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 ▲
Attorneys for ACF Defendants: Lucas T. Ritchie, Atty. Reg. No. 35805 Eric B. Liebman, Atty. Reg. No. 27051 Joyce C. Williams, Atty. Reg. No. 52930 MOYE WHITE LLP 16 Market Square 6th Floor 1400 16th Street Denver, CO 80202 Telephone: 303-292-2900 Email: Luke.Ritchie@moyewhite.com Eric.Liebman@moyewhite.com Joyce.Williams@moyewhite.com and Gary S. Lincenberg *(admitted pro hac vice)* Sharon Ben-Shahar Mayer *(admitted pro hac vice)* James S. Threatt *(admitted pro hac vice)* BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW, P.C. 1875 Century Park East, Twenty-Third Floor Los Angeles, CA 90067 Telephone: 310-201-2100 Email: glincenberg@birdmarella.com smayer@birdmarella.com jthreatt@birdmarella.com	Case Number: 2020CV30255 Courtroom 414
DEFENDANTS GARY DRAGUL, ACF PROPERTY MANAGEMENT, INC., ALAN C. FOX, MARLIN S. HERSHEY AND PERFORMANCE HOLDINGS, INC.'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER C.A.R. 4.2(a) PURSUANT TO C.R.S. § 13-4-102.1(1)	

Defendants Gary Dragul ("Dragul"), ACF Property Management, Inc. ("ACF"), Alan C. Fox ("Fox"), Marlin S. Hershey ("Hershey") and Performance Holdings, Inc. ("PH") (collectively, "Moving Defendants"), through counsel, hereby submit their joint Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) Pursuant to C.R.S. 13-4-102.1, and in support thereof state as follows:

C.R.C.P. 121, § 1-15, ¶ 8 AND C.A.R. 4.2(c) CERTIFICATIONS

Prior to filing this motion, counsel for Moving Defendants have met and conferred with counsel for plaintiff Harvey Sender as receiver ("Receiver") for Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC (collectively, "GDA"), and, based thereon, advise the Court that the Receiver opposes the requested relief. The requested certification of interlocutory appeal is not being sought for purposes of delay.

I. INTRODUCTION

Moving Defendants move to certify for interlocutory appeal a single issue in the Court's October 28, 2020 orders ("Orders") denying their respective motions to dismiss the Receiver's First Amended Complaint ("FAC"). Specifically, the issue Moving Defendants seek to certify is whether the Receiver has standing to bring his claims against them.

The Receiver asserts each of his claims on behalf of investors in the GDA Entities,[1] who are creditors of the Receivership Estate. While no Colorado appellate court has ever ruled on this issue, federal and state courts across the nation have repeatedly held that a receiver does not have standing to bring claims on behalf of creditors of the receivership estate and have dismissed such

[1] The term "GDA Entities" is defined in the FAC as referring to GDA and "a number of related entities and single purpose entities." FAC ¶ 10.

claims for lack of subject matter jurisdiction. Moving Defendants moved to dismiss the FAC on the ground, among others, that the Receiver lacks standing to assert his claims. On October 28, 2020, the Court denied all motions to dismiss by stamping Moving Defendants' respective proposed orders "Denied by the Court." The Court provided no reasoning or explanation for its Orders, but its rulings necessarily mean that the standing argument, and consequently the challenge to subject matter jurisdiction, was denied.

C.R.S. 13-4-102.1 and C.A.R. 4.2(a) allow this Court to certify an order for interlocutory appeal if immediate review "may promote a more orderly disposition or establish a final disposition of the litigation" and "[t]he order involves a controlling and unresolved question of law." C.R.S. 13-4-102.1; C.A.R. 4.2(a). The Court's Orders meet this standard. Resolution of the standing issue implicates the subject matter jurisdiction of this Court and controls the outcome of this case. It is a matter of first impression in Colorado, presenting important facts, invoking public interest concerns, and involving an unresolved and important question of law. Resolving this issue now will also obviate the risk of inconsistent rulings that may result if individual investors bring separate claims directly against Moving Defendants. If Moving Defendants are forced to wait until the proceedings are concluded to file their appeal and the Court of Appeals disagrees with this Court and determines the Receiver lacks standing to bring his claims, that decision will require a reversal and would result in an enormous waste of judicial and party resources. Immediate appellate review, on the other hand, may resolve this case or at least narrow the issues before the Court, and streamline further proceedings. Moving Defendants, therefore, ask the Court to certify for interlocutory appeal the question whether the Receiver has standing to assert the claims brought against them in this action.

II. THIS COURT SHOULD CERTIFY THE DECISION ON STANDING FOR INTERLOCUTORY APPEAL

1. Legal Standard for Certification of an Order for Interlocutory Appeal.

A trial court may certify an order as "immediately appealable" if:

> (1) "immediate review may provide a more orderly disposition or establish a final disposition of the litigation"; and
>
> (2) "the order involves a controlling and unresolved question of law."

C.R.S. 13-4-102.1. These requirements are reiterated in C.A.R. 4.2. In turn, Colorado courts have confirmed that an order may be certified for interlocutory 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 (Colo. App. 2015), *aff'd*, 372 P.3d 1047 (Colo. 2016); *Wahrman v. Golden W. Realty, Inc.*, 313 P.3d 687, 688 (Colo. App. 2011); *Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011). The Orders denying the Moving Defendants' standing argument meet each of these three criteria.

2. The Receiver's Standing to Pursue His Claims Presents an Unresolved Question of Law.

Taking the criteria enumerated in *Pandy* in reverse order, an "unresolved question of law" is "a question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court." C.A.R. 4.2(b)(2). The question must be one of "law," as opposed to a mixed question that involves the application of well-established legal

principles to the unique facts at hand. *See Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 611 (Colo. App. 2019), *reh'g denied* (Oct. 10, 2019), *cert. denied*, No. 19SC864, 2020 WL 1887932 (Colo. Apr. 13, 2020); *see also Clyncke v. Waneka,* 157 P.3d 1072, 1076 (Colo. 2007) (issues of statutory interpretation are questions of law). The Receiver's standing to bring claims on behalf of creditors is a pure question of law, and no Colorado appellate court has ever decided it, let alone resolved it in favor of standing.

Both federal and state courts in other jurisdictions have repeatedly held that a receiver lacks standing to sue on behalf of creditors of the receivership estate. For example, the Sixth Circuit held that a receiver "stand[s] in the shoes of the entity in receivership" and therefore "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, 793 (6th Cir. 2009) (citations omitted). In *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003), the court explained "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." *Id*., at 627 (citations omitted).

Other federal appellate courts, including the Tenth Circuit, have similarly held that a receiver has standing to bring only those claims that can be asserted by the individual or entities in receivership. *See Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008) ("A receiver may commence lawsuits, but stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted.") (citations and quotation marks omitted); *Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (equity receiver did not have standing to bring claims on behalf of investors); *Commodity Futures Trading Comm'n. v. Chilcott Portfolio*

Mgmt., Inc., 713 F.2d 1477, 1481 (10th Cir. 1983) (receiver can assert claims only for the corporate fund in receivership and cannot seek "damages on the claims for the investors").

State courts in other jurisdictions have reached a similar conclusion. *See e.g., Forex Capital Markets, LLC v. Crawford*, No. 05-14-00341-CV, 2014 WL 7498051, at *3 (Tex. App. Dec. 31, 2014) ("As a general rule, a receiver may sue only for claims of the entities in receivership, and may not assert claims for injuries directly suffered by the investors."); *GTR Source, LLC v. FutureNet Grp., Inc.*, 62 Misc. 3d 794, 807–09, 89 N.Y.S.3d 528, 539–40 (N.Y. Sup. Ct. 2018) (same).

No Colorado appellate court has ever decided this issue. In *Sender v. Kidder Peabody*, 952 P.2d 779 (Colo. App. 1997), the Colorado Court of Appeals considered a similar challenge to the standing of a *bankruptcy trustee* to assert claims on behalf of creditors of the bankruptcy estate. The court held that a bankruptcy trustee had no standing to do so. *Id.* at 781. Although the Colorado Court of Appeals' rationale in *Sender v. Kidder* supports a reversal here, that case did not directly resolve the standing question in the context of a receivership.[2]

The Receiver has argued that Section 13(s) of the Receivership Order authorizes him to sue on behalf of creditors. While this too is a matter of first impression in Colorado, courts in other jurisdictions have rejected similar arguments and have held that a receivership order cannot bestow standing where none exists under the United States Constitution. In *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990), for example, the court explained that "the appointment of a receiver is inherently limited by the jurisdictional constraints." Granting a receiver authority

[2] Underscoring that the issue at bar is one of first impression in Colorado is the fact that the Receiver argued in his Omnibus Response to Defendants' Motion to Dismiss that the *Sender* case is factually inapposite because, *inter alia*, it involved a bankruptcy trustee rather than a receiver.

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 legislature] and not the judiciary." *Id.* at 1421 n.6;[3] *see also Liberte Capital*, 248 F. App'x at 657–59 (receiver lacked standing despite receivership order's language purporting to authorize such claims); *Fleming*, 922 F.2d at 24–25 (although the district court empowered the receiver "to prevent irreparable loss, damage and injury to commodity customers and clients," the receiver lacked standing to sue for claims belonging to investors); *Marwil v. Farah*, No. 1:03–CV–0482–DFH, 2003 WL 23095657, at *7 (S.D. Ind. Dec. 11, 2003) (receiver lacked standing to represent the investors notwithstanding the language of the receivership court order that purported to enable him to do so because the court lacked the authority to transfer property—including causes of action—from the investors to the receiver). 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.

So, while federal and state courts in other jurisdictions have held that an order appointing a receiver cannot confer standing to sue on behalf of creditors, no Colorado appellate court has addressed this question. The Receiver's standing to sue thus is an unresolved question of law under C.R.S. 13-4-102.1 and C.A.R. 4.2.

[3] *See Wimberly v. Ettenberg*, 194 Colo. 163, 167 (Colo. 1977) (same considerations applicable to Article III standing also guide Colorado courts).

3. The Receiver's Standing to Pursue His Claims Presents a Controlling Question of Law.

Criterion (2) from the *Pandy* test is whether the question is "controlling." In making this determination, a court should consider the following factors: "(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"; and (4) whether the case involves "extraordinary facts." *Affiniti*, 461 P.3d at 612. "There is no doubt[, however,] that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district court proceedings." *Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colorado, Inc.*, 389 P.3d 888, 893 (Colo. App. 2013).

Here, these factors favor certifying the standing issue for interlocutory appeal. First, a receiver's standing to bring claims on behalf of creditors is one of widespread public interest because the public has a strong interest in ensuring that receivers act within the scope of their powers and within the constitutional constraints. *See Cargill, Inc. v. HF Chlor-Alkali, LLC*, No. 16-2506, 2016 U.S. Dist. LEXIS 123785, at *12 (D. Minn. Sept. 12, 2016) (declining to appoint receiver where party seeking same did not make adequate showing that appointing receiver would be in the public interest). Moreover, because receivers are officers of the court, *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2981 (3d ed. 1975), when they purport to bring claims for which they lack standing, they undermine the public's confidence not only in the institute of a receivership but also in the court. *Id.*

Analogy to federal law further demonstrates Congress's recognition that the conduct of a receiver is a matter of public interest that may warrant immediate review. Under Section

1292(a)(2) of Title 28 of the United States Code, the federal courts of appeal have jurisdiction to review "interlocutory orders… to take steps to accomplish the purposes [of the receivership], such as directing sales or other disposals of property." The interlocutory orders to which this statute refers have been defined as "orders in the nature of 'executions before judgment,' and in effect either ousting parties from the possession of property or injuriously controlling the management and disposition of property." *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2986 (3d ed. 1975); *see also S.E.C. v. Bartlett*, 422 F.2d 475, 477 (8th Cir. 1970) (holding that where a trial court denied a motion to vacate a receivership, such interlocutory ruling was appealable under 28 U.S.C. § 1292). The Receiver's assertion of claims on behalf of creditors is akin to an attempt to dispose of property that does not belong to the Estate. Such an order would be immediately appealable under federal law.[4]

Second, resolution of the standing issue would also avoid the risk of inconsistent results in different proceedings because the creditors on whose behalf the Receiver purports to sue are fully capable of filing lawsuits on their own behalf. While the Receivership Order requires creditors to refrain from independently prosecuting claims against Dragul and GDA as a condition to submitting a claim (see FAC, Ex. 1 at ¶ 16), it requires nothing of the sort as to prosecution of claims against third parties to the Receivership Order like Fox, ACF, Hershey and PH. The

[4] *See Adams v. Corr. Co. of Am.*, 264 P.3d 640, 643 (Colo. App. 2011) ("Some of the language in [C.R.S. § 13-4-102.1] is similar to the federal interlocutory appeal statute, 28 U.S.C. § 1292(b). When a federal law is similar to a Colorado statute, federal cases may be useful, although not determinative, in analyzing comparable language in the Colorado provision.").

appellate court's immediate resolution of the standing issue would thus prevent inconsistent rulings and duplicative litigation and liability for these parties.[5]

Third, the standing issue is case dispositive because, as more fully discussed in Section II.4 below, it underlies each of the claims asserted by the Receiver against Moving Defendants. If the Moving Defendants are required to wait until the proceedings are concluded to file their appeal and the appellate court determines the Receiver lacked standing to bring his claims, that decision will require a complete reversal, and would result in an enormous waste of judicial and party resources. *See Independent Bank v. Pandy,* 383 P.3d at 66 (statute of limitations issue was "controlling" because if it bars the Bank's complaint, then any disposition rendered by the district court would be vacated).

Triple Crown, 389 P.3d 888 is instructive. There, the court concluded that the question whether claims were properly sent to arbitration was "controlling" because "a decision that the order was incorrect would require a reversal of a final judgment." *Id.* at 893. The order therefore "could cause the needless expense and delay of litigating an entire case in a forum that had no power to decide it." *Id.* Like in *Triple Crown*, here too, if the case proceeds and the Court of Appeals ultimately determines that the Receiver had no standing to bring his claim, then everything the Court will have done in this case will be nullified, as all actions undertaken without standing necessarily lack subject matter jurisdiction and would consequently be void. *Cunningham v. BHP Petroleum Gr. Brit. PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005).

[5] This is not a merely theoretical concern. For example, the Receiver has asserted allegations in the FAC concerning matters that were actively litigated by Dragul's creditors in the Denver District Court in the case captioned *GDA DU Student Housing A LLC v. Alan C. Fox*, Case No. 2019CV32374. *See e.g.*, FAC ¶¶ 67-71.

4. Immediate Review May Establish a Final Disposition of the Litigation and at Least Will Promote a More Orderly Disposition of the Case.

Criterion (1) from *Pandy* is satisfied when the order being appealed is potentially case dispositive. *Independent Bank v. Pandy*, 383 P.3d at 66 (certification for interlocutory appeal granted where statute of limitations issue was potentially case dispositive). But even if an issue is not case dispositive, it may be certified for immediate review if its early resolution would promote the "orderly disposition" of the case. *See Affiniti*, 461 P.3d at 612 (review of the attorney-client privilege issue was certified for interlocutory appeal because, while not resolving the entire litigation, it played a central role in the court's resolution of a key immunity issue).

Here, the standing issue is case dispositive because the Receiver has purported to bring each of his claims against Moving Defendants on behalf of creditors of the Estate. And although the Receiver has argued that he brought at least some of the claims also on behalf of the "GDA Entities," as more fully discussed below, none of his claims *can* be asserted by those entities. Without standing, subject matter jurisdiction is lacking, rendering actions taken by the Receiver, as an officer of the Court, void. *Cunningham*, 427 F.3d at 1245.

First through third claims for relief: By his own allegations, the Receiver purports to bring the first through third claims solely on behalf of Dragul's investors and/or SPEs, all of which are described as "creditors of the Receivership Estate." FAC ¶¶ 315, 356, 361. The tolling allegations and prayers for relief further confirm this. *See* FAC ¶¶ 319–20, 325–26, 336, 338.

Nor *could* the Receiver bring these claims on behalf of the GDA Entities. The first claim for relief for violations of the Colorado Securities Act can be asserted only by a purchaser or seller of a security – here, the GDA investors. C.R.S. §§ 11-51-501(1), 11-51-604(1)–(3). Although the allegations in the FAC do not reflect that, the Receiver has argued in his Omnibus Response to

Defendants' Motions to Dismiss filed August 17, 2020 ("Response") that he has brought the first claim for relief on behalf of the "GDA Entities" as purchasers of securities. But the allegations reflect that neither fraud nor injury can be asserted by these entities. Detrimentally to the Receiver's argument, 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 true facts, were "in" on the alleged fraud, and were the ***recipients*** of many of the allegedly illicit commissions. *E.g., id.,* FAC ¶¶ 98, 111, 136, 153, 249, 299, 331.

The Receiver has conceded, as he must, that he brought the second and third claims solely on behalf of the GDA investors. Resp. at 14.[6]

Fourth claim for relief: Civil theft can be asserted only by the injured party, which the FAC alleges were only the "GDA Entity investors." FAC ¶ 377. In his Response, the Receiver has argued that the GDA Entities were injured as well because they were allegedly deprived of fees paid to the Moving Defendants. Resp. at 11. But according to the Receiver's own theory, if those 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.

Fifth and Sixth Claims for Relief: Violations of COCCA and aiding and abetting can be asserted only by those injured by one or more predicate acts. C.R.S. § 18–17–106(7). Again, the FAC alleges that only Dragul's investors sustained such injury. FAC ¶ 379, 393. The Receiver's

[6] Claims for negligence and negligent misrepresentation are premised on a duty of care that the Receiver claims Moving Defendants owed "to investors and prospective investors." FAC ¶¶ 357 & 360. Therefore, the Receiver could not bring those claims on behalf of Dragul and GDA even if he wanted to do so.

argument that the GDA Entities were harmed because they were deprived of the fees paid to the Moving Defendants is refuted by the Receiver's own allegations, as addressed above.

Seventh claim for relief: The Receiver alleges under the seventh claim for breach of fiduciary duty against Dragul that Mr. Dragul owed a fiduciary duty to "the GDA Entities and their member investors". FAC ¶ 409. But he alleges no facts to demonstrate what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered. The only facts he actually articulates in the FAC are to allege a duty owed to investors and how investors were purportedly injured. *Id.* ¶ 410, 412-415. Thus, the only plausibly-pled fiduciary duty claim is brought on behalf of third-party investor-creditors, not the GDA Entities.

Eleventh and twelfth claims for relief: The Receiver fails to allege a basis for his purported standing to assert his fraudulent transfer and unjust enrichment claims, but neither of them can be asserted on behalf of the parties in receivership. The relief afforded by the Colorado Uniform Fraudulent Transfer Act ("CUFTA") is expressly available only to creditors of the Estate. C.R.S. § 38-8-108(1) ("In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in section 38-8-109, may obtain" relief). And federal courts have repeatedly held that receivers lack standing to bring such claims. *See Eberhard*, 530 F.3d at 132 (receiver lacked standing to assert fraudulent conveyance claim because he did not represent any creditor); *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274 (7th Cir. 1997) (receiver appointed for trader who allegedly defrauded investors lacked standing to sue the defendant because the trader had no possible claim and the receiver had no standing to act on investors' behalf); *see also 2 Clark on Receivers* § 364 (3d ed. 1959) (a receiver "acquires no right ... to the

property fraudulently transferred for the reason that the transfer is valid against the debtor and cannot be set aside by the receiver as the debtor's successor").

The Receiver has cited cases in which receivers were allowed to pursue fraudulent transfer claims, but has ignored a crucial distinction—a fraudulent transfer claim may be brought by a receiver ***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) (receiver had standing because he seeks "to redress a distinct harm to [the entity in receivership], not just to its customers.").

The receivers in those cases therefore had standing to bring fraudulent transfer claims because the entities in receivership suffered injury distinct from the injury to the creditors. In contrast, here, the alleged injury to the GDA Entities—the fees paid to the Moving Defendants—is the *same injury* allegedly caused to Dragul's investors. In the absence of distinct injury to the entities in receivership, the Receiver has no standing to bring the eleventh and twelfth claims against the Moving Defendants.[7]

[7] The rationale underlying *Scholes* and *Knauer* with respect to fraudulent transfer claims 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.

A nearly identical fact pattern was addressed in *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 utilized 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 – the fees paid to the Moving Defendants – was caused during solicitation, which ultimately "fattened [GDA's] coffers." Because the GDA Entities benefitted from the solicitation activity, this alleged injury cannot support a fraudulent transfer and unjust enrichment claims by the GDA Entities.

The foregoing analysis confirms the Receiver's standing to sue on behalf of creditors is potentially case dispositive because none of the Receiver's claims against Moving Defendants can be asserted on behalf of Dragul or GDA – the only parties on whose behalf he has standing to sue.

This standing issue controls the outcome of the case and is not a matter that can be cured by further amendment of the FAC.

But even if the Court of Appeals concludes that some of the claims can be asserted on behalf of Dragul or GDA, that determination likely would still eliminate most of the claims, significantly narrow the scope of the case, and make for a more manageable, focused, and streamlined litigation. Resolution of the standing issue therefore would at least promote the orderly disposition of the litigation, if it does not dispose of it completely as to the Moving Defendants.

III. CONCLUSION

For the foregoing reasons, Moving Defendants respectfully request the Court to certify for interlocutory appeal under C.R.S. 13-4-102.1 and C.A.R. 4.2 the question whether the Receiver has standing to bring his claims. Allowing the court of appeals to take a close look at this issue will streamline and potentially dispose of this litigation, to the benefit of the parties, the Court, and the public at large. A proposed order granting the requested relief is submitted herewith.

Dated: November 12, 2020

Respectfully submitted,
MOYE WHITE LLP

s/ Lucas T. Ritchie
Lucas T. Ritchie
Eric B. Liebman
Joyce C. Williams
and
BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW, P.C
Gary S. Lincenberg (*admitted pro hac vice*)
Sharon Ben-Shahar Mayer (*admitted pro hac vice*)
James S. Threatt (*admitted pro hac vice*)
Attorneys for Defendants Alan C. Fox and ACF Property Management, Inc.

JONES & KELLER, P.C.

s/ Paul L. Vorndran
Paul L. Vorndran
Christopher S. Mills
Attorneys for Defendant Gary J. Dragul

GOODREID AND GRANT, LLC

s/ Thomas E. Goodreid
Thomas E. Goodreid
Paul M. Grant
Attorneys for Defendants Performance Holdings, Inc. and Marlin Hershey

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020 a true and correct copy of the foregoing was electronically filed via CCEF and served on the following:

Patrick D. Vellone, Esq.
Rachel E. Sternlieb, Esq.
Michael T. Gilbert, Esq.
ALLEN VELLONE WOLF
HELFRICH & FACTOR P.C.
1600 Stout St., Suite 1100
Denver, CO 80202
Attorneys for Receiver

Paul L. Vorndran, Esq.
Christopher S. Mills, Esq.
JONES & KELLER, P.C.
1675 Broadway, 26th Floor
Denver, CO 80202
Attorneys for Defendant Gary J. Dragul

Thomas E. Goodreid
Paul M. Grant
Goodreid & Grant LLC
7761 Shaffer Parkway, Suite 105
Littleton, CO 80127
Attorneys for Defendants Performance Holdings, Inc. and Marlin Hershey

John M. Palmeri, Esq.
Edward J. Hafer, Esq.
Margaret L. Boehmer, Esq.
GORDON & REES LLP
555 Seventeenth Street, Ste. 3400
Denver, CO 80202
Attorneys for Defendants Benjamin Kahn and The Conundrum Group, LLP

Susan Markusch and
Olson Real Estate Services, LLC
6321 South Geneva Circle
Englewood, CO 80111
Pro Se Defendants

s/ Brenda K. Sussman