

<p>DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202</p>	
<p>Plaintiff: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p>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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>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</p>	<p>Case No. 2020CV30255</p> <p>Courtroom: 414</p>
<p style="text-align: center;">DEFENDANT GARY DRAGUL’S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF UNIQUE ISSUE UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. § 13-4-102.1(1)</p>	

Defendant Gary Dragul, along with defendants ACF Property Management, Inc., Alan Fox, Marlin Hershey, and Performance Holdings, Inc., have jointly concurrently moved for certification of interlocutory appeal of whether the Receiver has standing to assert his claims in

this case as raised in those defendants' motions to dismiss the Receiver's First Amended Complaint. ("Standing Certification Motion"). However, Mr. Dragul argued in his motion to dismiss the First Amended Complaint an issue unique to him: that the Receiver cannot sue Mr. Dragul as a matter of law because Mr. Dragul is himself in the Receivership. Mr. Dragul hereby moves for certification of interlocutory appeal of that issue in addition to the standing issue.

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.

INTRODUCTION

Mr. Dragul, ACF Property Management, Inc., Alan Fox, Marlin Hershey, and Performance Holdings, Inc., set forth the background of this case and the law applicable to motions to certify for interlocutory appeal at length in the Standing Certification Motion, and Mr. Dragul does not repeat it here. Rather, Mr. Dragul adopts and incorporates by reference that background, legal standard, and analysis.

The Standing Certification Motion does not, however, raise for certification for interlocutory appeal the issue of whether the Receiver may sue Mr. Dragul when Mr. Dragul is himself in the Receivership because that issue is unique to Mr. Dragul. This Motion advances the certification request on this issue.

The three part test articulated by *Indep. Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015), *aff'd*, 372 P.3d 1047 (Colo. 2016) to determine whether an order may be certified for interlocutory appeal is met. The Court's October 28, 2020 Order ("Order") denying Mr. Dragul's Motion to Dismiss the FAC, with a "DENIED BY COURT" stamp, at least as to the denial of Mr. Dragul's motion refuting the Receiver's ability to sue him, should be certified.

ARGUMENT

Orders may be certified for immediate appeal “when (1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order from which an appeal is sought involves a controlling question of law; and (3) the order from which an appeal is sought involves an unresolved question of law.” *Indep. Bank v. Pandy*, 383 P.3d 64, 66, *aff’d*, 372 P.3d 1047. Here, the Order effectively determined that the Receiver could sue Mr. Dragul, a party in the receivership. A review now of that Order meets the *Pandy* test.

I. Immediate Review of Whether the Receiver May Sue Mr. Dragul Will Provide a More Orderly Disposition.

The first factor of *Pandy* is satisfied here because the resolution of the issue whether the Receiver can sue Mr. Dragul is dispositive of the litigation as to Mr. Dragul. If the Receiver cannot sue Mr. Dragul, a party in the Receivership, as a matter of law none of the claims against Mr. Dragul can proceed. As argued fully in Mr. Dragul’s Motion to Dismiss First Amended Complaint (filed July 6, 2020) (hereafter, “Dragul Motion to Dismiss”), a Receiver may not sue a party in receivership. Thus, a determination by the Court of Appeals that the Receiver has no authority to sue Mr. Dragul would dispose of the litigation against him. Alternatively, a determination by the Court of Appeals that the Receiver may maintain such an action will enable a more orderly resolution of the litigation because the parties will know that this fundamental issue, representing an all or nothing outcome, will not remain outstanding to frustrate resolution or settlement.

II. Immediate Review of Whether the Receiver May Sue Mr. Dragul Involves a Controlling Issue of Law

The second factor of *Pandy* is whether the Order involves a controlling issue of law. In making this determination, Courts should consider: “(1) whether the issue is one of widespread

public interest, (2) whether the issue would avoid the risk of inconsistent results in different proceedings; (3) whether the issue is ‘case dispositive.’” *Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 612, *reh'g denied* (Oct. 10, 2019), *cert. denied*, 2020 WL 1887932 (Colo. Apr. 13, 2020) (citations omitted).

The *Affiniti* factors support certification. There is public interest support for a determination whether a Receiver can sue the very party in receivership, and public interest is advanced by the lawful exercise of authority by a receiver, an officer of the court. The resolution the question whether the Receiver can sue Mr. Dragul by asserting investor claims avoids inconsistent outcomes where such investors might also assert such claims. Certainly, the resolution of whether the Receiver can sue Mr. Dragul is potentially dispositive of the Receiver’s case against Mr. Dragul. Certification of the Order is supported by the second *Pandy* factor.

III. Whether the Receiver May Sue Mr. Dragul is an Unresolved Question of Law

The third factor of *Pandy* concerns whether the issue is an unresolved question of law. Under *Pandy*, such a question must be one of law and not mixed with fact, and one that has not been resolved by either the Colorado Supreme Court or the United States Supreme Court. As argued fully in the Dragul Motion to Dismiss, no decision has been made by the Colorado Supreme Court or the United States Supreme Court concerning whether a receiver can sue a party in the receivership. Accordingly, this third factor is established.

CONCLUSION

The three part test in *Pandy* is met. This Court should grant the motion to certify the question pursuant to C.A.R. 4.2(a) and C.R.S. § 13-4-102.1(1) because the receiver cannot sue Mr. Dragul as a matter of law because Mr. Dragul is himself in the receivership.

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 FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF UNIQUE ISSUE UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. § 13-4-102.1(1)** was filed and served via the Colorado Court E-filing system to the following:

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