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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.

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Division/Courtroom: 414

RECEIVER'S RESPONSE TO DRAGUL'S MOTION IN THE ALTERNATIVE FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT

Plaintiff, Harvey Sender (the "**Receiver**"), solely in his capacity as Receiver for Gary Dragul ("**Dragul**"), GDA Real Estate Services, LLC and GDA Real Estate Management, LLC, hereby responds to Defendant Gary Dragul's Motion in the Alternative for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint (the "**Motion for Reconsideration**").

I. 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 of Sender & Smiley, LLC, as receiver for Gary Dragul ("**Dragul**"), GDA Real Estate Services, LLC ("**GDA RES**"), GDA Real Estate Management, LLC ("**GDA REM**"), (GDA RES and GDA REM are jointly referred to as, "**GDA**"), and a number of related entities and single purpose entities (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. **Compl. Ex. 1**, at ¶ 13(o). The Receivership Order 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." **Compl. Ex. 1**, at ¶ 13(s).

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 investors were defrauded of more than $70 million. Each of the Defendants in this case played a distinct and integral role in the scheme. The Defendants, excluding the Kahn Defendants, filed motions to dismiss in March 2020. In response, the Receiver filed his First Amended Complaint on June 1, 2020 (the "**Amended Complaint**").

Rather than answering, the same moving Defendants ("**Movants**") again moved to dismiss the Amended Complaint reiterating the same arguments made in their initial motions to dismiss. The Receiver filed an Omnibus Response to the renewed motions to dismiss on August 17, 2020.[1] Movants replied on September 8th, and on October 28, 2020, the Court denied the renewed motions to dismiss.[2]

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[1] Capitalized terms not defined here are defined in the First Amended Complaint or the Receiver's Omnibus Response.

[2] The Kahn Defendants are the only Defendants who have answered the Amended Complaint. On December 15, 2020, the Receivership Court entered an order approving a settlement agreement between the Receiver and the Fox Defendants that contemplated the dismissal with prejudice of all claims in this case against the Fox Defendants by the end of this year.

Dragul now asks the Court to reconsider his denial of his motion to dismiss. But, contrary to C.R.C.P. 121, § 1-15(11), Dragul primarily rehashes the same arguments he made in his initial motion to dismiss. The only manifest error of law or injustice he asserts is that instead of entering detailed findings on his motion to dismiss, the Court stamped the proposed order Dragul submitted to the Court "DENIED BY COURT" "three days before the Judge's retirement." Motion for Reconsideration at 2. Dragul argues this denial, without written reasons, violates his due process rights because he had moved to dismiss based on the Receiver's alleged lack of standing. *Id.* This argument is not grounds for reconsideration. And Dragul's remaining arguments again merely rehash ones he made in his initial motion to dismiss, and pursuant to Rule 121, § 1-15(11), do not warrant reconsideration. Although Dragul is plainly unhappy with the Court's ruling, he presents no legitimate basis for reconsideration.

II. Argument

A. Dragul has not presented grounds to reconsider.

Courts disfavor motions for reconsideration interlocutory orders. C.R.C.P. 121 § 1-15(11). "A party moving to reconsider must show more than a disagreement with a court's decision." *Id.* Typically, reconsideration is granted only when: (1) a former ruling is no longer sound because of changed conditions; (2) the Court needs to correct a previous ruling because of manifest legal or factual error; (3) an intervening change in law has occurred; or (4) manifest injustice would result from its original ruling.

People v. Schaufele, 2014 CO 43, ¶ 46 (2014) (citation omitted); *see also* Rule 121 § 1-15(11) (a party must "allege a manifest error of fact or law that clearly mandates a different result or other circumstances resulting in manifest injustice.") "A motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at apple' by using a word processor to move around the paragraphs from a previously submitted brief, and file a retread of the old brief disguised as a motion for reconsideration." *Shields v. Shetler*, 120 F.RD. 123, 126 (D. Colo. 1988).

Although Dragul plainly disagrees with the Court's denial of his motion to dismiss, that is not proper grounds for reconsideration. Because he fails to demonstrate a manifest error of fact or law that mandates a different result or other circumstance resulting in manifest injustice, his Motion for Reconsideration must be denied.

Dragul argues reconsideration is proper because the Court did not provide detailed reasons for denying his motion to dismiss. Motion for Reconsideration at 8. Dragul fails, however, to identify any authority to support this argument. Instead, he relies on a comment to C.R.C.P. 52 for the proposition that "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.* But Rule 52 explicitly states that "[f]indings of fact and conclusions of law *are unnecessary on decisions on motions under Rule 12 or 56* . . . ." (emphasis supplied); *see also Leidy's, Inc. v. H2O Eng'g, Inc.* 811 P.2d 38 (Colo. 1991) (Court not required

to make specific findings of fact and conclusions of law for the record on 12(b)(5) motion); *Henderson v. Romer*, 910 P.2d (Colo. App. 1995) (same); *Jamison V. People*, 988 P.2d 177, 179 (Colo. App. 1999) (same).

Dragul also relies on *Chostner v. Colorado Water Qual. Control Comm'n*, 327 P.3d 290, 297 (Colo. App. 2013),[3] and *Uptime Corp. v. Colorado Research Corp.*, 420 P.2d 232, 235 (Colo. 1996). Both cases are inapplicable because the courts there both entered orders drafted by counsel for the prevailing party without material change. In *Uptime*, the case was tried to the court. At the conclusion of evidence, the Court requested counsel for the respective parties to submit proposed findings of fact and conclusions of law. *Uptime*, 420 P.2d at 233. With the exception of one or two small changes, the court adopted verbatim the findings of fact and conclusions of law prepared by the plaintiff. *Id.* Defendant appealed, asserting that "the adoption by the trial court of the findings of fact and conclusions of law as prepared by the plaintiff was a violation of R.C.P.Colo. 52 and that the findings are insufficient to permit intelligent review on appeal, and consequently require reversal of the judgment." *Id.*

The Colorado Supreme Court affirmed the trial court, holding that the findings adopted by the court were not inadequate as a matter of law, stating:

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[3] Dragul relies upon *Chostner* for the proposition that "where . . . a district court adopts an order drafted by counsel, [appellate courts] scrutinize the order more critically," *Id.*, citing *Uptime Corp. v. Colorado Research Corp.*, 420 P.2d 232, 235 (Colo. 1966).

> We do not wish to be understood as approving the practice of uncritical adoption of findings prepared by litigants. But if, after careful study, the trial judge concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own. Where the findings of the trial court are verbatim those submitted by the successful litigant, we will, of course, scrutinize them more critically and give them less weight than if they were the work product of the judge himself, or, at least bear evidence that he has given them careful study and revision. But here we are not comparing the evidence with the findings, since the question of the sufficiency of the evidence to sustain the findings is not before us. We deal only with the adequacy of the findings.

Id. at 235.

But neither *Chostner* nor *Uptime* have any bearing hear because the Court did not request nor did the parties submit conclusions of law and findings of fact, and the Court did not adopt findings of fact or conclusions of law submitted by Receiver. Instead, the Court affixed a "DENIED BY COURT" stamp on Dragul's proposed order.

Perforce, at least one litigant will always disagree with a Court's ruling. But mere disagreement with a ruling is not a valid basis to reconsider. Although in rare circumstances a motion to reconsider may be warranted, it is improper to use a motion to reconsider – as Dragul does here – to ask a Court to readdress arguments the Court has previously considered and rejected.

B. The Court properly denied Dragul's motion to dismiss.

Although Dragul's Motion for Reconsideration should be denied because it fails to present valid grounds for reconsideration, it also fails on its merits. Dragul doesn't point to manifest errors of fact or law, instead he directs the Court to readdress arguments he previously made in his motion to dismiss. Essentially, Dragul again argues: (1) the Receiver lacks standing to assert investors' claims; (2) the Receiver may not sue Dragul because he is in receivership; (3) the Receiver is not authorized to prosecute the claims in this case; and (4) the Receiver's claims are time barred. If the Court does elect to readdress these agreement, they should again be rejected for the reasons articulated in the Receiver's Omnibus Response.

1. The Receiver does not assert only investor claims, which in any event he has express authority to do.

Dragul again argues the Receiver lacks standing to assert claims on behalf of third-party investor-creditors, merely citing to his Motion to Dismiss at 1-12. The Receiver addressed these arguments in the Omnibus Response. *See* Omnibus Response at Sections II(A) and (B), incorporated by reference.

2. The Receiver may sue Dragul.

Dragul re-argues that the Receiver cannot sue him here because Dragul's pre-appointment assets are part of the Estate, and in effect the Receiver is improperly asserting Dragul's claims against himself. Motion for Reconsideration at 6. Again, this merely re-asserts arguments he made in his Motion to Dismiss and his Reply in support of it. *See* Motion for Reconsideration at 6-7. As demonstrated in the Receiver's

Omnibus Response, the Receiver has standing to pursue all the claims asserted in the Amended Complaint, including Dragul. *See* Omnibus Response at Sections II(A) and (B), incorporated by reference.

Dragul likewise repeats his argument that the Receiver's claims against him must be dismissed because he has "already turned over all his assets derived from investor funds to the Receiver, meaning if the Receiver were to recover money for distribution to those investors, it would be an unlawful double recovery." Motion for Reconsideration at 7, citing Motion to Dismiss at 14-15. To reiterate the Receiver's Omnibus Response, "Dragul disregards that any judgment against him can be satisfied from assets acquired after the Receiver was appointed, and that he may be a necessary party here . . . [and] the other defendants can be expected to seek to apportion all fault to Dragul." Omnibus Response at 20. Again, there is no basis for Dragul's argument that the Receiver will obtain a double recovery .

Likewise, Dragul's repetition of his argument that "[i]f 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," is without merit. Motion for Reconsideration at 7, citing Motion to Dismiss at pp. 15-17. As set forth in the Omnibus Response, there is no support that the Receiver is using or would use privileged information against Dragul. *See* Omnibus Response at 22-23. Furthermore, the Receivership Court is the

sole forum in which issues regarding privilege must be raised, and such issues are not valid grounds for dismissing the Receiver's claims against Dragul. *Id*.

3. The Receivership Order authorizes the Receiver to pursue the claims asserted in the First Amended Complaint.

Once again, Dragul argues that 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." Motion for Reconsideration at 7, citing Motion to Dismiss at 17-18. Specifically, Dragul refers to paragraph 13(o) of the Receivership Order. But Dragul purposefully mischaracterizes the basis of the authority upon which the Receiver brings his claims here. As discussed in the Omnibus Response, the Receiver's authority is derived from and defined by the Receivership Order, which authorizes him to bring his lawsuit. In particular, ¶ 13(s) of the Receivership Order grants the Receiver the authority "[t]o prosecute claims and causes of action held by Creditors of Dragul for the benefit of Creditors, in order to assure the equal treatment of similarly situated Creditors." Compl. at Ex. 1; Omnibus Response at 2-5.

4. The Receiver's claims are not barred by applicable statutes of limitations

Finally, Dragul once again argues that the Receiver's Colorado Securities Act claims are time-barred under the 3-year statute of limitations and 5-year statute of repose. Motion for Reconsideration at 8, citing Motion to Dismiss at 18-23. As set

forth in the Omnibus Response, Dragul's arguments lack merit. Omnibus Response at Section II(D), incorporated by reference. Again, Dragul is simply rehashing arguments that he previously made and which this Court has rejected.

III. Conclusion

Motions to reconsider are disfavored and rarely granted. Dragul's Motion for Reconsideration is a paradigm for why that is so. It unabashedly rehashes his previous arguments, going so far as to incorporate those arguments whole cloth as grounds for reconsideration. But Rule 121, § 1-15(11) requires more. Because Dragul fails to demonstrate any manifest error of fact or law that clearly mandates a different result, his Motion for Reconsideration should be denied.

Dated: December 17, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of December, 2020 a true and correct copy of **RECEIVER'S RESPONSE TO DRAGUL'S MOTION IN THE ALTERNATIVE FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via the Colorado Courts E-Filing system to the following:

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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.