

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;
MARLIN S. HERSHEY;
PERFORMANCE HOLDINGS, INC.;
OLSON REAL ESTATE SERVICES,
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

**DEFENDANTS MARLIN S. HERSHEY'S, PERFORMANCE HOLDINGS, INC.'S, AND
GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF
INTERLOCUTORY APPEAL UNDER C.A.R. 4.2(a) PURSUANT TO C.R.S. § 13-4-
102.1(1)**

Defendants Marlin S. Hershey, Performance Holdings, Inc., and Gary Dragul (collectively, "Moving Defendants"), each through his/its respective counsel, file their Reply in Support of Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) Pursuant to C.R.S. § 13-4-102.1(1) and, in support thereof, respectfully set forth as follows:

I. INTRODUCTION

In his Response to the Moving Defendants' 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"), the Receiver misstates the discrete issue on which the Moving Defendants seek certification of an interlocutory appeal. The Receiver frames the issue on which the Moving Defendants seek certification as "whether the Receiver has standing to bring his claims against the [Moving Defendants]." However, as clearly stated multiple times in the Motion, the much narrower issue on which the Moving Defendants seek certification for an interlocutory appeal is whether the Receiver has standing to assert claims *on behalf of creditors of the Receivership Estate*. (See, e.g., Motion at pp. 2-3, 5, 8).

In the event that the Court of Appeals determines that the Receiver does not have standing to pursue claims on behalf of creditors of the Receivership Estate, this Court can apply the Court of Appeals' decision to the Receiver's claims alleged against the Moving Defendants to determine which of the claims the Receiver does not have standing to pursue. As the Moving Defendants noted in the Motion, all of the Receiver's claims against them are creditor claims and, thus, the Court of Appeals' decision, once applied on remand by this Court, could dispose of the Receiver's entire case against the Moving Defendants. Even if the decision is not completely

dispositive, though, it is inarguable that certain of the Receiver's claims against the Moving Defendants are distinctly creditor claims and, therefore, that a determination that the Receiver does not have standing to assert claims on behalf of creditors of the Receivership Estate at least would partially dispose of the Receiver's case. In such circumstances, certification of an interlocutory appeal on the issue of whether the Receiver has standing to assert creditor claims is appropriate, and the Receiver's arguments otherwise are unpersuasive.

II. ARGUMENT

A. The Receiver's Standing to Assert Claims on Behalf of Creditors of the Receivership Estate Is an Unresolved Question of Law

The Receiver appears to argue that the issue of his standing to assert claims on behalf of creditors of the Receivership Estate has been resolved favorably for him, citing Ralph E. Clark's treatise on receivers in support of his argument that he "succeeds to the rights of the creditors for whose benefit he was appointed." (Response at p. 7). However, the Moving Defendants did not locate a *single reported decision in any federal or state jurisdiction* in which a court cited Clark's treatise for such a proposition. Indeed, the Receiver never has identified a reported decision in which a court has held that a receiver succeeds to the rights of the creditors of the receivership estate, and the Moving Defendants certainly never have located any such decision. Rather, as set forth in the Motion, all legal authority is to the contrary. (Motion at pp. 5-7). Incorrectly citing a treatise for a proposition that never has been included in a reported decision is singularly unpersuasive. As set forth in the Motion, contrary to the Receiver's misstatement of the law regarding his authority to pursue claims on behalf of creditors, courts overwhelmingly have held that a receiver lacks standing to sue on behalf of creditors of the receivership estate and is limited to asserting those claims that could have been asserted by the individual or entities in receivership. (Motion at pp. 5-6).

Despite such overwhelming authority, the issue of a receiver's standing to assert claims

on behalf of creditors is unresolved in Colorado. The Receiver argues that the issue was decided favorably for him in *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989), but he is incorrect. The *Good Shepherd* court considered and decided a narrow issue under Colorado’s Medicaid law. In doing so, the court noted that “generally a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve.” *Good Shepherd*, 789 P.2d at 425. Such statement is precisely the law that the Moving Defendants seek to affirm and apply to the Receiver’s claims in this case and, conversely, the exact opposite of the proposition for which the Receiver cites *Good Shepherd*.

The Receiver also criticizes the Moving Defendants for citing *Sender v. Kidder Peabody*, 952 P.2d 779 (Colo. App. 1997), asserting that the Moving Defendants have represented that the decision in *Sender v. Kidder Peabody* resolved the issue of the Receiver’s standing yet argue in the Motion that the issue is unresolved. However, as addressed in the Motion, *Sender v. Kidder Peabody* involved a challenge to the standing of a bankruptcy trustee, not a receiver, to assert claims on behalf of creditors of the bankruptcy estate. Accordingly, although the Moving Defendants believe that the holding in *Sender v. Kidder Peabody* can and should be extended to a receiver’s standing to assert claims on behalf of creditors of a receivership estate, no appellate court in Colorado has yet expressly done so. Thus, a receiver’s standing to assert claims on behalf of creditors of the receivership estate remains an unresolved question of law in Colorado.

B. The Receiver’s Standing to Pursue Creditor Claims Is a Controlling Question of Law

As set forth in the Motion, whether the question of law for which a movant seeks certification is “controlling” is determined by considering four 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 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. April 13, 2020). The Receiver argues that 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.” (Response at p. 10). The Receiver’s argument misses the point as the “public interest” considered in determining whether an issue of law is “controlling” is the public interest in resolving and establishing certainty regarding the issue of law, not the Receiver’s interest in how and when this case is litigated. The Receiver similarly misses the point with respect to the avoidance of inconsistent results. The concern is not avoiding inconsistent results in this case or in other cases filed by the Receiver but rather avoiding inconsistent results between this case and lawsuits that have been or could be filed by creditors of the Receivership Estate directly against the Moving Defendants. As noted in the Motion, this is not merely a theoretical concern as at least one lawsuit involving matters alleged in this case has been filed against previous Defendant Alan C. Fox. (Motion at p. 10, fn. 5).

The Receiver further argues that the issue of his standing to assert creditor claims is not “controlling” because resolution of the issue may not be case dispositive. As more fully set forth in the Motion, all of the Receiver’s claims against the Moving Defendants are creditor claims and, therefore, all of the claims would be disposed of by a determination that the Receiver lacks standing to pursue creditor claims. (Motion at pp. 11-16). The Receiver disputes that all of his claims against the Moving Defendants are creditor claims but, as the Moving Defendants note in the Motion, the Receiver’s argument is belied by his allegations in the First Amended Complaint. (Motion at pp. 11-16). Nonetheless, even if the determination of the Receiver’s standing does not dispose of all of the Receiver’s claims, the issue still is appropriate for interlocutory review because a determination adverse to the Receiver definitely will dispose of many of the Receiver’s claims (*e.g.*, see Motion at pp. 11-12 discussing Receiver’s first, second, and third claims for

relief) and, thus, necessarily will result in a more orderly disposition of this case. (Motion at pp. 11-16); C.R.S. § 13-4-102.1 (2020); *Indep. Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015), *aff'd*, 372 P.3d 1047 (Colo. 2016).

This case presents “extraordinary facts” that support an interlocutory review because, without a scintilla of legal authority, the Receiver is asserting claims against the Moving Defendants that clearly belong only to the creditors of the Receivership Estate, not to the individual or entities in receivership. The determination of the Receiver’s standing to assert creditor claims will shape the future of this litigation. Accordingly, all parties, the Court, and even the creditors of the Receivership Estate will benefit if the issue of the Receiver’s standing is determined now rather than after this case is litigated fully and the outcome is exposed to the risk of a complete reversal because the Receiver lacked standing. *See Triple Crown at Observatory Vill. Ass’n, Inc. v. Vill. Homes of Colorado, Inc.*, 389 P.3d 888, 893 (Colo. App. 2013) (issue was “controlling” when a reversal of the trial court’s determination of the issue would require a reversal of the final judgment and result in “...the needless expense and delay of litigating an entire case in a forum that had no power to decide it.”).

C. Certification of an Interlocutory Appeal Will Not Unduly Delay This Case

As set forth above, whether certification of an interlocutory appeal will delay this case is not a factor in the consideration and determination of the Motion. *Affiniti*, 461 P.3d at 611; *Pandy*, 383 P.3d at 66. Even if it were a factor to be considered, though, a determination that the Receiver does not have standing to pursue creditor claims either would dispose of the Receiver’s case against the Moving Defendants or would narrow the Receiver’s case considerably, such that this case would be litigated more efficiently, economically, and expeditiously. Additionally, although the Receiver argues that an interlocutory appeal will prejudice the Kahn Defendants and the Markusch Defendants, neither the Kahn Defendants nor the Markusch Defendants have objected to the Motion. Moreover, the Markusch Defendants also would benefit from a

determination that the Receiver does not have standing to pursue creditor claims as, in large part, the Receiver's claims against the Markusch Defendants are identical to his claims against the Moving Defendants.

Finally, the Receiver's alleged concern that certification of an interlocutory appeal will unduly delay this case seems trivial for multiple reasons. First, the Receiver and the Moving Defendants already have sought and obtained without opposition numerous extensions of deadlines in this case, all of which have been reasonable given the complexity of the case and the numerous parties. For example, just with respect to his claims against the Moving Defendants, the Receiver has sought and obtained four (4) extensions of time totaling seventy-five (75) days – extensions to which the Moving Defendants summarily agreed. Second, in the Receivership case (Case No. 2018cv33011, Denver District Court), the Receiver was appointed nearly two and one-half years ago and, to date, has not made a distribution to creditors of the Receivership Estate. Accordingly, the Receiver's newfound concern for the expeditious administration of the Receivership Estate is misplaced. Third, the relatively short delay caused by an interlocutory appeal pales in comparison to the delay that would be caused if this case proceeds to judgment and then is reversed and remanded because the Receiver did not have standing to assert some or all of his claims against the Moving Defendants. Given the progression of this case and the Receivership case together with the benefit of an early determination of the Receiver's standing to pursue creditor claims, any delay caused by an interlocutory appeal should be inconsequential to the Receiver and, in any event, an insufficient reason to prevent the determination of an unresolved, controlling, and dispositive issue in this case.

WHEREFORE, the Moving Defendants respectfully request that the Court certify for interlocutory appeal under C.R.S. § 13-4-102.1 and C.A.R. 4.2 the question of whether the Receiver has standing to assert claims on behalf of creditors of the Receivership Estate.

Respectfully submitted this 31st 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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 31st day of December 2020:

Allen Vellone Wolf Helfrich and Factor PC
Michael Thomas Gilbert
Patrick D. Vellone
Rachel A. Sternlieb

Gordon and Rees LLP
John M. Palmeri
Margaret Louise Boehmer
Edward J. Hafer

Jones & Keller PC
Christopher Stephen Mills
Paul Leo Vorndran

Williams LLP
T. Edward Williams

/s/Paul M. Grant
Paul M. Grant