

DISTRICT COURT, DENVER COUNTY  
STATE OF COLORADO  
Denver District Court  
1437 Bannock St.  
Denver, CO 80202

DATE FILED: December 17, 2020 6:30 PM  
FILING ID: DAE50A621DF71  
CASE NUMBER: 2020CV30255

**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 Plaintiff:**

Patrick D. Vellone, #15284  
Matthew M. Wolf, #33198  
Rachel A. Sternlieb, #51404  
Michael T. Gilbert, #15009  
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.  
1600 Stout Street, Suite 1900  
Denver, Colorado 80202  
Phone (303) 534-4499  
pvellone@allen-vellone.com  
mwolf@allen-vellone.com  
rsternlieb@allen-vellone.com  
mgilbert@allen-vellone.com

Case No.: 2020CV30255

Division/Courtroom: 414

**RECEIVER'S RESPONSE TO DEFENDANTS' MOTIONS FOR  
CERTIFICATION OF INTERLOCUTORY APPEAL  
UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. §13-4-102.1(1)**

Plaintiff, Harvey Sender (the “**Receiver**”), hereby responds to: (1) the Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) pursuant to C.R.S. §13-4-102.1(1) (the “**Standing Motion**”) filed by Dragul, the Fox Defendants,<sup>1</sup> and the Hershey Defendants<sup>2</sup> (the “**Movants**”); and (2) Dragul’s separate 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) filed by Dragul (the “**Dragul Motion**”)<sup>3</sup> (jointly, the “**Certification Motions**”).

## I. Introduction

Through their Certification Motions, Movants ask the Court to allow them to take a premature piecemeal appeal that will delay resolution of this case to the detriment of Dragul’s defrauded investors. The Motions are contrary to Colorado’s long-standing and strong policy against piecemeal appeals. *See, e.g., Allison v. Engel*, 2017 COA 43, ¶ 31 (2017).

---

<sup>1</sup> On December 15<sup>th</sup>, the Receivership Court entered an order approving the Receiver’s Settlement Agreement with the Fox Defendants which resolves all claims asserted in this case against them. To the extent the Motion presents arguments unique to the Fox Defendants, they are moot.

<sup>2</sup> Capitalized terms not defined here are defined in the First Amended Complaint and the Receiver’s Omnibus Response to Defendants’ Motions to Dismiss.

<sup>3</sup> Dragul also filed an alternative Motion for Reconsideration concerning the same issue of whether the Receiver may sue him while he is subject to the Receivership as the one raised in his Certification Motion. The Receiver therefore incorporates the arguments set forth in his Response to Dragul’s Motion for Reconsideration being filed contemporaneously herewith as if fully set forth herein. And, because Dragul’s Certification Motion merely incorporates by reference all arguments advanced in his Motion to Dismiss on the issue, in the interest of efficiency, the Receiver hereby incorporates by reference Section II(B) of his Omnibus Response as is fully stated herein in response thereto.

Movants rely on C.R.S. § 13-4-102.1 and C.A.R. 4.2 for their extraordinary request. Under C.R.S. § 13-4-102.1, the court of appeals may permit an interlocutory appeal of “a certified question of law” only if (a) “immediate review may promote a more orderly disposition or establish a final disposition of the litigation;” and (b) the issue to be certified “involves a controlling and unresolved question of law.” Pursuant to C.A.R. 4.2, this Court must first certify the issue to the court of appeals for review.

The circumstances in which an interlocutory appeal is available is purposefully limited. *Wilson v. Kennedy*, 2020 COA 122, ¶ 29 (2020). “Those limitations reflect careful consideration by the General Assembly (for instance, in its enactment of section 13-4-102.1(1), which prompted the adoption of C.A.R. 4.2) and the Colorado Supreme Court Civil and Appellate Rules Committees to balance the interests of allowing interlocutory appeals in limited circumstances with the interests of maximizing judicial efficiency and minimizing piecemeal appeals.” *Id.* To permit piecemeal interlocutory appeals in cases where the articulated requirements are lacking, would both defeat this carefully crafted balance and frustrate the intent of both the legislature and the rule committees. *Id.* at ¶ 31. It would also be inappropriate considering the limited statutory jurisdiction of Colorado appellate courts. *Id.*

The issue Movants seek to certify is “whether the Receiver has standing to bring his claims against them” in this case. Standing Mot. at 2. Certification of that issue is appropriate only if “(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*, 2015 COA 3, ¶ 8 (2015). Because these requirements are not met here, the Certification Motions should be denied.

## II. Background

On August 30, 2018, the Court in *Rome v. Dragul, et al.* Case No. 2018CV33011, District Court, Denver, Colorado (the “**Receivership Court**”) entered a Stipulated Order Appointing Receiver (the “**Receivership Order**”) appointing Harvey Sender receiver for Gary Dragul and the GDA Entities, and their assets, interests, and management rights in related affiliated and subsidiary businesses (the “**Receivership Estate**” or the “**Estate**”). See Receivership Order, previously attached to original Complaint as Exhibit 1.

The Receivership Order grants the Receiver the authority to recover possession of Receivership Property from any persons who may wrongfully possess it and to prosecute claims premised on fraudulent transfer and similar theories. See Compl. Ex. 1, at ¶ 13(o). It also grants the Receiver the authority to prosecute claims and causes of action against third parties held by creditors of Dragul and the GDA Entities, and any subsidiary entities for the benefit of creditors of the Estate, “in order to assure the equal treatment of all similarly situated creditors.” See Compl. Ex. 1, at ¶ 13(s).

Pursuant to the foregoing authority, the Receiver filed his Complaint in this case on January 21, 2020 (the “**Complaint**”), asserting claims against Dragul and several co-conspirators stemming from a complex Ponzi scheme orchestrated by Dragul through which defrauded investors lost over \$70 million. The Markusch, Fox, Hershey, and Kahn Defendants (the “**Non-Dragul Defendants**”) all played roles in the fraud. Movants (excluding the Kahn Defendants), initially moved to dismiss the Receiver’s Complaint. The Kahn Defendants, who are not part of the Movant group here, did not move to dismiss, and filed their Answer on March 17, 2020.

The Receiver filed his First Amended Complaint on June 1, 2020 (the “**Amended Complaint**”). Movants filed motions to dismiss the Amended Complaint on July 6, 2020.<sup>4</sup> The Receiver filed an Omnibus Response to the motions to dismiss on August 17, 2020 (the “**Omnibus Response**”). Dragul and the Fox and Hershey Defendants replied on September 8, 2020. On October 28, 2020, the Court entered four separate orders denying the motions to dismiss.<sup>5</sup>

---

<sup>4</sup> The Markusch Defendants’ Motion to Dismiss was not filed until July 31, 2020.

<sup>5</sup> The Kahn Defendants are the sole Defendants herein that have filed an Answer to the Amended Complaint, and as such, the case is not yet at issue so proceedings against these Defendants have been stalled while the issues as to the remaining defendants are pending. Additionally, the Receiver and the Fox Defendants have entered into a Settlement Agreement and a motion seeking Receivership Approval thereof was filed in the Receivership Court on December 3rd. If approved, the Fox Settlement will resolve all claims asserted by the Receiver against the Fox Defendants herein.

### III. Certification is not appropriate.

In an effort to further delay this case with a detour to the court of appeals, Movants mischaracterize or ignore the Receiver's actual claims. Immediate review here will not promote judicial efficiency and will not, contrary to Movants' argument, finally resolve the claims in the case. And importantly, Movants themselves recognize that the standing issue involves not only legal questions – which may be appropriate for certification – but factual issues, which are not. *See* Standing Mot. at 3 (the standing issue “present[s] important facts”).

#### A. The standing issue is not a pure question of law.

Initially, certification is only appropriate for issues (1) of first impression in Colorado,<sup>6</sup> and (2) which involve purely legal issues, not mixed questions of law and fact. *See Rich v. Ball Ranch P'ship*, 2015 COA 6, ¶¶10-12 (2015). The lynchpin to the Certification Motions is Movants' contention that all of the Receiver's claims in this case are owned by creditors of the Estate, and the Receiver therefore lacks standing to bring them. Standing Mot. at 2, 5.

Movants continue to make this argument notwithstanding the allegations in the Amended Complaint that the Receiver brings his claims not only on behalf of defrauded investors, but also on behalf of the GDA Entities (or SPEs) themselves,

---

<sup>6</sup> In their Certification Motions, Movants argue the standing issue is unresolved in Colorado. But in their motions to dismiss, they argued that the issue *had been resolved* previously in *Sender v. Kidder Peabody*, 952 P. 2d 779 (Colo. App. 1997). *See* Dragul Mot. to Dismiss at §§ I(B) and II(A). Both the Fox and Hershey Defendants joined Dragul's argument.

which the Receiver indisputably has standing to pursue. As representative, the Receiver succeeds to the rights of the creditors for whose benefit he was appointed. 2 R. CLARK, *Treatise on the Law and Practice of Receivers*, §§ 594 (receiver for corporation), 595 (power to avoid fraudulent contracts and conveyances), and 599 (receiver for bank), at pp. 991-992, and 994 (3rd ed. 1992); *see also Good Shepherd Health Facilities of Colo, Inc. v. Dept, of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also* Omnibus Resp. at § § II(A)(6). Who owns the claims, and therefore the standing issue, thus involves both questions law and of fact, making it inappropriate to certify. *See Rich*, 2015 COA 6, ¶ 8. Indeed, Movants admit that the standing issue “present[s] important facts,” and “involves the application of well-established legal principles to the unique facts at hand.” Standing Mot. at 2, 4-5. Thus, the issue Movants seek to certify is not a pure issue of law as is required, and involves factual questions inappropriate for certification.

**B. Immediate review will not resolve this case, it will only delay it.**

Under *Pandy*, the Court must determine whether certification of its orders denying Movants’ motions to dismiss would promote a more orderly disposition or establish a final disposition of the litigation.<sup>7</sup> It will not.

---

<sup>7</sup> It is axiomatic that an order denying a motion to dismiss does not end litigation on its merits and is not a final appealable order. *E.g., In re Tri-Valley Distrib., Inc.*, 533 F.3d 1209, 1216 (10th Cir. 2008) (As a general rule, the “denial of a motion to dismiss, *even when the motion is based upon jurisdictional grounds*, is not immediately reviewable.” (citing *In re Magic Circle*, 889 F.2d at 954) (emphasis in original).

*First*, because the Receiver asserts claims of both the investors and on behalf of the defrauded Receivership entities, even if the Receiver were found to lack standing to pursue *investor* claims, his claims to recover for harm to the SPEs in the Estate will remain before this Court. And this Court, not the court of appeals, is in the best position to determine the nature and ownership of the Receiver's claims.

*Second*, resolving the standing issue for some claims will not resolve all of the twelve claims the Receiver asserts in the Amended Complaint. For example, the Receiver's eleventh claim for relief asserts a claim under CUFTA to recover fraudulent transfers Defendants received *from the GDA Entities* (not from investors) in the Estate. *See* Amd. Compl. at ¶¶ 442-46; *see also* Omnibus Resp. at § II(A)(6)(vi). It is well-established the Receiver has standing to recover fraudulent transfers that deplete the assets of the Estate. *See* Omnibus Resp. at § II(A)(6)(vi), citing *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995); *Lewis v. Taylor*, 2018 CO 76, ¶ 23; *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 192 (5th Cir. 2013); *Wing v. Dockstader*, 482 F. App'x 361, 364-65 (10th Cir. 2012); *Donell v. Kowell*, 533 F.3d 762, 777 (9th Cir. 2008); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at \* 2-3 (D. Utah May 14, 2009) (citing cases).

The same is true for the Receiver's twelfth claim for unjust enrichment, which the Receiver plainly has standing to pursue. *See* Omnibus Resp. at § II(A)(6)(vii), citing *Ashmore v. Dodds*, 262 F. Supp. 3d 341, 350-51 (D.S.C. 2017) (Ponzi scheme



receiver has standing to bring fraudulent transfer and unjust enrichment claims, and those claims are not barred by in pari delicto); *Hecht v. Malvern Preparatory Sch.*, 716 F. Supp. 2d 395, 403 (E.D. Pa. 2010) (Ponzi scheme receiver has standing to pursue fraudulent transfer and unjust enrichment claims); *Hays v. Adam*, 512 F. Supp. 2d 1330 (N.D. Ga. 2007) (Ponzi scheme receiver has standing to bring unjust enrichment claims to recover commissions and bonuses paid to agents soliciting investments in fraudulent scheme); *DeNune v. Consolidated Capital of N.A., Inc.*, 288 F. Supp. 2d 844, 854 (N.D. Ohio 2003) (receiver properly asserted claim for unjust enrichment). So even if the Court were to certify the question of the Receiver's standing to pursue investor claims, the claims being asserted on behalf of the GDA Entities, including the claims for fraudulent transfer and unjust enrichment, will remain for adjudication by this Court.

Certification will also delay resolution of the Receiver's claims against other defendants in this case. The Kahn Defendants filed their answer nine months ago and the Markusch Defendants have not sought certification. Regardless of any appellate court advisory opinion regarding receiver standing, the Receiver's claims against the Kahn Defendants and the Markusch Defendants will remain, further undermining the availability and efficacy of an interlocutory appeal. *See Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011) (denying certification even when for an issue of first impression because the case involved "numerous claims, counterclaims, cross-claims, and third-party claims, including claims for damages

and claims that do not appear to involve the [issue to be certified].”). The case is still not “at issue” after nearly a year. Certification and acceptance by the court of appeals would stay the case indefinitely. *See* C.A.R. 4.2(e)(2). And, it will prejudice the Receiver’s ability to administer the Receivership Estate, and cause undue harm to his creditor constituents.

**C. The standing issue is not “controlling.”**

Certification is appropriate only for “controlling” legal issues. No Colorado court has developed a single definition of “controlling” for purposes of either C.A.R. 4.2 petition or C.R.S. § 13-4-102.1. This is largely because “whether an issue is ‘controlling’ depends on the nature and circumstances of the order being appealed.” *Pandy*, 2015 COA 3, at ¶ 9. Courts consider the following factors to determine whether an issue is controlling: (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 Colorado, LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶ 17 (2019), *reh’g denied* (Oct. 10, 2019), *cert. denied*, 19SC864, 2020 WL 1887932 (Colo. Apr. 13, 2020) (citations omitted). Here, the public interest is best served by allowing this case to proceed without the delay that will be created by an unnecessary appeal so that the Receiver can proceed to administer the Estate. There is no risk of inconsistent results because this case is the only remaining case the

Receiver is pursuing that has not been settled. And as discussed, the issue is not case dispositive.

**D. The absence of findings of fact and conclusions is not grounds to certify.**

Finally, Movants argue certification is proper because when denying their motions to dismiss the Court did not make specific findings of fact or conclusions of law, instead simply stating their motions were “Denied by the Court.” *See* Standing Mot. at 3. Movants cite no authority in support of this argument, nor is the Receiver aware of any. The Court got it right; both issues of fact and law preclude dismissal of the Receiver’s claims and it would be inappropriate to authorize a piecemeal appeal of those issues.

Finally, Movants spend half a dozen pages re-arguing that the Receiver has not stated valid claims against them, and those claims should have been dismissed pursuant to C.R.C.P. 12(b)(5). *See* Standing Mot. at 11-16. But whether the Receiver’s Amended Complaint states viable claims for relief is **not** a pure legal issue appropriate for certification.

**IV. Conclusion**

Certification here is inappropriate here for several reasons. The issue Movants seek to certify is not purely a legal issue, certification will not resolve all of the claim or issues in the case, nor will it promote an orderly disposition of the remainder of the case. Certification will only further delay the case, which is not at issue after nearly a year. The Receiver therefore asks the Court to deny the Certification Motions

and order Movants to answer the Amended Complaint within 10 days so the parties can proceed with disclosures and discovery.

Dated: December 17, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



By: s/ Rachel A. Sternlieb

Patrick D. Vellone, #15284

Matthew M. Wolf, #33198

Rachel A. Sternlieb, #51404

Michael T. Gilbert, #15009

1600 Stout Street, Suite 1900

Denver, Colorado 80202

Tel: (303) 534-4499

[pvellone@allen-vellone.com](mailto:pvellone@allen-vellone.com)

[mwolf@allen-vellone.com](mailto:mwolf@allen-vellone.com)

[rsternlieb@allen-vellone.com](mailto:rsternlieb@allen-vellone.com)

[mgilbert@allen-vellone.com](mailto:mgilbert@allen-vellone.com)

ATTORNEYS FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on December 17, 2020, a true and correct copy of the **RECEIVER'S RESPONSE TO DEFENDANTS' MOTIONS FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. §13-4-102.1(1)** was filed and served via the Colorado Courts E-Filing system to the following:

Paul L. Vorndran  
Christopher S. Mills  
Jones Keller, P.C.  
1999 Broadway Street  
Suite 3150  
Denver, CO 80202  
pvorndran@joneskeller.com  
pmills@joneskeller.com

***Counsel for Defendant, Gary Dragul***

John M. Palmeri  
Margaret L. Boehmer  
Gordon Rees Scully Mansukhani LLP  
555 17th Street, Suite 3400  
Denver, CO 80202  
jpalmeri@grsm.com  
mboehmer@grsm.com

***Counsel for Defendants Benjamin Kahn and the Conundrum Group, P.C.***

Thomas E. Goodreid  
Goodreid and Grant, LLC  
1801 Broadway, Suite 1400  
Denver, CO 80202  
(303) 296-2048  
t.goodreid@comcast.net

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

Lucas T. Ritchie  
Eric B.Liebman  
Joyce C.Williams  
Moye White LLP  
1400 16th Street, 6th Floor  
Denver, CO 80202-1486  
Luke.Ritchie@moyewhite.com  
Eric.Liebman@moyewhite.com  
Joyce.Williams@moyewhite.com

and  
Gary S. Lincenberg (*pro hac vice*)  
Sharon Ben-Shahar Mayer (*pro hac vice*)  
Bird, Marella, Boxer, Wolpert, Nessim,  
Drooks, Lincenberg & Rhow, P.C.  
1875 Century Park East, 23rd Floor  
Los Angeles, CA 90067

***Counsel for Defendants, Alan C. Fox and ACF Property Management, Inc.***

John A. Chanin  
Foster Graham Milstein & Calisher,  
LLP  
360 South Garfield St., Suite 600  
Denver, CO 80209  
jchanin@fostergraham.com

***Counsel for Juniper Consulting Services, LLC***

Susan Markusch  
Olson Real Estate Services  
6321 S. Geneva Cir.  
Englewood, CO 80111  
Smarkusch96@gmail.com

***Pro Se Defendants***

  
s/ Rachel A. Sternlieb  
Allen Vellone Wolf Helfrich & Factor P.C.

*In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*