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| DISTRICT COURT, DENVER COUNTY, COLORADO<br>Court Address:<br>1437 Bannock Street, Rm 256, Denver, CO, 80202 | |
| **Plaintiff(s)** GERALD ROME SECURITIES COM FOR THE ST OF<br>v.<br>**Defendant(s)** GARY DRAGUL et al. | DATE FILED: November 13, 2018 6:32 AM<br>CASE NUMBER: 2018CV33011<br>CASE NUMBER: 2020CV30255<br>⚠ **COURT USE ONLY** ⚠<br>Case Number: 2018CV33011<br>Division: 424 Courtroom: |

**Order: (Proposed) Order Granting Receiver's Motion to Establish Claims Administration Procedure and to Set Claims Bar Date**

The motion/proposed order attached hereto: SO ORDERED.

Issue Date: 11/13/2018

MARTIN FOSTER EGELHOFF
District Court Judge

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| DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO<br>Denver District Court<br>1437 Bannock St.<br>Denver, CO 80202 | |
| **Plaintiff: Gerald Rome, Securities Commissioner for the State of Colorado**<br><br>v.<br><br>**Defendant: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC** | ▲COURT USE ONLY▲ |
| | Case Number: 2018CV33011<br><br>Division/Courtroom: 424 |

**ORDER GRANTING RECEIVER'S MOTION TO ESTABLISH CLAIMS ADMINISTRATION PROCEDURE AND TO SET CLAIMS BAR DATE**

This matter is before the Court on the Receiver's Motion to Establish Claims Administration Procedure and to Set Claims Bar Date **(**the "Motion") for the Receivership Estate of Gary Dragul ("Dragul"), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities (the "Estate"). The Court has reviewed the Motion and the file. Good cause exists to establish a claims procedure and claims bar date. It is therefore

ORDERED that the Receiver's Motion is GRANTED and the claim form and notice attached to the Motion are APPROVED;

IT IS FURTHER ORDERED that all parties asserting claims against the Estate shall submit claims to the Receiver on or before **February 1, 2019**; the Receiver shall promptly provide the Notice to all known creditors and parties in interest as set forth in the Motion, and shall file a certificate of service reflecting the same;

IT IS FURTHER ORDERED that for any unknown claimant not receiving Notice of the claims bar date within time sufficient to file a claim by February 1, 2019, the Receiver shall email or send by U.S. first-class mail the Notice and Claim Form promptly upon discovering any further claimant and shall file an additional certificate of service. Such claimant shall then have a period

of forty-five (45) days from the Receiver's mailing within which to submit a claim to the Receiver in accordance with the procedures approved herein. Finally,

IT IS FURTHER ORDERED that any claimant – as a condition of obtaining an allowed claim against the Estate – shall dismiss (without prejudice) any claim or cause of action pending against Dragul, the Dragul Entities, and any related entities that are part of the Receivership Estate. Failure to do shall result in a waiver of any right to participate in the Receivership claims administration process

Dated: _____, 2018

BY THE COURT

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| DISTRICT COURT, DENVER COUNTY<br>STATE OF COLORADO<br>Denver District Court<br>1437 Bannock St.<br>Denver, CO 80202 | DATE FILED: September 8, 2020 6:02 PM<br>FILING ID: B65D8C3CAA36B<br>CASE NUMBER: 2020CV30255 |
| **Plaintiff:** HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC<br><br>v.<br><br>**Defendants:** GARY J. DRAGUL, an individual; BENJAMIN KAHN, an individual; THE CONUNDRUM GROUP, LLP, a Colorado Limited Liability Company; SUSAN MARKUSCH, an individual; ALAN C. FOX, an individual; ACF PROPERTY MANAGEMENT, INC.; a California Corporation, MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; OLSON REAL ESTATE SERVICES, LLC, a Colorado Limited Liability Company; JUNIPER CONSULTING GROUP, LLC, a Colorado Limited Liability Company; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10. | ▲ COURT USE ONLY ▲ |
| Attorneys for Defendant Gary J. Dragul<br>Paul L. Vorndran, Atty. Reg. No. 22098<br>Christopher S. Mills, Atty. Reg. No. 42042<br>Jones & Keller, P.C.<br>1999 Broadway, Suite 3150<br>Denver, CO 80202<br>Phone: 303-573-1600<br>Email: pvorndran@joneskeller.com<br>cmills@joneskeller.com | Case No. 2020CV30255<br><br>Courtroom: 414 |

**DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

The Receiver complains Defendants' arguments "would render a receiver appointed by Colorado's Securities Commissioner . . . powerless to redress the very wrongs he was appointed to remedy." (Resp. 2.) That view explains the Receiver's overreaching here (and the $2,938,838.00 he billed the Estate, leaving only about $520,000 for distribution to creditors). Receivers are not appointed to "redress wrongs." That is the Commissioner's or prosecutor's job. Rather, as the Receiver concedes, "[t]he 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." (Resp. 2 (quoting *Hart v. Ed-Ley Corp.*, 482 P.2d 421, 425 (Colo. App. 1971).) The Receiver's *ultra vires* strategy to "redress wrongs" allegedly suffered by third-party investors, plus additional defects, justify dismissing the First Amended Complaint ("FAC").

## ARGUMENT

### I. The Receiver Lacks Standing to Assert Investor-Creditors' Claims

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

The Receiver does not contest that he brings *all* his claims against Mr. Dragul on behalf of investors. (*See* FAC ¶¶ 316, 357, 361, 362, 370, 372, 379, 409-410, 412-15, 443-44, 448.) Rather, he argues some of those claims were *also* brought on behalf of the Receivership entities. Consequently, as shown in the Motion and below, at a minimum, *all* of the claims against Mr. Dragul must be dismissed, at least in part, because they are undisputedly all brought at least in part on behalf of investor-creditors.

But it turns out all the claims are *solely* investor-creditor claims. (Mot. 5-8.) In his Response, the Receiver concedes he asserts the Colorado Securities Act ("CSA") claims against Dragul (i.e., "stemming from the GDA-managed properties and sale of promissory notes") only "on behalf of the individual investors." (Resp. 13.) He concedes the same—that duties were

owed to only "GDA Entity *Investors*"—for the negligence and negligent misrepresentation claims. (Resp. 14, emphasis added.)[1]

The Receiver cites FAC ¶¶ 61, 62, 100, 153, 171, 180, 193, 197, 201, 266, 270, 277-80, 293, 294, 297, 391, and 406 to argue he adequately alleged civil theft on behalf of the Estate. (Resp. 15.) None of those paragraphs allege Mr. Dragul stole money that belonged to the GDA Entities in the Receivership. (Many allege GDA *received* money. *E.g.*, FAC ¶¶ 61, 153.) The closest the Receiver comes is in FAC ¶¶ 391 and 406—which are in the COCCA claim, not civil theft—when he alleges Defendants "pilfered the SPEs thereby damaging the GDA Entities . . ." and "pilfered the SPEs [and] . . . have injured the GDA Entity investors and the Receivership Estate[.]" But since the SPEs are creditors (FAC ¶¶ 316, 372), that only alleges (and without any facts to rise beyond a speculative level[2]) that the Defendants stole from creditors, and that the GDA Entities suffered some indirect harm, which is insufficient to make out a civil theft claim by the GDA Entities. C.R.S. § 18-4-401. Rather, the Receiver alleges *investors'* property was taken. (FAC ¶¶ 372-77.)

For COCCA, the Receiver argues he 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." (Resp. 16.) But the Receiver cites no paragraph of the FAC to support this assertion. And since he only alleges injury beyond a speculative level to investors

[1] He vaguely asserts Mr. Dragul also owed duties to the "SPEs" (Resp. 14), but also alleges the SPEs are creditors (*e.g.*, FAC ¶¶ 316, 372.) Since the Receiver merely incorporates by reference his negligence and negligent misrepresentation claims to argue his breach of fiduciary duty claim is not merely asserted on behalf of investors (Resp. 17), that claim is solely an investor claim for the same reasons. (*See also* Mot. 7-8.)

[2] The Receiver cites myriad pre-*Warne* cases to argue the FAC need only provide notice of the claims. (Resp. 24-26.) The notice pleading standard is precisely what *Warne v. Hall*, 373 P.3d 588 (Colo. 2016), rejected. Now, a plaintiff must meet the "plausibility" standard by pleading sufficient facts to raise the right to relief beyond a speculative level. *Id*. at 591.

and not the Receivership entities (FAC ¶¶ 383, 386(a) & (b), 387(a)-(d)), he alleges no proximate cause for a COCCA claim against the Receivership entities' principal, like Mr. Dragul, flowing from some purported indirect harm even if it had been alleged. (Mot. 7); *Mendelovitz v. Vosicky*, 40 F.3d 182, 187 (7th Cir. 1994). (The Receiver's cases supposedly to the contrary (Resp. 16) involved direct harm to the receivership entities).

The Receiver argues he alleges the fraudulent transfer ("CUFTA") claim on behalf of not only creditors but also the GDA Entities. (Resp. 17-18.) But the FAC's factual allegations fail to support that. (*See* Mot. 8 & FAC ¶s cited therein.) As a matter of law, CUFTA claims may only be asserted by creditors, C.R.S. §§ 38-8-105, 108, so the Receiver would have to allege the GDA Entities were creditors, which he does not. Thus, all the case law he cites in which receivers or trustees pursued fraudulent transfer claims are inapposite not only because they are not binding in Colorado, but because the receivership entities or debtors there were the defrauded creditors. (Resp. 17-18.)

The Receiver's argument that he alleged the unjust enrichment claim on behalf of not just investors but also the Estate suffers the same defect. (Resp. 19.) The Receiver points to FAC ¶¶ 72-76, 293-94, 296-99, and FAC Ex. 3 to argue Mr. Dragul pilfered money that belonged to the GDA Entities. (Resp. 43.) But those paragraphs allege Mr. Dragul pilfered funds belonging to investors or unidentified SPEs, not belonging to the GDA Entities, even if the SPEs' funds were routed through GDA accounts. Since the SPEs are creditors (FAC ¶¶ 316, 372), the Receiver asserts this claim solely on behalf of creditors too.

Thus, all the claims against Mr. Dragul are investor-creditor claims.

B. The Receiver Lacks Standing to Assert Investor-Creditors' Claims

"[G]enerally, a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve." *Good*

*Shepherd Health Facilities of Colorado, Inc. v. Department of Health*, 789 P.2d 423, 425 (Colo. App. 1989). He thus cannot assert claims belonging to third parties, such as creditors. *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 781 (Colo. App. 1997); *In re M & L Business Machine Co., Inc.*, 160 B.R. 850, 851 (D. Colo. 1993); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995); *Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1128 (D. Minn. 2012). (*See* Mot. 9-12.)

The Receiver tries to distinguish this authority. (Resp. 5-8, 10-12.) He argues *Sender v. Kidder Peabody*, 952 P.2d at 781, does not apply because it is a bankruptcy case. (Resp. 7-8.) Though it is a bankruptcy case in which the very Receiver here was serving as trustee, that distinction is of no import under Colorado law, as "[t]he office of receiver is in the nature of that of a trustee, and those who have lawful claims against the receivership estate are *cestuis que trustent*." *Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 33 (Colo. 1931); (*see also* Mot. 11).[3] Indeed, the Receiver here expressly relied on bankruptcy law when seeking approval from the court that appointed him to abandon properties of the Estate. (Ex. B at ¶ 4.) He did not think bankruptcy law inapplicable then.

[3] The Receiver relies on *Hedged-Invs. Assoc., Inc.*, 84 F.3d 1281, 1285 n.5 (10th Cir. 1996) to argue bankruptcy cases are inapplicable. (Resp. 7-8.) In *Hedged*, 84 F.3d at 1285, the Tenth Circuit applied *in pari delicto* to trustees, contrary to the holding in *Scholes v. Lehmann*, 56 F.3d 750, that *in pari delicto* does not apply to receivers. *Hedged* did so because the Bankruptcy Code governed whether a trustee could bring a claim arising from wrongdoing of the debtor. 84 F.3d at 1285. It did not, as the Receiver asserts, say that bankruptcy law has no application to receiverships; it expressly declined to opine whether the *Scholes* holding would have any application to receiverships here. 84 F.3d at 1285 n.5. In *Hedged*, the same Receiver here, as Chapter 7 trustee, sued an innocent investor when she received a return that exceeded the amount of her investment. *Id*. at 1283. Reiterating its holding in *Sender v. Simon*, 84 F.3d 1299, 1304-05 (10th Cir. 1996), the Tenth Circuit noted that Sender had no greater rights to sue than the debtor, and that he could not assert the claim against the investor because that claim did not belong to the debtor. *Hedged*, 84 F.3d at 1284.

The Receiver argues *Good Shepherd* does not address standing (Resp. 6), but it is unclear how its holding that "a receiver . . . may assert no greater rights than the entity whose property the receiver was appointed to preserve[,]" 789 P.2d at 425, could mean anything other than that a receiver has the same standing as the entity in receivership, and no more. And to the extent *Good Shepherd* approved the receiver's retention of funds (Resp. 6), it did so under a statute, C.R.S. § 25-3-108, that modified the law generally applicable to receiverships when Medicaid payments are at issue. 789 P.2d at 425-26.

In *First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC*, 166 P.3d 166, 180 (Colo. App. 2007), the court held the estate lacks standing to assert creditors' claims. The Receiver asserts this case is inapplicable because it addressed only a creditor's standing to pursue claims against a bankrupt's officers and directors. (Resp. 6.) In fact, as to one claim, the *First Horizon* court ruled that because the creditor was injured, the *estate did not have standing on that claim because the debtor was not the one injured*. *First Horizon*, 166 P.3d at 180-82. The *First Horizon* case is on all fours.

The Receiver's attempt to distinguish the federal authority Mr. Dragul cites (Resp. 10-12) fares no better. Though the parties agree standing in state court is controlled by state law, federal authority is consistent with Colorado's law and thus persuasive. In *Javitch*, 315 F.3d at 627, the Sixth Circuit held that "although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors[,]" that the receiver there was properly asserting the receivership entities' claims, and that the receiver was therefore subject to the receivership entities' arbitration agreements. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009), which the Receiver cites to try to distinguish *Javitch* (Resp. 9), noted that *Javitch* briefly considered

standing while addressing the question of arbitrability, but the *Wuliger* court then described at length that receivers lack standing to assert third party investors' claims. 567 F.3d at 794 (citing *Liberte Capital Group, LLC v. Capwill*, 248 Fed. Appx. 650, 652-54, 656-57 (6th Cir. 2005)). The *Wuliger* court then determined the receiver was asserting claims belonging to at least one receivership entity, not creditors' claims. *Id.* Thus, *Javitch*, *Wuliger*, *Liberte*, and the entire body of law in the Sixth Circuit demonstrates the Receiver here lacks standing to assert creditors' claims.

*Kelley*, 901 F. Supp. 2d at 1128, (*see* Mot. 10-11; Resp. 12), is also on point. There, the court explained at length, and cited myriad cases to support, that "an equity receiver may sue only on behalf of the entity (or person) in receivership, not third parties." *Id*. The Receiver's attempt to distinguish *Kelley* because the FDCPA claim there may only be asserted by the Government (Resp. 12) is unavailing, as the *Kelley* court simply applied the general rule that the receiver may not assert third parties' claims to hold the receiver could not assert the third party Government's claim. *Id*. (framing issue addressed).

And the Receiver's attempt to distinguish *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), because it "ultimately confirmed that a receiver may bring claims . . . alleging harm to the corporation in receivership" fails on its face. (Resp. 12.) The problem here is that the Receiver is not "alleging harm to the [entities] in receivership[,]" but rather harm to creditors, for which he lacks standing. 744 F. Supp. at 1421, 1422-25.

C. The Receivership Order Cannot Grant the Receiver Standing He Otherwise Lacks

The Receiver argues the Receivership Order (FAC/Compl. Ex. 1) grants him standing to assert creditors' claims. (Resp. 2-6.) Not so. (*See* Mot. 5, 9-12 & *id*. 9 n.4.) "[T]he appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Scholes v. Schroeder*, 744 F. Supp. at 1421.

"Granting a receiver authority to bring claims held by others would violate those limitations, as 'the ability to confer substantive legal rights that may create standing [under] Article III is vested in Congress and not the judiciary.'" *Kelley*, 901 F. Supp. 2d at 1129 (quoting *Scholes*, 744 F. Supp. at 1421 n.6)). In rejecting the receiver's argument that he had standing to assert third parties' claims, the *Kelley* court noted that "courts have rejected attempts by receivers to use appointment orders to create standing to sue on behalf of non-receivership entities." *Id*. As the Sixth Circuit explained in *Liberte*, 248 Fed. Appx. at 664, if "a district court could confer individual creditors' standing on a receiver simply by ordering it so, such an exception would completely swallow the general rule that receivers may only sue on behalf of the entity they are appointed to represent, not on behalf of creditors[.]"[4] Though these cases are federal, the same standing test exists on the state level in Colorado. *E.g.*, *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977); *Conrad v. City and Cty of Denver*, 656 P.2d 662, 668 (Colo. 1982); *Sender v. Kidder Peabody*, 952 P.2d at 781.

Nor does Mr. Dragul's stipulating to the Receivership Order expand the Receiver's constitutional standing. Since standing is jurisdictional, *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004), it is not subject to waiver, *e.g.*, *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003); *National Labor Relations Board v. Somerville Constr. Co.*, 206 F.3d 752, 755 (7th Cir. 2000). "Even where the parties agree that a plaintiff has

[4] *See also Scholes v. Schroeder*, 744 F. Supp. at 1423 (holding "to the extent that the orders that appointed Scholes as receiver have purported to confer power on him to sue directly on behalf of investors, rather than in accordance with the just-stated principles, those orders exceed the power of the judiciary and will not be enforced in this action."); *Marwil v. Farah*, No. 1:03-CV-0482-DFH, 2003 WL 23095657, at *5-7 (S.D. Ind. Dec. 11, 2003) (holding receiver lacked standing to pursue creditors' claims and that "[n]otwithstanding the phrase included in an agreed court order negotiated among counsel . . ., the court simply does not have the power to transfer property (including causes of action) from non-parties (the note holders) to the conservator/receiver.").

Constitutional standing, courts must satisfy themselves that the jurisdictional requirement is met." *Native Am. Arts*, 253 F. Supp. at 1048. Since standing is an element of the court's subject matter jurisdiction, "no action of the parties can confer subject-matter jurisdiction upon a federal court [and] [t]hus, the consent of the parties is irrelevant . . . and principles of estoppel do not apply." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (internal citations omitted). Additionally, the Receiver's argument that parties have relied on their belief that the Receiver has standing to assert creditors' claims, even if true, is of no import. (Resp. 4, 5.) The Receiver cites no authority to suggest reliance will create standing that the constitution does not, and Mr. Dragul is aware of none. Since a court must always determine whether it has jurisdiction regardless of what the parties do, reliance plays no role.

D. The Receiver Cannot Borrow the Commissioner's Authority.

The Receiver argues he has standing derived from the Commissioner's authority under the "broad remedial provisions" of the CSA. (Resp. 3.) The Receiver never alleged in the Amended Complaint that he was asserting the Commissioner's claims. Moreover, he cannot. C.R.S. § 11-51-602(2) authorizes the Securities Commissioner, and not anyone else, to assert claims on behalf of injured parties. C.R.S. § 11-51-703(4) authorizes the Commissioner to delegate some of her powers, but only to "any officer of the division of securities"—not a third party. And the power to institute a CSA proceeding under C.R.S. § 11-51-602 is not one she can delegate even to another securities division officer; she must assert such claims herself.

E. Investor-Creditors Have Not Assigned Their Claims to the Receiver.

The Receiver argues that investor-creditors have "in effect assign[ed]" their claims to the Receiver when they certified that they had dismissed whatever suits they had pending and would not file new claims as a condition of participating in the equitable claims pool. (Resp. 4-5.) The Receiver does not say whether any of the investor-creditors even know the Receiver is asserting

they assigned him their claims. And an unclear assignment of a claim is unenforceable. *E.g.*, *People v. Adams*, 243 P.3d 256, 263 (Colo. 2010). Here, there is no language at all, let alone clear language, to suggest the investor-creditors were transferring their claims to the Receiver to pursue. Moreover, the November 13, 2018 Order Granting Receiver's Motion to Establish Claims Administration Procedure and to Set Claims Bar Date states on the last page that as a condition of participating in the equitable claims process, the creditor "shall dismiss (*without prejudice*) any claim or cause of action pending against Dragul[.]" (emphasis added). (Ex. C at 3.) This suggests creditors in the equitable distribution may be free to assert claims against Mr. Dragul once the Receivership concludes. If so, they cannot have assigned their claims to the Receiver, as they would necessarily still have those claims to assert.

## II. In Pari Delicto Bars the Receiver's Claims for Two Reasons

Even if the Receiver were asserting the Receivership entities' claims, which he is not, *in pari delicto* bars them as an issue of standing, and as a defense.

While the Receiver cites authority from other jurisdictions to argue *in pari delicto* is a defense and not a consideration for standing (Resp. 7-8), that authority has no effect where it conflicts with Colorado precedent as here. The law in Colorado, as articulated in *Sender v. Kidder Peabody*, is that:

> Although the doctrine of *in pari delicto* is usually applied as a defense on the merits, we conclude that it is appropriately raised with respect to the second prong of the standing test when, as here, the allegations of the amended complaint and the undisputed facts presented on summary judgment demonstrate that all the parties are participants in an illegal act.

952 P.2d at 782.[5] Here, the Receiver lacks standing to assert creditors' claims as a matter of law. But *even if* the Receiver were asserting claims belonging to the GDA Entities or Mr. Dragul, he

[5] The Receiver points to an unpublished Denver County District Court order in *Joseph v. Mueller*, 2010CV3280, which distinguished *Sender v. Kidder Peabody* on the basis that in the

lacks standing because those people and entities are *in pari delicto* with the Defendants, and under *Sender v. Kidder Peabody* and *Hedged-Invs. Assoc.*, *in pari delicto* is not only a defense but an issue of standing.

Additionally, no Colorado court has followed *Scholes v. Lehmann* and held a receiver is not subject to the defense of *in pari delicto* when asserting claims belonging to the entities in receivership. (Resp. 8-10.)[6] Thus, the *in pari delicto* defense remains viable as well.

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

The Receiver stands in the shoes of the people or entities in receivership and asserts their claims. *Sender v. Kidder Peabody*, 952 P.2d at 781; *Scholes v. Lehmann*, 56 F.3d at 753. (*See also* Mot. 12.) Since Mr. Dragul is in the Receivership, that means the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. But Mr. Dragul cannot sue himself. *BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013). This is completely

*Sender* case: (1) many investor claims were already settled; (2) the claim was asserted on behalf of the debtor but in *Joseph* the receiver was pursuing creditors' claims; and (3) there was no arbitration agreement unlike in *Joseph*. (Resp. 8 & Resp. Ex. 1 at 4.) The *Joseph* court then relied on *Scholes v. Lehmann*, 56 F.3d 750 (5th Cir. 1995), to hold the receiver there had standing to assert creditors' claims. (Resp. Ex. 1 at 5-6.) The holding in *Joseph* is both contrary to binding Colorado precedent in *Sender v. Kidder Peabody*, and contrary to *Scholes v. Lehmann*. Neither the *Joseph* court nor the Receiver here explain why the settlement of some investor claims or the existence of an arbitration agreement would have any bearing on standing. Since standing is jurisdictional and subject to a constitutional test, such considerations are irrelevant. And while the Seventh Circuit in *Scholes v. Lehmann* rejected *in pari delicto* as a consideration for standing, it still held that a receiver lacks standing to assert creditors' claims, noting that "[l]ike 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[.]" 56 F.3d at 753 (citing cases).

[6] The Receiver points to *Lewis v. Taylor*, 2018 CO 76, ¶ 23, to argue *Scholes* somehow applies in Colorado on the issue of *in pari delicto*. (Resp. 9.) But in *Lewis*, the court merely string cited *Scholes* for a completely different proposition: that one line of federal cases holds that payments innocent investors received in excess of the amount of principal they invested are avoidable as fraudulent transfers. *Lewis*, 2018 CO at ¶ 23.

separate from *in pari delicto*, and the Receiver never responds to this argument. The Court can grant the Motion and dismiss the claims against Mr. Dragul on that basis alone.

Separately, the Receiver may not sue Mr. Dragul under the doctrine of *in pari delicto* as it applies in Colorado per *Sender v. Kidder Peabody*, 952 P.2d at 780-81. Because Mr. Dragul was alleged to be not only a participant but the mastermind of the purported ponzi scheme, the Receiver both lacks standing under, and fails under the defense of, *in pari delicto*, as addressed above.[7] Even *Scholes v. Lehmann*, which unlike Colorado refused to apply *in pari delicto* to receivers, noted the result would likely be different there if the defendant, like Dragul, were in receivership. 56 F.3d at 754 ("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.").

Paragraph 26 of the Receivership Order also bars the Receiver from suing Mr. Dragul. It does not contain the phrase "actions by third-parties" as the Receiver asserts. (Resp. 20.) Rather, Paragraph 26 enjoins and stays all actions "against the Receiver, Dragul, GDARES and GDAREM, or the Receivership Estate" by anyone—it contains nothing limiting it to third parties' claims. Thus, it enjoins the Receiver from suing Dragul. The Receiver tries to skirt Mr. Dragul's argument that the Receiver will either receive an unlawful double recovery or have to pay a judgment against Mr. Dragul out of the Estate per Paragraph 10 of the Receivership Order (Mot. 14-15) by arguing a judgment may be satisfied by assets Mr. Dragul acquired after the

[7] The cases the Receiver cites (Resp. 20, citing *CFTC v. Chilcott*, 713 F.2d 1477, 1480 (10th Cir. 1983); *Marwil*, 2003 WL 23095657, at *5-7) do not change this result as neither are binding in Colorado and they are contrary to Colorado law which retains *in pari delicto* both as to a receiver's standing and as a defense. *E.g.*, *Sender v. Kidder Peabody*, 952 P.2d at 780-81. And in both *CFTC* and *Marwil*, the receiver was suing third parties, not a person or entity in receivership as the Receiver argues. *Chilcott*, 713 F.2d at 1480; *Marwil*, 2003 WL 23095657, at *1.

Receiver was appointed (Resp. 20). Setting aside whether there exist any such assets, since the Receiver already seized Mr. Dragul's assets for the purpose of paying creditors' equitable claims, there would necessarily be at least a majority double-recovery. Nor is it clear why Mr. Dragul's purported status as a necessary party (which the Receiver never explains), or the Receiver's expectation that the other Defendants will seek to apportion fault to Mr. Dragul (Resp. 20), has any bearing on whether the Receiver may sue Mr. Dragul.

The fact that the Receiver possesses and appears to be using Mr. Dragul's attorney-client privileged information against Mr. Dragul is another reason the Receiver cannot sue Mr. Dragul. (Mot. 15-17.) The Receiver responds by disparaging Mr. Dragul with myriad factual assertions, most irrelevant, which appear nowhere in the FAC, and which have never been proven. (Resp. 22-23.) The Receiver asserts that after the Receiver was appointed, Mr. Dragul "could have no expectation of privacy or privilege for information on the GDA server[.]" (Resp. 23.) That is remarkable both because the privileged information on the GDA server included information predating the Receiver's appointment, and because Paragraphs 7, 10, 13(d), and 28 of the Receivership Order all expressly state that Mr. Dragul maintains all privileges held in his personal capacity. And since the Receiver is using Mr. Dragul's privileged information to sue Mr. Dragul and his former attorney in *this* proceeding, under *this* FAC, it is up to *this* Court, not the Receivership Court, to address the resulting taint to this proceeding. (*See* Resp. 23.)

**IV. The Receiver is Not Authorized to Pursue Claims for Damages on Contingency**

Paragraph 13(o) of the Receivership Order authorizes the Receiver to retain counsel on contingency "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, including claims premised on fraudulent transfer or similar theories[.]" The Receiver argues the language

"including claims premised on fraudulent transfer" permits him to assert claims for damages (Resp. 21-22). But the "including" phrase denotes a non-exclusive list of examples (Resp. 20), *all* of which must be claims to recover possession of Receivership Property. Receivership Property only encompasses the Receivership entities' assets and assets related to or derived from investor funds (Rec. Order ¶ 9), not damages. (*See also* Mot. 17-18.) Since he is now on contingency (Mot. Ex. A), the Receiver's damages claims must be dismissed because the Receivership Order does not authorize him to bring them.

## V. Most of the Receiver's Claims are Time-Barred

### A. The Colorado Securities Act Claims are Time-Barred

The Receiver argues statute of limitations is an affirmative defense Defendants bear the burden to prove. (Resp. 44, 48.) That is false as to the CSA claims because timeliness is an element the Receiver bears the burden to properly allege (and later prove). (*See* Mot. 19-20.) The Receiver never addresses this fact. And he fails to allege his CSA claims are timely.

The Receiver's C.R.S. §§ 11-51-301, 401, 604(1) & (2), and 604(5) claims are all barred if filed "more than two years after the contract of sale[.]" C.R.S. § 11-51-604(8). FAC paragraph 321 (and paragraphs referenced in it), and FAC exhibits 23, 25, 28, 33, 35, & 42, show there was not a single investment occurring within two years of the January 21, 2020 filing of the original complaint. The Receiver points to FAC ¶¶ 204-212 & FAC Ex. 39 to argue there was a sale of securities "as late as 2018." (Resp. 50.) Those paragraphs and exhibit relate solely to a letter about the sale of a property, not solicitation or sale of a security. He also points to FAC ¶ 316 (Resp. 50), but that paragraph contains no factual allegations about any particular 2018 sale of a security. Finally, the Receiver points to Exhibit 3 to the original complaint to argue "Dragul consummated four sales of unregistered securities after January 21, 2018[.]" (Resp. 50-51.) But

that exhibit purports to show payments between entities, generally as part of settlement statements for real property, not any sales of securities. These claims are time-barred.

The vast majority of investments alleged to support the Receiver's C.R.S. §§ 11-51-501(1)-(c) and 604(3)-(4), and 11-51-604(5)(b) & (c) claims, are outside the C.R.S. § 11-51-604(8) statute of repose, (Mot. 21-23 & 21 n.9), as the Receiver concedes (Resp. 40, 46 n.22). All such claims based on those allegations must be dismissed.

The CSA claims also fail under the statute of limitations. Since as a matter of law, only investors may assert CSA claims, not the Receiver, C.R.S. §§ 11-51-604(1), 604(2)(a), 604(3), 604(5)(a) & (b), it is the date the investors discovered the violations, not when the Receiver discovered them, that matters. And since the Receiver bears the burden to prove the timeliness of the CSA claims, that means the Receiver must plead when the investors learned or should have learned of the violations. (Mot. 19-20.) Though the Receiver argues Defendants hid information from investors, he never alleges when they learned or should have learned, and his allegations show it was not within the limitations period. (*See* Mot. 20-23 & FAC ¶s cited therein.)

B. The Fraudulent Transfer and Unjust Enrichment Claims are Time-Barred.

While the Receiver asserts "many" of the allegedly fraudulent transfers were made within the four-year limitations period (Resp. 53), he appears to concede many of them were not, (Resp. 53; *see also* Mot. 23-24.) He tries to save the time-barred allegations by arguing he did not learn of them before the one-year limitations period under the discovery rule, and attempts to make this a fact dispute by attaching an affidavit. (Resp. 53; *see also* C.R.S. § 38-8-110 (setting forth 4-year limitations period, or one-year period under discovery rule).) But under *Lewis v. Taylor*, 375 P.3d 1205, 1207 (Colo. 2016), a receiver's fraudulent transfer claim accrues under the

discovery rule on the date of his appointment. The Receiver argues the receiver in *Lewis* actually knew, as a factual matter, of the claim on the date of his appointment. (Resp. 54.) But it would be impossible for a receiver to actually learn of a claim then, when he would not have even received the records relating to the receivership entities, let alone had a chance to review them and identify claims. *Lewis* necessary means that under the discovery rule as it applies to receivers, the receiver is deemed as a matter of law to have discovered the claim on the date of appointment, regardless of when he actually discovers it. Thus, the fraudulent transfer claim was stale by August 30, 2019 (a year after the Receiver was appointed).

Similarly, the Receiver's unjust enrichment claim is time-barred because, as the Receiver concedes, it is subject to the same statutes of repose and limitations as the fraudulent transfer claim. (Mot. 24; Resp. 54.)

**CONCLUSION**

The entire First Amended Complaint exceeds what the Receiver may do as a matter of law. It should be dismissed with prejudice.

Dated this 8th day of September, 2020.

JONES & KELLER, P.C.

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

*ATTORNEYS FOR DEFENDANT GARY J. DRAGUL*

## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via the Colorado Court E-filing system to the following:

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| | |
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| DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO<br>Denver District Court<br>1437 Bannock St.<br>Denver, CO 80202<br>720.865.8612 | DATE FILED: September 21, 2020 6:40 PM<br>FILING ID: [illegible]<br>CASE NUMBER: 2018CV33011 |
| **Plaintiff:** David S. Cheval, Acting Securities Commissioner for the State of Colorado<br><br>v.<br><br>**Defendants:** Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC | ▲COURT USE ONLY▲ |
| Attorneys for Receiver:<br>Patrick D. Vellone, #15284<br>Michael T. Gilbert, #15009<br>Rachel A. Sternlieb, #51404<br>ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.<br>1600 Stout St., Suite 1100<br>Denver, Colorado 80202<br>Phone Number: (303) 534-4499<br>pvellone@allen-vellone.com<br>mgilbert@allen-vellone.com<br>rsternlieb@allen-vellone.com | Case Number:<br>2018CV33011<br><br>Division/Courtroom: 424 |

**RECEIVER'S MOTION TO ABANDON 15 RESIDENTIAL PROPERTIES**

Harvey Sender, the duly-appointed receiver ("Receiver") for Gary Dragul ("Dragul"), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities (collectively, "Dragul and the GDA Entities"), hereby requests Court

approval to abandon the Estate's interest in 15 residential properties owned by the Estate.

## I. Background

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

2. On August 29, 2018, the Commissioner, Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver, consenting to the appointment of a receiver over Dragul and the GDA Entities pursuant to COLO. REV. STAT. § 11-51-602(1), C.R.C.P. 66.

3. On August 30, 2018, the Court entered a Stipulated Order Appointing Receiver (the "Receivership Order"), appointing Harvey Sender as receiver for Dragul and the GDA Entities and their respective properties and assets, as well as their interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate" or the "Estate"). Receivership Order at 2, ¶ 5.

## II. Authority

4. The Receivership Order authorizes the Receiver to sell or otherwise dispose of the assets of the Estate, including the personal property of the Receivership Estate. *Receivership Order* ¶ 13(t), at 12. Upon obtaining a court order, a receiver may generally abandon property that is of inconsequential value to an estate. *E.g.* 65 AM. JUR. 2D RECEIVERS § 156. Under the Bankruptcy Code, property may be

abandoned that is burdensome or of inconsequential value or benefit to a bankruptcy estate. 11 U.S.C. § 554(a).

5. The Receivership Estate presently includes 22 single-family residential properties (the "22 Residential Properties"). The Receiver has twice been under contract to sell all 22 Residential Properties, once in February 2019 to Odyssey Acquisitions III, LLC for $775,000 (that sale included 2 additional residential properties), and once in May 2019 with Chad Hurst for $575,000. Odyssey backed out of its contract within days, and after the Receiver obtained Court approval of the Hurst contract (over objection and after an evidentiary hearing), Hurst refused to close.[1]

6. The Receiver has since tried to market and sell all of the 22 Residential Properties and continues to do so with respect to the seven remaining properties that are not the subject of this motion.

7. The 15 residential properties the Receiver seeks to abandon are identified on the attached Exhibit 1, which also includes the Receiver's analysis of the lack of or minimal equity in the properties. The fair market values on Exhibit 1 are proposed list prices based on the Receiver's market research and the opinion of the Estate's residential property broker. Based on the Receiver's experience in this case, it is unlikely the properties would be sold for their listing prices.

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[1] The Estate retained Hurst's $100,000 earnest money deposit.

8. All 15 properties are owned by special purpose entities Dragul formed, each of whose sole member is X12 Housing, LLC ("X12"), f/k/a GDA Housing, LLC, whose sole member is Dragul. X12 is managed by X12 Housing Management, Inc., f/k/a GDA Housing Management, Inc.,[2] whose sole shareholder and President is Dragul. The 15 properties are therefore property of the Estate the Receiver is authorized to sell or otherwise dispose of.

9. Although the Receiver has been able to negotiate minimal concessions with the first mortgage holder on these properties, he has not been able to reach an agreement that would, after accounting for the administrative expenses to sell these properties, preserve any equity for the Estate.[3] The Receiver continues to incur liabilities to Revesco for managing the 15 properties, and is paying insurance and maintenance for them. Continuing to incur and pay these expenses would be burdensome to the Estate and not yield any return to the Estate or its creditors. Upon entry of an order authorizing the Receiver to abandon the 15 properties, the Receiver will stop managing the properties and cease paying insurance and ongoing maintenance for them. The Receiver will cooperate to turn the properties over to secured lenders and is serving this motion on them.

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[2] On April 17, 2018, Articles of Amendment changing the name of GDA Housing Management, Inc. to X12 Housing Management, Inc. was filed with the Colorado Secretary of State.

[3] Three of the 15 properties show equity assuming they were sold within the next 90 days at the proposed list price/estimated fair market value. But the administrative cost of doing so would more than offset any estimated equity.

WHEREFORE, the Receiver asks the Court to enter an order authorizing him to abandon any interests the Estate may have in the 15 residential properties listed on Exhibit 1, and authorizing the Receiver to stop managing the properties and to stop paying insurance and ongoing maintenance for them.

Dated: October 11, 2019.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: *s/ Michael T. Gilbert*
Patrick D. Vellone, #15284
Michael T. Gilbert, #15009
Rachel A. Sternlieb, #51404

ATTORNEYS FOR THE RECEIVER

## CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2019, a true and correct copy of **RECEIVER'S MOTION TO ABANDON 15 RESIDENTIAL PROPERTIES** was filed and served via the Colorado Courts E-Filing system to the following:

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## 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.

s/*Teresa Silcox*
Allen Vellone Wolf Helfrich & Factor P.C.