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.	▲ COURT USE ONLY ▲
Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1675 Broadway, 26th Floor Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2020CV30255 Courtroom: 414
DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION IN THE ALTERNATIVE FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR HEARING	

The Receiver argues that in Mr. Dragul's Motion to Dismiss the Receiver's First Amended Complaint ("Motion to Dismiss"), "the only manifest error of law or injustice [Mr. Dragul] 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.'" (Receiver's Response to Dragul's Motion in the Alternative for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint ("Response") 4.) That is not accurate. While Mr. Dragul did argue that the circumstances under which the October 28, 2020 order denying Mr. Dragul's Motion to Dismiss ("Order") was issued justify reconsideration, he also set forth six other manifest errors of law and manifest injustice. The Order necessarily held that: (1) the Receiver had standing to assert his claims; (2) the Receiver could sue Mr. Dragul even though Mr. Dragul is in the Receivership; (3) contrary to the Receivership Order, the Receiver could pursue his claims for damages even though he is on contingency; (4) the Receiver's Colorado Securities Act claims are timely; (5) the Receiver's Fraudulent Transfer (CUFTA) claim is timely; and (6) the Receiver's Unjust Enrichment claim is both timely and cognizable. Each of these reflects a manifest error of law.

Reconsideration is justified here because, as a matter of law, the Receiver cannot assert his claims and the Court lacks jurisdiction to hear them.

ARGUMENT

I. The Receiver Lacks Standing to Assert Third Party Investor Claims

As Mr. Dragul demonstrated in the Motion, supported by ample caselaw (Mot. 5-6 & n.1), and in his Motion to Dismiss (Mot. to Dismiss 5-12), the Receiver may assert claims belonging to the people or entities in receivership, but lacks standing to assert third-party creditors' claims. Those claims continue to belong to the creditors. Mr. Dragul noted that, while ample caselaw shows this to be true,[1] he is not aware of any contrary authority from any

[1] It does not matter if the Receivership Order purports to grant the Receiver authority to assert third-party creditors' claims. A court cannot grant a party standing it otherwise lacks as a matter of law. (Mot. to Dismiss 9 n.4; Dragul's Reply in support of Mot. to Dismiss 6-8); *Scholes v.*

jurisdiction anywhere in the U.S. (Mot. to Reconsider 6.) He also noted that, since the Receiver never identified any contrary caselaw in his "Omnibus Response" to the motions to dismiss, the Receiver must not be aware of any contrary authority either. (*Id*.) One would expect the Receiver to take this as a challenge to find contrary authority and identify it in his Response to the Motion for Reconsideration. The fact that he did not speaks volumes.[2] If the Order is not reconsidered, that would appear to make this Court the first in the nation to break from uniform precedent and rule that a receiver has standing to assert third-party creditors' claims.

II. The Receiver May Not Sue Mr. Dragul

In the Motion, Mr. Dragul demonstrated five reasons why the Receiver may not sue Mr. Dragul since Mr. Dragul is in receivership, starting with point that, since the Receiver stands in Mr. Dragul's shoes, that would mean Mr. Dragul is suing himself. (Mot. 6-7.) Mr. Dragul supported those reasons not only with references to his Motion to Dismiss, but also case cites. (*Id*.) The Receiver largely just refers to his Omnibus Response without substantively addressing this issue or any of the reasons supporting it. (Resp. 8-10.) But he makes two points worth addressing.

First, he argues that even though Mr. Dragul already turned all his assets over to the Receiver, there would not be a double-recovery if the Receiver prevailed on his claims here because: (1) any judgment can be satisfied with assets Mr. Dragul acquired after the Receiver was appointed; (2) Mr. Dragul may be a necessary party; and (3) other defendants may try to

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Schroeder, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990); *Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012) (quoting *Scholes*, 744 F. Supp. at 1421 n.6)); *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003).

[2] In fact, the Receiver said nothing in response except to refer to his Omnibus Response to the motions to dismiss. (Resp. 8.) He provided no explanation, analysis, application, or cites (*id*.), unlike Mr. Dragul who provided all of the above (Mot. 5-6 & n.1). It appears the Receiver is "rehashing" the same arguments, not Mr. Dragul.

apportion fault to Mr. Dragul. (Resp. 9-10.) Setting aside that the cases pending against Mr. Dragul have all but eliminated his ability to acquire any assets, the ability to recover against after-acquired assets has no bearing on the fact that the Receiver would still have an unlawful double-recovery up to the value of the assets Mr. Dragul already turned over. Had the Receiver not already seized those assets, Mr. Dragul would have them to satisfy a judgment. The Receiver also never articulates in either his Response or his Omnibus Response why Mr. Dragul would be a necessary party. And the Receiver never explains why Mr. Dragul being a necessary party or other defendants trying to apportion fault to him would have any bearing on whether there is an unlawful double-recovery.

Second, the Receiver argues Mr. Dragul has not proven the Receiver is using or will use Mr. Dragul's attorney-client privileged information against Mr. Dragul. (Resp. 9.) But he does not deny that he *has* such attorney-client privileged information, which is enough reason to preclude him from suing Mr. Dragul. It is also hard to escape the conclusion he is using it given the Receiver has sued Mr. Dragul *and* Mr. Dragul's former attorney, Benjamin Kahn/Conundrum Group LLC, here. The Receiver's argument that Mr. Dragul may only raise privilege issues with the court that appointed the Receiver ("Receivership Court") is legally baseless—it denies Mr. Dragul his universally-recognized right to protect his attorney-client privileged communications in the very forum where that right is being violated. Since the Receiver is using Mr. Dragul's privileged information to sue Mr. Dragul and his former attorney in *this* proceeding, under *this* FAC, it is up to *this* Court, not the Receivership Court, to address the resulting prejudice in *this* proceeding.

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III. The Receiver Cannot Sue for Damages on Contingency

The Receivership Order does not authorize the Receiver to pursue claims for damages on contingency. (Mot. 4, 7; Mot. to Dismiss 17-18.) The Receiver argues that the Receivership Order does authorize him to assert claims for damages, and criticizes Mr. Dragul for stating it does not. (Resp. 10.) The criticism is deserved. Though Mr. Dragul made clear on page 4 of the Motion and pages 17-18 of the Motion to Dismiss that the Receiver may not assert damages claims *on contingency* (as opposed to asserting them hourly, supposing they are otherwise legally sound), Mr. Dragul's counsel omitted the words "on contingency" from the end of the first sentence in section III of his Motion through a drafting error. Mr. Dragul's counsel apologizes for the confusion.

Nonetheless, since page 4 of the Motion and pages 17-18 of the Motion to Dismiss make clear the Receiver cannot assert damages claims on contingency, the Receiver must have understood Mr. Dragul's argument. Yet he did not respond to it at all.

IV. The Receiver's CSA, CUFTA, and Unjust Enrichment Claims are Time-barred and/or Not Cognizable

Based on the Receiver's own allegations, which Mr. Dragul accepted as true for the Motion to Dismiss, the Receiver's Colorado Securities Act ("CSA") claims, fraudulent transfer ("CUFTA") claims, and unjust enrichment claim are time-barred. (Mot. 8; Mot. to Dismiss 18-25.) And the unjust enrichment claim is not cognizable when plead with a fraudulent transfer claim. (Mot. 8; Mot. to Dismiss 24-25.) The Receiver does not respond to these points other than to refer to his Omnibus Response. But in his Omnibus Response, he argues that fact issues preclude ruling on statute of limitation grounds, ignoring both that the timeliness of a CSA claim is a substantive element the plaintiff must allege and prove, and that Mr. Dragul's arguments are based on the facts as the Receiver alleged them and in the exhibits the Receiver attached to his

FAC. (Omnibus Resp. section II(D); Mot. to Dismiss 18-25.) Both in his Response to the Motion for Reconsideration and his Omnibus Response, the Receiver also failed to address that the date of discovery on fraudulent transfer and unjust enrichment claims is the date of appointment of the receiver as a matter of law. (Mot. to Dismiss 23; Dragul's Reply in support of Mot. to Dismiss 14-15); *Lewis v. Taylor*, 375 P.3d 1205, 1207 (Colo. 2016). And the Receiver never responded to Mr. Dragul's argument that an unjust enrichment claim is not cognizable when pled with a fraudulent transfer claim. (Mot. to Dismiss 24-25; Omnibus Response, generally (not addressing this point); Mot. 8; Resp., generally (not addressing this point).

V. The Circumstances Surrounding the Order Also Justify Reconsideration

The Order consists of a stamp "DENIED BY COURT." Though it ruled on complicated issues presented in 170 pages of briefing on the motions to dismiss, which involved the Court's subject matter jurisdiction, the Order contains no explanation or reasoning. It was issued three days before the prior Judge's retirement as part of a mass issuance of myriad other non-reasoned stamped orders the Judge entered in other cases immediately before his retirement. These circumstances raise the question of whether the Court properly considered the motions to dismiss and related briefing.

The Receiver argues the Court should deny the Motion for Reconsideration because Mr. Dragul merely "rehashes the same arguments he made in his initial motion to dismiss." (Resp. 4-5.) But of the four grounds for reconsideration the Receiver identifies—(1) changed conditions, (2) to correct a manifest legal or factual error in the previous ruling, (3) intervening change in law, or (4) manifest injustice from the previous ruling (Resp. 4)—only the first and third reasons turn on something different than what was already raised in the original motion briefing.

Reasons (2) and (4)—the only reasons expressly identified in C.R.C.P. 121 § 1-15(11)—necessarily rely on what was already argued. They involve a manifest error in fact or law, or manifest injustice, made in ruling on those already-filed briefs. Here, the Receiver's "rehashing" argument is particularly misplaced. (Resp. 4, 5.) If the Order had set forth reasons for denying Mr. Dragul's Motion to Dismiss, Mr. Dragul could have articulated with particularity the manifest errors of law contained in the Order. But since it simply said "DENIED BY COURT", Mr. Dragul has no ability to articulate those errors other than by showing that the Court necessarily erroneously rejected legal principles Mr. Dragul set forth in his Motion to Dismiss. In effect, the Receiver's "rehashing" argument means that by stamping "DENIED BY COURT", the Court also foreclosed Mr. Dragul's ability to bring a motion for reconsideration. If this were true, it would compound the manifest injustice.[3]

In the Motion, Mr. Dragul cited cases to support the principle that while non-reasoned orders are not prohibited, they are disfavored. (Mot. 8 (citing *Chostner v. Colorado Water Qual. Control Comm'n*, 327 P.3d 290, 297 (Colo. App. 2013); *Uptime Corp. v. Colorado Research Corp.*, 420 P.2d 232, 235 (Colo. 1966).) The Receiver argues these cases are inapposite because "the courts there both entered orders drafted by counsel for the prevailing party without material change" (Resp. 6), and thus the cases do not "have any bearing [here] because the Court did not require 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 the Receiver" (Resp. 7). The Receiver never explains why this difference has any relevance here.

[3] Compare, for example, the case the Receiver cites, *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988), (Resp. 5.), in which the U.S. District Court *did* issue a reasoned decision.

The block quote from *Uptime* that the Receiver includes in his Response demonstrates the relevance of these cases. (Resp. 7 (quoting *Uptime*, 420 P.2d at 235).) The *Uptime* court, as the Receiver quotes, criticized the uncritical adoption of a litigant's findings, but ultimately upheld the findings because "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. . . . [but that appellate courts will] scrutinize them more critically . . . [if they do not] at least bear evidence that [the trial court judge] has given them careful study and revision." *Uptime*, 420 P.2d at 235.

Here, the Court did not even adopt a litigant's findings and conclusions of law, which at least would have set forth the reasons for the decision. Nor is there any indication there was "careful study" of the matters at issue in the motions to dismiss. The Order simply said "DENIED BY COURT". The manifest injustice here is therefore significantly greater than it was in either *Uptime* or *Chostner*. And, if not corrected, the error in denying the Motion to Dismiss could easily lead to the parties litigating this case through trial only to have the Court of Appeals determine this Court lacked subject matter jurisdiction to hear it in the first place.

CONCLUSION

Mr. Dragul does not dispute that motions for reconsideration are generally disfavored. And, with the impact of COVID, non-reasoned orders are more appropriate than ever. But here, it is not clear the Court considered the issues presented in the Motion to Dismiss, and in denying that motion, it erred as a matter of law—including by effectively ruling it has subject matter jurisdiction contrary to all other authority from all other jurisdictions in the nation. Reconsideration is justified here.

Because the history of this case and the issues presented in the Motion to Dismiss are complicated, and because a new Judge is now taking over the case, Mr. Dragul respectfully requests a hearing to address the matters at issue and assist the Court in any way the Court may find helpful.

Dated this 24th day of December, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills
Paul L. Vorndran, #22098
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ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION IN THE ALTERNATIVE FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR HEARING** was filed and served via the Colorado Court E-filing system to the following:

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