

<p>DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202</p>	
<p>Plaintiff: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p>Defendants: GARY J. DRAGUL, an individual; BENJAMIN KAHN, an individual; THE CONUNDRUM GROUP, LLP, a Colorado Limited Liability Company; SUSAN MARKUSCH, an individual; MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; OLSON REAL ESTATE SERVICES, LLC, a Colorado Limited Liability Company; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com</p>	<p>Case No. 2020CV30255</p> <p>Courtroom: 414</p>
<p style="text-align: center;">DEFENDANT GARY DRAGUL’S REPLY IN SUPPORT OF 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)</p>	

While Defendant Gary Dragul and several other defendants jointly moved for certification for interlocutory appeal of whether the Receiver has standing to assert third-party creditors’ claims (“Standing Certification Motion”), in his 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) (“Motion”), Mr. Dragul sought to certify for appeal an issue unique to him: that the Receiver

cannot sue Mr. Dragul as a matter of law because Mr. Dragul is himself in the Receivership. On December 17, 2020, the Receiver filed his “Response to Defendants’ Motions for Certification of Interlocutory Appeal[,]” (“Response”) (emphasis added), in which he stated he was responding not only to the Standing Certification Motion, but also to Mr. Dragul’s Motion on his unique issue. (Resp. 2.)

However, nowhere in his Response does the Receiver argue that Mr. Dragul does not meet the applicable test to certify his unique issue for interlocutory appeal. The Receiver only addresses the separate Standing Certification Motion. He incorporates by reference his response to Mr. Dragul’s alternative motion for reconsideration, and his “Omnibus Response” to the defendants’ motions to dismiss. (Resp. 2 n.3.) But the Receiver does not address whether Mr. Dragul’s unique issue meets the test for interlocutory appeal in either of those pleadings either. The Receiver simply fails to respond to Mr. Dragul’s Motion. Having failed to respond, the Receiver has confessed to the Motion. *E.g.*, C.R.C.P. 121, § 1-15.3 (“Other than motions seeking to resolve a claim or defense under C.R.C.P. 12 or 56, failure of a responding party to file a responsive brief may be considered a confession of the motion.”). The Court can and should grant the Motion for that reason.

Moreover, Mr. Dragul’s unique issue meets the test for certification for interlocutory appeal. Mr. Dragul does not repeat here what the Court already read in his Motion, but to summarize¹:

- Since Mr. Dragul is himself in the Receivership, the Receiver may not sue Mr. Dragul because:

¹ With respect to the law generally applicable to motions to certify for interlocutory appeal, Mr. Dragul refers to and incorporates by reference the Standing Certification Motion, and the Defendants’ concurrently filed reply in support of that Standing Certification Motion.

- The Receiver stands in Mr. Dragul’s shoes, which means Mr. Dragul would be suing himself;
 - The Receiver lacks standing under the doctrine of *in pari delicto* to sue the people or entities in Receivership;
 - The order appointing the Receiver enjoined all actions against the people and entities in Receivership, including against Mr. Dragul;
 - Mr. Dragul already turned over all his assets related to or derived from investor funds, meaning any recovery the Receiver might obtain from this action would be an unlawful double-recovery;
 - When the Receiver was appointed, Mr. Dragul turned over all his information including his attorney-client privileged information, which the Receiver is now using against Mr. Dragul.
- This issue meets the test for certification for interlocutory appeal because:
 - This issue is case-dispositive as to Mr. Dragul—if, as Mr. Dragul demonstrates, the Receiver may not sue Mr. Dragul, all of the claims against Mr. Dragul will be dismissed;
 - Immediate appellate review of this issue will provide a more orderly disposition of the case because otherwise, this case might proceed to judgment then be reversed on appeal only to start all over again with the prospect that the other defendants might be similarly impacted, and this uncertainty will frustrate potential resolution;
 - This issue involves a controlling issue of law because: (1) the scope of a receiver’s authority is a matter of public interest since it affects not only the

parties in receivership, but also creditors, and it affects the public's view of the judiciary since a receiver acts as an officer of the court; (2) there is a risk of inconsistent results because if the Receiver may sue Mr. Dragul here (especially if he is asserting creditors' claims), the rulings on the Receiver's claims could be inconsistent with the rulings on others' claims; and (3) as addressed above, the issue is case-dispositive as to Mr. Dragul.

- Whether the Receiver may sue Mr. Dragul is an unresolved question of law in Colorado which will benefit from appellate review.

CONCLUSION

In sum, the legal question of whether a receiver may sue a party in receivership meets the standard for certification for interlocutory review, and this case in particular and the parties in it would greatly benefit from such review. Since the Receiver did not respond to Mr. Dragul's Motion, it appears he does not disagree. For those reasons, Mr. Dragul respectfully requests the Court grant the Motion and certify this issue for interlocutory review.

Dated this 31st day of December, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills

Paul L. Vorndran, #22098

Christopher S. Mills, #42042

*ATTORNEYS FOR DEFENDANT GARY J.
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF 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)** was filed and served via the Colorado Court E-filing system to the following:

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