

DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

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

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

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

Thomas E. Goodreid, #25281
Paul M. Grant, #26517
Goodreid & Grant LLC
7761 Shaffer Parkway, Suite 105
Littleton, Colorado 80127
Phone: 303-296-2048x136 (Goodreid)
Phone: 720-810-4235 (Grant)
E-mail: t.goodreid@comcast.net
E-mail: pgrant@goodreidgrant.com

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Case Number: 20CV30255

Courtroom: 414

**UNOPPOSED JOINT MOTION OF DEFENDANTS MARLIN S. HERSHEY,
PERFORMANCE HOLDINGS, INC., ACF PROPERTY MANAGEMENT, INC., ALAN
C. FOX, AND GARY DRAGUL FOR ADDITIONAL ENLARGEMENT OF TIME TO
ANSWER OR OTHERWISE RESPOND TO RECEIVER’S FIRST AMENDED
COMPLAINT**

Defendants Marlin S. Hershey, Performance Holdings, Inc., ACF Property Management, Inc., Alan C. Fox, and Gary Dragul (collectively, “Movants”), each through his/its respective counsel, file this Unopposed Joint Motion for Additional Enlargement of Time to Answer or Otherwise Respond to Receiver’s First Amended Complaint and, in support thereof, respectfully set forth as follows:

C.R.C.P. 121, § 1-15(8) CERTIFICATION

The undersigned certify that they have, in good faith, conferred with the Receiver’s counsel about this Motion and, based thereon, advise the Court that the Receiver does *not* oppose the requested relief.

C.R.C.P. 121, § 1-11 CERTIFICATION

The undersigned certify that a copy of this Motion has been served upon Movants.

1. On June 1, 2020, the Receiver filed his First Amended Complaint (the “FAC”), which consists of 127 pages setting forth 448 numbered paragraphs and attaching 45 exhibits. In the FAC, the Receiver alleges twelve (12) claims against ten named Defendants and up to twenty (20) unnamed parties. Pursuant to C.R.C.P. 15(a), Movants’ original deadline to answer or otherwise respond to the FAC was June 15, 2020.

2. On June 5, 2020, Movants and Defendants Benjamin Kahn, The Conundrum Group, LLP, Susan Markusch, and Olson Real Estate Services, LLC jointly moved for an unopposed twenty-one day enlargement of time to answer or otherwise respond to the FAC. On June 8, 2020, the Court granted the unopposed motion and set July 6, 2020 as Movants’ deadline to answer or otherwise respond to the FAC.

3. On July 6, 2020, Movants filed their respective motions to dismiss the FAC. Briefing on the motions to dismiss was completed on September 8, 2020.

4. On October 28, 2020, the Court denied each of the Movants' motions to dismiss with the single word "DENIED" stamped on each such motion.

5. On November 6, 2020, Movants moved for an unopposed thirty-five day enlargement of time to answer or otherwise respond to the FAC. On November 10, 2020, the Court granted the unopposed motion and set December 17, 2020 as Movants' deadline to answer or otherwise respond to the FAC.

6. On November 12, 2020, Movants filed their Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) Pursuant to C.R.S. § 13-4-102.1(1) (the "Motion for Certification"), pursuant to which they seek certification to appeal the dispositive legal issue of the Receiver's standing to pursue claims on behalf of creditors of the receivership estate. Also on November 12, 2020, Defendant Gary Dragul filed two (2) additional motions – a 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) and a Motion in the Alternative for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint (together, the "Dragul Motions").

7. Under C.R.C.P. 121, § 1-15(1)(b), the Receiver's deadline to respond to the Motion for Certification and the Dragul Motions was December 3, 2020. However, the Receiver requested and received a two-week extension of such deadline, a request that Movants did not oppose. Accordingly, the Receiver's deadline to respond to the Motion for Certification and the Dragul Motions is December 17, 2020, and the Movants' deadline to file their reply in support of the Motion for Certification and Dragul's deadline to file his replies in support of the Dragul Motions is December 24, 2020.

8. C.R.C.P. 6(b) provides the Court with broad discretion to grant requests for enlargement of case management deadlines when made prior to the expiration of the prescribed

period. Here, the Movants seek an enlargement of time to answer or otherwise respond to the Complaint until after the Court determines the Motion for Certification. If the Court grants the Motion for Certification, Movants likely will move to stay this case until the Court of Appeals accepts the appeal and determines the dispositive issue of the Receiver's standing. *See* C.A.R. 4.2(e) (2020). If the Court denies the Motion for Certification, Movants seek an additional enlargement of time of twenty-one (21) days following the Court's denial to answer or otherwise respond to the FAC. The additional enlargement of time will allow the Motion for Certification to be briefed fully and provide the Court with sufficient time to consider and determine the Motion for Certification before Movants invest the considerable time and expense necessary to answer or otherwise respond to the FAC.

9. The requested enlargement of time will not interfere with any current settings or deadlines, as none exist at this point in the case.

10. The Receiver has agreed to the requested enlargement of time and will not be prejudiced. Further, the requested enlargement of time is not sought for an improper purpose or to unnecessarily delay this action but rather to promote efficiency and economy.

11. As set forth above, Movants requested and were granted two previous enlargements of time to answer or otherwise respond to the FAC, due to the complexity and unusual circumstances of this litigation.

WHEREFORE, Movants respectfully request that the Court enter an order granting them an enlargement of twenty-one (21) days following the Court's determination of the Motion for Certification to answer or otherwise respond to the FAC and provide such other and further relief to which Movants may be justly entitled.

Respectfully submitted this 4th day of December 2020.

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

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

By: /s/Christopher S. Mills
Christopher S. Mills

Attorneys for Gary Dragul

By: /s/Lucas T. Ritchie
Lucas T. Ritchie

*Attorneys for Benjamin Kahn and
The Conundrum Group*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 4th day of December 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

Bird, Marella, Boxer, et al.

Gary S. Lincenburg
Sharon Ben-Shahar Mayer
James S. Threatt

Gordon and Rees LLP

John M. Palmeri
Margaret Louise Boehmer
Edward J. Hafer

Jones & Keller PC

Christopher Stephen Mills
Paul Leo Vorndran

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

/s/Paul M. Grant

Paul M. Grant