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

Defendant Gary Dragul along with several other defendants are concurrently moving for certification of interlocutory appeal of the issue of standing raised in their motions to dismiss the Receiver's First Amended Complaint. Mr. Dragul is also separately concurrently moving for

certification of interlocutory appeal of an issue unique to him: that the Receiver may not sue Mr. Dragul because Mr. Dragul is in the Receivership. However, in the alternative to interlocutory appeal, Mr. Dragul moves for reconsideration. Though motions for reconsideration are disfavored, and Defendant Gary Dragul brings this motion ("Motion") reluctantly, because this is a rare circumstance which justifies reconsideration.

Here, the parties filed a combined 170 pages of briefing on their motions to dismiss the Receiver's First Amended Complaint, in which those defendants demonstrated, among other things, at least two ways in which the Receiver lacked standing to pursue the claims he alleged. That lack of standing means this Court lacks subject matter jurisdiction over this matter. But three days before the Judge's retirement, the Court denied the motions to dismiss by stamping "DENIED BY COURT" on the proposed orders. The Court provided no explanation for its ruling. In the weeks prior to his retirement, the Judge ruled on many dispositive motions in other matters, most of which the Court ruled by applying a three-word stamp and nothing else.

The denial reflects several manifest errors of law, the most significant of which is that the Receiver lacks standing to assert his claims, meaning the Court lacks subject matter jurisdiction. The denial without a reasoned order of motions involving such issues raises significant due process concerns. That lack of due process resulted in manifest injustice which justifies reconsideration.

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Mr. Dragul conferred with counsel for the Receiver and the Receiver opposes the relief sought in this Motion.

BACKGROUND

In August 2018, Harvey Sender was appointed Receiver for two of Mr. Dragul's entities, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC ("GDA Entities"), in Case No. 2018CV33011. Importantly, Mr. Sender was also appointed Receiver for Mr. Dragul personally. Mr. Dragul turned over to the Receiver all his assets derived directly or indirectly from investor funds, and turned over all information related to the Receivership entities, himself, and the transactions at issue, *including* Mr. Dragul's attorney-client privileged information such as communications with his attorneys.

Mr. Dragul was surprised when, in January 2020, the Receiver sued myriad defendants, *including Mr. Dragul himself*, alleging a variety of securities fraud and other claims. The claims the Receiver asserted are claims belonging to third-party investor-creditors, *not* claims belonging to the entities or people in Receivership. Most of the defendants moved to dismiss with 59 pages of combined briefing. In response, the Receiver filed the First Amended Complaint ("FAC").

The FAC still asserted third-party investor-creditors' claims, still alleged claims against Mr. Dragul even though Mr. Dragul is in the Receivership, and still asserted time-barred claims. Thus, defendants Alan Fox, ACF Property Management, Inc., Marlin Hershey, Performance Holdings, Inc., Susan Markush, Olson Real Estate Services, LLC, and Mr. Dragul ("Dismissing Defendants") moved to dismiss the FAC. The Dismissing Defendants' motions to dismiss the FAC, the Receiver's response, and the replies totaled 170 pages of briefing. In Mr. Dragul's July 6, 2020 motion to dismiss the FAC ("Motion to Dismiss"), brought under both Rules 12(b)(1) and 12(b)(5), he argued:

- The Receiver asserts third-party investor-creditors' claims, from whom he did not obtain an assignment of claims, which as a matter of law he lacks standing to assert. He may only assert claims belonging to the people or entities in Receivership. (Mot. to Dismiss 5-12.)

- As a matter of law, the Receiver may not sue Mr. Dragul because he serves as Receiver *for* Mr. Dragul:
    - Since the Receiver stands in the shoes of the people and entities in Receivership, that would mean Mr. Dragul is suing himself;
    - The Receiver lacks standing under the doctrine of *in pari delicto* to sue the people or entities in Receivership;
    - The order appointing the Receiver ("Receivership Order") enjoined all actions against the people and entities in Receivership, including against Mr. Dragul;
    - Mr. Dragul already turned over all his assets related to or derived from investor funds, meaning any recovery the Receiver might obtain from this action would be an unlawful double-recovery;
    - When the Receiver was appointed, Mr. Dragul turned over all his information including his attorney-client privileged information, which the Receiver is now using against Mr. Dragul.

(Mot. to Dismiss 12-17.)

- The Receiver was not authorized under the Receivership Order to pursue claims for damages on contingency. (Mot. to Dismiss 17-18.)
- The Receiver's Colorado Securities Act claims are time-barred. (Mot. to Dismiss 18-23.)
- The Receiver's Fraudulent Transfer (CUFTA) claim is time-barred. (Mot. to Dismiss 23-24.)
- The Receiver's Unjust Enrichment claim is both time-barred and not cognizable when pled with a Fraudulent Transfer claim. (Mot. to Dismiss 24-25.)

The Dismissing Defendants finished briefing their motions to dismiss the FAC on September 8. On October 28, 2020, three business days before the Judge's November 2nd retirement was effective, the Court denied the motions to dismiss the FAC. It did so by stamping "DENIED BY COURT" on the Dismissing Defendants proposed orders. The Court did not provide any reasoning for its decision.

ARGUMENT

Under C.R.C.P. 121, § 1-15(11), motions to reconsider are disfavored, but may be granted if the underlying order reflects "a manifest error of fact or law that clearly mandates a different result or other circumstance resulting in manifest injustice." The Court's October 28, 2020 Order ("Order") denying Mr. Dragul's Motion to Dismiss the FAC with a "DENIED BY COURT" stamp without any reasoning or explanation reflects both a manifest error of law and manifest injustice.

The lack of a written order makes it difficult to discern a single manifest error of law. However, the denial apparently means that the Court held: (1) the Receiver had standing to assert his claims; (2) the Receiver could sue Mr. Dragul even though Mr. Dragul is in the Receivership; (3) the Receiver could pursue his claims for damages even though he was on contingency, despite that this was barred under the Receivership Order; (4) the Receiver's Colorado Securities Act claims are timely; (5) the Receiver's Fraudulent Transfer (CUFTA) claim is timely; and (6) the Receiver's Unjust Enrichment claim is both timely and cognizable. Issues (1) & (2) are pure issues of law and relate to standing, meaning they are determinative of the Court's subject matter jurisdiction. The remaining issues might involve mixed issues of fact and law, but there were no fact disputes as they rested on the Receiver's factual allegations in the FAC, which the Dismissing Defendants assumed to be true for purposes of the motions to dismiss. The Court's holding as to each of these issues constitutes a manifest error of law.

I. The Receiver Lacks Standing to Assert Investors' Claims as a Matter of Law

Mr. Dragul will not repeat his Motion to Dismiss, but Mr. Dragul demonstrated in that motion that all of the claims the Receiver asserted in the FAC are third-party investor-creditors' claims, not claims belonging to the person or entities in Receivership. (Mot. to Dismiss 5-8.) A

receiver's power flows through the people and entities in receivership, meaning he can assert their claims. However, as a matter of law, the Receiver lacks standing to assert third-party creditors' claims. (Mot. to Dismiss 9-12).[1]

Mr. Dragul is aware of no case from any jurisdiction holding that receivers have standing to assert third-party creditors' claims. Apparently, the Receiver is not aware of any either, as he did not cite any such case in his response to the Motion to Dismiss. (Resp. Mot. to Dismiss 1-8, 10-12.) The Court's holding here would be the first to find standing, and thus subject matter jurisdiction under these circumstances. Thus the Order is contrary to all other authority on the issue, and it establishes manifest legal error that justifies reconsideration.

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

The Receiver stands in Mr. Dragul's shoes since Mr. Dragul is in the Receivership. Mot. to Dismiss 12; *E.g., Good Shepherd*, 789 P.2d at 425. That means the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. Mr. Dragul cannot sue himself. *See, e.g., BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013) (noting a party may not sue itself even if the party is serving in different legal capacities) (collecting cases). Additionally, the doctrine of *in pari delicto*, which applies both as an issue of standing and a

[1] S*ee also, e.g., Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 780-81 (Colo. App 1997) (holding "[a] bankruptcy trustee cannot assert the claims of creditors or third parties but stands in the shoes of the debtor and may properly assert claims belonging to the debtor."); *In re M & L Business Machine Co., Inc.*, 160 B.R. 850, 851 (D. Colo. 1993) (holding that a bankruptcy trustee, analogous to the Receiver here, lacked standing to assert creditors' claims against third parties; collecting cases); *Javitch v. First Union Sec., 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."); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (An "equity receiver may sue only to redress injuries to the entity in receivership."); *Good Shepherd Health Facilities of Colorado, Inc. v. Department of Health*, 789 P.2d 423, 425 (Colo. App. 1989) ("[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."); *Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1128-29 (D. Minn. 2012) ("[A]n equity receiver may sue only on behalf of the entity (or person) in receivership, not third parties. This is because a receiver 'stands in the shoes' of the receivership entity."); *First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC*, 166 P.3d 166, 180 (Colo. App. 2007) ("[I]f the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.").

defense in Colorado, means the Receiver cannot claim to assert the GDA Entities' claims against Mr. Dragul, even if he could ignore that Mr. Dragul is also in the Receivership. *Sender v. Kidder Peabody*, 952 P.3d at 782; (*see also* Mot. to Dismiss Reply 9-10).

Additionally, the Receivership Order enjoins all actions against the person and entities in Receivership, meaning the Receiver was enjoined from suing Mr. Dragul. (Mot. to Dismiss 14.) And Mr. Dragul already turned over all his assets derived from investor funds to the Receiver, meaning if the Receiver were to recover money for distributions to those investors, it would be an unlawful double recovery. (Mot. to Dismiss 14-15); *Andrews v. Picard*, 199 P.3d 6, 11 (Colo. App. 2007). Worse, the Receiver demanded, and Mr. Dragul turned over, all information on the GDA server which included all of Mr. Dragul's attorney-client privileged communications about the very transactions at issue. (Mot. to Dismiss 15-17.) If the Receiver can now sue Mr. Dragul and his former attorney as he tries to do in the FAC, it would allow the Receiver to use that attorney-client privileged information which the Receiver should not have against Mr. Dragul.

As a matter of law, then, the Receiver may not sue Mr. Dragul since Mr. Dragul is in the Receivership. The denial to the contrary reflects a manifest error of law.

III. The Receiver is Not Authorized to Prosecute Most of the Claims

The Receivership Order authorizes the Receiver to prosecute only claims "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[.]" (See Mot. to Dismiss 17-18.) Receivership Property only encompasses assets related to or derived from investor funds (Rec. Order ¶ 9), not damages. *Id.* Since most of the Receiver's claims seek to recover damages, he is not authorized to bring them under the plain language of the Receivership Order, and the denial to the contrary is manifest error.

IV. The Receiver's Claims are Time-Barred or Not Cognizable

Finally, the Receiver's Colorado Securities Act claims are time-barred under the 3-year statute of limitations and 5-year statute of repose under the Colorado Securities Act based on the Receiver's own factual allegations. (See discussion and authority in Mot. to Dismiss 18-23.) The fraudulent transfer claim is likewise barred under the C.R.S. § 38-8-110(1)(a) limitations period based on the Receiver's own factual allegations. (Mot. to Dismiss 23-24.) And the unjust enrichment claim is both time-barred and cannot be pled in conjunction with a fraudulent transfer claim. (Mot. 24-25.) It was manifest legal error not to dismiss these claims.

V. The Non-Reasoned Order Here Weighs in Favor of Reconsideration

Courts are not required to issue a reasoned decision even on a Rule 12 motion. C.R.C.P. 52. Particularly given the impact of the COVID pandemic, it would be unreasonable to expect trial courts to draft a written opinion explaining their rulings on simple or pro forma issues. However, "judges are encouraged to include in decisions on motions sufficient explanation that would be helpful to the parties and a reviewing court." C.R.C.P. 52, 2017 cmt. "Thus, even where findings and conclusions are not required, the better practice is to explain in a decision on any contested, written motion the court's reasons for granting or denying the motion." *Id.*

Indeed, "where . . . a district court adopts an order drafted by counsel, [appellate courts] scrutinize the order more critically." *Chostner v. Colorado Water Qual. Control Comm'n*, 327 P.3d 290, 297 (Colo. App. 2013). Nonetheless, orders submitted by counsel and adopted by the court may still pass muster except "when the findings themselves are inadequate and do not indicate the basis for the trial court's decision . . . the judgement will be reversed." *Uptime Corp. v. Colorado Research Corp.,* 420 P.2d 232, 235 (Colo. 1966).

CONCLUSION

Not often are motions for reconsideration justified, but this is one of those times. In the alternative to certifying issues in this case for interlocutory appeal, the Court should grant this Motion for Reconsideration, and substantively address the arguments in Mr. Dragul's Motion to Dismiss the FAC, and dismiss the FAC.

Dated this 12th day of November, 2020.

JONES & KELLER, P.C.

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

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION IN THE ALTERNATIVE FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via the Colorado Court E-filing system to the following:

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