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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Telephone: 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, BENJAMIN KAHN, THE CONUNDRUM GROUP, LLP, SUSAN MARKUSCH, ALAN C. FOX, ACF PROPERTY MANAGEMENT, INC., MARLIN S. HERSHEY, PERFORMANCE HOLDINGS, INC., OLSON REAL ESTATE SERVICES, LLC, JUNIPER CONSULTING GROUP, LLC, and JANE DOES 1-10, and XYZ CORPORATIONS 1-10.	▲COURT USE ONLY ▲
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DEFENDANTS ACF PROPERTY MANAGEMENT, INC. AND ALAN C. FOX'S REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1), 12(b)(5), AND 9(b)	

Defendants ACF Property Management, Inc. and Alan C. Fox (collectively "ACF"), through counsel, hereby submit their Reply Brief in Support of their Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), 12(b)(5), and 9(b), and in support thereof state as follows:

Introduction

The Receiver's Response reveals a mistaken interpretation of established law. The reason is obvious: He purports to assert claims on behalf of Dragul's creditors, but prevailing case law confirms he has no standing to do so. Now, with his failed standing brought to light, the Receiver tries to dress his claims as if they also belong to the "GDA Entities" in receivership. Even taking his allegations at face value, however, the Receiver has not alleged the GDA Entities relied on any misrepresentation or omission by ACF or that ACF's alleged conduct harmed them. Thus, the Receiver has not stated a claim against ACF, even on behalf of the GDA Entities.

The Receiver's arguments reveal just how far afield he has veered from the original purpose of his appointment: to preserve assets and ensure a *pro rata* distribution to investors.[1] Instead, the Receiver is now depleting what little of the Estate he has not already exhausted in order to assert frivolous claims that are outside the scope of his appointment.

Argument

1. The Receiver Lacks Standing to Bring the Claims Asserted Against ACF.

a. The Receiver Misconstrues the Powers Afforded Him Under the Law.

It is widely accepted that a receiver "lack[s] standing to bring suit unless the receivership entity could have brought the same action." *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787,

[1] *See* Commissioner's Ex Parte Motion for Appointment of Receiver, Case No. 2018-cv-33011, Filed Aug. 15, 2018, at ¶¶ 22–25. The Commissioner's motion is attached as **Exhibit A**.

793 (6th Cir. 2009) (citation omitted). The Receiver's Response reflects a fundamental misunderstanding of the powers afforded him under the law.

The Receiver relies on Section 13(s) of the Receivership Order as the purported source for his standing to sue on behalf of creditors. That order, however, cannot bestow standing where none exists. Courts routinely reject similar arguments by receivers, explaining "the appointment of a receiver is inherently limited by the jurisdictional constraints." *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990). Granting a receiver authority to bring claims held by others would violate those limitations, because "the ability to confer substantive legal rights that may create standing [under] Article III is vested in [the Legislator] and not the judiciary." *Id.* at 1421 n.6; *see also Liberte Capital Grp. v. Capwill*, 248 F. App'x 650, 657–59 (6th Cir. 2007) (receiver lacked standing despite receivership order's language purporting to authorize such claims); *Wimberly v. Ettenberg*, 194 Colo. 163, 167 (Colo. 1977) (same considerations applicable to Article III standing also guide Colorado courts). Indeed, 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 . . . directly." *Liberte Capital,* 248 F. App'x at 664. Accordingly, to the extent Section 13(s) purports to grant the Receiver standing to bring creditors' claims, it exceeds the powers of the judiciary and is void.

The Receiver's reliance on the waiver provision that requires creditors to forgo claims against Dragul, GDA and the Estate as a condition for submitting a claim only underscores his lack of standing as to ACF. That provision does ***not*** require creditors to waive claims ***against ACF*** or any other third parties. Precisely because nothing prevents creditors from directly pursuing their

claims against ACF, the implication of the Receiver's position is that ACF is vulnerable to duplicative litigation (and potentially judgments) brought by the Receiver and Dragul's creditors.[2]

The Receiver also argues that his standing to sue on behalf of creditors somehow derives from Section 602 of the Colorado Securities Act ("CSA"), which provides that in any enforcement action the "***securities commissioner*** may include . . . a claim for damages under section 11-51-604 for 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). These broad powers, however, are vested only with the Commissioner, not the Receiver. The Commissioner did ***not*** bring any enforcement action against ACF, and the CSA does ***not*** authorize the Commissioner to delegate her powers to do so to a receiver. The Receiver is, after all, "an officer of the court, and therefore not an agent of the parties." *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2981 (3d ed. 1975). The Receiver is ***not*** the long-arm of the Commissioner and does ***not*** derive powers from the CSA.

The Receiver also argues that equity favors his claimed standing because his interests "include not only protection of the receivership res, but also protection of defrauded investors." Resp. at 3. Again, however, equity cannot confer standing where none exists. And courts have made clear 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***." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) (emphasis

[2] The Receiver tries to distinguish *Sender v. Kidder Peabody*, 952 P.2d 779 (Colo. App. 1997), by claiming that here, there is no threat of duplicative litigation. Resp. at 8. For ACF, however, that threat is already a reality. As the Receiver recognizes, *see* FAC ¶¶ 67–71, ACF is presently defending an action by one of Dragul's investors regarding transactions discussed in the FAC.

added). Thus, none of the Receiver's claimed sources of authority can confer standing upon him to sue on behalf of creditors.

b. The Receiver Lacks Standing to Bring Claims on Behalf of Creditors.

The Receiver cannot escape the long line of cases holding that receivers lack standing to bring claims on behalf of the estate's creditors, and his efforts to distinguish them are misguided and unavailing. For instance, the Receiver suggests that *Javitch* did not directly confront a standing problem. As recognized in *Wuliger*, which the Receiver cites, however, *Javitch* confirmed "that receivers' legal rights are generally limited to those of the receivership entities." *Wuliger*, 567 F.3d at 794–95. The Receiver also seeks to distinguish *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008), on the ground that the receiver lacked standing to bring a fraudulent transfer claim there because the debtor was an individual, whereas here the receivership includes Dragul's entities. This argument conflates two distinct issues: (1) whether a receiver has standing to sue on behalf of creditors, which he clearly ***does not***; and (2) what claims belong to a debtor in receivership. *Eberhard* confirms the proposition for which it is cited: a receiver stands only in the shoes of the persons in receivership and has no standing to sue on behalf of creditors. *Id.* at 133–34. And contrary to the Receiver's suggestion otherwise, *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24–25 (1st Cir. 1990), did address standing, finding that the receiver could not bring claims belonging to investors.

c. The Receiver Cannot Maintain Claims Against ACF on Behalf of the GDA Entities.

Attempting to resurrect his failed standing, the Receiver argues that he is pursuing claims on behalf of the "GDA Entities." Even a cursory examination of the FAC, however, reveals the GDA Entities have no claims against ACF. First, the Receiver's theory ignores that the GDA

Entities are not alleged to have been misled by any misrepresentation. FAC ¶ 327–28, 331, 337. Instead, the Receiver alleges that the GDA Entities knew the truth and in fact were the ***recipients*** of many of the allegedly illicit commissions. *E.g., id.,* FAC ¶¶ 98, 111, 136, 153, 249, 299, 331.

Second, the Receiver's only theory of injury to the GDA Entities that concerns ACF is that the GDA Entities were allegedly deprived of fees paid to ACF. Resp. at 11. But according to the Receiver's own theory, if ACF's fees instead had been retained by the GDA Entities, they "ultimately [would have been] distributed to investors." *Id.* at 15. Either way, the GDA Entities would not have retained those fees and thus cannot claim to have been directly harmed.

A nearly identical fact pattern was addressed in a case given short shrift by the Receiver, *Knauer v. Johnathon Roberts Financial Group*, 348 F.3d 230 (7th Cir. 2003). As that court explained, Ponzi schemes have two distinct phases: (1) solicitation and (2) embezzlement. Entities used to execute the Ponzi scheme are not harmed during solicitation, even when, as alleged here, fees are taken from investors' funds. This is because the sales of securities ultimately "fatten[]… the companies' coffers." *Id.* at 234. During embezzlement, the Ponzi scheme operator then diverts for his own use the proceeds deposited with the corporation, and it is only this process that harms the corporation. A receiver thus has standing to pursue, on behalf of the corporation, claims predicated on the embezzlement phase but not the solicitation phase. *Id.* at 233–34. Courts across the nation have adopted the framework articulated in *Knauer. See, e.g.*, *Liberte*, 248 F. App'x at 662–63 (receivers only have standing to pursue claims on behalf of companies for funds taken during embezzlement stage); *Moecker v. Bank of America, N.A.*, No.13-CV-01095-SCB-EAJ, 2013 WL 12159056, at *4 (M.D. Fla. Oct. 21, 2013) ("a corporation has standing to assert claim[s] arising from the embezzlement phase . . . but not those arising from the sales phase").

Knauer is precisely on point. According to the Receiver's theory, the alleged harm to the GDA entities—fees paid to ACF—was caused during solicitation, which ultimately "fattened [GDA's] coffers." This alleged injury therefore cannot support a claim by the GDA Entities. The Receiver mischaracterizes his own pleadings when he argues that his claims against ACF also rely on embezzlement. Putting aside impermissible conclusory and grouping allegations, there are ***no*** allegations of ***fact*** that support this assertion. To the contrary, the factual allegations confirm ACF had ***no*** involvement in, and did ***not*** benefit from, Dragul's alleged embezzlement. FAC ¶¶ 58–77.

d. The Receiver's Claims Cannot be Asserted on behalf of the GDA Entities.

A review of the Receivers' claims verifies he lacks standing to bring any of them. The FAC does not even allege the first three causes of action are brought on behalf of the GDA Entities. ACF MTD at 9–10; FAC ¶¶ 315, 356, 361. The tolling allegations and prayers for relief further attest to this. *See* FAC ¶¶ 319–20, 325–26, 336, 338. The Receiver even concedes that his second and third claims are based only on harm to investors. *See* Resp. at 14. And, as more fully set out in the moving papers, nor *could* these claims be asserted by the GDA Entities. *See* ACF MTD at 10. The Receiver attempts to save his claims for securities fraud and COCCA by arguing the GDA Entities were purchasers of securities in ACF-controlled entities. But, he has made no factual allegations to support such claims by those entities. *See*, *supra,* p. 6. The factual allegations instead confirm that these claims are only asserted on behalf of investors. FAC ¶¶ 317, 323, 327, 331, 337.

For his fourth claim—civil theft—the Receiver attempts to manufacture standing for the Estate by relying on allegations about purported post-receivership efforts to deprive the Estate of an airplane and of assets sold by SSC 02, LLC ("SSC 02"). While the Receiver alleges that Defendants amended corporate documents to sell the airplane, he has not alleged that the Estate

was deprived of its share of any sale proceeds or that any proceeds even remained after the loan encumbering the plane was repaid. *See* Resp. at 15; FAC ¶ 261–74. There are also no allegations—nor can there be—that the Estate owned SSC 02 at the time it sold certain assets to ACF.[3] *See* FAC ¶¶ 278–82. The allegations therefore do not reflect any loss to the Estate.

As for the eleventh claim—fraudulent transfer—the Receiver proclaims it is "universally recognized" that receivers have standing to bring such claims. But the Receiver ignores a crucial requirement that is absent here—a fraudulent transfer claim may be brought on behalf of the estate ***only if it asserts a distinct harm that is clearly traceable to the entities in receivership***. *Scholes v. Lehmann*, 56 F.3d 750, 753–54 (7th Cir. 1995) (receiver could bring fraudulent transfer claims but only because entity in receivership was distinct from wrongdoer and suffered distinct injury); *Marion v. TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010) ("heart of the standing issue" is whether the receivership entity suffered a "distinct injury" from creditors); *Buckley v. Deloitte & Touche USA LLP*, 888 F. Supp. 2d 404, 411–12 (S.D.N.Y. 2012) (receiver had standing because he alleged separate "harms to [the entity in receivership]"); *Stern v. Legent Clearing LLC*, No. 09-CV-794, 2009 WL 2244616, at *3 (N.D. Ill. July 28, 2009) ("Here, the receiver has standing to sue Legent because the receiver seeks to redress a distinct harm to [the entity in receivership], not just to its customers.").

This distinction is confirmed by every case on which the Receiver relies. *E.g.*, *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015) (receiver had standing to sue for fraudulent

[3] The FAC alleges that ACF acquired the assets in July 2019, five months before Dragul entered into a settlement agreement with the Receiver, in which SSC 02 was deemed to be a part of the Estate. FAC ¶¶ 278, 282. Tellingly, on August 10, 2020, the Receivership Court entered an order ***denying the Receiver's motion for turnover*** of assets that ACF acquired from SSC 02, rejecting the assertion that ACF conspired with Dragul to remove those assets from the Estate.

transfer on behalf of "a business entity abused by a Ponzi scheme," to recover payments to vendors during embezzlement phase); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008) ("[T]he Receiver is . . . suing to redress injuries that [the corporation in receivership] suffered when its managers caused [it] to commit waste and fraud."). The receivers in those cases had standing to bring fraudulent transfer claims not merely because, as the Receiver contends, they were proceeding on behalf of entities in receivership as opposed to individual debtors, but because those entities suffered injury distinct from the creditors. *See also Knauer*, 348 F.3d at 233–34. In contrast, here, the alleged injury to the GDA Entities—fees paid to ACF—is the *same injury* asserted on behalf of Dragul's creditors. The Receiver therefore has no standing to bring that claim against ACF.

Finally, the rationale underlying *Scholes* and *Knauer* equally applies to unjust enrichment. Because the fees paid to ACF did not harm the GDA Entities but only allegedly the investors, the Receiver also has no standing to bring his twelfth claim for unjust enrichment.

2. The Receiver Has Failed to State a Claim Against ACF.

a. Rule 9(b) Applies to Each of the Receiver's Claims.

Whether Rule 9(b) applies turns on the factual predicate for the allegations—not on how they are styled. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 289 (Colo. App. 1994). By the Receiver's own admission, he has alleged a complex fraudulent scheme, and each of his claims is predicated on that conduct. *See* Resp. at 51. In similar cases, courts have found that Rule 9(b) applies to claims such as civil theft, fraudulent transfer, unjust enrichment and negligent misrepresentation. *See DTC Energy Grp., Inc. v. Hirschfeld*, 420 F. Supp. 3d 1163, 1180 (D. Colo. 2019) (civil theft); *Weinman v. McCloskey*, No. 14-CV-00296-CMA-CBS, 2015 WL 1528896, at *9 (D. Colo. Mar. 31, 2015) (fraudulent transfer); *Baker v. Wood, Ris & Hames*, 364 P.3d 872,

876 (Colo. 2016) (negligent misrepresentation); *Sterenbuch v. Goss*, 266 P.3d 428, 436–37 (Colo. App. 2011) (unjust enrichment analyzed under rules for fraudulent transfer). All of the Receiver's claims are thus subject to C.R.C.P. 9(b).

b. The Receiver Fails to Allege Fraud with the Required Particularity.

The Receiver still has not identified with particularity each of the transactions and each of the acts for which he accuses ACF of fraud. His contention that the exhibits to the FAC listing all of Dragul's investors provide the required specificity is emblematic of his disregard for Rule 9(b). A laundry list of investors is entirely unhelpful without knowing in what transaction they invested, when they invested, and how their investments relate to any fraudulent conduct attributed to ACF.

As discussed in the moving papers, the Receiver's conclusory and grouping allegations are bolstered primarily by allegations made "upon information and belief." On their own, each flaw is problematic; together, they are fatal. Grouping allegations, the Receiver contends, are justified because some acts are attributed to multiple Defendants. But the Receiver's practice is to make a single conclusory allegation identifying ACF, Dragul, and others, supported by factual allegations against other Defendants ***but not ACF***. For instance, the Receiver lumps ACF together with those who allegedly commingled GDA funds and diverted them to their use. *E.g.*, FAC ¶¶ 328, 383, 387. The specific allegations confirm, however, that ACF had no role in this activity. *See id.* ¶¶ 58–77.

Worse yet, the few allegations that purport to set forth facts about ACF are virtually all made on information and belief, invalidating them under these circumstances. Even *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 539–40 (9th Cir. 1989) – the sole case on which the

Receiver relies – makes clear that allegations upon information and belief are not justified here.[4] In *Moore*, the court held that pleading on information and belief may be allowed in the Rule 9(b) context, but only as to matters within the opposing party's knowledge ***and*** if "the allegations are accompanied by a statement of the facts on which the belief is founded." *Id.* (citation omitted); *see also State Farm*, 899 P.2d at 288 ("information and belief" allegations only sufficient if "accompanied by a statement on which the belief is founded"). In both *Moore* and *State Farm*, the respective courts dismissed claims because the *complaint* omitted statements on which the beliefs were founded. *See State Farm*, 899 P.2d at 289*; Moore*, 885 F.2d at 540–41. Here, too, the Receiver's allegations on information and belief do not contain such statements.

Nor does the Receiver allege that he lacks information peculiarly within the possession and control of ACF. While the Receiver makes this argument in his Response, *see* Resp. at 28, he may not "effectively amend" the complaint in opposing ACF's motion to dismiss. *See In re Quest Comms. Int'l Inc.*, 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004). Moreover, this is not a scenario in which information is peculiarly within the knowledge of the other party. ***The Receiver has had GDA's books and records for two years and has used his power under the Receivership Order to obtain pre-filing discovery from ACF and others.*** Particularly at this juncture, there is no excuse for his nearly exclusive reliance on information and belief allegations against ACF.[5]

[4] Other cases the Receiver cites—*Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) and *Wellons, Inc. v. Eagle Valley Clean Energy, LLC*, No. 15-CV-1252-RBJ, 2015 WL 7450420, at *2 (D. Colo. Nov. 24, 2015)—instead concern C.R.C.P. 8(a)'s less stringent plausibility standard.

[5] The Receiver's attempt to blame his pleading failure on ACF's reluctance to volunteer documents in the receivership case is contradicted by his assurances to that court that documents were sought solely to liquidate the Estate's interests in ACF entities and calculate distributions due to the Estate.

c. The Receiver Fails to State a Claim for Securities Fraud.

i. The Receiver's Primary Fraud Theory Fails as a Matter of Law.

The Receiver's primary theory of fraud fails as a matter of law because the price paid for real property is a matter of public record. Contrary to the Receiver's contention, ACF's argument does not rest on credibility determinations. Because buyers are deemed by law to have constructive knowledge of the purchase price, they could not have been misled by alleged misstatements about price. The Receiver is thus unable to allege either a misrepresentation or justifiable reliance.[6]

The Receiver also fails to distinguish *Kesicki v. Mitchell*, No. 06-CV-11247, 2008 WL 2958598 (Colo. Dist. Ct. Apr. 24, 2008), by arguing that the defendant there never misrepresented the price previously paid for the property. In *Kesicki*, the court found no fraud where the defendant advised "the other parties . . . that the property was worth $99,000.00, rather than the $60,000.00 he in fact paid." *Id*. Here, as in *Kesicki*, ACF's alleged misrepresentation concerned the price charged *to investors* and the nondisclosure of the price paid for the property. In fact, the Receiver's fraud theory is even more tenuous because here investors purchased membership interests in LLCs that owned the property. The Receiver has never been able to explain why the price of the *company* owning the property must be the same as the amount paid to acquire the property.

As demonstrated above in Sections 1(c) and 1(d), the Receiver's latest theory created out of whole cloth—that his claims are asserted on behalf of the GDA Entities for alleged misrepresentations by ACF—does not help him here. Most critically for present purposes, the

[6] The Receiver urges the Court to ignore the public records attached to ACF's motion to dismiss. While he is correct that recording statutes are meant to protect the public, that is precisely why his theory fails: recording statutes ensured the public knew the price ACF paid for each property.

Receiver alleges GDA knew the truth behind every misrepresentation. *See, e.g.*, FAC ¶ 331. His new theory thus cannot be squared with his own allegations.

In trying to save his securities fraud claim, the Receiver argues the FAC sets forth misrepresentations in addition to purchase price. But those he lists either cannot be attributed to ACF (*e.g.*, Dragul's investors were offered an interest in a GDA Entity rather than the LLC owning the property, or omissions regarding Dragul's commingling) or are components of an allegedly inflated purchase price (*e.g.*, the operating reserve, the amount raised, or commission payments). On their face, these alleged misrepresentations do not hold water. *See* ACF MTD at 20–21.

ii. The Receiver Fails to Properly Allege Timely Acts of Securities Fraud.

The foregoing pleading defects are fatal to the only two alleged securities fraud transactions that could possibly be timely: the sales of (1) Loggins Corner and (2) Laveen Ranch. The Receiver does not dispute and thus concedes ACF's challenge to his Loggins Corner allegations. *See* Resp. at 46–47. As for Laveen Ranch, the Receiver points to allegations that ACF represented it had previously sold $2.334 million in interests, when it had really sold less, so it could represent an inflated return on the proposed sale. Even a cursory examination of the transaction disproves this theory. First, this misrepresentation allegedly was intended to induce investors to consent to the sale, but the FAC confirms the GDA Entity could not stop the sale. FAC, Ex. 36 (GDA Entity held only 9.375% of the LLC). Second, if the goal was to represent an inflated return on investment, then overstating the amount of previously sold membership interests would have the ***opposite effect***—reducing the potential return on investment, thus making the transaction less attractive.

The Receiver further contends that three (of five) payments in Exhibit 6 are associated with transactions within the limitations period. But he does not specify which are the payments he

claims are timely and, fatally to his claim, nor does the FAC. The only apparently relevant commission is a $45,000 payment associated with Loggins Corner. By the Receiver's own allegations, however, that payment cannot be the basis for a securities fraud claim because it was taken for a loan re-financing and thus did not involve the purchase or sale of securities.

iii. The Receiver Has Not Alleged Vicarious Liability.

In a last-ditch effort, the Receiver argues that ACF is liable for Dragul's alleged securities fraud under control person and/or substantial assistance liability. Not so. The only ***facts*** the Receiver has alleged indicate that ACF had neither the knowledge nor the control required to support such liability. The Receiver argues that ACF purportedly: (1) "used GDA employees as if they were its own" (whatever that means); (2) made loans to Dragul, which he used to finance his operations; and (3) paid GDA its *pro rata* share from the sale of Loggins Corner, which Dragul never distributed to his investors. Resp. at 35. While these allegations confirm ACF conducted business with Dragul, they do not even suggest—let alone demonstrate—that ACF ***managed or controlled*** Dragul. Nor are there any allegations that ACF controlled or even had knowledge of Dragul's communications with his investors, on which the securities fraud claims against him are predicated. And, if the Receiver's theory of substantial assistance is that ACF made loans to Dragul and paid him distributions he was due, then virtually any person doing legitimate business with a Ponzi scheme operator could be held vicariously liable. Even the Receiver's backstop argument concerning the sale of the airplane and SSC 02's assets do not support his theory. *See* Section 1(d).

iv. The Receiver Fails to Allege that Securities were Unregistered or Sold by Unlicensed Brokers.

The Receiver concedes that only one transaction is timely for a sale of unregistered securities and/or by an unlicensed broker: Laveen Ranch. However, the Receiver cannot bring a

claim based on that transaction. Colorado law is unambiguous that only the ***purchaser*** may bring suit. *See* C.R.S. § 11-51-604(1), (2). As to Laveen Ranch, GDA and its investors were only sellers—***not purchasers***—of securities during the limitations period.

d. The Receiver Fails to Adequately Allege Violations of COCCA.

i. The Receiver Fails to Properly Allege Timely Predicate Acts.

The Receiver has failed to allege a pattern of racketeering activity, which requires at least two predicate acts. *People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012). The Receiver implicitly concedes that civil theft (as opposed to criminal) is not among the statutorily listed predicate acts. *See* C.R.S. § 18-17-103(5)(b)(II). And, as demonstrated in Sections 2(c)–(d) and in ACF's Motion to Dismiss, the Receiver has not alleged with sufficient particularity timely predicate acts of securities fraud, bank fraud or wire fraud upon which a COCCA violation could be premised.

ii. The Receiver Fails to Allege an Enterprise Distinct from the Persons Allegedly Engaged in Racketeering Activity.

The Receiver argues he has sufficiently alleged "persons" distinct from the "enterprise." However, even the authorities cited by the Receiver acknowledge that the enterprise must involve persons or entities who are not named defendants. *See Church Mut. Ins. Co. v. Coutu*, No. 17-cv-209-RM, 2018 WL 822552, at *8 (D. Colo. Feb. 12, 2018) (enterprise included defendants plus one individual and two companies); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1250 (10th Cir. 2016) (enterprise included "several other entities" in addition to defendants). Here, every member of the alleged enterprise is also a named defendant, which is fatal to the COCCA claim.

iii. The Receiver Fails to Allege ACF's Participation in the Enterprise and Aiding and Abetting Liability.

While the Receiver correctly notes that "[l]iability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs," *Reeves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original), he fails to properly apply this standard. Aside from the Receiver's self-serving characterizations of ACF's business dealings with Dragul, there are no specific allegations of ***fact*** showing that ACF's alleged conduct exceeded the bounds of conducting its own affairs. *See* Section 2(c)(iii), *supra*.

e. The Claims for Fraudulent Transfer and Unjust Enrichment are Untimely.

With respect to the eleventh and twelfth claims for fraudulent transfer and unjust enrichment, the Receiver hangs his hat on the discovery rule, arguing he did not gain full possession of GDA's records until February 2019. But the relevant inquiry is not when the Receiver learned of the violations but when he could have reasonably done so. *Lewis v. Taylor*, 375 P.3d 1205, 1206 (Colo. 2016). The import of *Lewis* is that, as a matter of law, the time the Receiver could reasonably have learned of the alleged violations is the time of his appointment. *Id.* at 1207.

The Receiver's attempt to distinguish *Lewis* is unavailing. In *Lewis*, as here, a receiver was appointed to preserve assets of entities used to perpetrate a Ponzi scheme. Despite the complexity of the offense and efforts to conceal criminal activity, the court found that the operation of the discovery rule meant the limitation period began to run on the date the receiver was appointed. *Id.* at 1206–07. This principle finds wide support in other jurisdictions. *See, e.g.*, *Wiand v. Meeker*, 572 F. App'x 689, 692 (11th Cir. 2014) (statute of limitations began to run on date receiver was appointed (collecting cases)); *Carney v. Lopez*, 933 F. Supp. 2d 365, 386 (D. Conn. 2013)

(receiver's fraud claim timely because it was brought within one year of appointment). And, as set out in the moving papers, the only timely transfers the Receiver alleges were wrongful have also not been alleged with sufficient particularity.[7] *See* ACF MTD at 14–18, 26–27.

CONCLUSION

For the foregoing reasons, ACF respectfully urges the Court to grant its motion to dismiss the FAC in its entirety as to ACF.

Dated: September 8, 2020

Respectfully submitted,

MOYE WHITE LLP

s/ Lucas T. Ritchie
Lucas T. Ritchie
Eric B. Liebman
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and
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[7] The Receiver's argument that the Court should not dismiss any claims based on statute of limitations grounds is unavailing. Although *Prospect Development Co. v. Holland & Knight, LLP*, 433 P.3d 146, 149–50 (Colo. App. 2018), counsels against dismissal based on affirmative defenses that have not yet been raised, it provides an exception where "the bare allegations of the complaint reveal that the affirmative defense applies." This is the case here, and the Court can thus appropriately dismiss the Receiver's claims on statute of limitations grounds. *See* FAC, Ex. 6.

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020 a true and correct copy of the foregoing was electronically filed via CCEF and served on the following:

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DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202	
GERALD ROME, Securities Commissioner for the State of Colorado, Plaintiff, v. GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC, Defendants.	▲ **COURT USE ONLY** ▲
CYNTHIA H. COFFMAN, Attorney General ROBERT W. FINKE, 40756* First Assistant Attorney General MATTHEW J. BOUILLON MASCARENAS, 46684* Ralph L. Carr Judicial Building 1300 Broadway, 8th Floor Denver, CO 80203 Tel: (720) 508- 6376 Fax: (720) 508-6037 Robert.Finke@coag.gov *Counsel of Record	Case No.: Courtroom:

EX PARTE **MOTION FOR APPOINTMENT OF RECEIVER WITH SUPPORTING LEGAL AUTHORITY**

Plaintiff Gerald Rome, Securities Commissioner for the State of Colorado (the "Commissioner"), by and through his counsel, the Colorado Attorney General, hereby moves this Court for an Order Appointing Randel Lewis as Receiver over the assets of Gary Dragul, GDA Real Estate Services, LLC ("GDARES") and GDA Real Estate Management, Inc. ("GDAREM"), and as grounds for this Motion, states as follows:

EXHIBIT A

INTRODUCTION

1. This Motion is made pursuant to § 11-51-602, C.R.S., which authorizes the Commissioner to bring this action to temporarily, preliminarily and permanently restrain and enjoin violations of the Colorado Securities Act (the "Act") by the Defendants and to enforce compliance with the Act, the purpose of which is "to protect investors." § 11-51-101(2), C.R.S.

2. The Commissioner filed his Complaint for Injunctive Relief and an *Ex Parte* Verified Combined Motion for Temporary Restraining Order, Preliminary Injunction, and Order Freezing Assets with Supporting Legal Authority (the "Motion for TRO") contemporaneous with this Motion. Both the Complaint and the Motion for TRO are incorporated by reference herein.

3. The Commissioner seeks, on an expedited basis, an Order Appointing Randel Lewis as Receiver over the assets of Gary Dragul ("Dragul"), GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, Inc. ("GDAREM") (collectively "GDA"). Given the circumstances described in the Complaint, the Commissioner is seeking the appointment of a receiver to prevent the threat of dissipation of assets and irreparable damage to Colorado investors and to marshal, and distribute, in an equitable and orderly manner, any remaining assets. Because of the immediate issues raised in the Motion, the Commissioner also seeks a forthwith ruling to address the same.

FACTUAL BACKGROUND

4. Defendant Dragul, as the President of GDARES and GDAREM, solicited investors to purchase membership interests in various limited liability companies which he controlled that were engaged in the business of acquiring and operating commercial real estate. From January 2008 until December 2015, Dragul, through GDA, sold more than $52 million worth of interests in 14 different LLCs to approximately 175 investors.

5. Amongst other projects ongoing during this period, Dragul raised $9.7 million from the sale of membership interests in the Plaza Mall Project in Buford, Georgia to 47 investors. In December 2008, Dragul acquired the property known as the Plaza at the Mall of Georgia for $25.9 million; and in April 2017, Dragul sold this interest for $32 million, resulting in net proceeds of $9.8 million. However, Dragul did not inform all investors that the sale had taken place. Instead, Dragul continued making payments to individual

investors as though the property were still under GDA's management and control.

6. In violation of the anti-fraud provision of the Act, Dragul represented to investors that they would profit from their investment while failing to disclose conflicts of interest and other material information. For example, not only did Dragul fail to disclose the sale of the Plaza Mall property, but he also did not distribute the proceeds of the sale to any individual investors. Rather, Dragul paid out approximately $5.6 million to a large investor–Israel-based real estate firm, Hagshama–and $4.2 million to his own company.

7. In further violation of the anti-fraud provision of the Act, Dragul commingled funds amongst the various LLCs that he controlled, treating investment funds given for specific projects as though they were fungible. Each LLC Entity was a separate legal entity in which the investors were promised profits from the operation, leasing, and eventual sale of the commercial property. However, rather than treat each LLC Entity as a separate legal entity, Dragul diverted the funds from the various LLC Entities and commingled the funds with other LLC Entities, his own personal funds and funds of family members. Contrary to the representations made by Dragul to investors that the funds would be used only for the specific purpose of purchasing the commercial real estate, the funds were diverted for undisclosed and unrelated purposes.

8. The commingling is to such an extent that it is now impossible to know the true ownership of the commingled funds.

9. As of the date of this filing, no Dragul investor has received their latest dividend payment or a full return of their principal. Furthermore, Dragul has indicated to at least one investor that: (1) he has no money, and (2) he does not intend to make payments to any remaining investors.

LEGAL STANDARD APPLICABLE TO MOTION FOR APPOINTMENT OF RECEIVER

10. Section 11-51-602, C.R.S. of the Act outlines the statutory authority and procedure that governs the Commissioner's request to obtain appointment of a receiver in this matter. Section 11-51-602(1) provides, in relevant part:

> Whenever it appears to the securities commissioner upon sufficient evidence satisfactory to the securities commissioner that any person has engaged in or is about to engage in any act or practice

> constituting a violation of this article or of any rule or order under 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. . . . In any such action, the securities commissioner shall not be required to plead or prove irreparable injury or the inadequacy of the remedy at law. Under no circumstances shall the court require the securities commissioner to post a bond.

11. Section 602(1) of the Act works in conjunction with C.R.C.P. 66, which authorizes the appointment of a receiver upon demonstration to the satisfaction of the Court that there is a need for the same.

12. Among the factors that a court should consider are:

> the existence of a valid claim by the moving party;
> the probability that fraudulent conduct has occurred or will occur to frustrate the claim;
> the imminent danger that property will be lost, concealed or diminished in value; and
> the likelihood that a receiver will do more harm than good.

See Waag v. Hamm, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998).[1]

13. The appointment of a receiver is a well-established equitable remedy available when necessary to protect property or rights. *Eureka Coal Co. v. McGowan*, 212 P. 521 (Colo. 1922). Upon appointment, a receiver serves neither the Plaintiff nor the Defendants, but is instead an officer of the court charged with the impartial exercise of the duties thus prescribed by the Order appointing the receiver. *Hart v. Ed-Ley*, 482 P.2d 421 (Colo. App. 1971). While the appointment of a receiver is available via C.R.C.P. 66, a receiver is also available by statute to the Commissioner in civil enforcement proceedings for injunctive relief. *See* § 11-51-602(1), C.R.S. (providing that the Commissioner may invoke such equitable remedies as necessary to enforce compliance with the Act).

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[1] In addition, *Waag v. Hamm* calls for the court to consider inadequacy of available legal remedies and lack of a less drastic equitable remedy. § 11-51-602(1), C.R.S., obviates the need for the Commissioner to establish these elements. *See Kourlis v. District Court*, 930 P.2d 1329, 1335 (Colo. 1997).

14. The appointment of a receiver is critical to preserve corporate assets. *Waag*, 10 F. Supp. 2d at 1193 (recognizing the necessity of receivers to protect property that may be in jeopardy). Without the appointment of a receiver, the corporate assets will be subject to diversion and waste to the detriment of those who were induced to invest in the corporate scheme. *Eureka Coal Co. v. McGowan*, 212 P. 521 (Colo. 1922).

15. Public policy considerations underlying the Act further support the appointment of a receiver because the Act is intended to "protect investors and maintain public confidence in securities markets . . . ." § 11-51-101(2), C.R.S. "[A] receiver is permissible and appropriate where necessary to protect the public interest and where it is obvious, as here, that those who have inflicted serious detriment in the past must be ousted." *SEC v. Bowler*, 427 F.2d 190, 198 (4th Cir. 1970).

ANALYSIS

I. The Commissioner has a valid claim with a strong likelihood of success against the Defendants.

16. In this matter, the Commissioner has alleged valid claims with a strong likelihood of success against the Defendants. In the Motion for TRO, the Complaint, and in this motion, it is shown that there is a strong likelihood that the Defendants have violated the antifraud provisions of the Act.

17. Materials gathered by the Division of Securities from Defendants, investors, and financial institutions provide compelling evidence that Dragul (A) commingled investor funds with those of other investors and (B) commingled investor funds with his personal funds.

18. As demonstrated herein, the Commissioner has raised sufficient claims, as stated in the Complaint, with a strong likelihood of success on the merits.

II. There is a strong probability that fraudulent conduct has occurred to frustrate the claim.

19. The evidence strongly supports the contention that Dragul has misappropriated monies entrusted to him for investment.

20. A receivership is appropriate where "active fraud and deceit appear, where the corporation is insolvent, or for some reason or other it has ceased to

carry on its authorized function, and because thereof its property and assets are in danger of being dissipated or lost…." *Diaz v. Fernandez*, 910 P.2d 96, 97 (Colo. App. 1995) (citing *Savageau v. Savageau*, 285 P.2d 810, 813 (Colo. 1955)).

21. Here, the facts strongly support the Commissioner's request for a receiver. Ample evidence exists that Dragul deceived investors, funneling their money into investment vehicles controlled by Dragul and then dissipating the funds at his sole discretion. Evidence also demonstrates that Dragul used the prospect of reviving less successful (or failed) investments to induce earlier investors to invest additional funds, which Dragul would then move around amongst various other company accounts as he saw fit. This pattern calls into question all investments related to Dragul. This uncertainty frustrates the Commissioner's claims by obscuring the scope and extent of the fraud perpetrated by Dragul.

III. There is an imminent danger that property will be diminished in value.

22. As demonstrated herein and in the Complaint, Dragul has deceived investors by taking their money given for a particular purpose and then using it for some other purpose unknown to investors. It is imperative that a receiver be appointed so that investors are able to obtain accurate and truthful information regarding the status of their investments and any eventual return of those investments. Without a Receiver, there is a threat that Dragul will continue to dissipate any remaining assets.

23. Likewise, in the very real possibility of private litigation brought by investors against Dragul and their fellow investors, the absence of a receiver will result in a potentially unfair distribution of remaining assets to some investors and not to others. This is particularly likely if private litigation proceeds without any oversight. This case involves fraud and misrepresentation made to numerous investors over the course of at least seven years. A receiver will evaluate all the facts regarding Dragul, GDARES, GDAREM, and any related entities, as well as the validity of any distributions to investors made by Dragul and GDA. Private litigants, however, have no duty to other investors and have every incentive to collect as much money as possible without regard to the impact on the other victims, each of whom has a valid claim on a part of any assets recovered.

IV. An appointed receiver will not do more harm than good.

24. A receivership is an appropriate equitable remedy under § 11-51-602(1), C.R.S., where the Commissioner is able to show that there are violations

of the act and those violations threaten the Commissioner's ability to protect investors and maintain public confidence in securities markets. There can be no doubt that the conduct of the Defendants shakes the confidence of investors and the investing public in securities markets. Whenever securities issuers omit material information to obtain investor funds and relay false statements to investors, confidence in the securities markets is undermined.

25. A receiver will step in as an officer of the court, and act as a neutral party to protect the assets of GDA and all related entities, as well as protect the investors during the pendency of this matter. A receiver will also ensure that the interests of all investors are fairly represented and that any recovered assets are not returned to investors in an arbitrary fashion.

CONCLUSION

26. A receiver is appropriate and necessary in this case for the following reasons. First, a receiver is necessary to take over the corporate books and assets of GDA and to preserve those assets during the pendency of this action. A receiver is also necessary to reconstruct Dragul's fraudulent conduct to determine accurately and equitably how to marshal and distribute the remaining assets to injured investors.

WHEREFORE, the Commissioner respectfully requests that this Court enter orders as follows:

A. Issue an Order Appointing Receiver, in the form submitted, naming Randel Lewis as receiver over Defendants Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, Inc.

B. Enter and issue such further and other relief as the Court deems just and equitable.

DATED this 15th day of August, 2018.

CYNTHIA H. COFFMAN
Attorney General

/s/ Matthew J. Bouillon Mascareñas

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