DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado v. **Defendants**: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	▲ 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 Michael C. Van (*Pro Hac Vice* Application Pending) Shumway Van 8985 S Eastern Ave., Suite 100 Las Vegas, NV 89123 Phone: 702-478-7770 Email: Michael@shumwayvan.com	Case No. 2018CV33011 Courtroom: 424

DEFENDANT GARY DRAGUL'S REPLY BRIEF RE RECEIVER'S MOTION TO APPROVE BROWNSTEIN SETTLEMENT

Defendant Gary Dragul provides this brief pursuant to the Court's December 11, 2020 Order to Set Hearing on issues Raised by Proposed Settlement with Brownstein.[1]

[1] Mr. Dragul's Denver counsel, Jones & Keller, is responsible for the portions of this brief dealing with the Receivership. His Nevada-based counsel who drafted the Brownstein Complaint, Shumway Van (*pro hac vice* admission pending), is responsible for the portions addressing the underlying merits of that Complaint and Nevada law.

ARGUMENT

I. Mr. Dragul's Personal Claims Do Not Belong to the Receiver

In its brief ("Brownstein Brief'), Brownstein joined in the Receiver's arguments and agreed with both "a) the Receiver's interpretation of the Receivership Order as including Dragul's claims in the Estate and b) the Receiver's conclusion that, even under Dragul's interpretation of the Order, the claims asserted in the Nevada Action are related to (and indeed, entirely premised upon) Dragul's dealings with investors." (Brownstein Br. 3.) However, as a matter of law and under the Receivership Order, Mr. Dragul's personal claims belong to him.

The Receiver and Brownstein argue, except for Mr. Dragul's residence, "all of Dragul's assets . . . are unconditionally property of the Receivership Estate, including all 'claims, and causes of action' held by [him]." (Receiver Reply 3-4.) But carving out Mr. Dragul's residence required no more than the language in Paragraph 9 of the Receivership Order starting with "Except that the personal residence of Dragul . . .". There would be no need for the following parenthetical language circumscribing the Receivership as to Mr. Dragul: "Harvey Sender ("the Receiver") is hereby appointed as Receiver for Dragul (limited to the definition of the "Receivership Property" or "Receivership Estate" as defined below)[.]" (Receivership Order ¶ 9.)[2] Under the Receiver's and Brownstein's view, this language is wholly superfluous, as the Receivership Order could have simply said the Receivership Estate includes "all of Dragul's assets of any kind, except his personal residence". Since courts avoid interpretations that render

[2] "Receivership Property" and "Receivership Estate" means assets, including "claims, and causes of action" "related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the [Commissioner's] Complaint, or derived indirectly or indirectly [sic] from investor funds". (*Id*.)

statutory or contractual language superfluous, *Larson v. Sinclair Transp. Co.*, 284 P.3d 42, 47 (Colo. 2012) (statutes); *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 700 (Colo. 2009) (contracts), the Court should reject Brownstein's and the Receiver's invitation to read this language out of the Receivership Order.

Additionally, the Receiver concedes the Receivership Order does not prohibit Mr. Dragul from "filing his taxes or getting medical attention" (Receiver Reply 5), because neither Mr. Dragul's "physical body nor his personal tax liability is part of the Receivership Estate" (*id.* 5-6). Mr. Dragul agrees, but the Receivership Order also expressly enjoins Mr. Dragul from binding himself to any contract or other obligation, or holding himself out as himself. (Receivership Order ¶¶ 19(b) & (c).) For Mr. Dragul's physical body or ability to file his personal tax return to be outside the Receivership Estate, there necessarily must be an additional limitation on the scope of the Receivership over Mr. Dragul. That limitation is expressly set forth in Paragraph 9, which limits the Receivership over Mr. Dragul to "Receivership Property" and "Receivership Estate", meaning related to or derived from investor funds. Only with that limitation can the Receivership Order still allow Mr. Dragul to seek medical attention[3] or file his tax returns.

Though the Receiver argues the Receivership treats Mr. Dragul the same as the GDA Entities except for his house, the Receiver consistently treats Mr. Dragul differently. The Receivership Order enjoins and stays claims against Mr. Dragul or the GDA Entities. (Receivership Order ¶ 26.) The Receiver enforces this as to claims against the GDA Entities, but

[3] And this limitation in the Receivership Order is why, if Mr. Dragul had medical malpractice claims, they would not be part of the Receivership Estate, even if they might be part of a bankruptcy estate. *Compare, e.g., In re Weinrich*, 2016 WL 2616771, No. 10-62170-7 (Bankr. D. Mont. May 4, 2016), which the Receiver cites in footnote 5 of his Reply.

not as to claims against Mr. Dragul—instead, the Receiver sued Mr. Dragul. The Receiver has a duty to satisfy the GDA Entities' legal obligations, like file tax returns, but says Mr. Dragul has that duty as to his own tax returns. So the Receiver clearly views the Receivership Order as applying differently to Mr. Dragul than it does to the GDA Entities, but apparently only when that difference works to the Receiver's advantage. The Receiver cannot have it both ways.

Moreover, as Mr. Dragul pointed out in his Objection, if the Receivership were as expansive as the Receiver and Brownstein say, it would mean if Mr. Dragul had counterclaims to assert against the Receiver, the Receiver alone would be authorized to assert and recover on those counterclaims . . . against himself. (Obj. 7.) That makes no sense, and neither the Receiver nor Brownstein responds to this point.

The Receiver's and Brownstein's alternative argument that the Brownstein claims are related to or derived from investor funds also fails. Mr. Dragul's personal tax returns—which according to the Receiver would show income derived from investors—would be as related to investor funds as the Brownstein claims. Same with any counterclaims Mr. Dragul would have against the Receiver, or any personal injury Mr. Dragul might suffer when driving to drop off investor information to the Receiver. Under the Receiver's and Brownstein's argument, these would all fall within the Receivership Estate, yet they concede filing tax returns and Mr. Dragul's "body" are *not* within the Estate.

II. The Claims Against Brownstein Are Meritorious

A. The Receiver's and Brownstein's Actions Show the Claims are Meritorious

The Receiver and Brownstein are not acting like they believe the claims are meritless. For example, unlike in every other settlement for which the Receiver has sought approval, in

which the Receiver has said the claims have merit, but that settlement nonetheless makes sense, here the Receiver and Brownstein say the claims "are not factually supported [and] not meritorious" (Brownstein Settlement Mot. ¶ 20), and that all of the claims are barred by the applicable statutes of limitation (*id*. ¶ 20). (*See also* Brownstein Br. 3, 5 (stating claims are "altogether without merit" and "are also barred by the applicable statutes of limitation").) They claim Brownstein is settling these purportedly meritless claims for $250,000 just to avoid litigation costs. But $250,000 is not a nuisance value settlement. If the claims are truly time-barred, Brownstein would prevail on a motion to dismiss at a cost of perhaps $10,000 (which it might then recover from the plaintiff)—why settle for $250,000?[4]

Additionally, if Brownstein truly believed the claims are meritless, why did it propose to represent Mr. Dragul in connection with meeting with the Attorney General regarding the indictments, but only if Mr. Dragul and the GDA Entities waived and released any claims for malpractice they might have against Brownstein? (*See* Ex. A.) And why did Brownstein hire expensive out-of-state counsel from Proskauer to represent it in settling mere "meritless" claims?

B. The Claims are Legally and Factually Meritorious

The Brownstein Complaint would survive Brownstein's purported defenses.[5] Mr. Dragul's claims in the Nevada Action would not be subject to dismissal. Nevada has not

[4] The Receiver argues that while C.R.C.P. 11 might preclude him from *filing* wholly meritless claims, it does not preclude him from threatening them to force settlement. (Receiver Reply 8-9.) While it is surprising the Receiver believes he can ethically extort money from another party by threatening claims he believes are baseless, that does not explain why Brownstein would play along. Since Brownstein also claims to believe the claims are baseless, Brownstein must believe the Receiver could never ethically follow through on filing the threatened claims, and that the Receiver would face sanctions if he did. If Brownstein actually believed this, why would it settle for $250,000? Why not call the Receiver's bluff?

[5] Brownstein re-casts the Receiver's argument that *in pari delicto* bars the claims to focus on the

adopted the federal "plausibility" pleading standard under *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) & *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). It is a notice pleading state,[6] meaning the complaint need only put defendants on fair notice of the claims for relief and the facts upon which they are based. *Liston v. Las Vegas Metropolitan Police Dept.*, 111 Nev. 1575, 1578 (1995) (citing *Swartz v. Adams*, 93 Nev. 240, 245 (1977)). The Brownstein Complaint satisfies Nevada's notice pleading standard because it sets out nearly 34 pages of fact allegations regarding Defendants' conduct, going beyond putting the defendants on notice and outlining many of the specific facts surrounding the allegations.

Brownstein's reliance on *Giduck v. Niblett*, 408 P.3d 856 (Colo. Ct. App. 2014) is misplaced. There, the court dismissed claims for failing to tie individual defendants to certain acts only after the opposing party moved for a "more definite statement" under C.R.C.P. 12(e). Even if Brownstein had filed such a motion, Mr. Dragul could amend the Complaint under Nevada's liberal amendment laws, as stated above. Moreover, Brownstein fails to cite any Nevada law supporting its position.

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alleged defrauding of investors rather than negligent provision of legal advice. (Brownstein Brief 7-9.) Since the Brownstein Complaint contains no fraud allegations, Brownstein's argument cannot be that *in pari delicto* applies under the allegations in the Complaint. Rather, Brownstein necessarily must mean that *in pari delicto* applies under the facts. In *In re Dublin Securities, Inc.*, 133 F.3d 377, 380 (6th Cir. 1997), which Brownstein cites (Brownstein Br. 8-9), the court noted "[i]n pari delicto refers to the plaintiff's participation in the same wrongdoing as the defendant" (quoting *Bubis v. Blandon*, 885 F.2d 317, 321 (6th Cir. 1989)). That would mean Brownstein is asserting that it conspired with Mr. Dragul and the GDA Entities to defraud creditors. *See id*. at 381 (concluding *in pari delicto* applied "to prevent recovery by debtors who *conspired* with the defendants to defraud innocent investors.") (emphasis added). This is all the more remarkable because it would mean Brownstein is liable to those creditors. *Id*. at 380 (noting *in pari delicto* did not insulate law firm from liability because creditors could sue it).

[6] Rule 8(a) of the Nevada Rules of Civil Procedure requires only that the claim "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks."

Also, Brownstein represented Mr. Dragul in his individual capacity. For instance, Brownstein reviewed, negotiated, or prepared numerous documents and agreements that Mr. Dragul signed in his individual capacity, including personal guarantees, documents evidencing his individual ownership in various entities and even a settlement agreement holding him personally liable, all of which documents Mr. Dragul signed on the advice of Brownstein. (Affidavit of Douglas J. Shumway ¶ 6, attached as Ex. B) Moreover, Brownstein refers to Mr. Dragul as its clients in myriad documents and emails. (*Id.* ¶ 7.)

Brownstein's representation of Mr. Dragul and his various entities included securities advice and related directly to the issues raised in the indictments against Mr. Dragul. For example, Brownstein advised on the documents that allowed GDA Real Estate to charge a $200,000 consulting fee on the Plaza Mall of Georgia transaction, which is an issue in the indictments against Mr. Dragul. (*Id.* ¶ 8.) Brownstein also prepared operating agreements for multiple entities and failed to disclose, or advise Mr. Dragul to disclose, the actual risks associated with an investment in such entities. (*Id.* ¶ 9-12.) And Brownstein prepared for Mr. Dragul a formal memorandum in 2016 discussing "whether" promissory notes would be considered securities, suggesting that Brownstein previously failed to advise Mr. Dragul that they could be. (*Id.* ¶ 13.)

It is unclear what basis Brownstein has to assert Mr. Dragul engaged in "active fraud concerning the crumbling financial condition of his businesses and inability, and ultimate failure, to repay investors Mr, Dragul solicited." (Brownstein Br. 8.) These businesses showed a 12-month rolling positive cash flow of $4,984,385 as of September of 2018, and that these businesses held substantial equity and were otherwise financially viable entities. (*Id.* at ¶16-17.)

The claims against Brownstein are not time barred for several reasons, including that Brownstein also assisted in Mr. Dragul's criminal defense action through 2018, at least, which precluded Mr. Dragul from discovering Brownstein's malfeasance before then. (*Id.* at ¶ 14.) And then Brownstein entered into a tolling agreement with Mr. Dragul, which ensured that the Nevada Action was timely filed.[7] Tolling agreements are not only permissible but favored under the law.[8]

Also, the Receiver's and Brownstein's argument that all the claims are time-barred is wholly inconsistent with the Receiver's argument in response to Mr. Dragul's motion to dismiss in the 2020 Action. There, he argues claims asserted by the Receiver do not accrue until the Receiver (not the injured party on whose behalf he sues) learned of the claims. (Ex. C at 49-50, 53-54.) Under the Receiver's argument in the 2020 Action, the claims against Brownstein, if asserted by the Receiver, could not have accrued until after the Receiver was appointed in August of 2018, and likely not until the Receiver learned of the Brownstein Complaint in October of 2020. Contrary to Brownstein's arguments, the statute of limitations did not begin to run concurrent with the 2015 settlement agreement nor when Brownstein issued its bills. Thus, under either Nevada or Colorado law, the statute of limitations would not have run on Mr. Dragul's claims.

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[7] Under Nevada law, "[a]n action against an attorney . . . to recover damages for malpractice . . . must be commenced within 4 years after the plaintiff sustains damages or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier." Nevada Revised Statues 11.207.

[8] *See, e.g.*, *Pontikis v. Woodlands Cmty. Ass'n*, 432 P.3d 201 (Nev. 2018) ("voluntary tolling agreements serve the public interest. They improve judicial economy by allowing litigants time to develop their claims and negotiate settlements, which reduces unnecessary and costly litigation.")

III. The Proposed Settlement is Not in the Best Interest of Creditors

At least one creditor has questioned the Brownstein settlement. On November 26, 2020, creditor Russ Becker emailed the Receiver's counsel, the Commissioner's counsel, and one of Mr. Dragul's counsel to complain about the proposed Brownstein settlement: "I was appalled at the pitiful amount settled upon. Clearly the receiver has taken the easy way out on so many occasions. Their only interest seems to be in collecting their fees." (Ex. D.)[9]

In arguing the proposed settlement is still in creditors' interest, Brownstein argues litigating against it would be costly for the Estate because Brownstein would pursue discovery against the Receiver, regardless of whether the Receiver or Mr. Dragul were prosecuting the claims. (Brownstein Br. 9-10.) But the Receiver will have to assemble and disclose all of that same information to Mr. Dragul in the 2020 Action.

Brownstein also argues Mr. Dragul has not supported the damages alleged in the Brownstein Complaint, exclaiming: "Allegations are neither facts nor evidence." (Brownstein Br. 9.) That is ironic because both the Receiver and Brownstein assert Mr. Dragul engaged in many types of illicit behavior, as though that had already been proven. (*E.g.*, Brownstein Br. 8 ("The indictments, however, *reveal* Dragul's own active fraud[.]") (emphasis added).) Neither the Receiver, nor the Commissioner, nor the Attorney General's office have yet proven *any* of their allegations. And the Receiver himself merely asserts, without facts or evidence, that the

[9] This is not the only creditor complaint for which it appears the Receiver did not inform the Court. At least two creditors, Susie Lewis and Chad Hurst, objected to the Receiver's proposed settlement with Alan Fox. (Exs. E & F) These creditors apparently replied-all to an email the Receiver's counsel sent to all creditors. Because Mr. Dragul's counsel were copied on the Receiver's email to creditors, Mr. Dragul's counsel also received the creditors' reply-all. Query whether other creditors also complained to the Receiver through other channels, which the Receiver has not disclosed to the Court or Mr. Dragul?

claims against Brownstein are meritless. He never explains why[10] or what efforts he made to investigate the claims.[11]

Nonetheless, in his Objection, Mr. Dragul explained the alleged damages, including that the amount of fees Brownstein charged—about $7,000,000—is readily ascertainable, and that some of the damages correspond to the exposure the GDA Entities face from investor-creditors, the amount of which is approximately $58 million according to *the Receiver's* reports to the Court about the amount of the creditors' claims asserted in the equitable claims pool. (Obj. 12-13.) Neither the Receiver nor Brownstein respond to these points. The $250,000 for which the Receiver wants to settle the Brownstein claims is 232 times less than supportable damages, and the creditors will ultimately suffer that difference if the settlement agreement is approved.

CONCLUSION

The Receiver is not authorized to settle Mr. Dragul's personal claims against Brownstein because those claims never belonged to the Receiver. While the Receiver is free to prosecute the GDA Entities' claims, but owes a fiduciary duty to the Estate and the Court to do so in good faith. If he is not willing to do so, the claims should be abandoned.

[10] Except that he vaguely asserts the claims must be time-barred because they pertain to transactions that concluded many years ago and into which the Commissioner and Attorney General began investigations in 2014, though he does not address the discovery rule or when the injury occurred. (Receiver Mot. ¶ 20.)

[11] If the Receiver were investigating the claims in good faith, one would imagine his first call would be to the author of the Brownstein Complaint. He never made any such inquiry.

Respectfully submitted this 21st day of January, 2021.

JONES & KELLER, P.C.

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ATTORNEYS FOR DEFENDANT GARY DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY BRIEF RE RECEIVER'S MOTION TO APPROVE BROWNSTEIN SETTLEMENT** was filed and served via the ICCES e-file system or email on this 21st day of January 2021 to the following counsel of record for the parties to the action and interested third parties:

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VIA U.S. MAIL AND E-MAIL

Gary J. Dragul
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RE: Engagement Agreement for Legal Services

Dear Gary:

Thank you for selecting Brownstein Hyatt Farber Schreck, LLP (the "Firm") to serve as your legal counsel in connection with the matters described below. We appreciate the opportunity to represent you in this matter. The purpose of this engagement letter (the "Agreement") is to outline the nature and scope of the engagement and our respective responsibilities and expectations.

The Client: The Firm will represent Gary J. Dragul.

Scope of Engagement: The Firm will serve as your counsel solely for the purpose of attending a meeting with Attorney General Weiser to attempt to negotiate a settlement of the claims pending against you in *People v. Dragul*, Denver District Court Case No. 2018CR1092 (the "Promissory Note Matter") and *Gerald Rome v. Gary Dragul, et al.*, Denver District Court Case No. 2018CV33011 (the "Rome Matter"). If the initial meeting with Attorney General Weiser is productive but does not result in a settlement, the Firm may, in its sole and subjective discretion, engage in further settlement discussions with the Attorney General's Office. Notwithstanding the foregoing, except to the extent limited by applicable law or rules of professional conduct, we may withdraw from this representation at any time following the meeting with Attorney General Weiser. Neither the Firm nor its lawyers will enter appearances for you in the Promissory Note Matter or the Rome Matter. You agree that these limitations on the scope of the services the Firm will provide to you are reasonable under the circumstances and that you have other competent counsel of record assisting you with other aspects of the Promissory Note Matter and the Rome Matter

If the Promissory Note Matter and the Rome Matter are not settled and your request the Firm (and the Firm agrees) to perform additional work on your behalf with respect to those Matters, or represent you in a manner that is beyond the scope of the engagement described above, you understand and agree that the Firm will provide an updated engagement letter specifying the scope of the new engagement and requiring payment of a retainer. Services rendered to you prior to your signing this Agreement are subject to the provisions of this Agreement.

Staffing, Fees, Costs and Billing Arrangements: It is anticipated that I will supervise and coordinate most of the work on this matter. My hourly rate for this engagement would ordinarily be $1,435. In consideration of the release contained in the following paragraph, however, the firm has agreed to waive its fee for this engagement.

EXHIBIT A

Release: In consideration of the Firm's agreement to represent you on the terms set out in this Agreement, you hereby release any and all claims, known or unknown, of any nature, scope or amount which you, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC and each of their its respective agents, managers, officers, shareholders, partners, members, directors, representatives, affiliated business entities, or subsidiaries (collectively, the "Dragul Releasors") may now or hereafter have against the Firm or any of the Firm's affiliated business entities, attorneys, officers, directors, shareholders, employees, or insurers that relate in any way to the Firm's representation of you and/or the Dragul Releasors on previous matters. The foregoing release shall extend to any alleged claims of professional negligence, the fees or other amounts charged by the Firm, and any other claims of any nature related to the representation by the Firm of you and/or the Dragul Releasors. You expressly agree and acknowledge that the release contained in this paragraph is supported by adequate consideration, irrespective of the number of hours the Firm spends on this engagement or the results obtained. By executing this Agreement, neither the Firm nor you is admitting any wrongdoing or fault in connection with the subject matter of the release contained in this paragraph.

You acknowledge that you have had an opportunity to review the release contained in this paragraph with independent legal counsel. In the event that you have not discussed the matter with a legal counselor of your choice before executing this document, you freely and voluntarily waive the right to such counsel, although you have the right to seek independent counsel concerning this matter at any time.

Dispute Resolution: All disputes arising out of or relating to the Agreement shall be resolved in a binding arbitration administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. The arbitration will take place in, and be administered in accordance with the laws of, the state in which the legal services provided by the Firm were primarily performed. The arbitrator shall award the substantially prevailing party its reasonable attorney fees and costs, and judgment on the award may be entered by a court of competent jurisdiction.

Complete Agreement: This Agreement contains all the terms and provisions of and related to our engagement. This Agreement may only be amended in a writing signed by a representative of the Firm and you. If any provision or part of this Agreement is held invalid or unenforceable for any reason, the remainder of this Agreement shall nonetheless remain in full force and effect.

If you agree with the terms and provisions of this Agreement, please countersign this letter where indicated below and return it to us with the deposit referenced above at your earliest opportunity. If you have any questions, please feel free to contact me or a member of our team.

Sincerely,

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: _____
Norman Brownstein

Acceptance of Agreement:

I have read and understand this Agreement. I am authorized to, and do hereby, engage Brownstein Hyatt Farber Schreck, LLP in accordance with the terms of this Agreement, effective as of the date of this Agreement.

GARY J. DRAGUL

Signed: _____

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DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado v. **Defendants**: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	▲ 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. 2018CV33011 Courtroom: 424

AFFIDAVIT OF DOUGLAS J. SHUMWAY

STATE OF TEXAS)
):ss
COUNTY OF BEXAR)

I, Douglas J. Shumway, state as follows:

1. I am over the age of 21, a resident of the United States, and otherwise competent to provide testimony in this matter. This testimony is based on my personal knowledge and, if called to testify in this case, my testimony would be consistent with this affidavit.

EXHIBIT B

2. I am a partner of the law firm Shumway Van (the "Firm"), which was retained by Gary Dragul ("Mr. Dragul") to pursue Mr. Dragul's claims for legal malpractice and negligence (the "Claims") against Brownstein Hyatt Farber Schreck, LLP ("BHFS").

3. I have personally reviewed documents that Mr. Dragul provided to the Firm related to the Claims.

4. In my review of the documents I was only able to locate one written representation agreement between Dragul or a GDA Entity and BHFS, which agreement stated "Dear Gary: You have asked us, and we have agreed, subject to our firm's conflicts of interest check, to act as legal counsel for Rose, LLC in connection with general, liquor licensing and other matters in which you may request our involvement from time to time and which we agree to undertake."

5. Upon review of the documents provided by Mr. Dragul, other than as noted above, I did not find any communication from BHFS that limited the scope or objectives of a representation associated with any transaction to one or more entities associated with a transaction to the exclusion of Mr. Dragul.

6. Upon review of the documents provided by Mr. Dragul, I noted various documents and agreements that BHFS appears to have drafted, negotiated, or otherwise was involved in and/or provided advice to Mr. Dragul in his individual capacity, including, by way of example, the following:

a) The Plainfield 09 A, LLC Operating Agreement (an entity in which Mr. Dragul individually and personally owned a 72.127% interest);

b) The YM Retail 07 A, LLC Operating Agreement (an entity in which Mr. Dragul individually and personally owned a 17.8614% interest);

c) The GDA Windsor Member, LLC operating agreement (an entity in which Mr. Dragul was a member);

d) Documents related to the Clearwater transaction (a transaction described in the second Colorado State Grand Jury Indictment) that repeatedly refer to Mr. Dragul individually without corresponding reference to any of Mr. Dragul's entities. Specifically, an email from Aaron Metz of GDA Real Estate to Rob Kauffman stated: "The net investment in Clearwater Shopping Center is $5,377,518. Gary and/or closely held entities, friends, family and employees, will own at least 10% of the property";

e) An email from Rick Thomas to various of the Defendants, Mr. Dragul, attorneys for Rialto Capital (a lender), and others, stating "Please find attached the note evidencing the loan from ACF. The pledge agreement is included as an exhibit to the note", which note and pledge agreement were related to the Clearwater transaction and executed by Mr. Dragul in his individual capacity;

f) A loan agreement related to a loan from Rialto Capital that was delivered to Mr. Dragul by Rob Kauffman which stated that "'Guarantor' shall mean individually and collectively as the context may require Gary Dragul, an individual, and any other Person guaranteeing any payment or performance obligation of Borrower";

g) Organizational charts reportedly prepared and distributed to third-parties by BHFS that indicate Mr. Dragul, in his individual capacity, was contemplated as being an equity holder or officer of one or more entities associated with a transaction;

h) Entity formation documents that indicate that "Gary J. Dragul" was the organizer of the entity, in his individual capacity, which documents were prepared by one or more of the Defendants;

i) The Colerain Ave Operating Agreement draft dated September 24, 2015 that identifies Mr. Dragul as a personal guarantor and Mr. Dragul sought advice related to the personal guaranty in an email dated September 28, 2015 to Marc Diamant and Rob Kauffman; and

j) Documents related to the Plaza Mall of Georgia transaction that indicate that Mr. Dragul, in his individual capacity, was an "investor," and a personal guaranty that was reviewed by one or more of the Defendants that states the following: "I, the undersigned, Gary J. Dragul, hereby confirm that I have read: (1) that certain Operating Agreement (the "Operating Agreement") of this date of Plaza Mall North 16, LLC (the "JV Company"), by and among CoFund 3, LLC ("CoFund"), Hagshama Atlanta 19 Buford LLC ("Hagshama 19"), GDA Plaza Mall Member, LLC ("GDA Member"), Gary J. Dragul and GDA Real Estate Management, Inc. ("GDA Manager"); and (2) that certain Letter Agreement (the "Letter Agreement") of this date by and among CoFund, Hagshama 19, GDA Member, Gary J. Dragul and GDA Manager, and accept and agree to be bound by the contents of the Operating Agreement and Letter Agreement entirely. I hereby guarantee to be liable to CoFund for any loss or damages incurred by CoFund, and for any payment due to CoFund under the Operating Agreement and the Letter Agreement which the JV Company and/or GDA Manager has failed to pay…"

7. In my review of the documents provided by Mr. Dragul I saw various documents and emails referring to "Gary" as the client.

8. In my review of the documents provided by Mr. Dragul I noted that BHFS was involved in and provided advice related to GDA Real Estate charging a $200,000 consulting fee related to the Plaza Mall of Georgia transaction, and the second indictment against Mr. Dragul stated that "None of these fees were disclosed to investors prior to the closing" notwithstanding certain of the Defendants acting as securities counsel related to the transaction in addition to preparing the documents that facilitated the payment of the fee.

9. In my review of the Operating Agreement of Plainfield 09A, LLC, which document was prepared by one or more of the Defendants, I noted that a few securities law-related disclosures were provided; however, Mr. Dragul was later indicted for soliciting and receiving investor funds and failing to disclose the actual risk associated with investments and failing to disclose the actual financial condition and substantial debt of GDA.

10. In my review of the documents provided by Mr. Dragul I noted that the private placement memorandum, subscription agreement, and operating agreements related to the "Clearwater" transaction did not mention conflicts associated with the Plainfield transaction, from which funds were derived for the "Clearwater" transaction, and for which Mr. Dragul was indicted, and no disclosures or risk factors from said private placement memorandum addressed the incorporation of prior investors into a new investment, yet Mr. Dragul was later indicted for activities related to such transactions.

11. In my review of the documents provided by Mr. Dragul related to the "Clearwater" transaction I was unable to locate any correspondence from BHFS that identified any risk

associated with incorporating Plainfield investors into Clearwater or that suggested that any additional disclosures be made to such investors based upon their investments in Plainfield.

12. In my review of the documents provided by Mr. Dragul I noted that BHFS prepared amendments to the operating agreement for Rose, LLC that incorporated a number of the "investors" associated with the promissory notes for which Mr. Dragul was indicted, but I did not see any communication from BHFS advising Mr. Dragul to make any disclosures to the new or existing investors in Rose, LLC notwithstanding the expansive disclosures that were made related to the first amendment to the operating agreement of Rose, LLC.

13. In my review of the documents provided by Mr. Dragul I noted the existence of a formal internal BHFS memorandum related to Mr. Dragul that was prepared in 2016 (which Mr. Dragul became the recipient of), which memorandum discussed "whether" promissory notes would be considered securities and was inconclusive; however, Mr. Dragul being later indicted for the existence and use of such promissory notes.

14. In my review of the documents provided by Mr. Dragul I noted that BHFS appeared to be involved in and provided advice related to Mr. Dragul's criminal defense until attorney Rick Kornfeld wrote an email to Stan Garnett and Rob Kauffman (attorneys at BHFS) on May 20, 2018 that stated the following: "As I discussed with Stan last week, we need to investigate whether we have an advice of counsel defense, based on Gary's prior interactions with the firm. Gary's recollection may not be in sync with what Stan has found out, but we need to chase it down nonetheless. The question, of course, is whether Gary obtained any advice regarding whether the offering in connection with Senor Frogs (or anything else, for that matter) was a security, and the particulars, if any, of the drafting of the PPM. The other issue, of course, would be whether Jeff

or anybody else perhaps didn't view it as a security, regardless of any discussion with Gary, so that there could be a defense by omission. I'm not sure what the most efficient way to track this down is, but certainly a review of billing records and a discussion with Jeff is probably a good start. Please let me know your thoughts regarding how to best pursue this issue, with appropriate sensitivities to privilege issues and any potential conflicts."

15. In my review of the documents provided by Mr. Dragul I was unable to locate any communication that led me to believe that Mr. Dragul was aware of any claim against BHFS until he attended the meeting referenced by Rick Kornfeld above.

16. In my review of documents provided by Stephen Janowiak, who is presently a Senior Acquisition Officer of State Teachers Retirement System of Ohio, one of the largest public pension funds in the U.S. with investment assets of $80.9 billion, a former Senior Vice President for Hunt Investment Management, a private equity company with approximately $411.9 million in total assets under management, a former Director of Transactions for Inland American REIT, an $11 billion public non-traded REIT, and former Vice President – Investments for General Growth Properties, a $19 billion real estate investment trust, I noted that as of September of 2018, the 12 month rolling cash flow statement for Cassinelli Square, Clearwater Collection, Marketplace at Delta, Happy Canyon Shoppes, Hickory Corners & Box, Prospect Square, Colerain Avenue, Summit Marketplace, Windsor Square indicated positive cash flow of $4,984,385, and the real estate related to the GDA Entities associated with those properties could be reasonably expected to produce similar revenues for a period of decades.

17. I also noted in the documents provided by Mr. Janowiak that there was purportedly substantial equity in the portfolio of properties associated with the GDA Entities and that GDA

Real Estate Services, LLC and GDA Real Estate Management, LLC were viable entities rather than businesses with a crumbling financial condition and inability to repay investors.

Dated this 21st day of January 2021.

DOUGLAS J. SHUMWAY

STATE OF TEXAS
COUNTY OF BEXAR

Sworn to and subscribed before me on the 21st day of January 2021 by Douglas J. Shumway.

(Personalized Seal)

MAYRA JUAREZ
Notary ID #129616664
My Commission Expires
December 4, 2021

Notary Public's Signature

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **AFFIDAVIT OF DOUGLAS J. SHUMWAY** was filed and served via the ICCES e-file system on this 6th day of January 2021 to the following counsel of record for the parties to the action and interested third parties:

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DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 (303) 606-2429	
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 Number: 2020CV30255 Division/Courtroom: 414
RECEIVER'S OMNIBUS RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS	

EXHIBIT C

TABLE OF CONTENTS

Harvey Sender, the duly-appointed receiver (the "Receiver") for Gary Dragul ("Dragul"), GDA Real Estate Services, LLC, GDA Real Estate Management, Inc., and related entities (collectively, "Dragul and the GDA Entities"), hereby responds to the Motions to Dismiss filed by Dragul,[1] Fox,[2] Hershey,[3] and Markusch[4] (collectively, "Movants").

I. INTRODUCTION

This case stems from a complex Ponzi scheme in which investors lost more than $70 million. The scheme was orchestrated by Dragul, who has been indicted on 14 counts of securities fraud. As set forth in the Amended Complaint, Movants each played an integral role in the scheme. Dragul, with the assistance of his co-conspirators solicited investments from investors by distributing false and misleading offering materials. Fictitious profits were paid to investors to allow the scheme to remain undetected for years while Dragul stole millions. After Dragul was indicted, the Receiver was appointed to administer the Dragul and the GDA Entities'[5] assets for the benefit of the defrauded creditors.

II. LAW AND ARGUMENT

A. The Receiver has Standing to Pursue His Claims.

Relying on inapplicable and inapposite authority, Movants argue the Receiver lacks standing to pursue *any* of the claims asserted in the Amended Complaint. Those arguments, if

[1] Defendant Gary Dragul's Motion to Dismiss First Amended Complaint ("Dragul MTD").

[2] Defendants ACF Property Management, Inc. ("ACF") and Alan C. Fox's ("Fox") Motion to Dismiss pursuant to C.R.C.P. 12(b)(1), 12(b(5), and 9(b) ("Fox MTD").

[3] Defendants Marlin S. Hershey's and Performance Holdings, Inc.'s ("Hershey") Motion to Dismiss pursuant to C.R.C.P. 12(b)(1) and (5) ("Hershey MTD").

[4] Defendant Susan Markush's ("Markusch") Motion to Dismiss First Amended Complaint ("Markusch MTD").

[5] Capitalized terms not defined here are defined in the Amended Complaint.

adopted by the Court, would render a receiver appointed by Colorado's Securities Commissioner (the "Commissioner") powerless to redress the very wrongs he was appointed to remedy. To determine whether the Receiver has standing, the Court must ascertain whether he has alleged an actual injury to a legally protected right or cognizable interest, and must accept as true the well-pleaded allegations of the Amended Complaint. *See, e.g., Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992). Based upon the allegations in the Amended Complaint, the Receiver has standing to assert his claims.

1. The Receiver has Standing Pursuant to the Colorado Securities Act and the Receivership Order

"A receiver is a fiduciary of the court and of the persons interested in the estate of which he is the receiver." *Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988) "The receiver's function is to collect the assets, obey the court's order, and in general to maintain and protect the property and the rights of the various parties." *Hart v. Ed-Ley Corp.*, 482 P.2d 421, 425 (Colo. App. 1971) (NSOP).

There is no dispute that a receiver's authority is derived from and defined by the Receivership Order. *See, e.g., Zeligman*, 762 P.2d at 785. Multiple provisions of the Receivership Order, as set forth in the Amended Complaint, authorize the Receiver to bring claims on behalf of the GDA Entities in Receivership *and* their creditors, members, and equity holders.[6] Particularly, ¶ 13(s), with which Movants take issue, grants the Receiver the authority "[t]o prosecute claims

[6] *See* Rcvrshp. Order at ¶ 9 (Receivership property includes claims and causes of action held by all Estate LLC entities; authorizing Receiver to pursue claims for the benefit of GDA Entities and their *creditors, members, and equity holders*); ¶ 13(o) (Receiver given express authority to pursue claims based on fraudulent transfer or similar theories)

and causes of action held by Creditors of Dragul [and the GDA Entities] for the benefit of Creditors, in order to assure the equal treatment of similarly situated Creditors[.]"

The plain language of the Receivership Order, combined with the nature of the Receiver's authority as a matter of Colorado statute and equity, unequivocally refutes Movants' standing defenses. The Receiver's authority derives from the Commissioner and the broad remedial provisions of the Colorado Securities Act ("CSA"). Section 602 of which provides, in pertinent part:

> [U]pon sufficient evidence satisfactory to the securities commissioner that any person has engaged in […] a violation of any provision of this article, the securities commissioner may apply to the district court of the city and county of Denver to temporarily restrain or preliminarily or permanently enjoin the act or practice in question and to enforce compliance with this article or any rule or order under this article.

C.R.S. § 11-51-602(1). In any action brought pursuant to § 602(1), the "securities commissioner may include […] a claim for damages under section 11-51-604 or restitution, disgorgement, or other equitable relief *on behalf of some or all of the persons injured by the act* or practice constituting the subject matter of the action[.]" C.R.S. § 11-51-602(2) (emphasis added).

The Receiver's authority also derives from equity. *See, e.g.*, *Erwin v. West*, 99 P.2d 201, 204 (Colo. 1939); *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 519 (Colo. App. 2006). In equity Ponzi scheme receiverships, "the interests of the Receiver are very broad and include not only protection of the receivership res, but also protection of defrauded investors and considerations of judicial economy." *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1197 (10th Cir. 2010) (citation omitted). The Receiver plays a critical role in Ponzi scheme receiverships where, as here, there are a large number of defrauded investors who, individually, lack the

resources or capacity necessary to pursue recovery. Indeed, Dragul admits he stipulated to the Receivership Order because he "believed a receivership would be the most effective way for investors to avoid losses." Dragul MTD at 3. The Receiver, who was appointed to represent the interests of **all** creditors, is uniquely positioned to marshal the Estate's assets for their benefit.

Dragul ignores that both he and his counsel negotiated the Receivership Order and all of its provisions – including its grant of standing to pursue creditor claims – with the Commissioner. Dragul MTD at 9, n. 4. The Receiver, on the other hand, had no involvement in the negotiation or drafting of the Receivership Order. Having negotiated the terms of the Order, stipulated to its entry, and after it has been relied upon by the Commissioner, the Receiver, and all creditors of the Estate, Dragul should be estopped from now objecting to the very provisions he negotiated. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."); *Arko v. People*, 183 P.3d 555, 560 (Colo. 2008) (judicial estoppel preludes a party from taking a position in a case that is totally inconsistent with a position it successfully took in an earlier, related proceeding in an intentional effort to mislead the court); *Fiedler v. Fiedler*, 879 P.2d 675, (Mont. 1994) (judicial estoppel precluded party from contravening previous stipulation).

Significantly, Dragul argues that if "the Receiver wanted to assert creditors' claims, he had an easy way to do it: get creditors to assign their claims to him." Dragul MTD at 12. The Fox Defendants, too, argue that because "Dragul's creditors have not assigned" their claims to the Receiver, they "are entirely capable of representing their own interests." Fox MTD at 10-11. Both

arguments, however, disregard the fact that *every* creditor claim filed in the Estate contains the following attestation under the penalty of perjury:

> **CLAIMANT HEREBY CERTIFIES THAT IT HAS DISMISSED ANY OTHER PENDING SUITS OR PROCEEDINGS IT HAS COMMENCED AGAINST DRAGUL, THE DRAGUL ENTITIES, OR THE RECEIVERSHIP ESTATE AND THAT IT WILL NOT FILE (OR RE-FILE) ANY SUIT OR PROCEEDING IN ANOTHER FORUM WITHOUT THE RECEIVER'S PERMISSION OR LEAVE OF THIS COURT.**

(bold and caps in original). Indeed, *the Fox Defendants filed 15 different claims against the Estate, each of which contains this very certification*.

Dragul's investors have already suffered significant financial harm. Justifiably relying on the Receivership Order, when they filed claims against the Estate, they agreed not to pursue individual claims, in effect assigning them to the Receiver. It would be inequitable to dismiss the Receiver's "investor claims" and force investors at this late stage to bring individual claims, which Defendants would certainly move to dismiss (as they have serially done here) as barred by the statute of limitations.

2. Defendants Cite No Colorado Authority to Support their Argument that this Court Should Disregard the Receivership Order's Grant of Standing.

Movants argue this Court should disregard the grant of standing in ¶13(s) of the Receivership Order because it was beyond the Receivership Court's power to bestow. They do not, however, address the other provisions of the Order authorizing the Receiver to pursue creditor claims. The Fox Defendants rely exclusively on federal cases. *See* Fox MTD at 13. Dragul and the

Hershey Defendants, too, rely almost exclusively on federal cases,[7] and the scant Colorado authority they cite is neither on point nor controlling.

The only Colorado case the Hershey Defendants cite is *Francis v. Camel Point Ranch, Inc.*, 2019 COA 108M, *as modified on denial of reh'g* (Sept. 19, 2019), for a proposition with which the Receiver agrees: A receiver's authority is derived from the order of appointment. Hershey MTD at 6. *Francis* does not discuss whether a receiver has standing to assert creditor claims, or whether an appointing court can authorize them to do so, and therefore, is not instructive here.

Dragul cites *Good Shepherd Health Facilities of Colo., Inc. v. Dep't of Health*, 789 P.2d 423 (Colo. App. 1989), for the proposition that "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 Shepard*, however, does not address standing. It ultimately held the receiver *could* retain funds that the entity in receivership could not; seemingly rejecting *in pari delicto*, the court held "that the receiver does *not* stand in the shoes" of the entity's operator. *Id*. at 426 (italics added). Dragul also goes on to quote *First Horizon Merchant Servs., Inc. v. Wellspring Capital Mgm't, LLC*, 166 P.3d 166 (Colo. App. 2007) in support of his argument. Dragul MTD at 11. But *First Horizon* was neither a receivership nor a bankruptcy case; it addressed only a creditor's standing to pursue claims against a bankrupt's officers and directors. These cases simply do not support Movants.

[7] *See* Dragul MTD at 9, n.4; Hershey MTD at 6. The federal cases are discussed below in section II, A, 4. Markusch simply incorporates the standing arguments made by the other Movants.

3. *Kidder Peabody* Improperly Conflated Standing with *in pari delicto*.

Dragul relies heavily on *Sender v. Kidder Peabody & Co.*, 952 P.2d 779 (Colo. App. 1975), for two propositions: (1) the Receiver lacks standing to assert *any* claim against *any* Defendant because all such claims belong to investors (Dragul MTD, § I, B at 9-12); and (2) the Receiver's claims against him personally are barred by *in pari delicto* (Dragul MTD, § II, A at 12-14). *Kidder Peabody* is distinguishable.

First, in *Kidder Peabody*, a chapter 7 bankruptcy trustee asserted claims for, *inter alia,* negligence and breach of fiduciary duty against brokers employed by several of the debtor's related entities that the debtor's principal had operated as a Ponzi scheme. *Id.* at 780. The appellate court affirmed the trial court's dismissal of the trustee's claims on the basis of the affirmative defense of *in pari delicto,* improperly conflating that affirmative defense with standing. *Kidder Peabody,* 952 P.2d at 782. The prevailing view, however, is that "[a]n analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*." *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d Cir. 2001). "Whether a party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms." *Id.; see also Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (agreeing with the First, Third, Fifth, and Eleventh Circuits that *in pari delicto* and standing are separate and distinct issues).[8]

Second, in *Kidder Peabody,* the claims were asserted by a bankruptcy trustee, not a receiver. As the Tenth Circuit observed in another case Ponzi scheme case, bankruptcy

[8] *See also Nisselson v. Lernout*, 469 F.3d 143, 150-51 (1st Cir. 2006); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006); *Terlecky v. Hurd (In re Dublin Sec. Inc.)*, 133 F.3d 377, 380 (6th Cir. 1997).

proceedings are governed by the Bankruptcy Code, they do "not implicate the law of receivership," and nothing therein should be construed to apply to receiverships. *Sender v. Buchanan (In re Hedged-Invs. Assocs., Inc.)*, 84 F.3d 1281, 1285 n. 5 (10th Cir. 1996).

Indeed, another division of this Court rejected an identical standing argument in *Joseph v. Mueller*, 2010 CV 3280. *Mueller*, like this case, involved a Ponzi scheme receivership similarly initiated by the Commissioner. In that case, Judge Bronfin declined to follow *Kidder Peabody*, and instead applied the holding and reasoning from the bellwether receivership case, *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995), in which Judge Posner rejected the *in pari delicto* defense. *See* Order re Mot. to Lift Stay at 3, Oct. 10, 2012 (attached as **Exhibit 1**).

Third, as Judge Bronfin observed, by the time the bankruptcy trustee filed suit in *Kidder Peabody*, the brokers had already paid $50 million to settle individual claims asserted by most investors. *Kidder Peabody*, 952 P.2d at 781. Allowing the bankruptcy trustee to pursue additional claims raised the specter of duplicative liability, concerns not present here where investors, in reliance on the Receivership Order and the court-approved claims process, have submitted claims against the Estate authorizing the Receiver to pursue claims on their behalf.

4. *In pari delicto* Does Not Bar the Receiver's Claims.

Contrary to Dragul's second argument, the Receiver's claims are not barred by *in pari delicto*. Perhaps because it involved claims asserted by a bankruptcy trustee and not a receiver, *Kidder Peabody* did not cite the seminal *receivership* case of *Scholes v. Lehmann*, 56 F.3d 750. *Scholes* and its vast progeny hold that *in pari delicto* does not apply to receivers appointed in the wake of Ponzi schemes. As Judge Posner described it, during the operation of the scheme, the

corporations created by the scheme operator are "robotic tools," but "nevertheless in the eyes of the law separate legal entities." Once the Ponzi scheme collapses,

> [t]he appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the operator's] evil zombies. Freed from his spell they became entitled to the return of the moneys—for the benefit not of [the operator] but of innocent investors—that [the operator] had made the corporations divert to unauthorized purposes.

Id. at 754. Therefore, "the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Id. Scholes* was cited with approval by the Colorado Supreme Court in *Lewis v. Taylor*, 2018 CO 76, ¶ 23, which held that a receiver can recover fraudulent Ponzi scheme transfers. *Scholes'* reasoning is fleshed out in *In Re: NJ Affordable Homes Corp*, 2013 WL 6048836 (Bankr. D.N.J. Nov. 8, 2013), which rejected the *in pari delicto* defense against a receiver:

> A corporate receiver represents not only the corporation but all of its creditors; in order to secure all the assets available, the receiver succeeds to their rights and has all the powers to enforce such rights that the creditors before the appointment had in their own behalf, even though such powers are beyond those which the receiver has as the representative of the corporation alone. 65 Am. Jur. 2d § 371 n. 3.
>
> However, while any defense good against the original party is generally good against the receiver, the rule is subject to exceptions, since, for example, defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver. So when an act has been done in fraud of the rights of the creditors of an insolvent corporation, the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself. *Id.*
>
> * * * *
>
> While a party may itself be denied a right or defense on account of its misdeeds, there is little reason to impose the same punishment on

> a trustee, receiver or similar innocent entity that steps into the party's shoes pursuant to court order or operation of law.
>
> A receiver, like a bankruptcy trustee and unlike a normal successor in interest, does not voluntarily step into the shoes of the [entity]; it is thrust into those shoes. It was neither a party to the original inequitable conduct nor is it in a position to take action prior to assuming the [entity's] assets to cure any associated defects....
>
> Also significant is the fact that the receiver becomes [the entity's] successor as part of an intricate regulatory scheme designed to protect the interests of third parties who also were not privy to the [entity's] inequitable conduct. That scheme would be frustrated by imputing the [entity's] inequitable conduct to the receiver, thereby diminishing the value of the asset pool held by the receiver and limiting the receiver's discretion in disposing of the assets.

Id. at *24-25, 28 (quoting *F.D.I.C. v. O'Melveny & Myers*, 61 F.3d 17, 19 (9th Cir. 1995) ("defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver. […] To hold otherwise would be to elevate form over substance—something courts sitting in equity traditionally will not do.") (emphasis added; some internal citations omitted)); *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012) ("The Receiver brought this suit on behalf of [the estate] to recover funds for defrauded investors and other innocent victims. Application of *in pari delicto* would undermine one of the primary purposes of the receivership established in this case, and would thus be inconsistent with the purposes of this doctrine."); *Grant Thornton, LLP v. F.D.I.C.*, 435 F. App'x 188, 200-01 (4th Cir. 2011) (receiver's claims not barred by *in pari delicto* because this defense would prevent the receiver from "vindicat[ing] the rights of the public.").

5. The Federal Cases Defendants' Rely On Are Not Controlling.

Movants cite *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), which provides it is "black-letter law that federal subject matter jurisdiction extends to *causes of action*, not to entire

cases as such.*"* *Id.* at 1420 (italics in original). So, "every asserted claim must be looked at separately, rather than tossing them all into the same basket[.]" *Id.* Yet, Movants toss all the Receiver's claims into a single basket and argue the Receiver lacks standing to assert *any* of them because they all *belong* to creditors.

As discussed in detail below, the Receiver's claims do not ***all*** belong to creditors. The Receiver seeks to recover for harm caused both to creditors ***and*** to the GDA Entities in Receivership. The Receiver's claims are largely predicated on Defendants' diversion of assets that should have been paid to and held by the GDA Entities, claims that are indisputably the Receiver's to bring. Moreover, because standing here must rest on Colorado law and not the federal constitution, federal law is not controlling. *See, e.g., Marks v. Gessler,* 350 P.3d 883, 900 (Colo. App. 2013).

Dragul and the Fox Defendants both rely on *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003) to challenge the Receiver's standing.[9] But, *Javitch* held only that a receiver was bound to arbitrate claims against the brokers he was suing, and "did not squarely confront a standing problem because the Receiver undeniably had standing" to bring his claims. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009).

The Fox Defendants also rely on *Eberhard v. Marcu*, 530 F.3d 122 (2nd Cir. 2008); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20 (1st Cir. 1990); and *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1481 (10th Cir. 1983), which are all distinguishable. In *Eberhard*, the court held that a receiver appointed for an individual lacked standing to bring fraudulent conveyance claims under New York law because a transferor cannot

[9] *See* ACF MTD at 9; Dragul MTD at 10.

sue to avoid his own fraudulent conveyance. *Eberhard*, 530 F.3d at 134. *Eberhard* is unique and distinguishable because the receiver there was appointed over only an individual's assets, not the assets of the companies he ran. The *Eberhard* court acknowledged that a different result would follow had the receiver been appointed over the companies' assets as well, in which case (as here), the companies would be creditors whose assets were depleted by the fraudulent conveyances and the receiver free to pursue them. *Id.; see also Federal Nat'l Mortg. Ass'n v. Olympia Mortg. Corp.*, 2011 WL 2414685, at *7 (E.D.N.Y. June 8, 2011) (*Eberhard* simply does not apply where wrongdoer conveyed away assets to the corporation's detriment.)

Fleming upheld dismissal of a receiver's claims against a commodities broker under F.R.C.P. 12(b)(6) (not 12(b)(1) as Movants rely on here) because the receiver did not allege harm to the entities in receivership. And unlike here, the receivership order in that case did *not* grant the receiver authority to prosecute investor claims. *Fleming*, 922 F.2d at 24-5.

Dragul also banks on *Kelly v. College of St. Benedict*, 901 F. Supp. 2d 1123 (D. Minn. 2012). The court in *Kelly* held that a receiver lacked standing to assert claims under the Fair Debt Collection Procedures Act because the Act authorizes only the United States to assert claims to collect governmental debts. *Id.* at 1130. The Receiver here is not asserting claims under the FDCPA, so this case is equally inapplicable.

Finally, Dragul and the Fox Defendants cite *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), which addressed pleading deficiencies in a receiver's complaint, but ultimately confirmed that a receiver may bring claims for securities fraud, common law fraud, fraudulent transfer, and breach of contract alleging harm to the corporation in receivership. *Id.* at 1424-25. None of these authorities support the blanket dismissal Movants urge.

6. The Receiver Has Standing to Assert the Specific Claims Alleged in the Amended Complaint.

Under the Receivership Order, the Receiver has standing to pursue creditor claims. But even if this Court disregards that grant of standing, the Receiver has standing to pursue the claims alleged in the Amended Complaint because they allege harm to the entities in Receivership, which the Receiver indisputably has standing to bring.

i. Claim I – Violations of the Colorado Securities Act

The Receiver's first claim asserts five different violations of the CSA. Movants argue the Receiver lacks standing to bring claims under C.R.S. §§ 11-51-604(2)(a) and 401 (against Dragul and the Fox and Hershey Defendants) for licensing and notice violations (Amd. Compl. ¶¶ 321-326) and C.R.S. §§ 11-51-604(3)-(4) and 501(a)-(c) (against Dragul and the Fox Defendants) for securities fraud (Amd. Compl. ¶¶ 327-338). *See*, *e.g.*, Dragul MTD at 5-6; Fox MTD at 10. Movants argue that § 11-51-604(2)(a) and (5)(a) claims can only be brought by a person buying a security under C.R.S. § 11-51-501(1) & 501(1)(b). These arguments also fail. First, with respect to the claims stemming from the Fox-owned SPEs, the Receiver asserts these claims on behalf of the GDA Entities, which were purchasers of securities (*i.e.*, membership interests in the Fox SPEs that owned the respective properties) and as to those stemming from the GDA-managed properties and sale of promissory notes, the Receiver asserts those claims on behalf of the individual investors. The Receivership Order expressly vests the Receiver with authority to pursue the claims of both the GDA Entities and the individual investors, and as such, has standing. *See* Rcvrshp. O. ¶¶ 9 and 13(s).

ii. Claims II and III – Negligence and Negligent Misrepresentation

The Receiver's second and third claims assert that Dragul, and the Fox and Hershey Defendants failed to exercise reasonable care in preparing or distributing solicitation materials to investors and made negligent misrepresentations to investors to induce them to invest. (Amd. Compl. ¶¶ 355-370). These claims are based on harm to investors which the Receivership Order specifically authorizes the Receiver to pursue. Rcvrshp. Order ¶ 13(s). Members and managers of a limited liability company such as the GDA Entities owe fiduciary duties to each other. *See LaFond v. Sweeney*, 343 P.3d 939 (Colo. 2015). Under governing law, Dragul owed the SPEs and the GDA Entity Investors the common law duties of loyalty, good faith and fair dealing, and due care. The specific duties that Dragul owed both to the SPEs and the GDA Entity Investors need not be specifically alleged, but instead may be inferred from the circumstances alleged in the Amended Complaint. For instance, a manager's use of the entity's funds for his own personal benefit without repaying the entity is an actionable breach of fiduciary duty. Dragul's comingling and theft of investor funds described in the Amended Complaint is but one of many examples of his breaches of duties of loyalty, good faith and due care. *See Polk v. Hergert Land & Cattle Co*., 5 P.3d 402, 405 (Colo. App. 2000).

iii. Claim IV -- Civil theft

The fourth claim is for civil theft under C.R.S. § 18-4-405 against all defendants. Dragul and the Fox Defendants argue the Receiver lacks standing to bring this claim because it alleges only harm to investors.[10] Both ignore numerous allegations in the Amended Complaint that they

[10] Fox MTD at 10; Dragul MTD at 6. Hershey does not argue standing, but does move to dismiss the civil theft claim for failure to state a claim. He points out that the Amended Complaint mistakenly refers to C.R.S. § 18-4-401, the criminal civil theft statute, rather than the civil Rights in Stolen Property Statute,

diverted Estate assets causing harm to the GDA Entities themselves. For example, the Receiver alleges Dragul and the Fox Defendants received undisclosed and illegal commissions in connection with the purchase and sale of various SPE properties. (Amd. Compl. ¶¶ 61, 62, 100, 153, 171, 180, 193, 197, and 201). These are funds which should have been retained by the SPEs, used in operations, and ultimately distributed to investors.

The Receiver also alleges Dragul diverted more than $20 million of investor funds from the SPEs (Amd. Compl. ¶¶ 293-294); that more than $34 million in illegal commissions were paid harming the GDA Entities (Amd. Compl. ¶¶ 297); and that Defendants pilfered SPE assets causing damaging to the GDA Entities and the Estate (Amd. Compl. ¶¶ 391, 406). The Complaint asserts that, even after the Receiver was appointed, Fox and Dragul conspired to remove SSC 02 assets from the Estate (Amd. Compl. ¶¶ 277-280), and that Dragul, the Fox and Kahn Defendants engaged in a similar conspiracy to abscond with the Estate's interest in an airplane (Amd. Compl. ¶¶ 266, 270). The Receiver plainly has standing to pursue this claim.

iv. Claim V – Violations of the Colorado Organized Crime Control Act ("COCCA")

The fifth claim asserts COCCA violations against Dragul, and the Fox and Hershey Defendants. In their motions, Dragul and the Fox Defendants argue the Receiver lacks standing to bring this claim. The Fox Defendants argue the Receiver has not alleged any injury to the GDA Entities. Fox MTD at 10. Dragul contends (1) the enterprise is alleged to have terminated when the Receiver was appointed so *the Receiver* could not have been injured by it, and (2) the Receiver

C.R.S. § 18-4-405, which Hershey mistakenly cites as C.R.S. § 8-4-405. Hershey MTD at 7. Regardless, it is apparent from the Motions to Dismiss that Movants are aware of the basis of the Receiver's civil theft claim against them.

for the GDA Entities cannot sue their principal because as a matter of law they cannot show an injury proximately caused by the racketeering activity. Dragul MTD at 7.

With respect to the Fox Defendants' argument, as discussed, the Receiver has alleged the GDA Entities were harmed by the COCCA conspiracy by depriving them of funds earmarked for their use, but which Defendants diverted to their own use.

Dragul's first argument – that the Receiver cannot show injury because the COCCA conspiracy terminated when he was appointed – is specious at best. The Receiver is not alleging that *he personally* was harmed by the COCCA conspiracy; he alleges *the GDA Entities* were harmed. Dragul's reliance on *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994), to support his position that a receiver lacks standing to sue officers or directors of an entity in receivership is misplaced. In *Mendelovitz*, a shareholder brought a derivative RICO action on behalf of a corporation against its directors. The court upheld dismissal of the shareholder's RICO claim because the damages alleged were speculative and remote, and depended on the "actions and decisions of third parties before coming into being." *Id.* at 185. Significantly, *Mendelovitz* was *not* a receivership case and did *not* involve claims brought by a receiver.

In contrast, *Larsen v. Lauriel Inv., Inc.*, 161 F. Supp. 2d 1029, 1046 (D. Ariz. 2001), held that a corporate receiver did have standing to bring RICO claims against the company's president for harm to the entity. *See also A. Farber & Partners, Inc. v. Garber*, 305 F. App'x 489, 491 (9th Cir. 2008) (receiver had standing bring RICO claim against corporate principals); *Dale v. ALA Acquisitions, Inc.*, 203 F. Supp. 2d 694, 703-04 (S.D. Miss. 2002) (receiver had standing to sue principal involved in Ponzi scheme); *Dale v. Frankel*, 131 F. Supp. 2d 852, 854 (S.D. Miss. 2001) (recognizing receiver's RICO claim against corporate principal).

v. Claim VII – Breach of Fiduciary Duty

Dragul next contends the Receiver has not alleged facts demonstrating what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered. Dragul MTD at 7-8. For the reasons discussed in section II. A. 6. ii., above, this argument also fails.

vi. Claim XI – Fraudulent Transfer

The eleventh claim seeks to recover fraudulent transfers under Colorado's Uniform Fraudulent Transfer Act, C.R.S. § 38-8-101-113 ("CUFTA") against all Defendants. For at least 35 years, it has been almost universally recognized that receivers have standing to bring claims under the UFTA to recover Ponzi scheme transfers. That fundamental principal is explicated in *Scholes v. Lehmann*, 56 F.3d 750, which held that receivers *do* have standing to recover fraudulent Ponzi scheme transfers because the transfers harm the entity in receivership. *Id.* at 754. As noted, the Colorado Supreme Court cited *Scholes* with approval in *Lewis v. Taylor*, 2018 CO 76, ¶ 23, and it has been followed by many other courts as well. *E.g., 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).

Nevertheless, Dragul and the Fox Defendants argue the Receiver lacks standing to assert fraudulent transfer claims because they belong exclusively to creditors. Fox MTD at 11; and Dragul MTD at 8. Both ignore the allegations in the Complaint that the GDA Entities were harmed when Dragul and the Fox Defendants (as well as the other named Defendants) paid themselves illegal and undisclosed commissions and otherwise fraudulently depleted the assets of the SPEs.

Dragul cites no case law to support his argument; the Fox Defendants rely on *Eberhard v. Marcu*;[11] *Troelstrup v. Index Futures Grp., Inc.*, 130 F.3d 1274 (7th Cir. 1997); and *Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230 (7th Cir. 2003). Fox MTD at 11-12. These cases, however, support the Receiver, not Movants. As discussed, the general rule of *Scholes v. Lehmann* is that a receiver has standing to pursue fraudulent transfer claims to recover transfers made by the entities placed into receivership. *Scholes* did not consider whether the general rule would apply if the Ponzi schemer "operated as a sole proprietorship rather than through corporations or other legally distinct entities." *Scholes*, 56 F.3d at 755. The Seventh Circuit addressed that issue in *Troelstrup*, where the receiver was appointed solely over the assets of the Ponzi scheme operator, not the corporate entities used in his scheme. *Troelstrup*, 130 F.3d 1274. The *Troelstrup* court ultimately held that the receiver could not sue a broker for negligence in facilitating the operator's fraud because the operator himself had not been damaged. *Id.* at 1276-77. Importantly, however, *Troelstrup* reaffirms *Scholes*' holding that a Ponzi scheme receiver has standing to pursue fraudulent transfer claims for funds wrongfully diverted from corporate entities. *Id.* at 1277. Finally, *Knauer* affirmed *Scholes*' holding that receivers have standing to recover funds wrongfully diverted from receivership entities. *Knauer*, 348 F.3d at 236. Contrary to the Fox Defendants' attempt to characterize the Receiver's claims as being based solely on the fraudulent solicitation of investors, the Receiver seeks to recover transfers of assets that Dragul, the Fox Defendants and their cohorts embezzled from the GDA Entities.

[11] Discussed and distinguished above in section II, A, 4.

vii. Claim XII -- Unjust Enrichment

Finally, Dragul and the Fox Defendants contend that the Receiver lacks standing to bring his twelfth claim for unjust enrichment. *See* Fox MTD at 11; Dragul MTD at 8. Neither cites any authority in support, they merely reiterate *their conclusion* that this claim does not belong to the Estate, but to its creditors.[12] Their failure to cite any authority is telling, given that multiple courts have held receivers do, indeed, have standing to pursue unjust enrichment claims against defendants for misappropriating estate assets. *See E.g.*, *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).

B. Dragul is Not Immune from Suit.

Dragul offers up a smorgasbord of other "equitable" reasons why the Receiver's claims against him must be dismissed. He argues that under *Kidder Peabody*, the Receiver cannot sue him because his claims are barred by *in pari delicto*. But as discussed, *in pari delicto* does not apply.

[12] The Hershey Defendants argue the unjust enrichment claim should be dismissed under C.R.C.P. 12(b)(5) because it is barred by *in pari delicto*. Hershey MTD at 8-9. As discussed above, *in pari delicto* does not apply. Here again, although Dragul casts his argument as a standing issue, it is actually a 12(b)(5) argument. Both arguments are addressed below in section II, C, 4, e.

And in cases Movants themselves cite, receivers' have been allowed to sue the Ponzi scheme perpetrator in receivership. *See CFTC v. Chilcott*, 713 F.2d at 1480; *Marwil v. Farah*, No. 1:03-CV-0482-DFH, 2003 WL 23095657, at *5-7 (S.D. Ind. Dec. 11, 2003) (receiver sued entities in receivership and their presidents). Dragul pilfered estate assets; there is nothing to prevent the Receiver from suing to recover them. Indeed, the Complaint alleges that even after the Receiver was appointed, Dragul continued to conceal and transfer estate assets to himself and family members.

Dragul also argues that two provisions of the Receivership Order bar the Receiver from suing him. *First*, he argues ¶ 12 authorizes the Receiver to sue only third parties, not Dragul himself. Dragul Motion at 14. But ¶ 12 addresses the Receiver's authority to demand turnover of Estate assets, not his authority to sue. Presumably Dragul meant to cite ¶ 13(n), which authorizes the Receiver to "institute such legal actions as the Receiver deems reasonably necessary, *including* actions […] against third parties." The use of "including" is an example of the Receiver's authority, not a limitation on it. *See, e.g.*, *Arnold v. Colorado Dep't of Corrections*, 978 P.2d 149, 152 (Colo. App. 1999). *Second*, he argues ¶ 26 precludes the Receiver's claims. But ¶ 26 stays actions by third-parties against the Receiver, Dragul, or the GDA Entities. It does not stay the Receiver from commencing actions specifically authorized by other provisions of the Receivership Order.

Dragul next argues the Receiver's claims are barred because all of his assets have already been turned over to the Receiver, and therefore the Receiver seeks a double recovery. Dragul Motion at 14-15. 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. Indeed, the other defendants can be expected to seek to apportion all fault to Dragul.

Dragul also accuses the Receiver of prosecuting this case in the hope of depleting the funds in the Estate to pay his own Receiver's fees. *Id.* at 15. This spurious argument is incorrect, and more importantly, provides no basis upon which to dismiss the claims against him.

Continuing his kitchen-sink approach, relying on ¶ 13(o) of the Receivership Order, Dragul contends all claims against him must be dismissed because the Receiver's current counsel is not authorized to prosecute them. *Id.* at 18. To put the argument in context, on May 11, 2020, the Receiver filed a Notice of Revised Compensation with the Receivership Court, notifying the Court and all parties in interest, that effective retroactively to November 1, 2019, counsel had agreed to pursue this case on a contingent fee basis in order to preserve Estate assets. A copy is attached as **Exhibit 2.** In a backdoor effort to starve funding for this case, on June 5, 2020, Dragul objected to the Receiver's Fourth Fee Application, and he also objected to the contingent fee agreement. **Exhibit 3**, at 11-13. That objection remains pending before the Receivership Court; this Court lacks jurisdiction to decide the issue. *See, e.g., Town of Minturn v. Sensible Housing Co., Inc.*, 273 P.3d 1154, 116 (Colo. 2012) (court first acquiring jurisdiction over parties and the subject matter has exclusive jurisdiction).

In both his fee objection and the present Motion to Dismiss, Dragul deliberately misrepresents the Receivership Order. He quotes the Order selectively as allowing the Receiver to hire counsel on a contingency basis only "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[.]" And, according to Dragul, because the Receiver seeks to recover damages here, not Receivership Property, all claims against him must be dismissed unless the Receiver hires new counsel on an hourly basis. Dragul Motion at 18. Dragul omits the remainder of the ellipsed

sentence, which continues "including claims premised on fraudulent transfer or similar theories," which is exactly what the Receiver pleads here. But Dragul knows this full well, having negotiated and stipulated to the Receivership Order.

Finally, Dragul argues this entire case must be dismissed because the Receiver possesses privileged information which Dragul speculates is being used against him. Dragul MTD at 15-17. Again, some context is important. After the Receiver was appointed on August 30, 2018, to facilitate the continued operation of the many Estate commercial properties, preserve value, and avoid threatened litigation over control issues, the Receiver retained a number of Dragul's employees to assist in managing the commercial properties. Under the guise of benevolently assisting the Receiver, Dragul continued to supervise his staff. Unbeknownst to the Receiver, Dragul was concealing and instructing his former staff to conceal material information in an effort to facilitate a hasty bulk sale of Estate assets to an entity which he and his staff would continue to run. Also unbeknownst to the Receiver, and again while purportedly working *for* the Receiver, Dragul had his former IT firm, NexusTek, copy the entire GDA server and billed the Estate for the cost of doing so.

In early 2019, the Receiver discovered Dragul had formed a competing business, RTG Partners, created a website for it, and was soliciting business. As set forth in the Complaint and in various filings in the Receivership case, Dragul and his staff were also actively diverting money from the Estate. After discovering this, the Receiver terminated Dragul's staff on March 15, 2019. Before their termination, Dragul had NexusTek make *another* copy of the server.

In April 2019, the Receivership Court granted the Commissioner and the Receiver's joint motion for writs of assistance. In early May 2019, sheriffs executed the writs and seized computers

and documents from Dragul's offices and home. At the home of Susan Markusch, Dragul's long-time CFO and a defendant here, the sheriff discovered her personal laptop had been removed but found 11 boxes of GDA financial documents in her living room, which she and Dragul had removed from the Estate and concealed from the Receiver.

Dragul made two copies of GDA's server. Apparently, he is now when NexusTek copied the served *the second time* in March 2019, it may have missed some files created after August 30, 2018. Upon his appointment, the Receiver became the privilege holder for the GDA Entities, so any purported privilege prior to that time is his to invoke or waive. *E.g., Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985) (upon appointment bankruptcy trustee controls attorney-client privilege); *Affiniti Colo., LLC v. Kissinger & Fellman, P.C.*, 2019 COA 147, ¶¶ 45-46 (attorney-client privilege ceases to apply to dissolved corporation, citing *Weintraub); State v. Doyle*, 2020 WL 3816152, at *14 (R.I. July 8, 2020) (receiver, not ousted fraudster controls attorney-client privilege). After August 30, 2018, Dragul could have no expectation of privacy or privilege for information on the GDA server while working for the Receiver.

While Dragul now complains the Receiver has not disgorged potentially privileged information from the GDA server, he has never raised this issue with the Receivership Court or asked the Receiver to do so. So, contrary to Dragul's unsupported speculation, the Receiver is not "actively using" *his* privileged information against him. Dragul Motion at 17. But in any event, these are issues to be raised in the Receivership Court and provide no basis for dismissing this entire case as Dragul requests.

C. The Receiver has Pled Viable Claims Pursuant to C.R.C.P. 9(b) and 12(b)(5).

Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). In reviewing motions to dismiss pursuant to C.R.C.P. 12(b)(5) ("Rule 12(b)(5)"), the Court must view all allegations in the Amended Complaint as true and in a light most favorable to the non-moving party. *Id.; see also Yadon v. Lowry*, 126 P.3d 332 (Colo. App. 2005). Motions to dismiss under 12(b)(5) should not be granted unless it appears beyond doubt that the plaintiff could prove no set of facts that would entitle him to relief. *Id* (citation omitted)*; see also Walker v. Van Laningham*, 148 P.3d 391 (Colo. App. 2006) (A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law). A court should therefore deny a motion to dismiss "if the factual allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff . . . present plausible grounds for relief." *Begley v. Ireson*, 2017 COA 3, ¶ 8 (Colo. July 3, 2017) (citing *Warne v.* Hall, 373 P.3d 588, 591–95 (Colo. 2016)) (concluding that "[n]othing more is required to survive a motion to dismiss for failure to state a claim" if the complaint alleged specific conduct of a plausible claim). In deciding a motion to dismiss, the plaintiff is entitled to all reasonable inferences in its favor. *Monez v. Reinertson*, 140 P.3d 242, 244 (Colo. App. 2006). A short and plain statement advising the defendant of the relief sought provides adequate notice of the claims brought. *See* C.R.C.P. 8(a); *Grizzell v. Hartman Enters., Inc.,* 68 P.3d 551, 553 (Colo. App. 2003) ("A complaint need not express all facts that support the claim, but need only serve notice of the claim asserted.").

Under the plausibility standard, a party must assert sufficient factual allegations "to raise a right to relief 'above the speculative level'" and "provide 'plausible grounds'" for relief. *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007). "Plausibility" does not, however, equate to credibility or believability; those issues are for the trier of fact. It "is manifestly improper to import trial-stage evidentiary burdens into the pleading standard." *Garcia-Catalan v. U.S.*, 734 F.3d 100, 103 (1st Cir. 2013). The purpose of a complaint is to put the defendants on notice of the allegations against them. It is not the Receiver's burden, in a complaint, to prove his case. Only to let the Defendants know what he intends to establish through discovery. The Amended Complaint contains ample factual allegations for the Court to conclude that the Receiver has pled plausible claims that are more than speculative. *Wellons, Inc. v. Eagle Valley Clean Energy, LLC*, 2015 WL 7450420, at *1 (D. Colo. Nov. 24, 2015).[13]

In essence, Movants argue that the Amended Complaint should be dismissed, not because it does not plead sufficient facts, but rather, based upon their affirmative defenses—all of which the Receiver opposes and which necessarily involve disputed issue of fact not properly the subject of a motion under Rule 12(b)(5). It is well-settled that affirmative defenses *cannot* constitute grounds for dismissal under Rule 12(b)(5). *Williams v. Rock-Tenn Servs.*, Inc., 370 P.3d 638, 642 (Colo. App. 2016); *Denver Parents Ass'n v. Denver Bd. of Educ.*, 10 P.3d 662, 665 (Colo. App.

[13] Case law interpreting the federal rule is persuasive in analyzing the Colorado rule. *State Farm Mut. Auto. Ins. Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994) (citing *Forbes v. Goldenhersh*, 899 P.2d 246 (Colo. App. 1994)).

2000). The Court should therefore reject Movants' improper attempts to prematurely adjudicate the claims on the merits under the guise of 12(b) motions.

The Fox and Markusch Defendants[14] incorrectly argue that because all of the Receiver's claims against them – violations of the CSA, negligence, negligent misrepresentation, civil theft, COCCA, aiding and abetting COCCA violations, fraudulent transfer, and unjust enrichment – stem from the same deceptive conduct, and thus "sound in fraud" *all* are subject to the heightened pleading standards of 9(b). *See* Fox MTD at 15; and Markusch MTD at 7. This is not so. Only the Receiver's claims for violations of the CSA (both plead as an independent claim and as a predicate act under COCCA) and the predicate acts of wire fraud and bankruptcy fraud "sound in fraud." *See Rome v. Reyes,* 2017 WL 2656693 at *8 (Colo. App. 2017); *Tal v. Hogan,* 453 F.3d 1244, 1263 (10th Cir. 2006). Allegations of civil theft, negligent misrepresentation,[15] and constructive fraudulent transfer are subject to the lower "plausibility" requirements. *See Myers v. Bureau of Prisons Mailroom Staff,* 573 Fed. Appx. 784, 786 (10th Cir. 2014) (a claim for theft is subject to the *Ashcroft v. Iqbal* standards of "facial plausibility"); *Touchtone Grp., LLC v. Rink,* 913 F. Supp. 2d 1063, 1083-84 (D. Colo. 2012) (holding that fraudulent transfer claims under C.R.S. § 38-8-105(1)(a) "are not subject to 9[(b)]'s heightened pleading standard, where, as here, the alleged transferor is operating a Ponzi scheme[,]" and "[u]nlike claims alleging fraud, claims for negligent

[14] The Hershey Defendants aver that only the securities fraud, negligent misrepresentation, and violations of COCCA are subject to the heightened standards of 9(b). Hershey MTD at 13.

[15] The Fox Defendants rely on dicta in *Van Leeuwan v. Nuzzi,* 810 F. Supp. 1120, 1123 (D. Colo. 1993), for the proposition that claims for negligent misrepresentation are subject to the pleading requirements of 9(b). Importantly, as the district court in *City of Raton v. Arkansas River Power Auth.*, 600 F. Supp. 2d 1130, 1143 (D.N.M. 2008), reasoned, because the *Van Leeuwan* court "did not state a rationale for holding the way it did," it would not apply the heightened pleading standards to negligent-misrepresentation claims. *Id. Accord Conrad v. The Educ. Res. Inst.*, 652 F. Supp. 2d 1172, 1183 (D. Colo. 2009).

misrepresentation are governed by Rule 8's liberal pleading standard"). Facial plausibility does not require all facts that support the claim to be pled, just that the complaint states "plausible grounds for relief." *Begley*, 2017 COA 3, at ¶ 8. However, assuming *arguendo* that the heightened pleading standards of 9(b) apply to all claims, the Amended Complaint meets those requirements, making dismissal unwarranted.

1. The Receiver has Alleged Fraud with the Requisite Particularity.

The Fox and Markusch Defendants contend that *all* of the Receiver's claims should be dismissed because they are not plead with the requisite specificity under Rule 9(b). Fox MTD at 15; Markusch MTD at 7. The Hershey Defendants make the same argument but only as to the Receiver's claims for violations of the CSA, negligent misrepresentation, and COCCA. Hershey MTD at 13-14.

Despite Rule 9(b)'s stringent requirements, "courts should be 'sensitive' to the fact that application of the Rule prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud.'" *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (quoting *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 284 (3d Cir. 1992) (citations omitted)). General statements and allegations must be considered alongside the other well-pled facts in the Amended Complaint, which should be read as a whole and "not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *See Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). While fraud and its circumstances must be stated with particularity, the "condition of mind of a person may be averred generally." C.R.C.P. 9(b).

Both the Fox and Markusch Defendants argue that the Amended Complaint impermissibly includes "group" allegations lacking the requisite specific required by 9(b). And, according to the

Fox Defendants, the allegations pleaded upon information and belief are insufficient to survive a motion to dismiss as lacking particularity. Fox MTD at 15; Markusch MTD at 7.

i. The Amended Complaint Does Not Contain Impermissible "Group Allegations".

The Fox and Markusch Defendants argue that the Amended Complaint contains impermissible "group allegations" and therefore does not meet the particularity requirements of 9(b). *See* Fox MTD at 16-17. In determining whether allegations satisfy Rule 9(b), courts have held that collective fraud may make it difficult to attribute particular fraudulent conduct to each individual defendant. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). To overcome such difficulties in cases of corporate fraud, the allegations should include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations. *Id.* The 148 new paragraphs in the "Factual Allegations" section of the Amended Complaint, which detail the "who, what, when, where, and how" of the alleged misrepresentations, which the Fox Defendants now characterize as "superfluous," are anything but. These allegations not only add details and specificity concerning the conduct alleged and role of each Defendant in the overall Scheme (*See* Amd. Compl. ¶¶ 90-105, 111-114, 118-119, 122-130, 133, 143-149, 153-158, 163-171, 173-175, 180-189, 191-200, 205-206, 219-221), they also include dates or date ranges (where known) of the offerings and misrepresentations or omissions in connection with the detailed transactions (*id.* ¶¶ 55, 59, 61- 62, 67, 77, 90-101). And contrary to the Fox and Hershey Defendants' contentions otherwise, the identities of the individual investors for each transaction are alleged, as is all relevant information about their investments, including the approximate dates and amounts of the investments (Amd. Compl., Exs. 23, 25, 28, 33, 35, 42). By the very nature of the overall scheme and the relation each of these Defendants had

to Dragul and the GDA Entities, some of the allegations necessarily apply to more than one Defendant. For instance, as the CFO and controller, respectively, of GDA, Markusch and Dragul both had an integral role in the extensive comingling, financial and tax reporting, and payment of funds from the GDA Entity accounts set forth in Exhibits 2-7. (Amd. Compl. ¶¶ 7, 58-59 and 75-77). Similarly, because ACF was so intertwined with and "utilized and shared the employees of GDA RES and GDA REM, including Defendant Markusch, to carry out the business of ACF[,]" many allegations oftentimes include both Dragul and the Fox Defendants. (Amd. Compl. ¶ 22). However, in discussing the role each played in the overall scheme, the conduct attributable to each of the Defendants is alleged with specificity.

ii. The Receiver's Allegations Made "Upon Information and Belief" are Proper.

The Fox Defendants next contend that the Receiver's allegations "upon information and belief" are insufficient to satisfy the particularity required by 9(b) because they are not also accompanied by a statement upon which the belief is founded.[16] *See* Fox MTD at 17. This argument also fails.

First, embedded among the allegations forming the bases of the Receiver's claims sounding in fraud that are made upon information and belief are countless paragraphs describing, in great detail, various transactions and offerings from the scheme's inception through the Receiver's appointment. (Amd. Compl. ¶¶ 67, 69, 96, 105, 115, 118, 124, 130, 137, 142, 144, 156, 179, 181, 183, 188, 198-99 & 211). And, as is the case here, when the fraud alleged is committed by a corporation or other organization, the plaintiff necessarily lacks personal knowledge of all of the

[16] The Fox Defendants fail, however, to point to any particular allegations made upon information and belief which they contend are improper.

underlying facts. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987). The same rationale holds true with respect to an elaborate criminal enterprise like the one at issue here, placing the investors and the Receiver in a disadvantageous position to learn of all of the underlying facts.

Second, the Fox Defendants' argument rests on a fundamentally flawed interpretation of applicable law – that is, when and how allegations made upon information and belief comply with 9(b). While allegations of fraud made upon information and belief usually do not satisfy the particularity requirements of 9(b), when they relate to matters particularly within the opposing party's knowledge, the rule is significantly relaxed. *Moore*, 885 F.2d at 540 (citing *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987)); *see also Warne*, 373 P.3d at 595 ("Far from its conflicting with the plausibility standard, federal courts have observed that ***pleading based on information and belief may, in fact, be useful*** where the facts giving rise to a plausible claim are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible.") (emphasis added); *see also Wellons*, 2015 WL 7450420, at *2 (quoting *Arista Records, L.L.C. v. Doe* 3, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard […] does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant."). Whether and to what extent each of these Defendants received unauthorized and undisclosed commissions is particularly within their control and possession. Similarly, whether Dragul and the Fox Defendants made failed to maintain the required reserves and the extent of the comingling of funds among various entity accounts are facts peculiarly within their possession and control. (Amd. Compl. ¶¶ 96, 124, 130, 194, 198). And many of the

allegations made upon information and belief relate to the Fox-SPEs and are contained in the very documents and financial statements that the Fox Defendants have actively withheld[17] from the Receiver, despite numerous requests and motions filed within the Receivership Action seeking their production. (Amd. Compl. ¶¶ 105, 118, 137, 142, 169, 181, 183, 199, 211, 276). *See Wellons*, 2015 WL 7450420, at *2.

Finally, other allegations made upon information and belief are non-essential allegations that merely provide additional factual background to provide a more complete picture of the transactions discussed and the overall scheme. (Amd. Compl. ¶¶ 37-38, 49, 79, 81, 164, 169, 230, 232, 244, 246, 336, 353).

2. The Receiver Adequately Alleges Violations of the Colorado Securities Act.

The Receiver's first claim for relief encompasses five categories of claims for violations of various provisions of the CSA.[18] Both the Fox and Hershey Defendants argue the Receiver's claim for securities fraud should be dismissed under Rule 12(b)(5) for a variety of reasons,

[17] Many of the specific details concerning the Fort Collins and Market at Southpark investments, and other Fox-owned properties have been withheld from the Receiver by the Fox Defendants. In fact, details concerning the Estate's interest in the Fox-owned and controlled properties are presently the subject of a turnover motion filed by the Receiver in the Receivership Court. Fox has refused to turnover both documents relating to these interests as well as actual distributions owed to the Estate in respect of the Estate's membership interests in these properties. On August 10th, the Receivership Court entered an order requiring ACF to turnover both withheld distributions and the withheld documents, financials, and other records requested for entities in which the Receivership Estate has an interest.

[18] The Receiver's first cause of action asserts claims under **(A)** C.R.S. §§ 11-51-604(1) and 301 (against Dragul and the Fox Defendants) for Securities Registration violations (Amd. Compl. ¶¶ 316-320); **(B)** C.R.S. §§ 11-51-604(2)(a) and 401 (against Dragul and the Fox and Hershey Defendants) for licensing and notice violations (Amd. Compl. ¶¶ 321-326); **(C)** C.R.S. §§ 11-51-604(3)-(4) and 501(a)-(c) (against Dragul and the Fox Defendants) for securities fraud (Amd. Compl. ¶¶ 327-338); **(D)** C.R.S. §§ 11-51-604(5)(a) and (b) (against Dragul and the Fox Defendants) for control person liability (Amd. Compl. ¶¶ 339-344); and (**E)** C.R.S. §§ 11-51-604(5)(c) (against the Kahn, Fox and Hershey Defendants) for substantial assistance (Amd. Compl. ¶¶ 345-354).

including that the allegations purportedly fail to meet the heightened pleading requirements of Rule 9(b). These arguments are, however, without merit.

i. Claim I.C. – Securities Fraud in Violation of C.R.S. §§ 11-51-604(3)-(4) and 11-51-501(a)-(c).

The Fox Defendants maintain that, because the Receiver cannot prove the elements of fraudulent misrepresentation and reliance, the Receiver's claims must be dismissed.[19] *See* Fox MTD at 19-20. This argument rests on credibility determinations and the resolution of disputed issues of material fact, which are improper to resolve at the pleading stage. "At the pleading stage, the plaintiff need not demonstrate that he is likely to prevail, but his claim must suggest 'more than a sheer possibility that a defendant has acted unlawfully.'" *Garcia-Catalan*. at 102-03 (internal citation omitted). Thus, the Court must accept the well-pleaded allegations of the Amended Complaint as true, and determine, not whether the Receiver will ultimately prevail on his claims at trial, but whether he has pled sufficient facts to place the Defendants on notice of the bases of the claims asserted against them.

The Fox Defendants aver that real property transactions are a matter of public record so investors could not have reasonably relied on the inflated purchase prices misrepresented in the Solicitation Materials, and submit as Exhibit A, what appear to be summary real estate transaction reports obtained from Westlaw.[20] They therefore argue the Receiver has failed to adequately allege

[19] The Fox Defendants section heading 3. a. ("The Receiver Cannot Allege the Required Elements of Fraudulent Misrepresentation and Reliance") further demonstrates that the motion is an improper attempt to litigate the merits of the claims under the guise of a 12(b)(5).

[20] The Fox Defendants aver that the submission of these real estate transaction reports complies with the rules for motions filed pursuant to Rule 12(b) because, they contend that the allegations regarding the real estate transactions "necessarily implicate the recorded documents related thereto." Fox MTD at n. 8. These exhibits must be disregarded as improperly submitted. The documents are neither "referred to in

either a misrepresentation or justifiable reliance. *Id.* at 20. They are incorrect. First, the Fox Defendants' improperly attempt to narrow the misrepresentations alleged in the Amended Complaint. As alleged in great detail, the misrepresentations and omissions on which these claims are based are much broader and entail material facts both misrepresented in and omitted from the Solicitation Materials like the Fox Defendants and Dragul's misrepresentations as to the structure of the investments, operating reserves to be maintained for each investment, the overall amount being raised for each offering and thus, the precise investment being purchased, and likewise involve omissions as to the extensive comingling, Defendants' receipt of unauthorized and undisclosed commissions from escrow of the properties and the SPE entity accounts, among other material items. (Amd. Compl. ¶¶ 62, 67, 87, 91, 95, 98-100, 102-103, 105, 113, 116, 122-24, 127, 130, 143-149, 155-56, 171-75, 186-88, 190-99, 204-208, 219-21, 251-53, 328). Whether the SPEs and investors justifiably relied on the Fox Defendants and Dragul's misrepresentations is not properly at issue on a motion to dismiss. The only issue properly before the Court is whether the Receiver has adequately alleged fraudulent misrepresentations and reliance, which he has. Therefore, the Fox and Hershey Defendants' argument fails.

Additionally, the fundamental purpose of recording statutes charging a buyer with notice as to facts like the purchase price of a property, is not to charge an SPE investor with such notice, but rather to protect buyers of real estate. *See City of Lakewood v. Mavromatis*, 786 P.2d 493, 494 (Colo. App. 1989), *aff'd*, 817 P.2d 90 (Colo. 1991) ("The purpose of this statute was to provide an

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the complaint," nor are they verifiable as publicly accessible information that the investors could have accessed at the time that the misrepresentations and omissions were made.

effectual remedy against the loss accruing to subsequent purchasers of real estate arising from the existence of secret or concealed conveyances thereof unknown to the subsequent purchaser").

Kesicki v. Mitchell, 2008 WL 2958598 (Colo. Dist. Ct. Apr. 24, 2008), relied upon by the Fox Defendants, is both distinguishable and inapplicable. There, the plaintiff, together with the defendant and a third-party, purchased a parcel of undeveloped land as an investment. *Id.* Ultimately, the plaintiff sued the defendant for anticipatory breach of contract, anticipatory promissory estoppel (specific performance), fraud, and unjust enrichment when he uncovered the price the defendant had initially paid for the property and refused to convey his interest to plaintiff as promised. In that case, however, the defendant never specifically made any representations as to the price paid for the property. Rather, the plaintiff claimed the defendant structured the investment in a manner that would financially inure to his own benefit. The same issues as to misrepresentations and reliance by hundreds of investors investing, not in the real estate scattered all over the country, but the SPE's whose sole function was to own it, were not at issue in the *Kesicki* case and its holding is inapplicable here.

Finally, the Fox Defendants' argument that they had no duty to notify Dragul's investors of anything, and that the individual investors could not have impacted the disposition of the properties conflates the two different categories of claims asserted in the Amended Complaint (a) on behalf of the SPE, which was an investor in the Fox-SPE that owned the property and sold the securities, and (b) on behalf of the GDA Entity Investors. The Amended Complaint therefore details misrepresentations and omissions made by the Fox Defendants to the SPEs and made by Dragul to the Individual Investors.

3. The Receiver Adequately Alleges ACF's Control and Provision of Substantial Assistance to GDA.

Next, the Fox Defendants argue the Amended Complaint fails to adequately allege that they were a "control person" or substantially assisted Dragul or GDA. Fox MTD at 23. In so arguing, Fox would have this Court believe that he was merely an innocent third-party who was also defrauded by Dragul. Not so. As alleged in the Amended Complaint, Fox and Dragul have been co-conspirators for years. ACF relied upon and used GDA employees as if they were its own. (Amd. Compl. ¶ 38). Moreover, Fox made numerous loans to Dragul to fund and ensure the continued operation of the scheme. *See, e.g., id.* ¶ 281. The Receiver further alleges that despite Fox's knowledge that Dragul would not pay the downstream investors the distributions to which they were entitled for investments such as Loggins Corners, the Fox Defendants gave him the proceeds for the sale of the property, which Dragul ultimately stole and never distributed to investors. (*Id.* ¶ 40, 214). Finally, the allegations that Dragul, and the Fox and Kahn Defendants concealed and transferred assets of the Estate after the Receiver was appointed further demonstrates the extent of the Fox Defendants' substantial assistance to Dragul's scheme in which Defendants committed numerous violations of the CSA.

4. The Amended Complaint States a Claims for Civil Theft against the Hershey Defendants.

The Hershey Defendants argue the Receiver fails to state a claim for civil theft against them because the Amended Complaint purportedly does not contain any allegation that "Hershey has a specifically identifiable pot of money that was directly traceable back through Dragul or his entities to the investors." Hershey Motion at 8. Not so. The Amended Complaint alleges that the Hershey Defendants received approximately $2,891,155.54 in commissions, paid by Dragul, from

funds received from GDA Entity Investors. *See* Complaint ¶¶ 310-312. This states a cognizable claim for civil theft against the Hershey Defendants.

5. The Amended Complaint States a Plausible Claim for Relief Against Dragul and the Fox and Hershey Defendants both for direct COCCA Violations and for Indirect Violations by Aiding and Abetting.

The Fox and Hershey Defendants seek to dismiss the fifth and sixth claims for relief alleging violations of COCCA and for aiding and abetting those violations. Fox argues the Amended Complaint fails to adequately allege (1) the predicate acts with the requisite specificity, (2) an "enterprise" distinct from the "persons," (3) timely predicate acts, (4) that the Fox Defendants' "conducted or participated" in the violations or breaches, or (5) aiding and abetting liability. Fox MTD at 24-26. The Hershey and Markusch Defendants likewise argue the Receiver fails to allege the predicate acts with particularity. Hershey MTD at 12-13; Markusch MTD at 4-8.

COCCA has broad applicability. It is not reserved for just organized crime; it also applies to individuals engaged in certain prohibited activities. *People v. Pollard,* 3 P.3d 473, 477 (Colo. App. 2000). It applies to "illicit as well as licit enterprises." *People v. Chaussee,* 880 P.2d 749, 754 (Colo. 1994) (COCCA "impose[s] civil and criminal liability on persons who engage in certain 'prohibited activities.'"). Nothing in COCCA's definition of "racketeering activity" requires indictment or conviction. *See* CRS § 18-17-103(5).

While COCCA and its federal analogue, RICO, are similar, but not identical, Colorado appellate courts have frequently found that case law under RICO is "instructive" as to COCCA claims. *See People v. Chausse,* 880 P.2d 749, 753 (Colo. 1994); *Benson v. People*, 703 P.2d 1274, 1076, n.1 (Colo. 1985).

6. The Receiver Sufficiently Alleges an Enterprise under C.R.S. § 18-17-104(3).

The Fox Defendants contend that the Receiver has failed to allege an enterprise distinct from the persons engaged in the racketeering activity. *See* Fox MTD at 25.

Under RICO, "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This broad definition encompasses "any union or group of individuals associated in fact" with: (1) a "purpose," (2) a "relationship among those associated with the enterprise," and (3) the "longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 944, 946 (2009) (citation and internal quotations omitted); *cf. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny*, 115 F. Supp. 2d 1210, 1227 (D. Colo. 2000) ("A COCCA enterprise is an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.") (citations and internal quotation marks omitted)). The Receiver alleges that Dragul and the Fox and Hershey Defendants, associated together, among themselves and with others, to form an association-in-fact "enterprise" with the purpose of defrauding both the GDA Entities and Investors. (Amd. Compl. ¶¶ 380-382). As alleged in great detail in the Amended Complaint, the "persons" – Dragul, and the Fox and Hershey Defendants – carried out the fraudulent scheme through their participation and association with GDA RES and GDA REM – the "enterprise." (Amd. Compl. ¶¶ 380-382).

While, as the Fox Defendants correctly note, the defendant "person" must be an entity distinct from the alleged "enterprise," their argument disregards the fact that "allegations of two separate legal entities joining together, in addition to several other entities or persons, to conduct

racketeering activity can be sufficient to establish an association-in-fact enterprise." *Church Mut. Ins. Co. v. Coutu*, 2018 WL 822552, at *8 (D. Colo. Feb. 12, 2018), *rept. and recommendation. adopted in part*, 2018 WL 1517022 (D. Colo. Mar. 28, 2018) (citation omitted)).

7. The Receiver Adequately Alleges Predicate Acts of Five Types of Violations of the CSA, Wire Fraud, and Bankruptcy Fraud.

Both the Fox and Hershey Defendants argue the Receiver fails to allege a pattern of racketeering with particularity, specifically, with respect to the predicate acts of securities fraud, wire fraud, and bankruptcy fraud. *See* Fox MTD at 15-18; Hershey MTD at 13-14. They argue the Amended Complaint contains only conclusory allegations of securities and wire fraud, without identifying the "who, what, when, where, and why" required by Rule 9(b).

COCCA claims are proven by establishing a "pattern of racketeering activity." *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1370 (Colo. App. 1993). COCCA defines a "pattern of racketeering" activity as "engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise." *New Crawford*, 877 P.2d at 1371 (citing C.R.S. § 18–17–103(3)). "Racketeering activity" occurs if one commits, attempts to commit, conspires to commit, or solicits, coerces, or intimidates another person to commit, any of the federal or Colorado crimes listed under § 18–17–103, which include:

> (a) Any conduct defined as "racketeering activity" under […] (1)(B) ["any act which is indictable under any of the following provisions of title 18 of the U.S. Code: […] section 1343 (relating to wire fraud), and (1)(D) [any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities…]; or
>
> (b) Any violation of the following provisions of the Colorado statutes or any criminal act committed in any jurisdiction of the United States which, if committed in this state, would be a crime under the following provisions of the Colorado statutes:

* * *

> (XIII) Securities offenses, as defined in sections 11-51-401 and 11-51-603 (registration of brokers and dealers), 11-51-301 and 11-51-603 (registration of securities), and 11-51-501 and 11-51-603 (fraud and other prohibited practices), C.R.S.

C.R.S.§ 18-17-103. As predicate acts, the Receiver alleges five different categories of violations of the CSA (Amd. Compl. ¶¶316-354; 386-387(a)), wire fraud under 18 U.S.C. § 1343 (Amd. Compl. ¶¶ 386-387(b)), civil theft under C.R.S. § 18-4-401 (Amd. Compl. ¶¶ 386-387(c)); and bankruptcy fraud under 18 U.S.C. § 152(5) and (8) (Amd. Compl. ¶¶ 386-387(d)).

i. Violations of the CSA

For the reasons set forth in section II. D. 3., above, the Receiver has adequately alleged five different categories of violations of the CSA with the requisite particularity.

ii. Wire Fraud (18 U.S.C. § 1343)

The elements of federal mail fraud as defined in 18 U.S.C. § 1341 are (1) a scheme or artifice to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises, (2) an intent to defraud, and (3) use of the mails to execute the scheme. *See United States v. Haber*, 251 F.3d 881, 887 (10th Cir. 2001). The Amended Complaint alleges with the requisite specificity the means by which Dragul and the Fox and Hershey Defendants committed wire fraud in furtherance of the scheme. (Amd. Compl. ¶ 387.b.). Specifically, from 2006 through 2018, these Defendants "knowingly devised or intended to devise a Scheme to defraud and to obtain money from investors under false pretenses, representations and promises, including material misrepresentations and omissions in the Solicitation Materials concerning the investment, payment of illegal and undisclosed commissions, and improper comingling and misappropriation of GDA

Entity Investor funds." *Id.* In carrying out this scheme, they used interstate and foreign wires to transfer funds belonging to the SPEs and the GDA Entity Investors. *Id.*

iii. Civil Theft (C.R.S. § 18-4-401)

In footnote, the Fox Defendants claim that only theft under C.R.S. § 18-4-401 is a sufficient predicate act under COCCA, rather than under § 18-4-406. Fox MTD at 24, n.9. The Fox Defendants fail to acknowledge that the civil theft claim the Receiver asserts is based on C.R.S. § 18-4-405 (Amd. Compl. ¶¶ 371-377). And, for the reasons set forth in section II. A. 6. iii. and II. C. 4., this claim is adequately pleaded. *See Nova Leasing, LLC v. Sun River Energy, Inc.*, 11-CV-00689-CMA-BNB, 2012 WL 3778332, at *4 (D. Colo. Aug. 31, 2012).

iv. The Predicate Acts Pleaded Are Not Time-barred.

Dragul, and the Hershey and Markusch Defendants complain that many of the referenced securities transactions predate January 21, 2015, or August 30, 2014. As discussed below in section II. D. 3., these transactions, while barred for the purposes of the securities fraud claim, are actionable under COCCA. *See People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012) ("if one predicate act falls within its respective limitations period, other predicate acts occurring within ten years before the occurrence of the first can be presented as evidence of racketeering activity even if they could not give rise to a separate prosecution.").

8. The Receiver Adequately Alleges ACF Conducted or Participated in the Racketeering Enterprise

Next, the Fox Defendants argue the Receiver has not alleged they conducted or participated in the racketeering enterprise because the conduct on which this claim is based, they contend, relates to "communications with its own investors." Fox MTD at 25. They argue the Amended

Complaint fails to allege the Fox Defendants had any knowledge of Dragul's "comingling activity, diversion of investor funds, or insolvency of the operation." *Id.*

This argument fails for 3 primary reasons. *First*, as discussed above in section II, A, the Receiver asserts these claims not only on behalf of the GDA Entity Investors, but also on behalf of the SPEs. And the argument is contrary to the controlling law providing that a defendant's "participation" does not necessarily mean it had a formal position within or significant control of the enterprise; rather, that it had "some part in the directing the enterprise's affairs." *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1101 (10th Cir. 1999) (citation omitted). As alleged in detail in the Amended Complaint, the Fox Defendants were more than merely innocent third-parties – they were directly involved in the ongoing scheme and they handsomely profited from their involvement.

Section 18–17–104(3) imposes liability on "persons[s] employed by, or associated with [the enterprise], [who] knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity[.]" The terms "conduct" or "participation" are not defined in COCCA. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). "Conduct" means to lead, run, manage, or direct. *Id*. Conduct or participation indicates only "'some degree of direction.'" *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461 (D. Colo. 1996) (citing *Reves*, 507 U.S. at 178). "Participate" means "to take part in." *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1646 (1976)). "Liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs." *Id*. (citing *Reves*, 507 U.S. at 185) (internal quotations omitted). Liability therefore attaches if a defendant merely participates either in the operation or management of the enterprise itself. *Id.* In

that respect, the "enterprise" is categorized as "vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity." *Id* (citing *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 257 (1994)).

Similarly, the defendants in *First Interstate Bank of Denver* sought to dismiss the FDIC's COCCA claims on the same basis as do the Fox Defendants here. Ultimately, the court held that the allegations were sufficient to establish primary liability where the FDIC had alleged the defendants were aware of "unusual activity" and "non-standard practices" used in the fraudulent scheme. *First Interstate Bank*, 937 F. Supp. at 1469. The court also cited various allegations of other implicitly related conduct undertaken by the defendants. *Id.*

9. The Receiver Adequately Alleges Aiding and Abetting Liability.

The Fox Defendants argue the Receiver has failed to allege aiding and abetting liability under COCCA because there are no allegations as to their actual knowledge of the primary violation. Fox MTD at 26. For the reasons discussed in sections II. D.3 and E, above, the Amended Complaint contains ample allegations that the Fox Defendants had actual knowledge of the COCCA violations. By virtue of their role in the scheme, they had actual knowledge of and in fact were an integral part of the enterprise's commission of violations of the CSA, wire fraud, and civil theft. Any question as to the Fox Defendant's intent is necessarily an issue of fact improper for to dispose of on a motion to dismiss.

10. The Receiver has Sufficiently Pled a Claim for Unjust Enrichment.

Dragul and the Hershey Defendants argue the Receiver's claim for unjust enrichment must be dismissed under 12(b)(5). To recover for unjust enrichment, the Receiver must establish that Dragul and the GDA Entities conferred a benefit upon the Defendants, and that the Defendants

appreciated that benefit under circumstances where it would be inequitable for them retain it without paying its value. *Martinez v. Continental Enters.*, 730 P.2d 308, 317 (Colo. 1986).

The gist of the Hershey Defendants' argument is that the Amended Complaint does not contain facts suggesting that it would be inequitable for them to retain the commissions they received.[21] Hershey MTD at 8. They claim that because the Receiver alleges that Dragul, individually and through GDA RES and GDA REM, was the primary participant in the Ponzi scheme, the Hershey Defendants could not have been "unjustly enriched." *Id.* This argument fails. The Receiver has alleged, in detail, the precise role the Hershey Defendants played in the scheme and how they were unjustly enriched. For instance, the Hershey Defendants solicited investors on Dragul's behalf for which they received undisclosed and unauthorized commissions. (Amd. Compl. at ¶¶ 41-43, 310-12, and Ex. 7). The undisclosed commissions paid to the Hershey Defendants came both from the SPE accounts and the GDA accounts and contained comingled investor funds. *Id.*

Dragul argues the Receiver has not alleged what benefits he received, or how they came at the Estate's expense. Dragul MTD at 8. Dragul ignores the plethora of allegations in the Amended Complaint that detail his pilfering of the GDA Entity accounts for his own benefit and the benefit of his family and friends. (Amd. Compl. ¶¶ 72-76, 293-94, 296-99, and Ex. 3). For example, the Amended Complaint alleges that "from 2003 through August 2018, Dragul, in active concert with the other Defendants, stole over $20.2 million from investors which was used, *inter alia*, to pay

[21] The Hershey Defendants also contend that the Receiver's unjust enrichment claims fails because the Receiver has an adequate remedy at law. However, under Colorado law, legal and equitable claims can be pled in the alternative. *See, e.g.., Interbank Investments, L.L.C. v. Vail Valley Consol. Water Dist*., 12 P.3d 1224, 1232 (Colo. App. 2000) and C.R.C.P. Rule 8(c)(2).

almost $9 million in gambling debts, to pay millions to his family and the Non-Dragul Defendants, and to fund the extravagant lifestyles of Dragul, his family, coworkers, and those Dragul designated as "friends of the house." (Amd. Compl. ¶ 293).

Accordingly, the Receiver has adequately pled a claim for unjust enrichment as to Dragul and the Hershey Defendants, sufficient to provide notice of the claim and the bases therefor. *See Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1480 (D. Colo. 1995) (finding claims for unjust enrichment asserted by defrauded investors against a bank, its officers and employees purportedly involved in the Ponzi scheme).

D. The Receiver's Claims Are Not Time Barred.

Defendants argue that the Receiver's Claims for Violation of the CSA, Negligence, Negligent Misrepresentation, Aiding and Abetting, Violation of COCCA, Fraudulent Transfer and Unjust Enrichment are untimely. As discussed below, each of Defendants' arguments is without merit and fails as a matter of law.

With regard to the statute of repose, applicable only in connection with the First Claim for Violation of the CSA, the Amended Complaint alleges that each Defendant committed securities fraud in connection with the purchase or sale of a security consummated within the last five years. As such, this argument, which only Fox advances, is without merit.

The statute of limitations is an affirmative defense. *See* C.R.C.P. 8(c); *Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 151 (Colo. App. 2018). Defendants bear the burden of establishing the applicability of the statute of limitations. *See W. Distr. Co. v. Diodosio*, 841 P.2d 1053, 1057 (Colo. 1992). To do so, "the applicability of the defense has to be clearly indicated and must appear on the face of the pleading[.]" *Williams v. Rock-Tenn Servs., Inc*., 370 P.3d 638,

642 (Colo. App. 2016) (internal quotations omitted). "Whether a particular claim is time barred presents a question of fact and may only be decided as a matter of law when the undisputed facts clearly show that the plaintiff had, or should have had the requisite information as of a particular date." *See Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007) (internal quotations and citations omitted). "Typically, when a plaintiff knew or should have known of his or her injury and its cause is a question of fact for the jury to determine. A triable factual issue remains when there is sufficient evidence for a jury to reasonably find for the plaintiff." *Nichols v. Burlington N. & Santa Fe Ry. Co.*, 56 P.3d 106, 109 (Colo. App. 2002) (internal citations omitted).

Here, many of the relevant allegations fall within the applicable statutes of limitations irrespective of the date of discovery. Moreover, the Receiver alleges with specificity that, due in large part to the Defendants' active concealment, he could not possibly have known of the injury and cause thereof prior to August 2018. *See* Complaint ¶¶ 259-292. The Complaint also alleges that Defendants actively concealed their wrongful conduct from the GDA Entity investors by, among other things, refusing to produce books, records and financials. *Id*. ¶¶ 73, 259, 276. At a minimum, a triable factual issue exists regarding the statute of limitations which precludes dismissal of any of the Receiver's claims at this point.

1. The First Claim for Violation of the CSA is Not Time Barred by Either the Five-Year Statute of Repose or the Three-Year Statute of Limitations.

Section 604(8) of the CSA provides in relevant part:

> No person may sue under subsection (3) or (4) or paragraph (b) or (c) of subsection (5) of this section more than three years after the discovery of the facts giving rise to a cause of action under subsection (3) or (4) of this section or after such discovery should have been made by the exercise of reasonable diligence and in no event more than five years after the purchase or sale.

The Fox Defendants argue the Receiver fails to allege securities fraud in connection with the purchase or sale of a security consummated within five years of the date of the Complaint.[22] Dragul and the Hershey Defendants also argue the securities fraud claim is barred by the statute of limitations.[23] These arguments are contrary to the allegations in the Amended Complaint.

i. Statute of Repose

The Fox Defendants concede that two securities transactions involving ACF occurred within the limitations period: (1) the April 2018 sale of Loggins; and (2) the September 2018 sale of Laveen Ranch. *See* Fox MTD at 21 (citing Amd. Compl. ¶¶ 135, 204-08). However, they argue that these claims are not actionable because the Receiver fails to allege that the Fox Defendants were involved in Dragul's activities relative to these securities transactions. *Id.* Not so. For example, the Complaint details the Fox Defendants' direct fraud in connection with the sale of Laveen Ranch securities in the very same paragraphs the Fox Defendants cite in their Motion. (*See* Amd. Compl. ¶¶ 204-08). In particular, the Receiver alleges that in a September 13, 2018, letter sent to the investors in Laveen Ranch, including the Dragul SPE, the Fox Defendants misstated

[22] Dragul, and the Hershey and Markusch Defendants complain that many of the referenced securities transactions predate January 21, 2015, or August 30, 2014. As discussed in this section, these transactions, while barred for the purposes of the securities fraud claim, are actionable under COCCA. *See People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012). With respect to the securities fraud claim, Dragul concedes that at least sixteen (16) securities transactions were consummated within five years of the date of the Complaint. *See* Dragul Motion at 21-22 (citing Amd. Compl. Exs. 33, 42). Hershey similarly concedes that four transactions post-date August 30, 2014. *See* Hershey Motion at 10 (citing Amd. Compl. ¶ 148, 155, Ex. 33). Markush makes no reference to statutes of repose or limitation. Thus, Dragul, Hershey, and Markush do not argue that the securities fraud claims asserted against them are barred by the statute of repose.

[23] Fox does not make a statute of limitations argument in connection with the CSA. *See* Fox MTD at 19-24.

the amount of membership interests sold and investor returns, and failed to disclose other material facts. (*Id.* ¶¶ 205-06).

Additionally, Exhibit 6 to the Complaint identifies three commission payments made to the Fox Defendants after January 21, 2015, in connection with the sale of securities. And paragraphs 331(a)-(p) of the Amended Complaint detail the Fox Defendants' securities fraud violations in connection with all of the relevant transactions, including the most recent transactions identified on Exhibit 6.

Finally, the Receiver asserts claims against the Fox Defendants for control person liability and substantial assistance under subsections 604(5)(a), (b) and (c). (*See* Amd. Compl. ¶¶ 339-349). Specifically, the Receiver alleges that "Fox had the power to influence and control and did influence and control, directly or indirectly, over the decision-making of Dragul, including the distribution and making of false and misleading statements to prospective investors and in material omissions contained in the Solicitation Materials."(*Id.* ¶ 34)2. The Receiver similarly alleges that the Fox Defendants provided substantial assistance to Dragul in several ways including, "[m]aking material misstatements to the GDA Entity Investors to induce their investment in both Fox and Dragul formed and controlled SPEs." *Id*. ¶349(b). Based on such control and substantial assistance, the Fox Defendants are, as a matter of law, jointly and severally liable with Dragul, including in connection with the securities transactions Dragul concedes transpired after January 21, 2015. *See* C.R.S. § 11-51-604(5)(a), (b) & (c); Dragul MTD at 21-22 (citing Amd. Compl. at Exs. 33 and 42).

ii. Statute of Limitations.

To begin, several of the relevant securities transactions occurred within the three-year statute of limitations period, *i.e.*, after January 21, 2017, for the Fox Defendants, Dragul and the Markusch Defendants, and after August 30, 2016, for the Hershey Defendants, who executed a Tolling Agreement. As discussed above, the Fox Defendants and Dragul committed securities fraud in connection with a September 13, 2018, letter, which is attached to the Amended Complaint as Exhibit 38. Exhibit 3 to the original complaint identifies commission payments made to Dragul after January 21, 2017, each of which is alleged to involve securities fraud. (*See* Amd. Compl. ¶¶ 328, 331(k)). And the Fox and Hershey Defendants are jointly and severally liable for such security fraud based upon their control of and substantial assistance to Dragul. *See* C.R.S. § 11-51-604(5)(a), (b) & (c). Thus, the Court can and should reject Defendants' statute of limitations argument without considering when the claims could have reasonably been discovered.

With respect to discovery, Defendants bear the burden of establishing that the factual allegations "clearly show that the plaintiff had, or should have had the requisite information as of a particular date." *See Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307. Just the opposite is true here. The Amended Complaint details, in numerous places, why the claims could not have been discovered prior to August 30, 2018. (*See* Amd. Compl. ¶¶ 73, 259-292). With respect to the securities fraud claim, the Complaint alleges:

> Neither the Receiver nor the GDA Entity Investors could have discovered these material misstatements and omissions made in connection with the sale of securities prior to August 30, 2018, at the earliest, through reasonable diligence because (a) the Receiver did not have access to the GDA books and records before that date as Dragul and GDA were not yet subject to a receivership, (b) Dragul and the Fox Defendants refused to produce the SPE books to the GDA Entity Investors on numerous occasions; and (c) the

> manner in which Dragul conducted GDA's business was designed to conceal or hide the facts of his fraud, theft, and material misrepresentations and omissions. Moreover, upon information and belief, Dragul destroyed or deleted data, information, documents, and other electronically stored information prior to the Receiver's appointment.

(Amd. Compl. ¶ 353). These allegations are more fully detailed elsewhere in the Amended Complaint, including paragraphs 259 through 292. The Receiver alleges that "Dragul refused to produce the SPE books and records to GDA Entity Investors for inspection despite periodic requests,"(*id*. at ¶ 259), and, in any event, Dragul and Markusch routinely reversed and comingled funds at the end of financial reporting periods to falsely represent to investors the financial condition of the SPE. (*Id*. ¶ 73). "Even after the Receiver was appointed, Dragul and his staff, including Markusch, and the Kahn Defendants concealed documents and information from the Receiver and his counsel and thwarted such efforts to uncover the truth." (*Id*. ¶ 260). For his part, "after the Receiver's appointment, Fox has systematically refused to produce documents in response to the Receiver's numerous requests" which resulted in the Receiver filing a Turnover Motion with the Receivership Court. (*Id.* ¶¶ 275-77). The Receivership Court granted the Turnover Motion on August 10, 2020, and ordered the Fox Defendants to turnover, among other things, operating agreements for 16 entities in which the Dragul SPE invested, tax returns and detailed financial records, all of which will finally provide the Receiver visibility into these entities and the relevant transactions. *See* Order, attached as **Exhibit 4.**

The Hershey Defendants contend that because the Colorado Securities Commissioner and Attorney General began to investigate Dragul and the GDA Entities in 2014, the Receiver and/or GDA Entity Investors should have discovered their fraud by 2017. *See* Dragul MTD at 11. This assertion is unsubstantiated and nonsensical. First, any knowledge of the Securities Commissioner

or Attorney General is not imputed to either the Receiver or GDA Entity Investors. Second, Dragul fails to explain how either was equipped to discover his fraud notwithstanding the active concealment detailed in the Amended Complaint. In fact, Dragul (and the other Defendants) say nothing in response to the Receiver's allegations of active concealment as relating to when the Receiver could reasonably have discovered the basis for his securities fraud claims.

Finally, Dragul conflates the statute of repose with the statute of limitations. He argues the Receiver's allegations fail to show the claims based on Plaza Mall and Prospect Square are timely under the three-year statute of limitations because the transactions at issue took place between 2008 and 2016. *See* Dragul MTD at 22. These arguments ignore entirely the discovery rule. The Receiver's securities fraud claim is timely.

iii. Statute of Repose for Securities Registration and Licensing Violations.

Claims for securities registration and licensing violations must be brought within "two years of the contract of sale." C.R.S. § 11-51-604(8). Dragul, and the Fox and Hershey Defendants contend that the Receiver has not pointed to any contract of sale on or after January 21, 2018 (for Dragul and the Fox Defendants) or after August 30, 2017, for the Hershey Defendants. *See* Dragul MTD at 21; Fox MTD at 22; Hershey MTD at 10. Defendants are wrong.

As detailed above and in the Amended Complaint, Dragul, and the Fox Defendants[24] sold unregistered securities without a license in violation of C.R.S. §§ 11-51-301 and 401 as late as 2018. *See* Complaint ¶¶ 204-212 & Ex. 39 thereto; *see also id*. ¶ 316 (referencing 2018 transaction in connection with registration violations). Moreover, without a license, Dragul consummated four sales of unregistered securities after January 21, 2018, which are identified on Exhibit 3 to the

[24] The Receiver does not assert a registration claim against the Hershey Defendants.

original Complaint. The Hershey Defendants violated the licensing provisions of the Colorado Securities Act after January 21, 2018, by soliciting and selling membership interests in the four SPEs identified on Exhibit 3. *Id*. ¶¶ 321-22.

2. The Second and Third Claims for Negligence and Negligent Misrepresentation Against the Hershey Defendants are Timely.

The Hershey Defendants argue that the Receiver's negligence and negligent misrepresentation claims are barred by applicable statutes of limitations – two years for negligence and three years for negligent misrepresentation. *See* Hershey MTD at 11; C.R.S. § 13-80-101(c); C.R.S. § 13-80-102. Dragul joins this argument but fails to apply it to the specific allegations against him. *See* Dragul Notice of Joinder at 2, filed July 13, 2020. None of the remaining Defendants advance a statute of limitations argument relative to the negligence claims.

A claim for negligence accrues when both the injury and its cause are known or should have been known through the exercise of reasonable diligence. C.R.S. § 13-80-108(1). Negligent misrepresentation claims accrue when the misrepresentation is discovered or should have been discovered through reasonable diligence. C.R.S. § 13-80-108(3).

The negligence and negligent misrepresentation claims are premised on the same conduct at issue in the Receiver's securities fraud claim. (*See* Amd. Compl. ¶¶ 355-370). And the Hershey Defendants make the exact same fatally flawed arguments here – namely, they ignore transactions within the applicable statute of limitations and contend that the Securities Commissioner's investigation somehow put the GDA Entity Investors and Receiver on notice of the claims. These arguments fail for the same reasons outlined in the prior section. The Receiver's negligence and negligent misrepresentation claims are not time barred.

3. The Fifth and Sixth Claims for Violation of and Aiding and Abetting Violations of COCCA are Timely.

A claim for violation of COCCA must be filed within five (5) years of when the claim accrues. C.R.S. § 13-80-103.8. However, "if one predicate act falls within its respective limitations period, other predicate acts occurring within ten years before the occurrence of the first can be presented as evidence of racketeering activity even if they could not give rise to a separate prosecution." *See People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012). Among others, the Receiver asserts predicate acts for violations of the CSA and wire fraud.[25] *See* Amended Complaint ¶ 386; C.R.S. § 18-17-103(5).

The Fox Defendants argue the Receiver's purported failure to allege timely acts of securities fraud or wire fraud render the COCCA claim untimely. *See* Fox Motion at 24-25. As demonstrated above, the Receiver's securities fraud claims are timely. And the Fox Defendants fail to address the timeliness of the wire fraud claim as a predicate act whereas the Complaint is replete with allegations of recent wire fraud by these Defendants. *See, e.g.,* Amd. Compl. ¶¶ 270-288, 387(b).

The Hershey Defendants concede the Receiver has alleged predicate acts within the applicable statute of limitations[26] but contend that many of their wrongful acts are not actionable because they accrued more than five years prior to the Tolling Agreement. *See* Hershey Motion at

[25] The Complaint also alleges that Dragul and the Fox Defendants' bankruptcy fraud under 18 U.S.C. § 152(5) and (8) constitute predicate acts. (*See* Amd. Compl. ¶ 387(d)). The Fox Defendants argue bankruptcy fraud under 18 U.S.C. § 157 does not qualify as a predicate act. *See* Fox Motion at 24. That is correct, but the Complaint relies on § 152 not § 157. Section 152 involves concealing assets, making false statements and fraudulently transferring or concealing assets, which the Receiver has alleged occurred here. (*See* Amd. Compl. ¶ 387(d)).

[26] Thereby conceding that the claim is not time-barred.

12-13. The argument fails for two reasons. First, neither the GDA Entity Investors nor the Receiver could have discovered the wrongful conduct through reasonable diligence within that timeframe for the reasons discussed above. Second, because the Receiver has alleged at least one predicate act within the applicable statute of limitation (as the Hershey Defendants concede), they may, as a matter of law, present evidence of racketeering activity up to ten years prior to that predicate act. *Davis*, 296 P.3d at 229. Thus, the COCCA claims are timely.[27]

4. The Eleventh Claim for Fraudulent Transfer is Timely.

Dragul and the Fox Defendants argue that the Receiver's Fraudulent Transfer claim is untimely because the claim was not brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." C.R.S. § 38-8-110; Dragul MTD at 23-24; Fox MTD at 26-27.[28] To the contrary, many of the fraudulent transfer commissions identified in Exhibits 3-7 of the original Complaint were made within four years of the date the Complaint was filed (January 21, 2016). Additionally, as alleged in detail in the Amended Complaint and explained in the attached Affidavit of Ms. Drew, the GDA Entity Investors had no way of knowing about the fraudulent transfers because Dragul refused to produce the SPE books and records despite periodic requests and, once the Receiver was appointed, Dragul and the other Defendants actively concealed their misconduct and relevant documents, which prevented discovery until late 2019. (Amd. Compl. ¶¶ 259-292). *See* Affidavit of Sephanie Drew, attached as **Exhibit 5**.

[27] Dragul and the Markusch Defendants do not make any independent argument regarding the timeliness of the COCCA claims.

[28] The Hershey and Markusch Defendants do not independently make this argument.

These circumstances distinguish *Lewis v. Taylor*, 375 P.3d 1205 (Colo. 2016), upon which Dragul relies. *See* Dragul MTD at 25. There, the Colorado Supreme Court noted that the relevant fraudulent transfer "was or could reasonably have been discovered by the Receiver on the date of his appointment." 375 P.3d at 1207. In *Lewis*, unlike here, there is no indication that the entities in receivership actively concealed relevant information or documents from the receiver. Simply put, *Lewis* does not establish a per se rule that a fraudulent transfer claim accrues no later than the date a receiver is appointed, or otherwise abrogate the statutory discovery rule.

The Fox Defendants argue that only three of the commissions are within the limitations period and the Receiver fails to allege sufficient facts to support recovering them as fraudulent transfers. *See* Fox MTD at 27. In doing so, the Fox Defendants again ignore the discovery rule. Because the GDA Entity Investors did not have access to the commission information and the Receiver was unable to identify the fraudulent transfers until 2019, all of the commissions paid are recoverable by the Receiver. Additionally, as discussed above, the Receiver's allegations regarding the commissions contain the requisite specificity. *Supra* at II. C.

5. The Twelfth Claim for Unjust Enrichment is Timely .

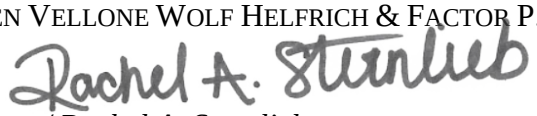
Dragul and the Fox Defendants argue that because the unjust enrichment claim seeks the same relief as the fraudulent transfer claim, it is subject to the same statute of limitations, and is similarly time-barred. *See* Dragul MTD at 24-25; Fox MTD at 26-27. But the fraudulent conveyance claim is not time-barred and, as such, neither is the unjust enrichment claim

III. CONCLUSION

For the foregoing reasons, the Receiver respectfully asks requests that the Court deny the Defendants' Motions to Dismiss the First Amended Complaint.

DATED: AUGUST 17, 2020

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



By: *s/ Rachel A. Sternlieb*

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, a true and correct copy of the foregoing, **Receiver's Omnibus Response in Opposition to Defendants' Motions to Dismiss the 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.

[redacted]

From: Russ Becker <rpb@swcp.com>
Sent: Thursday, November 26, 2020 2:21:28 PM
To: Paul L. Vorndran <pvorndran@joneskeller.com>
Subject: FW: settlement with Bronwstein Hyatt

From: Russ Becker [mailto:rpb@swcp.com]
Sent: Thursday, November 26, 2020 2:18 PM
To: 'Robert.Finke@coag.gov'
Subject: FW: settlement with Bronwstein Hyatt

Mr. Finke I inadvertently left your email address off this memo.

From: Russ Becker [mailto:rpb@swcp.com]
Sent: Thursday, November 26, 2020 2:12 PM
To: 'pvellone@allen-vellone.com'; 'mgilbert@allen-vellone.com'; 'rsternlieb@allen-vellone.com'; 'pvorndran@joneskeller.com'
Subject: settlement with Bronwstein Hyatt

Gentlemen, I am one of the investors in GDA Services. I have followed the suit against Brownstein Hyatt. I was appalled at the pitiful amount settled upon. Clearly the receiver has taken the easy way out on so many occasions. Their only interest t seems to be in collecting their fees. If there is abandonment, it is that the receiver has abandoned the interests of investors. Gentlemen, I feel abandoned. I implore you to do the right thing.

Russell P. Becker
505 2285399
rpb@swcp.com

EXHIBIT D

From:	Susan Lewis
To:	Dragul Receivership; Pat Vellone; Michael T. Gilbert; Rachel Sternlieb; Marilyn R. Davies; Terri M. Novoa
Cc:	"Robert.Finke@coag.gov"; "Janna.Fischer@coag.gov"; Paul L. Vorndran; Christopher S. Mills
Subject:	RE: Tung Chan et al v. Gary Dragul et al 2018CV33011
Date:	Tuesday, December 15, 2020 7:47:06 AM
Attachments:	image001.png
Importance:	High

As a member of several of the properties being considered I vehemently object to this recommendation. It leaves the members with nothing. Based on past activities, Alan Fox will just sell it to another entity he sets up for a huge loss and then will be left with the property to do as he wishes. He was a part of Dragul's scheme and should not receive anything.

Susie Lewis
President

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sblewis@BEAMconstruction.com | BEAMconstruction.com

From: Dragul Receivership <dragulreceivership@allen-vellone.com>
Sent: Friday, December 04, 2020 5:14 PM
To: Dragul Receivership <dragulreceivership@allen-vellone.com>; Pat Vellone <PVellone@allen-vellone.com>; Michael T. Gilbert <mgilbert@allen-vellone.com>; Rachel Sternlieb <rsternlieb@allen-vellone.com>; Marilyn R. Davies <mdavies@allen-vellone.com>; Terri M. Novoa <TNovoa@allen-vellone.com>
Cc: 'Robert.Finke@coag.gov' <Robert.Finke@coag.gov>; 'Janna.Fischer@coag.gov' <Janna.Fischer@coag.gov>; 'pvorndran@joneskeller.com' <pvorndran@joneskeller.com>; 'cmills@joneskeller.com' <cmills@joneskeller.com>
Subject: Tung Chan et al v. Gary Dragul et al 2018CV33011

Good Afternoon,

Attached please find the following filed on December 3, 2020 in the above referenced matter:

- Receiver's Motion to Approve Agreement with Alan C. Fox, the Alan C. Fox Revocable Trust Dated December 2, 1999 and ACF Property Management, Inc.

Thank you.

EXHIBIT E

Very truly,

Legal Assistant Team
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