

DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

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

▲ COURT USE ONLY ▲

vs.

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

Case Number: 20CV30255

Courtroom: 414

*Counsel for Defendants Performance Holdings, Inc.
and Marlin Hershey*

Thomas E. Goodreid, #25281
Paul M. Grant, #26517
Goodreid & Grant LLC
1801 Broadway, Suite 1400
Denver, Colorado 80202
Phone: 303-296-2048x136 (Goodreid)
Phone: 720-810-4235 (Grant)
E-mail: t.goodreid@comcast.net
E-mail: pgrant@goodreidgrant.com

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

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

I. INTRODUCTION

As noted in the Motion, the Receiver only specifically alleges that Hershey was involved in transactions regarding four (4) properties/entities. (Complaint at ¶¶ 91-94, 97, 145, 148, 155, 173-177, 220-221).¹ Additionally, with respect to those four (4) properties/entities, the Receiver alleges that, after January 1, 2014, Hershey only was involved with four (4) discrete transactions – the “rollover” of four investments related to the Plaza Mall of Georgia North. (Complaint at ¶¶ 148, 155, Exhibit 33). Finally, the Receiver acknowledges that all of the finder’s fees or commissions that the Receiver seeks to recover from Hershey were paid between January 19, 2001 and December 16, 2013. (Complaint at ¶¶ 42, 87, Ex. 7).

From these underwhelming and stale allegations, the Receiver manufactures eight (8) claims against Hershey, including at least four (4) fraud-based claims. It is the paucity of specific allegations against Hershey that defines the Receiver’s approach to Hershey. Rather than allege specific facts against Hershey, presumably because he cannot do so, the Receiver has lumped Hershey with the other defendants and merely made broad and conclusory allegations in an attempt to implicate Hershey in the entirety of the alleged fraudulent scheme, despite the fact that the Receiver acknowledges that Hershey barely has been involved with the other defendants since 2013. The Receiver’s attempt is futile as his claims against Hershey must be dismissed because the Receiver lacks standing to bring them, they are not properly pled, or they are barred

¹ The Receiver also vaguely asserts that Hershey was involved in the High Street project “in or about 2014” but provides no details regarding Hershey’s alleged involvement. (Complaint at ¶ 67). Interestingly, despite the Receiver’s allegations that Hershey was involved in a few discrete transactions with Dragul from 2014 through 2016, the last payment to Hershey was made on December 16, 2013, Hershey only received a total of six (6) payments in 2013, and Hershey did not receive a single payment in either 2011 or 2012. (Complaint at Ex. 7). These facts are inconsistent with the Receiver’s vague allegations that Hershey continued to solicit investors for projects in 2014 and later.

by applicable statutes of limitations or repose.

II. ARGUMENT

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

1. Other Than Pursuant to Paragraph 13(s) of the Receivership Order, the Receiver Does Not Have a Basis or Authority to Assert Claims on Behalf of Creditors of the Receivership Estate

The Receiver argues that multiple provisions of the Receivership Order authorize him to bring claims on behalf of creditors of the receivership estate, but he is mistaken. Paragraph 9 of the Receivership Order permits the Receiver to “investigate any claims and causes of action which may be pursued *for the benefit of Dragul, GDARES, GDAREM, their creditors, members, and equity holders...*”, but paragraph 9 does not authorize the Receiver to assert creditors’ claims.

Similarly, paragraph 13(o) of the Receivership Estate does not authorize the Receiver to bring creditors’ fraudulent transfer claims but rather only permits the Receiver to pursue fraudulent transfer claims to “recover possession of the Receivership Property.” Thus, while both provisions are consistent with the Receiver’s responsibility to preserve the receivership estate for the benefit of creditors, neither provides the Receiver with the authority to pursue claims belonging to creditors. *See Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) (“...[A]lthough 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.”).

The Receiver also does not derive any authority to bring creditors’ claims from the statute permitting the securities commissioner to pursue such claims. C.R.S. § 11-51-602 authorizes the securities commissioner to enforce the Colorado Securities Act by, *inter alia*, including in any enforcement action “...a claim for damages under 11-51-604 or restitution, disgorgement, or other equitable relief on behalf of some or all of the persons injured by the act or practice

constituting the subject matter of the action.” C.R.S. § 11-51-602(2) (2020); *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 29-30 (Colo. 2001). However, the statute does not allow the securities commissioner to assign its enforcement role to a third party nor does the statute permit a receiver to enforce its provisions. Additionally, the Receivership Order does not authorize the Receiver to exercise the securities commissioner’s enforcement role. Indeed, in *Chan v. Dragul, et al.*, Case No. 2018cv33011, District Court for the City and County of Denver (the “Receivership Case”), the securities commissioner himself is pursuing damages on behalf of creditors of the receivership estate. (Receivership Case Complaint at ¶¶ 32-33, 41-42). Accordingly, to allow the Receiver also to pursue claims and/or damages on behalf of creditors of the receivership estate would force certain Defendants to defend against the same claims twice and could result in inconsistent determinations of the same claims and/or a double recovery of damages.

The Receiver further argues that he has standing to bring creditors’ claims pursuant to equitable principles. However, none of the cases cited by the Receiver stands for such a proposition. In fact, none of them even address a receiver’s standing to assert claims on behalf of creditors of a receivership estate.

Finally, the Receiver asserts that creditors of the receivership estate, in effect, assigned their claims to him when they filed a claim in the Receivership Case. However, the language in the cited claim form is not an assignment of a creditor’s claim but rather an agreement not to diminish the receivership estate by individually pursuing claims against it. Notably, the form provision does not contain the word “assign” or any derivation thereof and does not even address claims that creditors may have against individuals or entities other than those individuals and entities that comprise the receivership estate. Thus, it is clear that, by filing a claim in the Receivership Case, creditors of the receivership estate did not assign to the Receiver their claims against Hershey and other individuals or entities that are not in receivership. *See Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 845 (Colo. App. 2007) (although no particular formalities

are necessary for a valid assignment, the “intent to make the assignment must be apparent”).

2. The Receiver’s Claims Against Hershey Are Creditors’ Claims

The Receiver generally asserts that he “seeks to recover for harm caused both to creditors and to the GDA Entities in Receivership.” However, this statement simply is not true with respect to the Receiver’s claims against Hershey as all such claims are creditors’ claims. The Receiver asserts two (2) claims against Hershey for violation of the Colorado Securities Act based on the sale of securities to investors – violations of C.R.S. §§ 11-51-401 and 11-51-501(1). (Complaint at ¶¶ 321, 345-348). With respect to each violation, only the buyer of a security, *i.e.*, the investor, can bring a claim. C.R.S. §§ 11-51-604(2)(a), 11-51-604(5)(c). Similarly, only investors can bring claims for negligence or negligent misrepresentation against Hershey because both claims are premised on Hershey’s alleged breach of his duty to investors. (Complaint at ¶¶ 357, 362-370).

With respect to his claims for civil theft, violations of the Colorado Organized Crime Control Act (“COCCA”), aiding and abetting violations of COCCA, fraudulent transfer, and unjust enrichment, the Receiver distinctly pleads each claim on behalf of creditors/investors of the receivership estate, not on behalf of the GDA Entities, as, in support of such claims, he alleges conduct directed at and damages incurred by such creditors/investors. (Complaint at ¶¶ 373-377, 383, 387(a)-(c), 389, 391, 395-396, 402, 406, 443-444, 448). Accordingly, all of the Receiver’s claims alleged against Hershey are claims of creditors/investors, not the GDA Entities. Therefore, the Receiver’s argument that he has standing to pursue the claims alleged in the Complaint because they allege harm to the entities in Receivership is inapplicable to Hershey.

3. The Receiver Does Not Have Standing to Pursue Creditors’ Claims

The only authority that the Receiver has to pursue claims of creditors/investors of the receivership estate is Paragraph 13(s) of the Receivership Order. The Receiver does not provide any authority to counter settled law that, regardless of Paragraph 13(s), (i) he may not assert any

rights greater than the those of the entity whose property he was appointed to preserve, (ii) a court cannot exceed its power by conferring standing on a receiver that is prohibited by law, and (iii) the grant of authority in the Receivership Order to pursue claims on behalf of creditors of the receivership estate is prohibited by law. *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (“Since 1935 it has been well settled that ‘the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.’”); *Scholes v. Schroeder*, 744 F.Supp. 1419, 1422 (N.D. Ill. 1990) (a receiver cannot pursue claims that belong not to the receivership estate but rather to those who may have an interest in the estate). Instead, the Receiver merely argues that he has standing to pursue his fraudulent transfer and unjust enrichment claims even if those claims are brought on behalf of creditors because the GDA Entities were damaged as a result of the transfers. Thereby, the Receiver appears to confess that he lacks standing to pursue six (6) of his eight (8) claims against Hershey – violations of the Colorado Securities Act, negligence, negligent misrepresentation, civil theft, and violations of COCCA – as such claims are creditors’ claims that, notwithstanding the improvident and incorrect grant of authority in paragraph 13(s) of the Receivership Order, the Receiver is not authorized to pursue.

Even if the Receiver has standing to pursue his fraudulent transfer and unjust enrichment claims² pursuant to the reasoning in *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), he only may do so with respect to the entities in receivership through which Dragul allegedly operated his fraudulent scheme. *See Scholes*, 56 F.3d at 754 (receiver had standing to pursue fraudulent transfers made by three corporations in receivership when transfers injured corporations and creditors of the corporations). Thus, to the extent that the Receiver’s fraudulent transfer and

² The Receiver’s fraudulent transfer and unjust enrichment claims are nearly identical as both seek to recover payments made to Hershey. The unjust enrichment claim simply is the equitable equivalent of the statutory fraudulent transfer claim.

unjust enrichment claims are premised on payments from entities other than those that comprise the receivership estate, neither the reasoning in *Scholes* nor its progeny provide the Receiver with any authority to recover payments made by such entities.³ The Receiver lacks standing to pursue claims based on payments from entities that are not part of the receivership estate, and, therefore, his fraudulent transfer and unjust enrichment claims based on such payments must be dismissed.

B. The Receiver Acknowledges That He Does Not Have a Claim for Civil Theft

The Receiver does not substantively address Hershey's argument that he has not alleged a claim for civil theft against Hershey because he does not, and cannot, state that any particular set or sets of funds are directly traceable from the investors to Dragul and then to Hershey. *See Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 608 (Colo. 2016) (an allegation of civil theft fails if "it does not allege an intent to deprive [plaintiff] . . . of specific funds."). Rather, the Receiver simply reiterates the allegations in the Complaint that Hershey received approximately \$2,891,155.54 in commissions paid by Dragul. However, as Exhibit 7 to the Complaint makes clear, the payments to which the Receiver refers were not from investors but rather were from various entities associated with Dragul. The Receiver alleges that Hershey stole funds from investors, not from any of the entities identified on Exhibit 7. (Complaint at ¶¶ 373-377). In order to state a claim for civil theft, the Receiver had to identify the specific investor funds allegedly stolen by Hershey. Because the Receiver did not, and cannot, do so, such claim must be dismissed pursuant to C.R.C.P. 12(b)(5).

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

As Hershey stated in the Motion, the Receiver does not, and presumably cannot, identify the creditors on whose behalf he allegedly asserts claims. Thus, the Receiver's fraud-based claims against Hershey are based on the Receiver's speculation that fraud occurred but are

³ Exhibit 7 to the Complaint lists all of the payments to Hershey that the Receiver seeks to recover as fraudulent transfers or pursuant to his unjust enrichment claim. A substantial number of these payments were not paid by any of the entities that comprise the receivership estate.

unsupported by any specific facts establishing when, how, and to what extent the alleged fraud occurred. General and collective factual allegations simply do not support the Receiver's fraud-based claims against Hershey as they fail to provide Hershey with adequate notice of the basis of the claims against him. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (dismissing § 1983 claims alleged against multiple defendants because complaint's collective allegations against "defendants" with no "distinction as to what acts are attributable to whom" made it "impossible for any of these individuals [defendants] to ascertain what particular unconstitutional acts they are alleged to have committed."); *Lane v. Capital Acquisitions and Management Co.*, 2006 WL 4590705, *5 (S.D. Fla. 2006) (complaint for violations of Civil Rights Act and FLSA failed to satisfy minimum pleading standard of F.R.C.P. 8 "[b]y lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct..."); *Medina v. Bauer*, 2004 WL 136636, *6 (S.D. NY 2004) (complaint for violations of Copyright Act, RICO, and various state laws failed to satisfy minimum pleading standard of F.R.C.P. 8 by lumping defendants and failing to distinguish their conduct). This is especially true with respect to the Receiver's fraud-based claims which must be pled with particularity. Colo.R.Civ.P. 9(b) (2020).

The Receiver argues that, in the Complaint, "the identities of the individual investors for each transaction are alleged, as is all relevant information about their investments, including the approximate dates and amounts of the investments," citing six (6) exhibits in support. However, such exhibits are merely lists of investors in various projects, four (4) of which concern Hershey – Plaza Mall of Georgia North (Ex. 33), Fort Collins WF 02, LLC (Ex. 35), High Street (Ex. 25), and Prospect Square (Ex. 42). The exhibits do not specify which, if any, of the listed investors allege fraud, when Hershey communicated with any investor who alleges fraud, what Hershey communicated to any investor who alleges fraud, whether any such investor relied on Hershey's communication, or whether the investor suffered some damage as a result of any such reliance.

Accordingly, the Receiver has failed to meet the pleading requirements of C.R.C.P. 9(b), and, therefore, the Receiver's claims for violations of the Colorado Securities Act, negligent misrepresentation, and violations of COCCA must be dismissed.⁴

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

The Receiver does not contest that, to the extent that he can allege claims on behalf of creditors of the receivership estate, he stands in the shoes of such creditors and, therefore, is subject to any defenses to which the creditors are subject, including the statute of limitations. Thus, because the Receiver purports to supplant the creditors, he may initiate an action so long as the creditors are not barred from doing so by the applicable statute of limitations. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1249 (Colo. 1994).

Here, the Receiver concedes that his claim against Hershey for violation of C.R.S. § 11-51-401(1) is time-barred under C.R.S. § 11-51-604(8). (Response at p. 46, fn. 22). Additionally, the Receiver acknowledges that his claim against Hershey for violation of C.R.S. § 11-51-501(1) also is time-barred under C.R.S. § 11-51-604(8) except with respect to four (4) discrete transactions that occurred after August 29, 2014. (Response at p. 46, fn. 22).⁵

The Receiver does not address Hershey's argument that, as pled, the Receiver's negligence and negligent misrepresentation claims are time-barred because the Receiver acknowledges that creditors knew or should have known of such claims no later than 2012. Accordingly, except possibly with respect to a claim for negligence or negligent misrepresentation based on the four (4) discrete transactions made in connection with the Plaza

⁴ The Receiver argues that his negligent misrepresentation claim is not subject to the heightened pleading requirement of C.R.C.P. 9(b). However, because such claim is grounded in fraud (Complaint at ¶¶ 362-363, 365), it is subject to C.R.C.P. 9(b). See *Martin v. Chinese Children Adoption Int.*, 2020 WL 1703793, *6 (D. Colo. April 8, 2020) (holding that F.R.C.P. 9(b) applies to negligent misrepresentation claim grounded in fraud).

⁵ Subsequently in the Response, the Receiver states that "[t]he Hershey Defendants violated the licensing provisions of the Colorado Securities Act after January 21, 2018, by soliciting and selling membership interests in the four SPEs identified on Exhibit 3." (Response at p. 51). However, there are no such allegations in the Complaint.

Mall of Georgia North in 2015 and 2016, the Receiver appears to confess that his negligence and negligent misrepresentation claims are time-barred.

Finally, the Receiver contends that he has alleged a predicate act against Hershey within the applicable limitations periods and, therefore, that he has alleged viable COCCA claims against Hershey. However, the only conduct alleged against Hershey within the applicable five-year limitation period is that he was involved in certain “rollover” transactions with respect to the Plaza Mall of Georgia North. With respect to these transactions, there are no allegations about how Hershey was involved and, thus, whether his alleged involvement constituted a predicate act for purposes of a COCCA claim. Without the occurrence of a predicate act within the five-year limitations period, the Receiver does not have a COCCA claim against Hershey. C.R.S. § 13-80-103.8 (2020).

E. Adoption of Other Defendants’ Arguments in Support of Their Motions to Dismiss

To the extent that Defendants Dragul, Alan Fox/ACF Property Management, Inc., and Susan Markusch/Olson Real Estate Services, LLC make arguments that also are applicable to the Receiver’s claims alleged against Hershey, Hershey adopts such arguments and incorporates them herein by reference.

Respectfully submitted this 8th day of September 2020.

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 8th day of September 2020:

Allen Vellone Wolf Helfrich and Factor PC

Michael Thomas Gilbert

Patrick D. Vellone

Rachel A. Sternlieb

Moye White

Eric Brian Liebman

Joyce Carmel Williams

Lucas Trask Ritchie

Gordon and Rees LLP

John M. Palmeri

Margaret Louise Boehmer

Jones & Keller PC

Christopher Stephen Mills

Paul Leo Vorndran

Susan Markusch (by first-class, U.S. mail)

/s/Paul M. Grant

Paul M. Grant