority is telling, given that multiple courts have held receivers do, indeed, have standing to pursue unjust enrichment claims against defendants for misappropriating estate assets. *See E.g.*, *Ashmore v. Dodds*, 262 F. Supp. 3d 341, 350-51 (D.S.C. 2017) (Ponzi scheme receiver has standing to bring fraudulent transfer and unjust enrichment claims, and those claims are not barred by *in pari delicto*); *Hecht v. Malvern Preparatory Sch.*, 716 F. Supp. 2d 395, 403 (E.D. Pa. 2010) (Ponzi scheme receiver has standing to pursue fraudulent transfer and unjust enrichment claims); *Hays v. Adam*, 512 F. Supp. 2d 1330 (N.D. Ga. 2007) (Ponzi scheme receiver has standing to bring unjust enrichment claims to recover commissions and bonuses paid to agents soliciting investments in fraudulent scheme); *DeNune v. Consolidated Capital of N.A., Inc.*, 288 F. Supp. 2d 844, 854 (N.D. Ohio 2003) (receiver properly asserted claim for unjust enrichment).

B. Dragul is Not Immune from Suit.

Dragul offers up a smorgasbord of other "equitable" reasons why the Receiver's claims against him must be dismissed. He argues that under *Kidder Peabody*, the Receiver cannot sue him because his claims are barred by *in pari delicto*. But as discussed, *in pari delicto* does not apply.

---

[12] The Hershey Defendants argue the unjust enrichment claim should be dismissed under C.R.C.P. 12(b)(5) because it is barred by *in pari delicto*. Hershey MTD at 8-9. As discussed above, *in pari delicto* does not apply. Here again, although Dragul casts his argument as a standing issue, it is actually a 12(b)(5) argument. Both arguments are addressed below in section II, C, 4, e.

And in cases Movants themselves cite, receivers' have been allowed to sue the Ponzi scheme perpetrator in receivership. *See CFTC v. Chilcott*, 713 F.2d at 1480; *Marwil v. Farah*, No. 1:03-CV-0482-DFH, 2003 WL 23095657, at *5-7 (S.D. Ind. Dec. 11, 2003) (receiver sued entities in receivership and their presidents). Dragul pilfered estate assets; there is nothing to prevent the Receiver from suing to recover them. Indeed, the Complaint alleges that even after the Receiver was appointed, Dragul continued to conceal and transfer estate assets to himself and family members.

Dragul also argues that two provisions of the Receivership Order bar the Receiver from suing him. *First*, he argues ¶ 12 authorizes the Receiver to sue only third parties, not Dragul himself. Dragul Motion at 14. But ¶ 12 addresses the Receiver's authority to demand turnover of Estate assets, not his authority to sue. Presumably Dragul meant to cite ¶ 13(n), which authorizes the Receiver to "institute such legal actions as the Receiver deems reasonably necessary, *including* actions […] against third parties." The use of "including" is an example of the Receiver's authority, not a limitation on it. *See, e.g.*, *Arnold v. Colorado Dep't of Corrections*, 978 P.2d 149, 152 (Colo. App. 1999). *Second*, he argues ¶ 26 precludes the Receiver's claims. But ¶ 26 stays actions by third-parties against the Receiver, Dragul, or the GDA Entities. It does not stay the Receiver from commencing actions specifically authorized by other provisions of the Receivership Order.

Dragul next argues the Receiver's claims are barred because all of his assets have already been turned over to the Receiver, and therefore the Receiver seeks a double recovery. Dragul Motion at 14-15. Dragul disregards that any judgment against him can be satisfied from assets acquired after the Receiver was appointed, and that he may be a necessary party here. Indeed, the other defendants can be expected to seek to apportion all fault to Dragul.

Dragul also accuses the Receiver of prosecuting this case in the hope of depleting the funds in the Estate to pay his own Receiver's fees. *Id.* at 15. This spurious argument is incorrect, and more importantly, provides no basis upon which to dismiss the claims against him.

Continuing his kitchen-sink approach, relying on ¶ 13(o) of the Receivership Order, Dragul contends all claims against him must be dismissed because the Receiver's current counsel is not authorized to prosecute them. *Id.* at 18. To put the argument in context, on May 11, 2020, the Receiver filed a Notice of Revised Compensation with the Receivership Court, notifying the Court and all parties in interest, that effective retroactively to November 1, 2019, counsel had agreed to pursue this case on a contingent fee basis in order to preserve Estate assets. A copy is attached as **Exhibit 2.** In a backdoor effort to starve funding for this case, on June 5, 2020, Dragul objected to the Receiver's Fourth Fee Application, and he also objected to the contingent fee agreement. **Exhibit 3**, at 11-13. That objection remains pending before the Receivership Court; this Court lacks jurisdiction to decide the issue. *See, e.g.*, *Town of Minturn v. Sensible Housing Co., Inc.*, 273 P.3d 1154, 116 (Colo. 2012) (court first acquiring jurisdiction over parties and the subject matter has exclusive jurisdiction).

In both his fee objection and the present Motion to Dismiss, Dragul deliberately misrepresents the Receivership Order. He quotes the Order selectively as allowing the Receiver to hire counsel on a contingency basis 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[.]" And, according to Dragul, because the Receiver seeks to recover damages here, not Receivership Property, all claims against him must be dismissed unless the Receiver hires new counsel on an hourly basis. Dragul Motion at 18. Dragul omits the remainder of the ellipsed

sentence, which continues "including claims premised on fraudulent transfer or similar theories," which is exactly what the Receiver pleads here. But Dragul knows this full well, having negotiated and stipulated to the Receivership Order.

Finally, Dragul argues this entire case must be dismissed because the Receiver possesses privileged information which Dragul speculates is being used against him. Dragul MTD at 15-17. Again, some context is important. After the Receiver was appointed on August 30, 2018, to facilitate the continued operation of the many Estate commercial properties, preserve value, and avoid threatened litigation over control issues, the Receiver retained a number of Dragul's employees to assist in managing the commercial properties. Under the guise of benevolently assisting the Receiver, Dragul continued to supervise his staff. Unbeknownst to the Receiver, Dragul was concealing and instructing his former staff to conceal material information in an effort to facilitate a hasty bulk sale of Estate assets to an entity which he and his staff would continue to run. Also unbeknownst to the Receiver, and again while purportedly working *for* the Receiver, Dragul had his former IT firm, NexusTek, copy the entire GDA server and billed the Estate for the cost of doing so.

In early 2019, the Receiver discovered Dragul had formed a competing business, RTG Partners, created a website for it, and was soliciting business. As set forth in the Complaint and in various filings in the Receivership case, Dragul and his staff were also actively diverting money from the Estate. After discovering this, the Receiver terminated Dragul's staff on March 15, 2019. Before their termination, Dragul had NexusTek make *another* copy of the server.

In April 2019, the Receivership Court granted the Commissioner and the Receiver's joint motion for writs of assistance. In early May 2019, sheriffs executed the writs and seized computers

and documents from Dragul's offices and home. At the home of Susan Markusch, Dragul's long-time CFO and a defendant here, the sheriff discovered her personal laptop had been removed but found 11 boxes of GDA financial documents in her living room, which she and Dragul had removed from the Estate and concealed from the Receiver.

Dragul made two copies of GDA's server. Apparently, he is now when NexusTek copied the served *the second time* in March 2019, it may have missed some files created after August 30, 2018. Upon his appointment, the Receiver became the privilege holder for the GDA Entities, so any purported privilege prior to that time is his to invoke or waive. *E.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985) (upon appointment bankruptcy trustee controls attorney-client privilege); *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶¶ 45-46 (attorney-client privilege ceases to apply to dissolved corporation, citing *Weintraub); State v. Doyle*, 2020 WL 3816152, at *14 (R.I. July 8, 2020) (receiver, not ousted fraudster controls attorney-client privilege). After August 30, 2018, Dragul could have no expectation of privacy or privilege for information on the GDA server while working for the Receiver.

While Dragul now complains the Receiver has not disgorged potentially privileged information from the GDA server, he has never raised this issue with the Receivership Court or asked the Receiver to do so. So, contrary to Dragul's unsupported speculation, the Receiver is not "actively using" *his* privileged information against him. Dragul Motion at 17. But in any event, these are issues to be raised in the Receivership Court and provide no basis for dismissing this entire case as Dragul requests.

C. The Receiver has Pled Viable Claims Pursuant to C.R.C.P. 9(b) and 12(b)(5).

Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). In reviewing motions to dismiss pursuant to C.R.C.P. 12(b)(5) ("Rule 12(b)(5)"), the Court must view all allegations in the Amended Complaint as true and in a light most favorable to the non-moving party. *Id.; see also Yadon v. Lowry,* 126 P.3d 332 (Colo. App. 2005). Motions to dismiss under 12(b)(5) should not be granted unless it appears beyond doubt that the plaintiff could prove no set of facts that would entitle him to relief. *Id* (citation omitted)*; see also Walker v. Van Laningham,* 148 P.3d 391 (Colo. App. 2006) (A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law). A court should therefore deny a motion to dismiss "if the factual allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff . . . present plausible grounds for relief." *Begley v. Ireson*, 2017 COA 3, ¶ 8 (Colo. July 3, 2017) (citing *Warne v.* Hall, 373 P.3d 588, 591–95 (Colo. 2016)) (concluding that "[n]othing more is required to survive a motion to dismiss for failure to state a claim" if the complaint alleged specific conduct of a plausible claim). In deciding a motion to dismiss, the plaintiff is entitled to all reasonable inferences in its favor. *Monez v. Reinertson*, 140 P.3d 242, 244 (Colo. App. 2006). A short and plain statement advising the defendant of the relief sought provides adequate notice of the claims brought. *See* C.R.C.P. 8(a); *Grizzell v. Hartman Enters., Inc.,* 68 P.3d 551, 553 (Colo. App. 2003) ("A complaint need not express all facts that support the claim, but need only serve notice of the claim asserted.").

Under the plausibility standard, a party must assert sufficient factual allegations "to raise a right to relief 'above the speculative level'" and "provide 'plausible grounds'" for relief. *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). “Plausibility” does not, however, equate to credibility or believability; those issues are for the trier of fact. It “is manifestly improper to import trial-stage evidentiary burdens into the pleading standard.” *Garcia-Catalan v. U.S.*, 734 F.3d 100, 103 (1st Cir. 2013). The purpose of a complaint is to put the defendants on notice of the allegations against them. It is not the Receiver’s burden, in a complaint, to prove his case. Only to let the Defendants know what he intends to establish through discovery. The Amended Complaint contains ample factual allegations for the Court to conclude that the Receiver has pled plausible claims that are more than speculative. *Wellons, Inc. v. Eagle Valley Clean Energy, LLC*, 2015 WL 7450420, at *1 (D. Colo. Nov. 24, 2015).[13]

In essence, Movants argue that the Amended Complaint should be dismissed, not because it does not plead sufficient facts, but rather, based upon their affirmative defenses—all of which the Receiver opposes and which necessarily involve disputed issue of fact not properly the subject of a motion under Rule 12(b)(5). It is well-settled that affirmative defenses *cannot* constitute grounds for dismissal under Rule 12(b)(5). *Williams v. Rock-Tenn Servs.*, Inc., 370 P.3d 638, 642 (Colo. App. 2016); *Denver Parents Ass’n v. Denver Bd. of Educ.*, 10 P.3d 662, 665 (Colo. App.

[13] Case law interpreting the federal rule is persuasive in analyzing the Colorado rule. *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994) (citing *Forbes v. Goldenhersh,* 899 P.2d 246 (Colo. App. 1994)).

2000). The Court should therefore reject Movants' improper attempts to prematurely adjudicate the claims on the merits under the guise of 12(b) motions.

The Fox and Markusch Defendants[14] incorrectly argue that because all of the Receiver's claims against them – violations of the CSA, negligence, negligent misrepresentation, civil theft, COCCA, aiding and abetting COCCA violations, fraudulent transfer, and unjust enrichment – stem from the same deceptive conduct, and thus "sound in fraud" *all* are subject to the heightened pleading standards of 9(b). *See* Fox MTD at 15; and Markusch MTD at 7. This is not so. Only the Receiver's claims for violations of the CSA (both plead as an independent claim and as a predicate act under COCCA) and the predicate acts of wire fraud and bankruptcy fraud "sound in fraud." *See Rome v. Reyes*, 2017 WL 2656693 at *8 (Colo. App. 2017); *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006). Allegations of civil theft, negligent misrepresentation,[15] and constructive fraudulent transfer are subject to the lower "plausibility" requirements. *See Myers v. Bureau of Prisons Mailroom Staff*, 573 Fed. Appx. 784, 786 (10th Cir. 2014) (a claim for theft is subject to the *Ashcroft v. Iqbal* standards of "facial plausibility"); *Touchtone Grp., LLC v. Rink*, 913 F. Supp. 2d 1063, 1083-84 (D. Colo. 2012) (holding that fraudulent transfer claims under C.R.S. § 38-8-105(1)(a) "are not subject to 9[(b)]'s heightened pleading standard, where, as here, the alleged transferor is operating a Ponzi scheme[,]" and "[u]nlike claims alleging fraud, claims for negligent

---

[14] The Hershey Defendants aver that only the securities fraud, negligent misrepresentation, and violations of COCCA are subject to the heightened standards of 9(b). Hershey MTD at 13.

[15] The Fox Defendants rely on dicta in *Van Leeuwan v. Nuzzi,* 810 F. Supp. 1120, 1123 (D. Colo. 1993), for the proposition that claims for negligent misrepresentation are subject to the pleading requirements of 9(b). Importantly, as the district court in *City of Raton v. Arkansas River Power Auth.*, 600 F. Supp. 2d 1130, 1143 (D.N.M. 2008), reasoned, because the *Van Leeuwan* court "did not state a rationale for holding the way it did," it would not apply the heightened pleading standards to negligent-misrepresentation claims. *Id. Accord Conrad v. The Educ. Res. Inst.*, 652 F. Supp. 2d 1172, 1183 (D. Colo. 2009).

misrepresentation are governed by Rule 8's liberal pleading standard”). Facial plausibility does not require all facts that support the claim to be pled, just that the complaint states “plausible grounds for relief.” *Begley*, 2017 COA 3, at ¶ 8. However, assuming *arguendo* that the heightened pleading standards of 9(b) apply to all claims, the Amended Complaint meets those requirements, making dismissal unwarranted.

1. The Receiver has Alleged Fraud with the Requisite Particularity.

The Fox and Markusch Defendants contend that *all* of the Receiver’s claims should be dismissed because they are not plead with the requisite specificity under Rule 9(b). Fox MTD at 15; Markusch MTD at 7. The Hershey Defendants make the same argument but only as to the Receiver’s claims for violations of the CSA, negligent misrepresentation, and COCCA. Hershey MTD at 13-14.

Despite Rule 9(b)’s stringent requirements, “courts should be ‘sensitive’ to the fact that application of the Rule prior to discovery ‘may permit sophisticated defrauders to successfully conceal the details of their fraud.’” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (quoting *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir. 1992) (citations omitted)). General statements and allegations must be considered alongside the other well-pled facts in the Amended Complaint, which should be read as a whole and “not parsed piece by piece to determine whether each allegation, in isolation, is plausible.” *See Braden v. Wal–Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir. 2009). While fraud and its circumstances must be stated with particularity, the “condition of mind of a person may be averred generally.” C.R.C.P. 9(b).

Both the Fox and Markusch Defendants argue that the Amended Complaint impermissibly includes “group” allegations lacking the requisite specific required by 9(b). And, according to the

Fox Defendants, the allegations pleaded upon information and belief are insufficient to survive a motion to dismiss as lacking particularity. Fox MTD at 15; Markusch MTD at 7.

i. The Amended Complaint Does Not Contain Impermissible "Group Allegations".

The Fox and Markusch Defendants argue that the Amended Complaint contains impermissible "group allegations" and therefore does not meet the particularity requirements of 9(b). *See* Fox MTD at 16-17. In determining whether allegations satisfy Rule 9(b), courts have held that collective fraud may make it difficult to attribute particular fraudulent conduct to each individual defendant. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). To overcome such difficulties in cases of corporate fraud, the allegations should include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations. *Id.* The 148 new paragraphs in the "Factual Allegations" section of the Amended Complaint, which detail the "who, what, when, where, and how" of the alleged misrepresentations, which the Fox Defendants now characterize as "superfluous," are anything but. These allegations not only add details and specificity concerning the conduct alleged and role of each Defendant in the overall Scheme (*See* Amd. Compl. ¶¶ 90-105, 111-114, 118-119, 122-130, 133, 143-149, 153-158, 163-171, 173-175, 180-189, 191-200, 205-206, 219-221), they also include dates or date ranges (where known) of the offerings and misrepresentations or omissions in connection with the detailed transactions (*id.* ¶¶ 55, 59, 61- 62, 67, 77, 90-101). And contrary to the Fox and Hershey Defendants' contentions otherwise, the identities of the individual investors for each transaction are alleged, as is all relevant information about their investments, including the approximate dates and amounts of the investments (Amd. Compl., Exs. 23, 25, 28, 33, 35, 42). By the very nature of the overall scheme and the relation each of these Defendants had

to Dragul and the GDA Entities, some of the allegations necessarily apply to more than one Defendant. For instance, as the CFO and controller, respectively, of GDA, Markusch and Dragul both had an integral role in the extensive comingling, financial and tax reporting, and payment of funds from the GDA Entity accounts set forth in Exhibits 2-7. (Amd. Compl. ¶¶ 7, 58-59 and 75-77). Similarly, because ACF was so intertwined with and "utilized and shared the employees of GDA RES and GDA REM, including Defendant Markusch, to carry out the business of ACF[,]" many allegations oftentimes include both Dragul and the Fox Defendants. (Amd. Compl. ¶ 22). However, in discussing the role each played in the overall scheme, the conduct attributable to each of the Defendants is alleged with specificity.

ii. The Receiver's Allegations Made "Upon Information and Belief" are Proper.

The Fox Defendants next contend that the Receiver's allegations "upon information and belief" are insufficient to satisfy the particularity required by 9(b) because they are not also accompanied by a statement upon which the belief is founded.[16] *See* Fox MTD at 17. This argument also fails.

First, embedded among the allegations forming the bases of the Receiver's claims sounding in fraud that are made upon information and belief are countless paragraphs describing, in great detail, various transactions and offerings from the scheme's inception through the Receiver's appointment. (Amd. Compl. ¶¶ 67, 69, 96, 105, 115, 118, 124, 130, 137, 142, 144, 156, 179, 181, 183, 188, 198-99 & 211). And, as is the case here, when the fraud alleged is committed by a corporation or other organization, the plaintiff necessarily lacks personal knowledge of all of the

[16] The Fox Defendants fail, however, to point to any particular allegations made upon information and belief which they contend are improper.

underlying facts. *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1439 (9th Cir. 1987). The same rationale holds true with respect to an elaborate criminal enterprise like the one at issue here, placing the investors and the Receiver in a disadvantageous position to learn of all of the underlying facts.

Second, the Fox Defendants' argument rests on a fundamentally flawed interpretation of applicable law – that is, when and how allegations made upon information and belief comply with 9(b). While allegations of fraud made upon information and belief usually do not satisfy the particularity requirements of 9(b), when they relate to matters particularly within the opposing party's knowledge, the rule is significantly relaxed. *Moore*, 885 F.2d at 540 (citing *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1439 (9th Cir. 1987)); *see also Warne*, 373 P.3d at 595 ("Far from its conflicting with the plausibility standard, federal courts have observed that ***pleading based on information and belief may, in fact, be useful*** where the facts giving rise to a plausible claim are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible.") (emphasis added); *see also Wellons*, 2015 WL 7450420, at *2 (quoting *Arista Records, L.L.C. v. Doe* 3, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard […] does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant."). Whether and to what extent each of these Defendants received unauthorized and undisclosed commissions is particularly within their control and possession. Similarly, whether Dragul and the Fox Defendants made failed to maintain the required reserves and the extent of the comingling of funds among various entity accounts are facts peculiarly within their possession and control. (Amd. Compl. ¶¶ 96, 124, 130, 194, 198). And many of the

allegations made upon information and belief relate to the Fox-SPEs and are contained in the very documents and financial statements that the Fox Defendants have actively withheld[17] from the Receiver, despite numerous requests and motions filed within the Receivership Action seeking their production. (Amd. Compl. ¶¶ 105, 118, 137, 142, 169, 181, 183, 199, 211, 276). *See Wellons,* 2015 WL 7450420, at *2.

Finally, other allegations made upon information and belief are non-essential allegations that merely provide additional factual background to provide a more complete picture of the transactions discussed and the overall scheme. (Amd. Compl. ¶¶ 37-38, 49, 79, 81, 164, 169, 230, 232, 244, 246, 336, 353).

2. The Receiver Adequately Alleges Violations of the Colorado Securities Act.

The Receiver's first claim for relief encompasses five categories of claims for violations of various provisions of the CSA.[18] Both the Fox and Hershey Defendants argue the Receiver's claim for securities fraud should be dismissed under Rule 12(b)(5) for a variety of reasons,

[17] Many of the specific details concerning the Fort Collins and Market at Southpark investments, and other Fox-owned properties have been withheld from the Receiver by the Fox Defendants. In fact, details concerning the Estate's interest in the Fox-owned and controlled properties are presently the subject of a turnover motion filed by the Receiver in the Receivership Court. Fox has refused to turnover both documents relating to these interests as well as actual distributions owed to the Estate in respect of the Estate's membership interests in these properties. On August 10th, the Receivership Court entered an order requiring ACF to turnover both withheld distributions and the withheld documents, financials, and other records requested for entities in which the Receivership Estate has an interest.

[18] The Receiver's first cause of action asserts claims under **(A)** C.R.S. §§ 11-51-604(1) and 301 (against Dragul and the Fox Defendants) for Securities Registration violations (Amd. Compl. ¶¶ 316-320); **(B)** C.R.S. §§ 11-51-604(2)(a) and 401 (against Dragul and the Fox and Hershey Defendants) for licensing and notice violations (Amd. Compl. ¶¶ 321-326); **(C)** C.R.S. §§ 11-51-604(3)-(4) and 501(a)-(c) (against Dragul and the Fox Defendants) for securities fraud (Amd. Compl. ¶¶ 327-338); **(D)** C.R.S. §§ 11-51-604(5)(a) and (b) (against Dragul and the Fox Defendants) for control person liability (Amd. Compl. ¶¶ 339-344); and **(E)** C.R.S. §§ 11-51-604(5)(c) (against the Kahn, Fox and Hershey Defendants) for substantial assistance (Amd. Compl. ¶¶ 345-354).

including that the allegations purportedly fail to meet the heightened pleading requirements of Rule 9(b). These arguments are, however, without merit.

i. Claim I.C. – Securities Fraud in Violation of C.R.S. §§ 11-51-604(3)-(4) and 11-51-501(a)-(c).

The Fox Defendants maintain that, because the Receiver cannot prove the elements of fraudulent misrepresentation and reliance, the Receiver's claims must be dismissed.[19] *See* Fox MTD at 19-20. This argument rests on credibility determinations and the resolution of disputed issues of material fact, which are improper to resolve at the pleading stage. "At the pleading stage, the plaintiff need not demonstrate that he is likely to prevail, but his claim must suggest 'more than a sheer possibility that a defendant has acted unlawfully.'" *Garcia-Catalan*. at 102-03 (internal citation omitted). Thus, the Court must accept the well-pleaded allegations of the Amended Complaint as true, and determine, not whether the Receiver will ultimately prevail on his claims at trial, but whether he has pled sufficient facts to place the Defendants on notice of the bases of the claims asserted against them.

The Fox Defendants aver that real property transactions are a matter of public record so investors could not have reasonably relied on the inflated purchase prices misrepresented in the Solicitation Materials, and submit as Exhibit A, what appear to be summary real estate transaction reports obtained from Westlaw.[20] They therefore argue the Receiver has failed to adequately allege

[19] The Fox Defendants section heading 3. a. ("The Receiver Cannot Allege the Required Elements of Fraudulent Misrepresentation and Reliance") further demonstrates that the motion is an improper attempt to litigate the merits of the claims under the guise of a 12(b)(5).

[20] The Fox Defendants aver that the submission of these real estate transaction reports complies with the rules for motions filed pursuant to Rule 12(b) because, they contend that the allegations regarding the real estate transactions "necessarily implicate the recorded documents related thereto." Fox MTD at n. 8. These exhibits must be disregarded as improperly submitted. The documents are neither "referred to in

either a misrepresentation or justifiable reliance. *Id.* at 20. They are incorrect. First, the Fox Defendants' improperly attempt to narrow the misrepresentations alleged in the Amended Complaint. As alleged in great detail, the misrepresentations and omissions on which these claims are based are much broader and entail material facts both misrepresented in and omitted from the Solicitation Materials like the Fox Defendants and Dragul's misrepresentations as to the structure of the investments, operating reserves to be maintained for each investment, the overall amount being raised for each offering and thus, the precise investment being purchased, and likewise involve omissions as to the extensive comingling, Defendants' receipt of unauthorized and undisclosed commissions from escrow of the properties and the SPE entity accounts, among other material items. (Amd. Compl. ¶¶ 62, 67, 87, 91, 95, 98-100, 102-103, 105, 113, 116, 122-24, 127, 130, 143-149, 155-56, 171-75, 186-88, 190-99, 204-208, 219-21, 251-53, 328). Whether the SPEs and investors justifiably relied on the Fox Defendants and Dragul's misrepresentations is not properly at issue on a motion to dismiss. The only issue properly before the Court is whether the Receiver has adequately alleged fraudulent misrepresentations and reliance, which he has. Therefore, the Fox and Hershey Defendants' argument fails.

Additionally, the fundamental purpose of recording statutes charging a buyer with notice as to facts like the purchase price of a property, is not to charge an SPE investor with such notice, but rather to protect buyers of real estate. *See City of Lakewood v. Mavromatis*, 786 P.2d 493, 494 (Colo. App. 1989), *aff'd,* 817 P.2d 90 (Colo. 1991) ("The purpose of this statute was to provide an

---

the complaint," nor are they verifiable as publicly accessible information that the investors could have accessed at the time that the misrepresentations and omissions were made.

effectual remedy against the loss accruing to subsequent purchasers of real estate arising from the existence of secret or concealed conveyances thereof unknown to the subsequent purchaser").

Kesicki v. Mitchell, 2008 WL 2958598 (Colo. Dist. Ct. Apr. 24, 2008), relied upon by the Fox Defendants, is both distinguishable and inapplicable. There, the plaintiff, together with the defendant and a third-party, purchased a parcel of undeveloped land as an investment. *Id.* Ultimately, the plaintiff sued the defendant for anticipatory breach of contract, anticipatory promissory estoppel (specific performance), fraud, and unjust enrichment when he uncovered the price the defendant had initially paid for the property and refused to convey his interest to plaintiff as promised. In that case, however, the defendant never specifically made any representations as to the price paid for the property. Rather, the plaintiff claimed the defendant structured the investment in a manner that would financially inure to his own benefit. The same issues as to misrepresentations and reliance by hundreds of investors investing, not in the real estate scattered all over the country, but the SPE's whose sole function was to own it, were not at issue in the *Kesicki* case and its holding is inapplicable here.

Finally, the Fox Defendants' argument that they had no duty to notify Dragul's investors of anything, and that the individual investors could not have impacted the disposition of the properties conflates the two different categories of claims asserted in the Amended Complaint (a) on behalf of the SPE, which was an investor in the Fox-SPE that owned the property and sold the securities, and (b) on behalf of the GDA Entity Investors. The Amended Complaint therefore details misrepresentations and omissions made by the Fox Defendants to the SPEs and made by Dragul to the Individual Investors.

3. The Receiver Adequately Alleges ACF's Control and Provision of Substantial Assistance to GDA.

Next, the Fox Defendants argue the Amended Complaint fails to adequately allege that they were a "control person" or substantially assisted Dragul or GDA. Fox MTD at 23. In so arguing, Fox would have this Court believe that he was merely an innocent third-party who was also defrauded by Dragul. Not so. As alleged in the Amended Complaint, Fox and Dragul have been co-conspirators for years. ACF relied upon and used GDA employees as if they were its own. (Amd. Compl. ¶ 38). Moreover, Fox made numerous loans to Dragul to fund and ensure the continued operation of the scheme. *See, e.g., id.* ¶ 281. The Receiver further alleges that despite Fox's knowledge that Dragul would not pay the downstream investors the distributions to which they were entitled for investments such as Loggins Corners, the Fox Defendants gave him the proceeds for the sale of the property, which Dragul ultimately stole and never distributed to investors. (*Id.* ¶ 40, 214). Finally, the allegations that Dragul, and the Fox and Kahn Defendants concealed and transferred assets of the Estate after the Receiver was appointed further demonstrates the extent of the Fox Defendants' substantial assistance to Dragul's scheme in which Defendants committed numerous violations of the CSA.

4. The Amended Complaint States a Claims for Civil Theft against the Hershey Defendants.

The Hershey Defendants argue the Receiver fails to state a claim for civil theft against them because the Amended Complaint purportedly does not contain any allegation that "Hershey has a specifically identifiable pot of money that was directly traceable back through Dragul or his entities to the investors." Hershey Motion at 8. Not so. The Amended Complaint alleges that the Hershey Defendants received approximately $2,891,155.54 in commissions, paid by Dragul, from

funds received from GDA Entity Investors. *See* Complaint ¶¶ 310-312. This states a cognizable claim for civil theft against the Hershey Defendants.

5. The Amended Complaint States a Plausible Claim for Relief Against Dragul and the Fox and Hershey Defendants both for direct COCCA Violations and for Indirect Violations by Aiding and Abetting.

The Fox and Hershey Defendants seek to dismiss the fifth and sixth claims for relief alleging violations of COCCA and for aiding and abetting those violations. Fox argues the Amended Complaint fails to adequately allege (1) the predicate acts with the requisite specificity, (2) an "enterprise" distinct from the "persons," (3) timely predicate acts, (4) that the Fox Defendants' "conducted or participated" in the violations or breaches, or (5) aiding and abetting liability. Fox MTD at 24-26. The Hershey and Markusch Defendants likewise argue the Receiver fails to allege the predicate acts with particularity. Hershey MTD at 12-13; Markusch MTD at 4-8.

COCCA has broad applicability. It is not reserved for just organized crime; it also applies to individuals engaged in certain prohibited activities. *People v. Pollard*, 3 P.3d 473, 477 (Colo. App. 2000). It applies to "illicit as well as licit enterprises." *People v. Chaussee*, 880 P.2d 749, 754 (Colo. 1994) (COCCA "impose[s] civil and criminal liability on persons who engage in certain 'prohibited activities.'"). Nothing in COCCA's definition of "racketeering activity" requires indictment or conviction. *See* CRS § 18-17-103(5).

While COCCA and its federal analogue, RICO, are similar, but not identical, Colorado appellate courts have frequently found that case law under RICO is "instructive" as to COCCA claims. *See People v. Chausse,* 880 P.2d 749, 753 (Colo. 1994); *Benson v. People*, 703 P.2d 1274, 1076, n.1 (Colo. 1985).

6. The Receiver Sufficiently Alleges an Enterprise under C.R.S. § 18-17-104(3).

The Fox Defendants contend that the Receiver has failed to allege an enterprise distinct from the persons engaged in the racketeering activity. *See* Fox MTD at 25.

Under RICO, "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This broad definition encompasses "any union or group of individuals associated in fact" with: (1) a "purpose," (2) a "relationship among those associated with the enterprise," and (3) the "longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 944, 946 (2009) (citation and internal quotations omitted); *cf. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny*, 115 F. Supp. 2d 1210, 1227 (D. Colo. 2000) ("A COCCA enterprise is an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.") (citations and internal quotation marks omitted)). The Receiver alleges that Dragul and the Fox and Hershey Defendants, associated together, among themselves and with others, to form an association-in-fact "enterprise" with the purpose of defrauding both the GDA Entities and Investors. (Amd. Compl. ¶¶ 380-382). As alleged in great detail in the Amended Complaint, the "persons" – Dragul, and the Fox and Hershey Defendants – carried out the fraudulent scheme through their participation and association with GDA RES and GDA REM – the "enterprise." (Amd. Compl. ¶¶ 380-382).

While, as the Fox Defendants correctly note, the defendant "person" must be an entity distinct from the alleged "enterprise," their argument disregards the fact that "allegations of two separate legal entities joining together, in addition to several other entities or persons, to conduct

racketeering activity can be sufficient to establish an association-in-fact enterprise." *Church Mut. Ins. Co. v. Coutu*, 2018 WL 822552, at *8 (D. Colo. Feb. 12, 2018), *rept. and recommendation. adopted in part*, 2018 WL 1517022 (D. Colo. Mar. 28, 2018) (citation omitted)).

7. The Receiver Adequately Alleges Predicate Acts of Five Types of Violations of the CSA, Wire Fraud, and Bankruptcy Fraud.

Both the Fox and Hershey Defendants argue the Receiver fails to allege a pattern of racketeering with particularity, specifically, with respect to the predicate acts of securities fraud, wire fraud, and bankruptcy fraud. *See* Fox MTD at 15-18; Hershey MTD at 13-14. They argue the Amended Complaint contains only conclusory allegations of securities and wire fraud, without identifying the "who, what, when, where, and why" required by Rule 9(b).

COCCA claims are proven by establishing a "pattern of racketeering activity." *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1370 (Colo. App. 1993). COCCA defines a "pattern of racketeering" activity as "engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise." *New Crawford*, 877 P.2d at 1371 (citing C.R.S. § 18–17–103(3)). "Racketeering activity" occurs if one commits, attempts to commit, conspires to commit, or solicits, coerces, or intimidates another person to commit, any of the federal or Colorado crimes listed under § 18–17–103, which include:

> (a) Any conduct defined as "racketeering activity" under […] (1)(B) ["any act which is indictable under any of the following provisions of title 18 of the U.S. Code: […] section 1343 (relating to wire fraud), and (1)(D) [any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities…]; or
>
> (b) Any violation of the following provisions of the Colorado statutes or any criminal act committed in any jurisdiction of the United States which, if committed in this state, would be a crime under the following provisions of the Colorado statutes:

*   *   *

> (XIII) Securities offenses, as defined in sections 11-51-401 and 11-51-603 (registration of brokers and dealers), 11-51-301 and 11-51-603 (registration of securities), and 11-51-501 and 11-51-603 (fraud and other prohibited practices), C.R.S.

C.R.S.§ 18-17-103. As predicate acts, the Receiver alleges five different categories of violations of the CSA (Amd. Compl. ¶¶316-354; 386-387(a)), wire fraud under 18 U.S.C. § 1343 (Amd. Compl. ¶¶ 386-387(b)), civil theft under C.R.S. § 18-4-401 (Amd. Compl. ¶¶ 386-387(c)); and bankruptcy fraud under 18 U.S.C. § 152(5) and (8) (Amd. Compl. ¶¶ 386-387(d)).

i. Violations of the CSA

For the reasons set forth in section II. D. 3., above, the Receiver has adequately alleged five different categories of violations of the CSA with the requisite particularity.

ii. Wire Fraud (18 U.S.C. § 1343)

The elements of federal mail fraud as defined in 18 U.S.C. § 1341 are (1) a scheme or artifice to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises, (2) an intent to defraud, and (3) use of the mails to execute the scheme. *See United States v. Haber*, 251 F.3d 881, 887 (10th Cir. 2001). The Amended Complaint alleges with the requisite specificity the means by which Dragul and the Fox and Hershey Defendants committed wire fraud in furtherance of the scheme. (Amd. Compl. ¶ 387.b.). Specifically, from 2006 through 2018, these Defendants "knowingly devised or intended to devise a Scheme to defraud and to obtain money from investors under false pretenses, representations and promises, including material misrepresentations and omissions in the Solicitation Materials concerning the investment, payment of illegal and undisclosed commissions, and improper comingling and misappropriation of GDA

Entity Investor funds." *Id.* In carrying out this scheme, they used interstate and foreign wires to transfer funds belonging to the SPEs and the GDA Entity Investors. *Id.*

iii. Civil Theft (C.R.S. § 18-4-401)

In footnote, the Fox Defendants claim that only theft under C.R.S. § 18-4-401 is a sufficient predicate act under COCCA, rather than under § 18-4-406. Fox MTD at 24, n.9. The Fox Defendants fail to acknowledge that the civil theft claim the Receiver asserts is based on C.R.S. § 18-4-405 (Amd. Compl. ¶¶ 371-377). And, for the reasons set forth in section II. A. 6. iii. and II. C. 4., this claim is adequately pleaded. *See Nova Leasing, LLC v. Sun River Energy, Inc.*, 11-CV-00689-CMA-BNB, 2012 WL 3778332, at *4 (D. Colo. Aug. 31, 2012).

iv. The Predicate Acts Pleaded Are Not Time-barred.

Dragul, and the Hershey and Markusch Defendants complain that many of the referenced securities transactions predate January 21, 2015, or August 30, 2014. As discussed below in section II. D. 3., these transactions, while barred for the purposes of the securities fraud claim, are actionable under COCCA. *See People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012) ("if one predicate act falls within its respective limitations period, other predicate acts occurring within ten years before the occurrence of the first can be presented as evidence of racketeering activity even if they could not give rise to a separate prosecution.").

8. The Receiver Adequately Alleges ACF Conducted or Participated in the Racketeering Enterprise

Next, the Fox Defendants argue the Receiver has not alleged they conducted or participated in the racketeering enterprise because the conduct on which this claim is based, they contend, relates to "communications with its own investors." Fox MTD at 25. They argue the Amended

Complaint fails to allege the Fox Defendants had any knowledge of Dragul's "comingling activity, diversion of investor funds, or insolvency of the operation." *Id.*

This argument fails for 3 primary reasons. *First*, as discussed above in section II, A, the Receiver asserts these claims not only on behalf of the GDA Entity Investors, but also on behalf of the SPEs. And the argument is contrary to the controlling law providing that a defendant's "participation" does not necessarily mean it had a formal position within or significant control of the enterprise; rather, that it had "some part in the directing the enterprise's affairs." *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.,* 194 F.3d 1089, 1101 (10th Cir. 1999) (citation omitted). As alleged in detail in the Amended Complaint, the Fox Defendants were more than merely innocent third-parties – they were directly involved in the ongoing scheme and they handsomely profited from their involvement.

Section 18–17–104(3) imposes liability on "persons[s] employed by, or associated with [the enterprise], [who] knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity[.]" The terms "conduct" or "participation" are not defined in COCCA. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). "Conduct" means to lead, run, manage, or direct. *Id*. Conduct or participation indicates only "'some degree of direction.'" *F.D.I.C. v. First Interstate Bank of Denver, N.A*., 937 F. Supp. 1461 (D. Colo. 1996) (citing *Reves*, 507 U.S. at 178). "Participate" means "to take part in." *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1646 (1976)). "Liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." *Id.* (citing *Reves*, 507 U.S. at 185) (internal quotations omitted). Liability therefore attaches if a defendant merely participates either in the operation or management of the enterprise itself. *Id.* In

that respect, the "enterprise" is categorized as "vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity." *Id* (citing *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 257 (1994)).

Similarly, the defendants in *First Interstate Bank of Denver* sought to dismiss the FDIC's COCCA claims on the same basis as do the Fox Defendants here. Ultimately, the court held that the allegations were sufficient to establish primary liability where the FDIC had alleged the defendants were aware of "unusual activity" and "non-standard practices" used in the fraudulent scheme. *First Interstate Bank*, 937 F. Supp. at 1469. The court also cited various allegations of other implicitly related conduct undertaken by the defendants. *Id.*

9. The Receiver Adequately Alleges Aiding and Abetting Liability.

The Fox Defendants argue the Receiver has failed to allege aiding and abetting liability under COCCA because there are no allegations as to their actual knowledge of the primary violation. Fox MTD at 26. For the reasons discussed in sections II. D.3 and E, above, the Amended Complaint contains ample allegations that the Fox Defendants had actual knowledge of the COCCA violations. By virtue of their role in the scheme, they had actual knowledge of and in fact were an integral part of the enterprise's commission of violations of the CSA, wire fraud, and civil theft. Any question as to the Fox Defendant's intent is necessarily an issue of fact improper for to dispose of on a motion to dismiss.

10. The Receiver has Sufficiently Pled a Claim for Unjust Enrichment.

Dragul and the Hershey Defendants argue the Receiver's claim for unjust enrichment must be dismissed under 12(b)(5). To recover for unjust enrichment, the Receiver must establish that Dragul and the GDA Entities conferred a benefit upon the Defendants, and that the Defendants

appreciated that benefit under circumstances where it would be inequitable for them retain it without paying its value. *Martinez v. Continental Enters.,* 730 P.2d 308, 317 (Colo. 1986).

The gist of the Hershey Defendants' argument is that the Amended Complaint does not contain facts suggesting that it would be inequitable for them to retain the commissions they received.[21] Hershey MTD at 8. They claim that because the Receiver alleges that Dragul, individually and through GDA RES and GDA REM, was the primary participant in the Ponzi scheme, the Hershey Defendants could not have been "unjustly enriched." *Id.* This argument fails. The Receiver has alleged, in detail, the precise role the Hershey Defendants played in the scheme and how they were unjustly enriched. For instance, the Hershey Defendants solicited investors on Dragul's behalf for which they received undisclosed and unauthorized commissions. (Amd. Compl. at ¶¶ 41-43, 310-12, and Ex. 7). The undisclosed commissions paid to the Hershey Defendants came both from the SPE accounts and the GDA accounts and contained comingled investor funds. *Id.*

Dragul argues the Receiver has not alleged what benefits he received, or how they came at the Estate's expense. Dragul MTD at 8. Dragul ignores the plethora of allegations in the Amended Complaint that detail his pilfering of the GDA Entity accounts for his own benefit and the benefit of his family and friends. (Amd. Compl. ¶¶ 72-76, 293-94, 296-99, and Ex. 3). For example, the Amended Complaint alleges that "from 2003 through August 2018, Dragul, in active concert with the other Defendants, stole over $20.2 million from investors which was used, *inter alia*, to pay

[21] The Hershey Defendants also contend that the Receiver's unjust enrichment claims fails because the Receiver has an adequate remedy at law. However, under Colorado law, legal and equitable claims can be pled in the alternative. *See, e.g.., Interbank Investments, L.L.C. v. Vail Valley Consol. Water Dist*., 12 P.3d 1224, 1232 (Colo. App. 2000) and C.R.C.P. Rule 8(c)(2).

almost $9 million in gambling debts, to pay millions to his family and the Non-Dragul Defendants, and to fund the extravagant lifestyles of Dragul, his family, coworkers, and those Dragul designated as "friends of the house." (Amd. Compl. ¶ 293).

Accordingly, the Receiver has adequately pled a claim for unjust enrichment as to Dragul and the Hershey Defendants, sufficient to provide notice of the claim and the bases therefor. *See Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1480 (D. Colo. 1995) (finding claims for unjust enrichment asserted by defrauded investors against a bank, its officers and employees purportedly involved in the Ponzi scheme).

D. The Receiver's Claims Are Not Time Barred.

Defendants argue that the Receiver's Claims for Violation of the CSA, Negligence, Negligent Misrepresentation, Aiding and Abetting, Violation of COCCA, Fraudulent Transfer and Unjust Enrichment are untimely. As discussed below, each of Defendants' arguments is without merit and fails as a matter of law.

With regard to the statute of repose, applicable only in connection with the First Claim for Violation of the CSA, the Amended Complaint alleges that each Defendant committed securities fraud in connection with the purchase or sale of a security consummated within the last five years. As such, this argument, which only Fox advances, is without merit.

The statute of limitations is an affirmative defense. *See* C.R.C.P. 8(c); *Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 151 (Colo. App. 2018). Defendants bear the burden of establishing the applicability of the statute of limitations. *See W. Distr. Co. v. Diodosio*, 841 P.2d 1053, 1057 (Colo. 1992). To do so, "the applicability of the defense has to be clearly indicated and must appear on the face of the pleading[.]" *Williams v. Rock-Tenn Servs., Inc.*, 370 P.3d 638,

642 (Colo. App. 2016) (internal quotations omitted). "Whether a particular claim is time barred presents a question of fact and may only be decided as a matter of law when the undisputed facts clearly show that the plaintiff had, or should have had the requisite information as of a particular date." *See Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007) (internal quotations and citations omitted). "Typically, when a plaintiff knew or should have known of his or her injury and its cause is a question of fact for the jury to determine. A triable factual issue remains when there is sufficient evidence for a jury to reasonably find for the plaintiff." *Nichols v. Burlington N. & Santa Fe Ry. Co.*, 56 P.3d 106, 109 (Colo. App. 2002) (internal citations omitted).

Here, many of the relevant allegations fall within the applicable statutes of limitations irrespective of the date of discovery. Moreover, the Receiver alleges with specificity that, due in large part to the Defendants' active concealment, he could not possibly have known of the injury and cause thereof prior to August 2018. *See* Complaint ¶¶ 259-292. The Complaint also alleges that Defendants actively concealed their wrongful conduct from the GDA Entity investors by, among other things, refusing to produce books, records and financials. *Id.* ¶¶ 73, 259, 276. At a minimum, a triable factual issue exists regarding the statute of limitations which precludes dismissal of any of the Receiver's claims at this point.

1. The First Claim for Violation of the CSA is Not Time Barred by Either the Five-Year Statute of Repose or the Three-Year Statute of Limitations.

Section 604(8) of the CSA provides in relevant part:

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

The Fox Defendants argue the Receiver fails to allege securities fraud in connection with the purchase or sale of a security consummated within five years of the date of the Complaint.[22] Dragul and the Hershey Defendants also argue the securities fraud claim is barred by the statute of limitations.[23] These arguments are contrary to the allegations in the Amended Complaint.

i. Statute of Repose

The Fox Defendants concede that two securities transactions involving ACF occurred within the limitations period: (1) the April 2018 sale of Loggins; and (2) the September 2018 sale of Laveen Ranch. *See* Fox MTD at 21 (citing Amd. Compl. ¶¶ 135, 204-08). However, they argue that these claims are not actionable because the Receiver fails to allege that the Fox Defendants were involved in Dragul's activities relative to these securities transactions. *Id.* Not so. For example, the Complaint details the Fox Defendants' direct fraud in connection with the sale of Laveen Ranch securities in the very same paragraphs the Fox Defendants cite in their Motion. (*See* Amd. Compl. ¶¶ 204-08). In particular, the Receiver alleges that in a September 13, 2018, letter sent to the investors in Laveen Ranch, including the Dragul SPE, the Fox Defendants misstated

[22] Dragul, and the Hershey and Markusch Defendants complain that many of the referenced securities transactions predate January 21, 2015, or August 30, 2014. As discussed in this section, these transactions, while barred for the purposes of the securities fraud claim, are actionable under COCCA. *See People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012). With respect to the securities fraud claim, Dragul concedes that at least sixteen (16) securities transactions were consummated within five years of the date of the Complaint. *See* Dragul Motion at 21-22 (citing Amd. Compl. Exs. 33, 42). Hershey similarly concedes that four transactions post-date August 30, 2014. *See* Hershey Motion at 10 (citing Amd. Compl. ¶ 148, 155, Ex. 33). Markush makes no reference to statutes of repose or limitation. Thus, Dragul, Hershey, and Markush do not argue that the securities fraud claims asserted against them are barred by the statute of repose.

[23] Fox does not make a statute of limitations argument in connection with the CSA. *See* Fox MTD at 19-24.

the amount of membership interests sold and investor returns, and failed to disclose other material facts. (*Id.* ¶¶ 205-06).

Additionally, Exhibit 6 to the Complaint identifies three commission payments made to the Fox Defendants after January 21, 2015, in connection with the sale of securities. And paragraphs 331(a)-(p) of the Amended Complaint detail the Fox Defendants' securities fraud violations in connection with all of the relevant transactions, including the most recent transactions identified on Exhibit 6.

Finally, the Receiver asserts claims against the Fox Defendants for control person liability and substantial assistance under subsections 604(5)(a), (b) and (c). (*See* Amd. Compl. ¶¶ 339-349). Specifically, the Receiver alleges that "Fox had the power to influence and control and did influence and control, directly or indirectly, over the decision-making of Dragul, including the distribution and making of false and misleading statements to prospective investors and in material omissions contained in the Solicitation Materials."(*Id.* ¶ 34)2. The Receiver similarly alleges that the Fox Defendants provided substantial assistance to Dragul in several ways including, "[m]aking material misstatements to the GDA Entity Investors to induce their investment in both Fox and Dragul formed and controlled SPEs." *Id.* ¶349(b). Based on such control and substantial assistance, the Fox Defendants are, as a matter of law, jointly and severally liable with Dragul, including in connection with the securities transactions Dragul concedes transpired after January 21, 2015. *See* C.R.S. § 11-51-604(5)(a), (b) & (c); Dragul MTD at 21-22 (citing Amd. Compl. at Exs. 33 and 42).

ii. Statute of Limitations.

To begin, several of the relevant securities transactions occurred within the three-year statute of limitations period, *i.e.*, after January 21, 2017, for the Fox Defendants, Dragul and the Markusch Defendants, and after August 30, 2016, for the Hershey Defendants, who executed a Tolling Agreement. As discussed above, the Fox Defendants and Dragul committed securities fraud in connection with a September 13, 2018, letter, which is attached to the Amended Complaint as Exhibit 38. Exhibit 3 to the original complaint identifies commission payments made to Dragul after January 21, 2017, each of which is alleged to involve securities fraud. (*See* Amd. Compl. ¶¶ 328, 331(k)). And the Fox and Hershey Defendants are jointly and severally liable for such security fraud based upon their control of and substantial assistance to Dragul. *See* C.R.S. § 11-51-604(5)(a), (b) & (c). Thus, the Court can and should reject Defendants' statute of limitations argument without considering when the claims could have reasonably been discovered.

With respect to discovery, Defendants bear the burden of establishing that the factual allegations "clearly show that the plaintiff had, or should have had the requisite information as of a particular date." *See Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307. Just the opposite is true here. The Amended Complaint details, in numerous places, why the claims could not have been discovered prior to August 30, 2018. (*See* Amd. Compl. ¶¶ 73, 259-292). With respect to the securities fraud claim, the Complaint alleges:

> Neither the Receiver nor the GDA Entity Investors could have discovered these material misstatements and omissions made in connection with the sale of securities prior to August 30, 2018, at the earliest, through reasonable diligence because (a) the Receiver did not have access to the GDA books and records before that date as Dragul and GDA were not yet subject to a receivership, (b) Dragul and the Fox Defendants refused to produce the SPE books to the GDA Entity Investors on numerous occasions; and (c) the

> manner in which Dragul conducted GDA's business was designed to conceal or hide the facts of his fraud, theft, and material misrepresentations and omissions. Moreover, upon information and belief, Dragul destroyed or deleted data, information, documents, and other electronically stored information prior to the Receiver's appointment.

(Amd. Compl. ¶ 353). These allegations are more fully detailed elsewhere in the Amended Complaint, including paragraphs 259 through 292. The Receiver alleges that "Dragul refused to produce the SPE books and records to GDA Entity Investors for inspection despite periodic requests,"(*id*. at ¶ 259), and, in any event, Dragul and Markusch routinely reversed and comingled funds at the end of financial reporting periods to falsely represent to investors the financial condition of the SPE. (*Id*. ¶ 73). "Even after the Receiver was appointed, Dragul and his staff, including Markusch, and the Kahn Defendants concealed documents and information from the Receiver and his counsel and thwarted such efforts to uncover the truth." (*Id*. ¶ 260). For his part, "after the Receiver's appointment, Fox has systematically refused to produce documents in response to the Receiver's numerous requests" which resulted in the Receiver filing a Turnover Motion with the Receivership Court. (*Id.* ¶¶ 275-77). The Receivership Court granted the Turnover Motion on August 10, 2020, and ordered the Fox Defendants to turnover, among other things, operating agreements for 16 entities in which the Dragul SPE invested, tax returns and detailed financial records, all of which will finally provide the Receiver visibility into these entities and the relevant transactions. *See* Order, attached as **Exhibit 4.**

The Hershey Defendants contend that because the Colorado Securities Commissioner and Attorney General began to investigate Dragul and the GDA Entities in 2014, the Receiver and/or GDA Entity Investors should have discovered their fraud by 2017. *See* Dragul MTD at 11. This assertion is unsubstantiated and nonsensical. First, any knowledge of the Securities Commissioner

or Attorney General is not imputed to either the Receiver or GDA Entity Investors. Second, Dragul fails to explain how either was equipped to discover his fraud notwithstanding the active concealment detailed in the Amended Complaint. In fact, Dragul (and the other Defendants) say nothing in response to the Receiver's allegations of active concealment as relating to when the Receiver could reasonably have discovered the basis for his securities fraud claims.

Finally, Dragul conflates the statute of repose with the statute of limitations. He argues the Receiver's allegations fail to show the claims based on Plaza Mall and Prospect Square are timely under the three-year statute of limitations because the transactions at issue took place between 2008 and 2016. *See* Dragul MTD at 22. These arguments ignore entirely the discovery rule. The Receiver's securities fraud claim is timely.

iii. Statute of Repose for Securities Registration and Licensing Violations.

Claims for securities registration and licensing violations must be brought within "two years of the contract of sale." C.R.S. § 11-51-604(8). Dragul, and the Fox and Hershey Defendants contend that the Receiver has not pointed to any contract of sale on or after January 21, 2018 (for Dragul and the Fox Defendants) or after August 30, 2017, for the Hershey Defendants. *See* Dragul MTD at 21; Fox MTD at 22; Hershey MTD at 10. Defendants are wrong.

As detailed above and in the Amended Complaint, Dragul, and the Fox Defendants[24] sold unregistered securities without a license in violation of C.R.S. §§ 11-51-301 and 401 as late as 2018. *See* Complaint ¶¶ 204-212 & Ex. 39 thereto; *see also id.* ¶ 316 (referencing 2018 transaction in connection with registration violations). Moreover, without a license, Dragul consummated four sales of unregistered securities after January 21, 2018, which are identified on Exhibit 3 to the

[24] The Receiver does not assert a registration claim against the Hershey Defendants.

original Complaint. The Hershey Defendants violated the licensing provisions of the Colorado Securities Act after January 21, 2018, by soliciting and selling membership interests in the four SPEs identified on Exhibit 3. *Id.* ¶¶ 321-22.

2. The Second and Third Claims for Negligence and Negligent Misrepresentation Against the Hershey Defendants are Timely.

The Hershey Defendants argue that the Receiver's negligence and negligent misrepresentation claims are barred by applicable statutes of limitations – two years for negligence and three years for negligent misrepresentation. *See* Hershey MTD at 11; C.R.S. § 13-80-101(c); C.R.S. § 13-80-102. Dragul joins this argument but fails to apply it to the specific allegations against him. *See* Dragul Notice of Joinder at 2, filed July 13, 2020. None of the remaining Defendants advance a statute of limitations argument relative to the negligence claims.

A claim for negligence accrues when both the injury and its cause are known or should have been known through the exercise of reasonable diligence. C.R.S. § 13-80-108(1). Negligent misrepresentation claims accrue when the misrepresentation is discovered or should have been discovered through reasonable diligence. C.R.S. § 13-80-108(3).

The negligence and negligent misrepresentation claims are premised on the same conduct at issue in the Receiver's securities fraud claim. (*See* Amd. Compl. ¶¶ 355-370). And the Hershey Defendants make the exact same fatally flawed arguments here – namely, they ignore transactions within the applicable statute of limitations and contend that the Securities Commissioner's investigation somehow put the GDA Entity Investors and Receiver on notice of the claims. These arguments fail for the same reasons outlined in the prior section. The Receiver's negligence and negligent misrepresentation claims are not time barred.

3. The Fifth and Sixth Claims for Violation of and Aiding and Abetting Violations of COCCA are Timely.

A claim for violation of COCCA must be filed within five (5) years of when the claim accrues. C.R.S. § 13-80-103.8. However, "if one predicate act falls within its respective limitations period, other predicate acts occurring within ten years before the occurrence of the first can be presented as evidence of racketeering activity even if they could not give rise to a separate prosecution." *See People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012). Among others, the Receiver asserts predicate acts for violations of the CSA and wire fraud.[25] *See* Amended Complaint ¶ 386; C.R.S. § 18-17-103(5).

The Fox Defendants argue the Receiver's purported failure to allege timely acts of securities fraud or wire fraud render the COCCA claim untimely. *See* Fox Motion at 24-25. As demonstrated above, the Receiver's securities fraud claims are timely. And the Fox Defendants fail to address the timeliness of the wire fraud claim as a predicate act whereas the Complaint is replete with allegations of recent wire fraud by these Defendants. *See, e.g.,* Amd. Compl. ¶¶ 270-288, 387(b).

The Hershey Defendants concede the Receiver has alleged predicate acts within the applicable statute of limitations[26] but contend that many of their wrongful acts are not actionable because they accrued more than five years prior to the Tolling Agreement. *See* Hershey Motion at

---

[25] The Complaint also alleges that Dragul and the Fox Defendants' bankruptcy fraud under 18 U.S.C. § 152(5) and (8) constitute predicate acts. (*See* Amd. Compl. ¶ 387(d)). The Fox Defendants argue bankruptcy fraud under 18 U.S.C. § 157 does not qualify as a predicate act. *See* Fox Motion at 24. That is correct, but the Complaint relies on § 152 not § 157. Section 152 involves concealing assets, making false statements and fraudulently transferring or concealing assets, which the Receiver has alleged occurred here. (*See* Amd. Compl. ¶ 387(d)).

[26] Thereby conceding that the claim is not time-barred.

12-13. The argument fails for two reasons. First, neither the GDA Entity Investors nor the Receiver could have discovered the wrongful conduct through reasonable diligence within that timeframe for the reasons discussed above. Second, because the Receiver has alleged at least one predicate act within the applicable statute of limitation (as the Hershey Defendants concede), they may, as a matter of law, present evidence of racketeering activity up to ten years prior to that predicate act. *Davis*, 296 P.3d at 229. Thus, the COCCA claims are timely.[27]

4. The Eleventh Claim for Fraudulent Transfer is Timely.

Dragul and the Fox Defendants argue that the Receiver's Fraudulent Transfer claim is untimely because the claim was not 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." C.R.S. § 38-8-110; Dragul MTD at 23-24; Fox MTD at 26-27.[28] To the contrary, many of the fraudulent transfer commissions identified in Exhibits 3-7 of the original Complaint were made within four years of the date the Complaint was filed (January 21, 2016). Additionally, as alleged in detail in the Amended Complaint and explained in the attached Affidavit of Ms. Drew, the GDA Entity Investors had no way of knowing about the fraudulent transfers because Dragul refused to produce the SPE books and records despite periodic requests and, once the Receiver was appointed, Dragul and the other Defendants actively concealed their misconduct and relevant documents, which prevented discovery until late 2019. (Amd. Compl. ¶¶ 259-292). *See* Affidavit of Sephanie Drew, attached as **Exhibit 5**.

[27] Dragul and the Markusch Defendants do not make any independent argument regarding the timeliness of the COCCA claims.

[28] The Hershey and Markusch Defendants do not independently make this argument.

These circumstances distinguish *Lewis v. Taylor*, 375 P.3d 1205 (Colo. 2016), upon which Dragul relies. *See* Dragul MTD at 25. There, the Colorado Supreme Court noted that the relevant fraudulent transfer "was or could reasonably have been discovered by the Receiver on the date of his appointment." 375 P.3d at 1207. In *Lewis*, unlike here, there is no indication that the entities in receivership actively concealed relevant information or documents from the receiver. Simply put, *Lewis* does not establish a per se rule that a fraudulent transfer claim accrues no later than the date a receiver is appointed, or otherwise abrogate the statutory discovery rule.

The Fox Defendants argue that only three of the commissions are within the limitations period and the Receiver fails to allege sufficient facts to support recovering them as fraudulent transfers. *See* Fox MTD at 27. In doing so, the Fox Defendants again ignore the discovery rule. Because the GDA Entity Investors did not have access to the commission information and the Receiver was unable to identify the fraudulent transfers until 2019, all of the commissions paid are recoverable by the Receiver. Additionally, as discussed above, the Receiver's allegations regarding the commissions contain the requisite specificity. *Supra* at II. C.

5. The Twelfth Claim for Unjust Enrichment is Timely .

Dragul and the Fox Defendants argue that because the unjust enrichment claim seeks the same relief as the fraudulent transfer claim, it is subject to the same statute of limitations, and is similarly time-barred. *See* Dragul MTD at 24-25; Fox MTD at 26-27. But the fraudulent conveyance claim is not time-barred and, as such, neither is the unjust enrichment claim

III. CONCLUSION

For the foregoing reasons, the Receiver respectfully asks requests that the Court deny the Defendants' Motions to Dismiss the First Amended Complaint.

DATED: AUGUST 17, 2020

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: *s/ Rachel A. Sternlieb*
Patrick D. Vellone, #15284
Matthew M. Wolf, ##33198
Rachel A. Sternlieb, #51404
Michael T. Gilbert, #15009
1600 Stout Street, Suite 1900
Denver, Colorado 80202
Tel: (303) 534-4499
pvellone@allen-vellone.com
mwolf@allen-vellone.com
rsternlieb@allen-vellone.com
mgilbert@allen-vellone.com

ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, a true and correct copy of the foregoing, **Receiver's Omnibus Response in Opposition to Defendants' Motions to Dismiss the Amended Complaint** was filed and served via the Colorado Courts E-Filing system to the following:

Paul L. Vorndran
Christopher S. Mills
Jones Keller, P.C.
1999 Broadway Street
Suite 3150
Denver, CO 80202
pvorndran@joneskeller.com
pmills@joneskeller.com
Counsel for Defendant, Gary Dragul

Thomas E. Goodreid
Goodreid and Grant, LLC
1801 Broadway, Suite 1400
Denver, CO 80202
(303) 296-2048
t.goodreid@comcast.net
Counsel for Defendants, Marlin Hershey and Performance Holdings, Inc.

John M. Palmeri
Margaret L. Boehmer
Gordon Rees Scully Mansukhani LLP
555 17th Street, Suite 3400
Denver, CO 80202
jpalmeri@grsm.com
mboehmer@grsm.com
Counsel for Defendants Benjamin Kahn and the Conundrum Group, P.C.

Lucas T. Ritchie
Eric B. Liebman
Moye White LLP
1400 16th Street, 6th Floor
Denver, CO 80202-1486
Luke.Ritchie@moyewhite.com
Eric.Liebman@moyewhite.com

Gary S. Lincenberg
Sharon Ben-Shahar Mayer
Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.
1875 Century Park East
Twenty-Third Floor
Los Angeles, CA 90067
glincenberg@birdmarella.com
smayer@birdmarella.com

Counsel for Defendants, Alan C. Fox and ACF Property Management, Inc.

Thomas F. Quinn, P.C.
303 East 17th Avenue, Suite 920
Denver, CO 80203
Tel: 303.832.4355
tquinn@tfqlaw.com
Counsel for Defendant, Susan Markusch

s/ Terri M. Novoa
Allen Vellone Wolf Helfrich & Factor P.C.

In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

DATE FILED: August 17, 2020 6:11 PM
FILING ID: 59781EAFEAE91
CASE NUMBER: 2020CV30255

EFILED Document
Filing ID: 46907178
Review Clerk: Tina Brown

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Address: City and County Building 1437 Bannock Street Denver, CO 80202	**COURT USE ONLY**
Plaintiff: FRED J. JOSEPH vs. **Defendants:** SEAN MICHAEL MUELLER, *et al.*	Case No. **10CV3280** Courtroom: **203**

ORDER RE:

JEFFRIES' MOTION TO LIFT STAY AND ENJOIN RECEIVER FROM PROCEEDING WITH FINRA ARBITRATION AND RECEIVER'S MOTION TO COMPEL ARBITRATION

The issues currently before the Court involve Motions filed on July 10, 2012 by a brokerage firm, Jeffries & Company, Inc. (Jeffries) to lift the April 27, 2010 stay on actions against Mr. Mueller and his hedge funds, and to enjoin the Receiver from proceeding with most of his claims in an arbitration currently pending before the Financial Industry Regulatory Agency (FINRA), as well as a Motion filed by the Receiver on August 28, 2012 to Compel Arbitration, seeking to require Jeffries to proceed with a FINRA arbitration as to the Receiver's claims. The Securities Commissioner has filed a limited joinder in the Receiver's Motion.

For the reasons set forth below, the Court **denies** Jeffries' Motion and **grants** the Receiver's Motion.

I. Background and Factual History of Issues

The details of the present case are set forth in the parties' Motions and will not be repeated here.

M.S. Howells (Howells) is a brokerage firm. It entered into a written Fully Disclosed Clearing Agreement with Jeffries, a much larger broker-trader, to carry out various instructions and clear securities which Howells traded. Howells acted as the Introducing Broker and Jeffries acted as the Clearing Firm.

In running the ponzi schemes which underlie this receivership, Mr. Mueller's hedge funds placed orders through Howells which, in turn, carried out and cleared those trades through Jeffries between approximately January 2008 and October 2009.

On April 13, 2012, the Receiver initiated a FINRA arbitration proceeding against Jeffries, seeking to recover approximately $42,000,000 (including approximately $32,000,000 in investor money that was allegedly transferred through Howells to Jeffries) under claims arising under the Colorado CUFTA statute as well as under theories of negligence, aiding and abetting, unjust enrichment and equitable disgorgement.

On July 10, 2012, the Receiver and Jeffries submitted the controversy to FINRA arbitration, as follows:

FINRA ARBITRATION Submission Agreement

In the Matter of the Arbitration Between

Name(s) of Claimant(s)

C. Randel Lewis

12-01388

Name(s) of Respondent(s)

Jefferies & Company, Inc.

1. The undersigned parties ("parties") hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure.

2. The parties hereby state that they or their representative(s) have read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules.

3. The parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s). The parties further agree and understand that the arbitration will be conducted in accordance with the FINRA Code of Arbitration Procedure.

4. The parties agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement. The parties further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. The parties hereto have signed and acknowledged the foregoing Submission Agreement.

[signature] 7/10/12

Jefferies & Company, Inc. | Asst General Counsel | Date

State Capacity if other than individual (e.g., executor, trustee, corporate officer)

LC43A: SUBMISSION AGREEMENT
idr: 02/09/2009

RECIPIENTS:
Eugene McGivney, Mgr., Jefferies & Company, Inc.
Jeffries & Company, Inc., 520 Madison Avenue, 16th Floor, New York, NY 10022

On July 10, 2012, Jeffries also filed its Motions in this case.

On July 11, 2012, Jeffries filed a lengthy answer and response to the Receiver's claims in the FINRA arbitration, in which it raised issues asserting the Receiver's lack of standing to bring the claims and under the *in pari delicto* doctrine (Mr. Mueller and the hedge funds were guilty of wrongdoing and the Receiver, who stands in the Estate's shoes, cannot assert claims against a third party in which the Estate participated). On July 12, 2012, Jeffries designated nonparties at fault in the FINRA arbitration.

In its current Motions, Jeffries seeks to enjoin the Receiver from proceeding with most of the claims in the FINRA arbitration. Jeffries argues the Receiver lacks standing to assert those claims because, in essence, they represent investors' payments made into the Estate, and not payments by the Estate to Jeffries, and because the Receiver stands in the shoes of the Estate and is *in pari delicto* with the Estate. The Receiver seeks to compel Jeffries to submit to the arbitration and argues Jeffries' written agreement with Howells requires it to submit the present controversy to arbitration.

II. Applicable Case Law and Analysis

Jeffries claims that decisions of the Colorado Court of Appeals and Second Circuit are on point and compel the Court to stay the FINRA arbitration because the Receiver lacks standing. The Court respectfully disagrees.

In *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 782 (Colo. App. 1997), Donahue operated a ponzi scheme through various hedge funds and defrauded investors out of hundreds of millions of dollars. The hedge funds filed (or were compelled to file) for Ch. 7 bankruptcy protection and liquidation. The bankruptcy court appointed a bankruptcy trustee. The investors filed class action claims against Kidder Peabody (brokerage), which were settled. Then, after the class action settlement, the bankruptcy trustee (representing the estate of Donahue and his hedge funds) brought an action in state district court against the brokerage, claiming that it had aided and abetted Donahue and to compel arbitration on that claim. The brokerage moved for summary judgment, arguing that the bankruptcy trustee lacked standing to pursue the case. The trial court granted summary judgment in favor of the brokerage, finding no standing, a ruling that was affirmed by the Court of Appeals.

> [The trustee's] amended complaint alleged that the [hedge funds] had suffered substantial economic losses as a result of [the brokerage's] alleged wrongdoings. However, even if we

> assume that there are [investors] who have suffered economic losses notwithstanding the separate litigation noted above [the investors' class action which had been settled], we conclude that [the bankruptcy trustee] lacks standing under the second prong of the standing test.
>
> * * *
>
> . . . 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.

Sender, 952 P.2d at 781-82. Because of its conclusion that the bankruptcy trustee lacked standing to assert the claims against the brokerage, the Court did not reach the merits of the issue of the motion to compel arbitration.

The Court finds that *Sender* is readily distinguishable. In *Sender,* the investors had already sued and settled their claims against the brokerage in a separate class action in state court, *before* the bankruptcy trustee subsequently raised additional claims against the brokerage; here, no such claims have been filed or settled by the Mueller investors against Jeffries. In *Sender,* the trustee's claims related to alleged injuries done to the *wrongdoer* (the hedge funds) due to the brokerage's alleged wrongdoings; here, as Jeffries recognizes, the Receiver is pursuing claims claiming injuries to the Mueller investors, not the Mueller hedge funds. In *Sender,* there was no signed agreement to arbitrate; here there is. Jeffries' argument about *Sender* is somewhat like trying to force a square peg into a round hole: while merely taking isolated sentences from *Sender* and trying to force them to fit the facts of this case can make it seem like *Sender* is dispositive of the issues here, it is not . . . it does not fit the facts of this case.

In *Shearson Lehman Hutton, Inc. v. Wagoner,* 944 F. 2d 114 (2nd Cir. 1991), Kirschner incorporated a wholly owned corporation. The corporation opened brokerage accounts with Shearson (the brokerage). Acting through Kirschner, the corporation then engaged in a ponzi scheme and issued illegal securities to fellow members of Kirschner's church. The corporation later went bankrupt. The bankruptcy court appointed a receiver, who filed claims against the brokerage, including claims that the brokerage churned the corporation's accounts, as well as claims on behalf of the fellow church members. The brokerage agreement between the corporation and the brokerage contained an arbitration clause. The Second Circuit held that a portion of the trustee's claims (the direct churning claim against the brokerage) should proceed to arbitration under the arbitration clause, but held the bankruptcy trustee lacked standing to assert the church members' claims against the brokerage:

> To the extent the demand alleges money damages to [the corporation], it is uncontested that [the corporation's] sole stockholder and decisionmaker, Kirschner, not only knew of the bad investments, but actively forwarded them. A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation. . . . We therefore hold that the trustee lacks standing to bring the second claim, which belongs solely to the creditors.

944 F.2d at 120.

Wagoner is less inapposite than *Sender* but it does not, in the Court's view, mandate the conclusion that the Trustee here lacks standing to pursue the arbitration. *Wagoner* was decided in the context of a bankruptcy trustee and the the federal Bankruptcy Code[1], inapplicable here. The *Wagoner* trustee tried to assert the *wrongdoers'* (the corporations and Kirschner's) claims against the brokerage, claims which the court held belonged to the investors, not the corporation; here, the Trustee seeks to assert claims which belong to the investors, not to the Mueller hedge funds. And, importantly, unlike this case, the *Wagoner* parties had no signed agreement to arbitrate.

The Court finds the reasoning in *Scholes v. Lehmann,* 56 F.3d 750 (7th Cir.1995), most applicable to the present situation. There, one Michael Douglas set up corporations which, in turn, offered sales of shares in limited partnerships of which the corporations were the general partners. All investments were part of a ponzi scheme which, after defrauding investors of millions of dollars, fell apart. The federal SEC brought an action in federal court and, at its request, the court appointed a receiver for the corporations to recover money on behalf of the investors. The receiver then pursued claims under the state fraudulent conveyance statute for monies transferred to Douglas' ex-wife, to a 'net winner' in the ponzi scheme, and to charities Douglas liked. The Seventh Circuit rejected the assertions that the receiver lacked standing to proceed:

---

[1] "Under the Bankruptcy Code the trustee stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy. *See* 11 U.S.C. §§ 541, 542 (1988). . . ." 944 F.2d at 119. *See In re Hedged-Investments Associates, Inc.*, 84 F.3d 1281, 1285 (10th Cir. 1996)("Though the Seventh Circuit's reasoning in *Scholes* enjoys a certain appeal, both from doctrinal and public policy perspectives, we cannot adopt it in this case. Put most simply, Mr. Sender is a bankruptcy trustee acting under 11 U.S.C. § 541, and bankruptcy law, apparently unlike the law of receivership, expressly prohibits the result Mr. Sender urges." (Footnote omitted)

> The argument that [receiver] did not [have standing to sue] is that he was "really" suing on behalf not of Douglas or Douglas's corporations, the perpetrator and tools of the Ponzi scheme, respectively, but of the investors, the purchasers of limited-partners interests in the corporations; and a receiver does not have standing to sue on behalf of the creditors of the entity in receivership. Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit. How, the defendants ask rhetorically, could the allegedly fraudulent conveyances have hurt Douglas, who engineered them, or the corporations that he had created, that he totally controlled and probably (the record is unclear) owned all the common stock of, and that were merely the instruments through which he operated the Ponzi scheme?
>
> The answer—so far as the corporations are concerned, and we need go no further—turns out to be straightforward. The corporations, Douglas's robotic tools, were nevertheless in the eyes of the law separate legal entities with rights and duties. They received money from unsuspecting, if perhaps greedy and foolish, investors. That money should have been used for the stated purpose of the corporations' sale of interests in the limited partnerships, which was to trade commodities. Instead Douglas caused the corporations to pay out the money they received to himself, his ex-wife, his favorite charities, and an investor, Phillips, whom Douglas wanted to keep happy, no doubt in the hope that Phillips would invest more money in the Ponzi scheme or encourage others to do so. In the case of the ex-wife, the money went from the corporations first to Douglas and then from him to her, but we cannot see what difference that should make. If the money stopped with Douglas, a certain awkwardness might arise from the fact that Scholes is the receiver both for Douglas and for the corporations which would be suing him for that money. But that is not our case and we need not consider it.
>
> * * *
>
> Now that the corporations created and initially controlled by Douglas are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by Douglas. We cannot see any legal objection and we particularly cannot see any practical objection. The conceivable alternatives to these suits for getting the money back into the pockets of its rightful owners are a series of individual suits by the investors, which, even if successful, would multiply litigation[.]

56 F.3d at 753, 754-55. *See, e.g., Wing v. Hammons*, 2009 WL 1362389 (D. Utah 2009)("The reasoning in *Scholes* has been endorsed in several Ponzi scheme cases involving federal equity receivers. *See, e.g., Donell v. Kowell,* 533 F.3d 762, 777 (9th Cir.2008) ("The Receiver has standing to bring this suit because,

although the losing investors will ultimately benefit from the asset recovery, the Receiver is in fact suing to redress injuries that Wallenbrock suffered when its managers caused Wallenbrock to commit waste and fraud."); In re *Burton Wiand,* No. 8:05-CV-1856-T-27MSS, 2007 WL 963165, at *2 (M.D.Fla. Mar.27, 2007) ("Because the corporation was injured by the diversion of its assets, the receiver, standing in the shoes of the corporation, had standing to set aside the fraudulent transfers."); *Quilling v. Cristell,* No. 3:04-CV-252, 2006 WL 316981, at *6 (W.D.N.C. Feb. 9, 2006) ("Under the clear and persuasive reasoning of the court in *Scholes,* the Receiver, as receiver for all entities owned or controlled by Gilliland, including the Gilliland Entities, properly has standing to bring the fraudulent transfer claims that he is asserting against Defendants."); *Obermaier v. Arnett,* No. 2:02-CV-111, 2002 WL 31654535, at *4 (M.D.Fla. Nov.20, 2002) ("The Receiver, as an equity receiver, clearly has standing to bring claims if the causes of action attempt to redress injuries to the Receivership Entities.")

Here, the Receiver is acting on behalf of the investors and against the alleged wrongdoer (Jeffries) for monies which were paid to it (through Howells) by Mr. Mueller and the Mueller hedge funds. Especially in a non-bankruptcy context and considering the objectives of the Receiver's broad powers under the April 27, 2010 appointment and CUFTA, the Court finds that this is an appropriate exercise of the Receiver's authority. Moreover, Judge Carrigan's ruling in *Johnson v. Chilcott,* 590 F.Supp. 204, 209-10 (D.Colo.1984)(dismissing receiver's federal claims under Commodities and Securities Exchange Acts against individuals employed at brokerages, but <u>not</u> state-law fraud and negligence claims), supports rather than refutes the Receiver's position here.

The Court disagrees that Jeffries faced a 'Hobson's choice' in either responding to the Receiver's arbitration or violating FINRA or NYSE rules. Of note, Jeffries did not specifically object to the arbitration in its Answer. To be sure, Jeffries raised the issues about the Receiver's standing and *in pari delicto* defense in its answer (the identical issues raised here); but, it did not object. *Compare Prudential Securities, Inc. v. Emerson,* 905 F. Supp. 1038, 1043 (M.D. Fla. 1995) ("In its written answer to the Emersons' statement of claim, Prudential Securities objected to the arbitrability of the insurance claims.") (*See* Jeffries' Answer to Arbitration, ¶¶ 37 – 42). Instead, Jeffries signed an unqualified agreement to arbitrate, reproduced above, containing no objection, limitation or reservation. This represents a clear and unequivocal agreement to arbitrate, including the issues of the Receiver's standing and the *in pari delicto* defense. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995)

("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so.")

For these reasons, the Court finds that the Receiver has standing to pursue, and that Jeffries has agreed to arbitrate, the claims. Because these are claims brought by the Receiver and defenses which Jeffries raises, there is no present issue about lifting the stay against Mr. Mueller or the Estate. The Receiver's Motion to Compel Arbitration is **granted** and Jeffries is ordered to proceed with the FINRA arbitration.

Dated this 10th day of October, 2012.

BY THE COURT:

Edward D. Bronfin
District Court Judge

cc: All counsel

DADATE FILED: AugMsty 171, 2020 69157PAM
FILFNGNO: 1597SA0A3F47AE9835
CASEASNUMBER: 2020C180V23011

District Court, Denver County, State of Colorado Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433	
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▲
<u>Attorneys for Receiver</u>: 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*

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
1600 Stout Street, Suite 1900
Denver, Colorado 80202
Tel: (303) 534-4499
pvellone@allen-vellone.com
mgilbert@allen-vellone.com
rsternlieb@allen-vellone.com

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:

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

Tung Chan, Securities Commissioner for the State of Colorado

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

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

DATE FILED: August June 5 17, 2020 2020 6:11 PM
FILING ID: 159 7A8 19 E3A F E4A E 49 D 5FF
CASE NUMBER: 2020 2018 CV 3 3 011 1

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
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 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. 2018CV33011 Courtroom: 424

DEFENDANT GARY DRAGUL'S OBJECTION TO RECEIVER'S FOURTH APPLICATION FOR PROFESSIONAL FEES AND EXPENSES

Defendant Gary Dragul through undersigned counsel, objects to the Receiver's Fourth Application for Professional Fees and Expenses ("Fee Application" or "Fee App."), as follows:

INTRODUCTION

The Receiver filed the Fee Application on May 11, 2020, seeking an additional $392,064.76 for himself, his counsel, accountants, and a property manager, for five months of work, in addition to the $2,546,774.81 in fees he has already been awarded. After deducting this

new amount from the Receiver's operating account, that would leave about $520,000 remaining for distribution to creditors of the Estate—approximately 17% of the fees the Receiver and his colleagues received.

The assets the Receiver took into the Estate upon appointment were worth approximately $4,315,000 on a book liquidation value matrix, plus contingent assets of $4,270,000 for real property assets after anticipated appreciation, and a range of $12,475,000 to $22,475,000 for the Special Purpose Entity membership interest assets. (Ex. 1.)[1] But the Receiver mismanaged and abandoned valuable properties and other assets, resulting in only $912,778.64 in his operating account *before* deducting the fees he now seeks to pay himself.

Worse, in the first three months of the Receivership, before the Receiver or his counsel had incurred much in fees billed against the Estate, the Receiver received and rejected offers to purchase much of or all of the assets in Receivership, each of which would have netted the Estate—and the investors—over $5,000,000, and in most cases would have resulted in a full recovery for those investors, plus interest. By rejecting those offers, the Receiver cost the investors millions. He did, however, significantly increase the fees he and his counsel were able to recover in this matter.

The reasonableness of fees that may be recovered are in large part dependent on value or benefit they provide to the client—the results obtained. Here, the Receiver's and Receiver's counsel's work *cost* the investors benefit, leaving them with virtually nothing.

---

[1] Ex. 1 is a Nov 2, 2018 memo from The Conundrum Group (Ben Kahn) described more fully below.

ARGUMENT

Paragraph 13(l) of the Order Appointing Receiver ("Receivership Order") authorizes the Receiver to pay "general counsel, accounting, and other professionals as may be *reasonably necessary* to the proper discharge of the Receiver's duties[.]" (emphasis added.) As to attorney fees, "[a] party requesting an award of attorney fees bears the burden of proving by a preponderance of the evidence its entitlement to such an award." *Kinsey v. Preeson*, 746 P.2d 542, 551-52 (Colo. 1987). "A court makes an initial estimate of a reasonable attorney fee by calculating the lodestar amount." *Payan v. Nash Finch Co.*, 310 P.3d 212, 217 (Colo. App. 2012). In determining the lodestar amount, courts multiply the number of hours reasonably expended by the reasonable hourly rate. *Tallitsch v. Child Support Services, Inc.*, 926 P.2d 143, 147 (Colo. App. 1996). As the party seeking to recover fees, the Receiver must establish the reasonableness of the fees it seeks to recover for its counsel. *Ramos v. Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). Here, the Receiver makes no attempt to establish the reasonableness of any of the fees he seeks to recover.

Moreover, the Colorado Rules of Professional Conduct also prohibit collecting an "unreasonable fee," to be determined according to the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

Colo. R.P.C. 1.5(a). Here, the key consideration is the amount involved and results obtained.

I. **<u>The Receiver Refused Offers to Purchase the Estate Assets That Would Have Resulted in Millions More Dollars to Investors (But Less in Fees to the Receiver & His Counsel), Rendering the Fees Sought Unreasonable</u>**

The assets originally in the Receivership Estate consisted generally of real property owned directly by the Receivership Estate after it was turned over immediately following appointment of the receiver, and Special Purpose Entity ("SPE") membership interests (also owning real property). (Ex. 1 at 2.)[2] On or about September 18, 2018, potential buyer Steve Grove offered the Receiver a net $10,178,094.00 including earmarks for certain liabilities, or $5,579,542.00 excluding the earmarks, to purchase GDA Real Estate Services, LLC ("GDARES") and the Receivership assets, keep GDARES as a going concern, and assume its liabilities. (*Id*. at 3.) It also would have provided a full return plus 8% interest to all investors. (*Id*. at 4.) The Receiver had been appointed only a couple weeks before and had therefore incurred minimal fees charged to the Estate. Had the Receiver accepted that offer then, the Estate would have had nearly that entire amount to distribute to creditors. He rejected it.

On September 26, 2018, Steve Grove submitted another purchase proposal, for a net $10,178,004.00 including earmarks for certain liabilities, or $5,579,451.00 without. (Ex. 1 at 4-5.) It again would have provided a full return plus interest to all investors. (*Id*.) The Receiver rejected it.

---

[2] Ex. 1 is the Nov 2, 2018 memo from The Conundrum Group (Ben Kahn) who had been performing legal work for the GDA Entities before the Receivership, and continued doing legal work for the Receivership after that. The memo summarizes purchase offers for the Receiver. Actual evidence of the assets in the Receivership Estate, and of the actual offers, generally via Letters of Intent directly from the prospective buyers, exist on the GDA Server. The Receiver seized the GDA Server, and has thus far refused to provide a complete copy to Mr. Dragul.

On October 4, 2018, Steve Grove submitted another proposal to purchase just the assets for $5,580,000.00 with no earmarks or conditions. (Ex. 1 at 5.) The Receiver rejected it.

On or about October 30, 2018, Steve Grove submitted a letter of intent for a fourth proposal, which would have been for $5,200,000.00 for the real estate assets and certain but not all SPE membership interests with no earmarks. (Ex. 1 at 5-6.) The Receiver rejected it.

In approximately early November, 2018, Don Provost and Alberta Development were prepared to submit a proposal to purchase the real estate assets and most of the SPE membership interests for $6,000,000 with certain conditions. (Ex. 1 at 6-7.) The Receiver rejected it.

Around the same time, Nick Liu was prepared to submit an offer to acquire all the real estate assets for $5,000,000.00. (Ex. 1 at 7-8.) The Receiver rejected it.

Also around the same time, Hagshama was prepared to offer approximately $1,000,000.00 for the SPE membership interests. (Ex. 1 at 8.) Since it did not cover the real estate assets, the Receiver could have accepted it in combination with Nick Liu's offer. (*Id.*) The Receiver rejected it.

All of these offers were made within the first three months of appointment of the Receiver, before the Receiver or his counsel had incurred much in fees (and before the value of the assets dropped through mismanagement). They all would have resulted in a return to investors of millions of dollars more than the $912,778.64 currently in the Receiver's operating account to pay creditors, of which only $520,713.88 will remain after deducting the fees he requests now. However, if he had accepted any of these offers, the Receiver and his counsel and other professionals would not have been able to collect the $2,546,774.81 in fees they have already taken from the Estate, plus $392,064.76 in new fees they seek now.

II. The Receiver Mismanaged Properties in the Estate and Lost All or Most of Their Value, Rendering the Fees Sought Unreasonable

When the Receiver was appointed, he inherited myriad properties with equity in each ranging up to nearly $6 Million, and deals nearly finalized to bring in substantially more income. (Ex. 2.)[3] This is demonstrated by the purchase offers described above. The Receiver squandered virtually all of that value. For example, with Happy Canyon Market and Happy Canyon Shoppes, the Receiver received combined equity of $5,943.423.00.[4] (*Id.* at 2.) It was in the process of being remodeled and leases had already been signed for about 85% of the property. (*Id.* at 32-37.) When the Receiver took over, he shut down construction, left the property dormant for 14 months, lost all of the tenants, and ultimately sold the property for a net inflow to the Receivership Estate of approximately $623,000.[5]

With the Prospect Square property, the Receiver received $2,670,981.00 of equity owned by GDARES or Gary Dragul.[6] (Ex. 2 at 2.) It was 79% leased and Mr. Dragul had a new lease ready to be put in place with Big Lots for a space being vacated by Krogers. (*Id.* at 44-48.) The Receiver failed to complete the Big Lots deal. He swept rents from other tenants, but ignored the existing lender and stopped making mortgage payments. The Receiver then abandoned the

---

[3] Ex. 2 is a summary of equity in and features of properties in the Receivership Estate prepared for and provided to potential buyer Steve Grove. Underlying documentation for each property exists in the GDA Server, which the Receiver seized and has thus far refused to provide a copy of to Mr. Dragul. This exhibit is not paginated; the page numbers refer to PDF page.

[4] Mr. Dragul or GDARES owned and turned over to the Receiver 100% of the equity in Happy Canyon Shoppes; other equity in Happy Canyon Market was also held by GDARES's institutional partner, Hagshama, and other equity owners.

[5] *See* Rec'vrs 4th Rep. 3, showing $600,494.52 for Happy Canyon Shoppes and some unidentified small fraction of $710,000 for Happy Canyon Market.

[6] Similarly, other equity was held by Hagshama and other equity owners.

property and the lender put it into a separate receivership and foreclosed. (Rec'vrs 4th Rep. 4, showing abandonment.)

With the Clearwater Collection property, the Receiver received $2,116,269.00 in equity.[7] (Ex. 2 at 2.) It was 87% leased with tenants including Floor & Décor and LA Fitness. (*Id.* at 17-21.) The Receiver abandoned the property and the lender put it in another receivership and moved to foreclose. (Rec'vrs 4th Rep. 4, showing abandonment.) The Receiver walked away from over $2.3 million in lender reserves which he could have recovered for the Estate.[8]

The Estate also took possession of myriad residential properties. It abandoned most of them. While they were in the Receiver's possession, he made no effort to maintain their value, including by performing even basic maintenance. The resulting decrease in value is why the Receiver abandoned them. By way of one example, the property at 5788 Lansing sustained such heavy and wide-spread water damage under the Receiver's watch that it will likely be a total loss.[9] And for another residential property, 1660 N. LaSalle, Unit 3909, in Chicago, Illinois, the Receiver did not pay HOA dues. That lead to the HOA foreclosing on the property. (Ex. 4.)

The Receiver cost the Estate substantial value. That result does not warrant more fees.

III. The Receiver Unlawfully Walked Away From Money Owed to the Estate Under a Consulting Agreement, Rendering the Fees Sought Unreasonable

On July 26, 2018, GDARES (as consultant) and Reali Capital, LLC ("Reali") entered into a consulting agreement ("Consulting Agreement") whereby GDARES—through Gary Dragul and his team—would provide due diligence, market analysis, leasing, property improvements,

---

[7] Again, other equity was held by Hagshama and other equity owners.
[8] Ex. 3. Specifically, this lender reserve is the sum of the $1,282,643.09 of "Suspense Balance" and 988,248.44 of "Reserve Balance".
[9] *See* still photos taken from video attached as Ex. 12.

tenant finish, business operations, and value maximalization services to Reali in connection with Reali's purchase and operation of a commercial property in Castle Rock, CO. (Ex. 5 & *id.* §§ I.A-F, II.A.) In exchange, GDARES would be paid consulting fees calculated according to a formula dependent on the type of work being performed, rents received, increase of value to the property, etc. (*Id.* §§ II.B, E.)

Subsequently, the Receiver took over as Receiver for GDARES and Mr. Dragul. On November 6, 2018, the Receiver and Mr. Dragul, on behalf of GDARES, Reali, and Mr. Dragul personally on his own behalf, then entered into an amendment to the Consulting Agreement ("Amended Consulting Agreement"). (Ex. 6.) Notably, Mr. Dragul did not merely sign as president of GDARES, but also as and for himself personally. This was because Mr. Dragul was personally to perform the consulting services for GDARES. No investor funds were involved.

The Amended Consulting Agreement changed some but not all payment terms.[10] Notably, payment was to be allocated 20% to Harvey Sender as Receiver for Mr. Dragul and GDARES (meaning to the Estate), and the remaining 80% to an account chosen by the

[10] The consultant was still due the Property Services fee of 2.5% of base rents actually received per § II.B.1.a of the original Consulting Agreement, unless Reali chose to buy out the consultant or sell the property, and the consultant was still due either: 1) Per the original Consulting Agreement § II.E.1, if Reali opts to buy out consultant, consultant is due an amount based on what the proceeds from the sale of the property would have been if Reali opted to sell rather than buy out consultant minus certain enumerated deductions, except that the amount Reali gets to deduct from that amount is increased by $100,000 (per § 4 of the Amended Consulting Agreement), and the amount paid to consultant is reduced by 75% (per § 5 of the Amended Consulting Agreement); or (2) Per original Consulting Agreement § II.E.2, if Reali sells the property, the consultant is due am amount calculated by taking the proceeds and deducting certain enumerated deductions, except that the amount Reali may deduct is increased by $100,000 (per § 4 of the Amended Consulting Agreement), and the amount paid to consultant is reduced by 75% (per § 5 of the Amended Consulting Agreement). If either (1) or (2) is paid, $100,000 must be deducted from it and paid to Ronen Sadeh (per § 8 of the Amended Consulting Agreement). (*See* cited sections in Exs. 5, 6.)

consultant, which the parties all understood was for ultimate receipt by Mr. Dragul personally since he personally would be performing the work and could not lawfully be forced to perform work with no compensation.[11]

On March 19, 2019, Reali and—purportedly—GDARES, terminated the Consulting Agreement and Amended Consulting Agreement. (Ex. 7, "Termination Agreement").) The Receiver signed on behalf of GDARES. Mr. Dragul did not sign on behalf of GDARES, or on his own behalf personally, though he signed for both in the Amended Consulting Agreement. Indeed, Mr. Dragul was never even informed of this termination. Since Mr. Dragul was a signatory to the Amended Consulting Agreement but not to the Termination Agreement, the Termination Agreement is void, or at least not binding on Mr. Dragul. Moreover, the Receiver never sought the Court's permission to terminate—and thereby abandon this asset—though he recognized the need to seek Court approval to abandon other property.

And here, this asset is quite valuable. If the Termination Agreement were invalid—which it is—Reali still owes between approximately $587,687 and $2,050,343, based on market factors, to not only Mr. Dragul via GDARES, but to the Receivership Estate. (Ex. 8.)[12] Not only

---

[11] If this were not the case, there is no discernable reason the allocation would not have been 100% to the Receiver.

[12] The Ex. 8 spreadsheet reflects anticipated amounts owing, depending on capitalization rate, of the buy-out option under the Consulting Agreement and Amended Consulting Agreement (p. 1), and sale-of-property option (p. 2-3). The highest estimated number in the "Total Remaining" column (i.e., total remaining to be paid) is $2,050,343 for the buy-out option at a 7% cap rate (p. 1), and the lowest amount is $587,687 for the sale-of-property option at an 8% cap rate (p. 3).

did the Receiver unlawfully terminate the Amended Consulting Agreement, but he abandoned between $117,537.40 and $410,068.60[13] of value to the Estate for no reason whatsoever.[14]

IV. **The Receiver Already Has Virtually All of Mr. Dragul's Assets, Yet is Billing the Estate to Sue Mr. Dragul for Damages He Cannot Collect, Rendering the Fees Sought Unreasonable**

When the Receiver was appointed, including as Receiver for Mr. Dragul personally, Mr. Dragul turned over virtually all of his assets to the Receiver. That ultimately included chattel and assets that did not meet the definition of Receivership Property but which Mr. Dragul chose not to fight. Mr. Dragul now has approximately zero net worth. The Receiver knows this, as the Receiver seized *all* of Mr. Dragul's personal and professional financial records. Yet, despite the fact Mr. Dragul is himself in the Receivership, the Receiver sued Mr. Dragul, apparently seeking damages of over $19 million. Since the Receiver already took Mr. Dragul's assets and added them to the Receivership Estate, he will need to satisfy any judgment he receives against Mr. Dragul first out of the Receivership Estate if he is to avoid an unlawful double recovery. It makes no sense to satisfy a judgment intended to benefit creditors out of funds the Receiver already has to pay to creditors. And even if the Receiver were to try to execute on a judgment against Mr. Dragul, he cannot. Mr. Dragul has nothing to satisfy it with, which the Receiver knows. Thus, the Receiver has incurred and will continue to incur significant fees and costs (even if its counsel were to shift to contingency) with no hope of recovering anything more from Mr. Dragul for creditors. The only parties who benefit from this are the Receiver and his

[13] Based on the 20% of the above numbers that would be allocated to the Estate.
[14] Indeed, drafting and executing the Termination Agreement cost the Estate more out of pocket than simply doing nothing and leaving the Amended Consulting Agreement in place.

counsel. Since the fees the Receiver seeks to prosecute the claims against Mr. Dragul cannot possibility benefit the Receivership Estate, they are not reasonable.

V. The Receiver Incurred over $200,000 in Fees to Recover $93,000 From the Draguls, Rendering the Fees Sought Unreasonable

The fees obtained by the Receiver for himself, accountants, and Allen Vellone in the Third Fee Application, and those sought in the Fourth Fee Application here, appear to reflect at least $204,811.50 of fees spent pursuing assets from Mr. Dragul and his family members. (Ex. 9, highlighted entries.) The Receiver recovered $33,545.40 for assets the Draguls turned over (Rec'rs 4th Rep. 8), and another $60,000 for two of the Draguls' properties, 2432 S. Newport and 2625 S. Oneida (*id*. 4), for a total of $93,545.40. The creditors would have been better off if the Receiver focused his efforts elsewhere.

VI. The Receiver's Counsel's New Fee Agreement is Contrary to the Rules of Professional Conduct and Results in Unreasonable Fees, Rendering the Fees Sought Unreasonable

Paragraph 13(o) of the Receivership Order permits the Receiver to retain counsel on contingency only on "commercially *reasonable* terms, as determined by the Receiver in the exercise of his *reasonable* business judgment[.]" (emphasis added.) In connection with his Fourth Report, the Receiver filed a "Notice Concerning Revised Compensation of Allen Vellone Wolf Helfrich & Factor P.C." ("Comp Notice"). It provides notice that the Receiver's legal counsel ("Allen Vellone") is moving from hours-based compensation to the following contingent fee compensation for two particular civil cases, effective November 1, 2019:

> 25% of any recovery obtained in either case [2019CV33373 and 2020CV30255] 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.

(Comp Notice ¶ 5.) This compensation arrangement is unreasonable for several reasons.

First, Allen Vellone was already paid $1,060,816.70 on an hourly basis in this Receivership (Fee App. 3), including approximately $52,705.13[15] specifically for the two civil cases at issue in the contingent fee arrangement. Under the new fee arrangement, Allen Vellone would receive a contingent percentage *on top of* those hourly fees already received, resulting in an unreasonable fee.

Second, the contingent fee arrangement itself is contrary to the Rules of Professional Conduct. Pursuant to Colorado Rule of Professional Conduct 1.5(1), a lawyer may not collect an unreasonable fee. Colo. R. Gov'g Contingent Fees 3(d) prohibits contingent fee agreements that are "unconscionable, unreasonable, and unfair." Colo. R.P.C. 1.5(f) notes that "[f]ees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client." Here, the amount of the fee agreement is untethered from the provision of any benefit or performance of any legal service. For example, if Allen Vellone does no further legal work between now and September 5, 2020, its contingent fee will jump from 25% to 38% due just to the passage of time, despite that Allen Vellone conferred no benefit and performed no work. The agreement might pass muster if it were tied to particular work—for example, if the contingent fee jumped when Allen Vellone started trial, or even when it started trial preparation two weeks before trial. But here it does not even do that. Consequently, the fee arrangement is barred under Colo. R.P.C. 1.5(f) because the contingent amounts increase without having been earned through conferral of a benefit or performance of work.

---

[15] See highlighted entries on Ex. 10. This amount is approximate because the fee entries for the two civil cases do not appear to be recorded to a separate matter number prior to November 1, 2019, are not always sufficiently clear to determine what case they related to, and were often block billed.

Finally, 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[.]" While some of the Receiver's claims in the two civil cases, such as fraudulent transfer, might be construed to seek to recover Receivership Property (though that is disputed), many of the claims seek to recover damages—and not even for injury to the entities in receivership, but to third parties such as creditors. But Receivership Property only encompasses assets related to or derived from investor funds, (Rec. Order ¶ 9), not damages. Thus, the Receiver lacks authority to hire counsel on a contingent basis to recover damages on these claims.

VII. <u>The Receiver and His Counsel Block-Billed, Rendering the Fees Sought Unreasonable</u>

Block billing is a deviation from the standard practice in Colorado and "across-the-board percentage cuts are routinely employed by courts to remedy such block billing." *Payan*, 310 P.3d at 218. "[W]here services are listed or lumped together without any specific indication of the time spent on each service the explanation is inadequate." *In re Associated Grocers of Colo., Inc.*, 137 B.R.413, 420 (Bankr. D. Colo. 1990); *accord Ramos*, 713 F.2d at 553 (time records "must reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks[.]"). Colorado courts have the "authority to reduce hours that are billed in block format." *Payan,* 310 P.3d at 216-17 (20 percent reduction in all hours billed for block billing); *see also In re Beverly Mfg. Corp.*, 841 F.2d 365, 370 (11th Cir. 1988); *Henderson v. Horace Mann Ins. Co.*, 560 F. Supp. 2d 1099, 1117 (N.D. Okla. 2008) ("Courts confronted with block-billing have reduced the attorney fees claimed by a fixed percentage or disallowed them entirely.").

Here, the Receiver and his counsel (and accountants) block-billed the majority of their fee entries. (*See generally*, Fee App. Exs. 1-3.) For example, the February 12, 2020 time entry for Allen Vellone timekeeper "MTG" reflects a total of 5.25 hours spent on nine discrete tasks without separating the time by task. (Fee App. Ex. 2 at 17.) Additionally, the Allen Vellone entries include a cost for $3,500.00 for "Professional services – JON LEADER, ESQ." (Fee App. Ex. 2 at 29.) The Receiver provides no breakdown or even explanation of this charge, which facially appears to be legal fees.

VIII. Allen Vellone Routinely Disregarded the Court's Rules and Rules of Civil Procedure, Rendering the Fees Sought Unreasonable

On more than one occasion, the Receiver's counsel publicly-filed and then posted on its website confidential identifiers including account numbers and social security numbers, of Mr. Dragul and his family members. (Ex. 11.) He only redacted them after being called out, though he repeated the offense again, only to redact after being called out again. Then, the Receiver's counsel did it a third time, this time with Alan Fox, as Mr. Fox's May 13, 2020 Motion to Strike establishes. That Motion to Strike also points out that the Receiver's counsel included in his reply on his turnover motion against Fox myriad new arguments and nineteen new exhibits, all of which should have been included in his original turnover motion to adequately support the relief he sought. And the Receiver's counsel exceeded the page limits for a reply by 50% without seeking leave of Court to do so. More should be expected of counsel billing well over $1 million in legal fees to the Estate.

CONCLUSION

The Receiver is entitled only to reasonable fees, which are in large part based on the value he provides to the creditors. Here, he rejected offers that would have resulted in millions

more going to creditors, squandered Estate assets, and incurred fees far exceeding what he obtained for the Estate. The $2,546,774.81 he has already received exceeds reasonable compensation. Mr. Dragul respectfully requests the Court deny the Fee Application.

Mr. Dragul further respectfully requests the Receiver be directed to serve this Response on all known creditors of the Receivership Estate pursuant to the Court's February 1, 2019 Order clarifying notice procedures for the case, and permit those creditors additional time to respond to the Receiver's Fee Application.

Respectfully submitted this 5th day of June, 2020.

JONES & KELLER, P.C.

<u>/s/ Christopher S. Mills</u>
Paul Vorndran, #22098
Chris Mills, #42042
1999 Broadway, Suite 3150
Denver, CO 80202
Teleph: (303) 573-1600
Facsimile: (303) 573-8133

ATTORNEYS FOR DEFENDANT GARY DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S OBJECTION TO RECEIVER'S FOURTH APPLICATION FOR PROFESSIONAL FEES AND EXPENSES** was filed and served via the ICCES e-file system on this 5th day of June 2020 to all counsel of record for the parties to the action, including the following:

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout St., Suite 1100
Denver, Colorado 80202
Phone Number: (303) 534-4499
pvellone@allen-vellone.com
mgilbert@allen-vellone.com
rsternlieb@allen-vellone.com

Counsel for Receiver

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

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

/s/ Christopher S. Mills
Christopher S. Mills

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Court Address: City and County Building
1437 Bannock Street
Denver, CO 80202

DATE FILED: August [illegible], 2020 [illegible]
CASE NUMBER: 2018CV33011 [illegible]
CASE NUMBER: 2020CV30255

Plaintiff:

DAVID CHEVAL, Acting Securities Commissioner for the State of Colorado

v.

Defendant:

GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC.

▲ COURT USE ONLY ▲

Case Number: **18CV33011**

Courtroom: **424**

ORDER RE: RECEIVER'S MOTION FOR TURNOVER vs. ALAN C. FOX AND ACF PROPERTY MANAGEMENT, INC.

The Court has reviewed the motion, the response filed on behalf of non-parties Alan C. Fox and ACF Property Management, Inc., the reply and sur-reply filed thereto. The Court has also considered the various attachments to the pleadings, applicable authorities and the Court's file, as well as the statements and arguments presented at the hearing on the motion. The Court now enters the following findings and orders.

1. Documents

The Receiver seeks the disclosure from the non-parties of documents deemed necessary in order to value and market the Receiver's membership interest in a variety of entities created by the non-parties. Among the categories of documents subject to the turnover motion are (1) operating agreements for each of the 16 identified entities; (2) tax returns for each entity for the last five years; (3) detailed financial statements for each entity for the

last five years; (4) debt/loan documents related to the financing of each entity and related financing information; (5) documentation of the owners of each entity, including changes in ownership during the past five years; and (6) the most recently available appraisals of the real estate owned by each entity.

The Court finds that the documents requested by the Receiver are relevant and necessary for a proper valuation of the Receiver's membership interest in the specified entities, and that such valuation is likewise necessary for the Receiver to accomplish its mandate to liquidate these membership interests for the benefit of the Estate. Although the non-parties raised a variety of objections to disclosure of the documents in their written pleadings, they acknowledged at the hearing on the motion that their primary concern was obtaining an appropriate confidentiality agreement to protect itself and others from what they consider inappropriate disclosure.

The Court accordingly **grants** the Receiver's motion for disclosure of the categories of documents specified in the motion, subject to an appropriate confidentiality agreement. The confidentially agreement must recognize the Receiver's need to share documents and other information derived from the documents with internal staff, experts, third-party prospective buyers and others involved in liquidating the assets, as well as the Court. The confidential agreement, however, may limit disclosure of the documents and information derived therefrom with other entities and parties who are not related with or involved in the marketing and sale of various membership interests for the benefit of the Estate. Such non-disclosure includes the non-parties' involvement in independent litigation.

The Receiver and the non-parties represented at the hearing that they would cooperate to draft a mutually acceptable agreement for the Court's approval, which is now so ordered, subject to the general parameters as stated in this order. To the extent that issues persist as to the scope or limits of the confidentiality agreement, such issues may be set for a further hearing.

2. Distributions

It is undisputed that the non-parties have withheld in excess of $180,000.00 in distributions owing to the Estate. Regardless of "concerns" expressed by the non-parties as to how the Receiver might "handle" the distributions, the non-parties have failed to state a legal

justification for withholding the distributions that due and owing to the Receivership Estate.

Accordingly, the Receiver's motion for the non-parties to pay the Estate the $184,637.00 in withheld distributions, as documented in the motion, as well as a complete and accurate accounting of all distributions owed to the Estate, is granted. Such payment shall be accomplished within 14 days of this order. Any additional accounting shall be accomplished within 35 days of this order.

3. Transfer of SSC 02, LLC

The Receiver's motion seeks an order requiring the non-parties to convey to the Receiver the Estate's former SSC 02 interests in Kenwood Pavilion 14 A, LLC, Fenton Commons, and College Marketplace, or to otherwise pay to the Estate the reasonable value of the asset. In essence, the Receiver asserts that the non-parties conspired with Dragul (and possibly others) to illicitly remove the assets from the Receivership Estate, and that the transfer of the asset to the non-parties was fraudulent.

The Court recognizes that the circumstances of the transfer, as outlined in the motion and reply, raise suspicion about the nature of the transfer and the non-parties' notice or knowledge of the Estate's asserted interest in the asset. However, the Court also recognizes that requiring the non-parties to reconvey the asset to the Receiver (or pay commensurate value) under the auspicious of the Receivership Order, without the process and findings otherwise required by Colorado's Uniform Fraudulent Transfer Act, deprives the non-parties of significant due process rights, not the least of which is to confront and challenge the allegations and mount a defense in a court of law.

Accordingly, the motion to convey the Estate's former interest in the SSC 02 entity is **denied**. Relief, if any, should be sought by other means, including relief via the CUFTA.

SO ORDERED, this 10th day of August, 2020

BY THE COURT:

Martin F. Egelhoff
District Court Judge

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: August 17, 2020 6:11 PM FILING ID: 59781EAFEAE91 CASE NUMBER: 2020CV30255
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 Plaintiff: Patrick D. Vellone, #15284 Matthew M. Wolf, #33198 Rachel A. Sternlieb, #51404 Michael T. Gilbert, #15009 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout Street, Suite 1900 Denver, Colorado 80202 Phone (303) 534-4499 pvellone@allen-vellone.com mwolf@allen-vellone.com rsternlieb@allen-vellone.com mgilbert@allen-vellone.com	Case No.: 2020CV30255 Division/Courtroom: 414

AFFIDAVIT OF STEPHANIE DREW

I, **STEPHANIE J. DREW**, declare under penalty of perjury that:

1. I am a partner RubinBrown's Corporate Finance and Forensic Services Group (the "Firm"), an accounting firm with its Denver office located at 1900 16th Street, Suite 300, Denver, Colorado 80202.

2. RubinBrown was retained by Harvey Sender as Receiver in the above-captioned case on September 7, 2018 to assist him in administering the Receivership Estate, including providing forensic accounting and expert witness services, as well as tax preparation services to the Estate.

3. I am the supervising partner on this engagement and have been primarily responsible for the work performed in this case to date.

4. RubinBrown and I have extensive experience in providing expert witness and forensic accounting services in connection with litigation support and with respect to the matters for which it is to be employed in this case.

5. RubinBrown did not obtain access to the GDA Server until September 2018 when a forensic copy of the GDA server was obtained by RubinBrown IT personnel. At that time, neither RubinBrown nor the Receiver had access to GDA's QuickBooks because access credentials were not provided, which were different than the credentialed access to the general server. We did not receive passwords until the end of February 2019.

6. Even upon obtaining access to the GDA QuickBooks files, foundation for the s allegations, including the impact to the SPEs and the individual investors could not be ascertained.

7. The books of SPE's were maintained in two separate accounting systems, Colonial and QuickBooks, which included over 90 sets of books, most of which did not contain a complete and accurate set of accounting transactions. This was in part due to the voluminous nature of the commingling between the SPE's, GDA Real Estate Services and Gary Dragul.

8. Further, Markusch stopped reconciling the cash transactions for the GDA Entities in QuickBooks in mid 2017 after Dragul's indictment. Instead, , Markusch began keeping handwritten reconciliations including bank transfer detail,

check copies, and bank statements, which were concealed from the Receiver. This documentation was stored in eleven boxes and three grocery bags which were found in Markusch's dining room when the Receiver executed Writs of Assistance in April 2019.

9. Along with the reconciliations, the stored documentation included closing statements related to property acquisitions, tax information, investor records, operating agreements, promissory notes, loan schedules, correspondence with investors; financial information related to Performance Holdings, .notes related to liquidity issues with the SPEs, printed email correspondence, bank statements and payroll records

10. Additionally, RubinBrown did not have access to complete copies of bank statements for the SPE accounts, as they were not saved on the GDA server. My understanding is that the Receiver's attorneys subpoenaed statements for numerous different accounts from 10 different banks. See copies of subpoenas attached hereto as Exhibit 1. From January through October 2019, the subpoenaed banks produced voluminous bank records for the GDA Entities, from which we used in part to compile a master cash database, which was substantially completed in May 2019.

11. It was not until that time that a complete financial analysis could be performed including, but not limited to, the commissions identified in the First Amended Complaint and Exhibits thereto.

Executed on August 17, 2020.

Stephanie J. Drew

Subscribed and sworn before me,
this 17th day of August, 2020, by
Stephanie J. Drew.

WITNESS my hand and official seal.

My commission expires: 6/20/2024

[SEAL]

Notary Public