DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: March 18, 2021 CASE NUMBER: 2020CV30255
Plaintiffs: **HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC** v. Defendants: **GARY J. DRAGUL, BENJAMIN KAHN, THE CONUNDRUM GROUP, LLP, SUSAN MARKUSCH, ALLEN C. FOX, ACF PROPERTY MANAGEMENT, INC., MARLIN S. HERSHEY, PERFORMANCE HOLDINGS, INC., OLSON REAL ESTATE SERVICES, LLC, JUNIPER CONSULTING GROUP, LLC, and JANE DOES 1-10, and XYZ CORPORATIONS 1-10.**	▲ COURT USE ONLY ▲ Case Number: 2020 CV 30255 Ctrm: 414

ORDER RE: DEFENDANTS GARY DRAGUL, ACF PROPERTY MANAGEMENT, INC., ALAN C. FOX, MARLIN S. HERSHEY AND PERFORMANCE HOLDINGS, INC.'S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER C. A. R. 4.2(a) PURSUANT TO C.R.S. §13-4-102.1(1)

THIS MATTER is before the court on Defendants Gary Dragul, ACF Property Management, Inc., Alan C. Fox, Marlin S. Hershey and Performance Holdings, Inc.'s, Motion for Certification of Interlocutory Appeal under C.A.R. 4.2(a) pursuant to C.R.S. §13-4-102.1(1), filed November 12, 2020 ("Motion"). The court, having reviewed the Motion, the Receiver's Response filed December 17, 2020, Defendants' Reply, filed December 31, 2020, the court file, the applicable law, and being otherwise fully advised the premises, hereby FINDS and ORDERS as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The Colorado Securities Commissioner brought an enforcement action against Gary Dragul and his companies, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC, ("GDA entities") alleging a long-standing equity Ponzi scheme involving the solicitation of numerous investors into a large number of single purpose entities ("SPEs") established for the purpose of investing in commercial real estate. *Chan v. Dragul*, et. al. 2018 CV 33011 (Denver

District Court). On August 31, 2018, the court appointed Plaintiff Sender as the receiver for Dragul and the GDA entities ("Plaintiff" or "Receiver"), pursuant to a Stipulated Order Appointing Receiver ("Receivership Order"). Paragraph 13 of the Receivership Order granted Sender "all the powers and authority usually held by equity receivers and reasonably necessary to accomplish the purposes stated herein, including, but not limited to, the following powers…:"

> (o)…. [T]o 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, including claims premised on fraudulent transfer or similar theories, in this or any other jurisdictions, including foreign countries;
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> * * * *
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> (s) To prosecute claims and causes of actions held by Creditors of Dragul, [the GDA entities], and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors.

Receivership Order, at 6-7, 10-12.

Receiver Sender has brought several cases, including ones against Dragul's family members,[1] three favored investors,[2] and three banks[3] as well as this one. This case focuses on several individuals and their companies who allegedly facilitated the Ponzi scheme in concert with Dragul, and is referred to as the "Insider Case." See, Receiver's Fifth Report filed in 2018 CV 33011, March 9, 2021, at 9-13. Several Defendants moved to dismiss the Complaint, relying principally on an argument that the Receiver lacked standing. The Receiver then filed a First Amended Complaint on June 1, 2020 ("FAC"), in which he expanded upon allegations regarding harm to the Receivership estate, including the GDA entities, arising from the fraudulent conduct associated with the Ponzi scheme. All Defendants except Kahn and the Conundrum Group[4] renewed their motions to dismiss, again relying on the grounds of standing. This court denied all of those motions in a series of orders issued by Judge McGahey on October 28, 2020. Although the orders do not state the grounds for the denials, this judicial officer understands them to have been based upon the standing issue.

Defendants now seek certification of this court's orders denying their motions to dismiss for an interlocutory appeal, pursuant to C.R.S. §13-4-102.1 and C.A.R. 4.2(a), as to what they argue is a controlling and unresolved issue of Colorado law: whether a receiver may pursue claims which belong to creditors of the receivership estate.

[1] Sender v. Dragul, et.al., 2019 CV 33373 (Denver District Court)
[2] Sender v. Becker, et. al., 2019 CV 33374 (Denver District Court)
[3] Sender v. Bank of America, 2019 CV 33375 (Denver District Court)
[4] Defendants Kahn and the Conundrum Group filed their Answer, Affirmative Defenses and Jury Demand to the FAC on July 6, 2020.

LEGAL STANDARD

C.R.S. §13-4-102.1, which was enacted in 2010, provides, in relevant part, as follows:

> **13-4-102.1 Interlocutory appeals of determinations of questions of law in civil cases.** (1) The court of appeals, under rules promulgated by the Colorado supreme court, may permit an interlocutory appeal of a certified question of law in a civil matter from a district court … if:
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> (a) The trial court certifies that immediate review may promote a more orderly disposition or establish a final disposition of the litigation; and
>
> (b) The order involves a controlling and unresolved question of law.

The Supreme Court promulgated C.A.R. 4.2 to guide the courts with respect to such interlocutory appeals. With respect to the grounds for such an appeal, subsection (b) of the rule is largely duplicative of the statute, but provides the following definition of an "unresolved question of law:"

> For purposes of this rule, an "unresolved question of law" is a question that has not been resolved by the Colorado Supreme Court or determined in a published decision of the Colorado Court of Appeals, or a question of federal law that has not been resolved by the United States Supreme Court.

C.A.R. 4.2 (b)(2). Thus, in the court of appeal's discretion, review "may be granted when (1) immediate review may promote a more orderly disposition or establish a final disposition of litigation; (2) the order involves a controlling question of law; and (3) that question law is unresolved." *Affiniti Colorado, LLC v. Kissinger & Fellman, P. C.*, 2019 COA 147, ¶ 12, 461 P.3d 606, 611 (Colo. App. 2019), citing *Independent Bank v. Pandy*, 2015 COA 3, ¶8, 383 P.3d 64 (Colo. App. 2015), *aff'd* 2016 CO 49, 372 P.3d 1047 (Colo. 2016); *Kowalchik v. Brohl*, 2012 COA 25, ¶13, 277 P.3d 885 (Colo. App. 2012). As the *Affiniti* court observed,

> No division of this court has developed a single definition of "controlling" for purposes of a C.A.R. 4.2 petition. Rather, "whether an issue is 'controlling' depends on the nature and circumstances of the order being appealed." Factors to be considered in making this determination include: (1) whether the issue is one of widespread public interest, (2) whether the issue would avoid the risk of inconsistent results in different proceedings, (3) whether the issue is "case dispositive," and (4) whether the case involves "extraordinary facts."

2019 COA 147, ¶17, 461 P.3d 606, 612 (internal citations omitted).

ANALYSIS

The court will consider each of the foregoing elements in turn.

1. Immediate Review May Promote a More Orderly Disposition or Establish a Final Disposition of the Litigation.

Defendants' motions to dismiss challenged the Receiver's standing to bring the claims asserted against them, which they contend belong exclusively to the creditors of the receivership estate, and not to Dragul or the GDA entities, i.e., the receivership estate. Standing is a matter of subject matter jurisdiction*, see, e.g*., *Hotaling v. Hickenlooper,* 275 P.3d 723, 725 (Colo. App. 2011), and therefore if the Receiver does not have standing, his claims must be dismissed. *See, e.g.*, C.R.C.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Such a dismissal would obviously result in a final disposition of this litigation. Perhaps more importantly, however, appellate guidance at this stage of the proceedings would avoid an eventuality similar to that which the court found compelling in granting a Rule 4.2 petition in *Triple Crown at Observatory Village Association, Inc. v. Village Homes of Colorado, Inc.*, 2013 COA 144, ¶ 15, 389 P.3d 888, 891 (Colo. App. 2013), with respect to a trial court's order granting an order to compel arbitration:

> Here, we conclude that immediate review may well promote a more orderly disposition of litigation. Were we not to grant immediate review, the parties could potentially arbitrate all of the claims in this case and then the Association could appeal the order compelling arbitration. Were a division of this court to conclude that the district court had erred in enforcing the arbitration provision, the parties would have needlessly expended substantial amounts of time and money. In these circumstances, we conclude that accepting this appeal now would promote a more orderly disposition of the litigation.

Receiver argues that Dragul and the GDA entities he controls were involved in the negotiations of the Receivership Order, including its enumeration of the Receiver's powers in ¶ 13(s), which Defendants now contend he is without standing to exercise. However, those enumerated powers go to the issue of whose claims the Receiver may prosecute, apparently even without their consent, and therefore clearly raises an issue of standing and subject matter jurisdiction, regardless of the parties' agreement. To simply conclude, as the Receiver suggests, that Dragul and the GDA entities have agreed to the Receiver's powers and are therefore estopped to challenge them would run afoul of the well-settled rule of law that subject matter jurisdiction cannot be conferred on the court by the agreement of the parties. *See, e.g., Department of Transportation v. Auslaender*, 94 P.3d 1239, 1241 (Colo. App. 2004).

Even if it does not eventually result in a dismissal, the interlocutory appeal could significantly narrow and refine the issues going forward. As set forth in greater detail below regarding whether the question is "controlling," the Receiver opposed the motions to dismiss on the grounds that the Ponzi scheme did damage to the GDA entities themselves, in addition to investors in the Ponzi scheme. If the court of appeals were to agree, but also find that the

Receiver is without authority to pursue this litigation on behalf of the investor creditors, this would certainly narrow and streamline the process of resolving this litigation. The damages would be confined to those of the GDA entities, as distinct from those of the defrauded investors.

2. The Orders Involve a Controlling and Unresolved Question of Law.

a. Unresolved

Taking the second issue first, whether the question of law at issue here is unresolved is a very straightforward matter of application of Rule 4.2's plain and unambiguous language. Neither party has directed the court's attention to, nor has the court found, any decision of the supreme court or the court of appeals which answers the question of whether a receiver may assert the rights of creditors of a receivership estate.[5]

The closest the parties have come is the case of *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779 (Colo. App. 1997), in which the court of appeals determined that a bankruptcy trustee was without standing to assert claims belonging to the creditors of the bankrupt estate. In so holding, the court relied principally upon the Tenth Circuit's interpretation of a section of the Bankruptcy Code, 11 U.S.C. § 541, that "claims asserted by trustee must belong to the debtor entity itself, not debtor's creditors individually." 952 P. 2d at 781, citing *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996), as well as several other federal and state appellate courts reaching similar conclusions regarding bankruptcy trustees. *Sender v. Kidder Peabody* is distinguishable because this case involves a receiver, and not a trustee in bankruptcy, and therefore is not subject to the section of the Bankruptcy Code which the *Sender* court found dispositive.

Accordingly, the question is clearly "unresolved" within the meaning of Rule 4.2 (b)(2).

b. Controlling

The more difficult question is whether the question is "controlling" for purposes of the requested certification under C.A.R. 4.2. The court will consider each of the factors set forth by the *Affiniti* court in order.

i. Widespread Public Interest

Relying on C.R.S. §11-51-602(1), the Securities Commissioner filed a motion requesting the appointment of a receiver contemporaneously with his complaint in *Chan v. Dragul*, 2018 CV 33011, indicating that receiverships are a preferred tool for prosecuting alleged violations of securities laws and resolving them expeditiously on behalf of defrauded investors. The statute itself makes no reference to the appointment of a receiver. However, the Stipulated Receivership Order bestows relatively broad powers on the Receiver, including under ¶ 13 (s) "[t]o prosecute claims and causes of actions held by Creditors of Dragul,[the GDA entities], and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors." The purpose appears to be that the court-appointed receiver will pursue remedies for investors, even those whose claims are not large enough to justify the risk and expense of separate litigation. Laudable as that goal may be, of course, receivers must still function within

[5] Because this is a matter of state, and not federal, law, there is also no controlling precedent from the United States Supreme Court.

the confines of the law, and may only assert claims properly belonging to the receivership estate. For these reasons, the question of law as to which Defendants seek certification is of widespread public interest, not only in this case, but in future ones.

ii. Avoiding the Risk of Inconsistent Results in Different Proceedings

If a receiver is properly authorized to pursue claims on behalf of creditors, including investors, litigation of this sort could be handled in a centralized, coordinated fashion which would not exist if each individual investor was left their own devices in pursuing remedies. The court notes that the remaining Defendants in this Insider Case are apparently the last targets of the Receiver's litigation efforts in this matter[6], so the risk of inconsistent results is minimized simply by virtue of the length of time these cases have been pending. Obviously, however, to the extent that separate trial courts reach different results regarding the standing of the receiver to prosecute claims of creditors of the receivership estate, some creditors may be successful while others will not be.

To a certain extent, the question of law as to which Defendants seek certification is a matter of characterization, which could certainly lead to inconsistent results in different courts. As noted, the Defendants contend that this is a straightforward matter of standing, and that the receiver has none to pursue rights that belong to other parties, i.e., the creditors of the receivership estate, most especially the investors. The Receiver, on the other hand, contends that the Ponzi scheme actually caused harm to the GDA entities themselves, which are now a portion of the receivership estate, and whose rights he clearly can pursue. In doing so, he relies principally on the seminal case of *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995), which involved a similar Ponzi scheme masterminded by one Douglas and three corporations he created and, in turn, caused the corporations to create limited partnerships in which the corporations would be the general partners and would sell limited partnership interests to the investing public, ostensibly in a commodities trading business. *Id.*, at 752. In rejecting a challenge to the court-appointed receiver's standing to bring fraudulent conveyance claims under Illinois law on behalf of Douglas and his companies and against several insiders, Judge Posner wrote as follows:

> The argument that he did not [have standing] is that he was "really" suing on behalf not of Douglas or Douglas's corporations, the perpetrator and tools of the Ponzi scheme, respectively, but of the investors, the purchasers of limited-partners interests in the corporations; and a receiver does not have standing to sue on behalf of the creditors of the entity in receivership… How, the defendants ask rhetorically, could the allegedly fraudulent conveyances have hurt Douglas, who engineered them, or the corporations that he had created, that he totally controlled and probably…. owned all the common stock of, and that were merely the instruments through which he operated the Ponzi scheme?

[6] *Chan v. Dragul*, 2018 CV 33011, Receiver's Fifth Report, filed March 9, 2021, ¶ 28, at 11 ("The claims pending in the Insider Case against Dragul, the Kahn Defendants, Markusch, and the Hershey Defendants are the only remaining Estate litigation claims.")

> The answer – so far as the corporations are concerned, and we need go no further – turns out to be straightforward. The corporations, Douglas's robotic tools, were nevertheless in the eyes of the law separate legal entities with rights and duties. They receive money from the unsuspecting, if perhaps greedy and foolish, investors. That money should have been used for the stated purpose of the corporations' sale of interests in the limited partnerships, which was to trade commodities. Instead Douglas caused the corporations to pay out the money they received to himself, his ex-wife, his favorite charities, and an investor, Phillips, whom Douglas wanted to keep happy, no doubt in the hope that Phillips would invest more money in the Ponzi scheme or encourage others to do so…
>
> The three sets of transfers removed assets from the corporations for an unauthorized purpose and by doing so injured the corporations.

56 F.3d at 753-754.[7]

Here, the Receiver included allegations in the FAC designed to assert injuries to the GDA entities themselves, in an effort to come within the rule of *Scholes.* However, persuasive though Judge Posner may be in *Scholes,* there is no doubt that no Colorado appellate court has adopted its holding as the law in Colorado.[8] Thus, depending upon how a court were to construe the Receiver's allegations regarding harm to the GDA entities, it might conclude that the Receiver had standing to pursue a remedy for the injuries caused to the GDA entities, as distinct from the other creditors of the receivership estate, including the investors. Appellate guidance in the context of this particular case would avoid inconsistent results among trial courts.

iii. Whether the Issue is "Case Dispositive."

The court of appeals' resolution of the question of the Receiver's standing may very well be case dispositive. If the court were to reject the rule of *Scholes* and determine that the Receiver was without authority to pursue remedies on behalf of creditors of the receivership estate, despite the language of the Receivership Order, the case would likely be dismissed on the issue of standing.

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[7] Judge Posner also observed: "[T]he defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated. [citations omitted] Now that the corporations created and initially controlled by Douglas are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by Douglas. We cannot see any legal objection and we particularly cannot see any practical objection. The conceivable alternatives to these suits for getting the money back into the pockets of its rightful owners are a series of individual suits by the investors, which, even if successful, would multiply litigation…"

[8] Receiver points out that *Scholes* is cited with approval by the Supreme Court in *Lewis v. Taylor*, 427 P.3d 796, 800 (Colo. 2018), but only as being exemplary of the majority view in the federal courts that "the general rule is that to the extent innocent investors have received payments in excess of the amounts of principal that they originally invested, those payments are avoidable as fraudulent transfers."

On the other hand, should the court adopt a rule along the lines of *Scholes,* the issue might not be case dispositive. It is unclear to the court at this juncture whether the injuries caused to the GDA entities, as alleged by the Receiver, are coextensive with those suffered by the other creditors, including investors. It may be that, if the court of appeals concludes that the Receiver lacks standing to pursue creditors' claims, but does have standing to pursue the claims of the GDA entities, that the question of law will not be dispositive of the entire case, but will certainly narrow the issues going forward.

iv. Whether the Case Involves "Extraordinary Facts."

This case does arguably involve some extraordinary facts, arising primarily from the nature of the Ponzi scheme involved. The Receiver alleges that the GDA entities themselves were at cross purposes. On the one hand, they are apparently duly formed limited liability companies, with their own separate legal existence, whose purported function was to locate, solicit and obtain commercial real estate investments, allegedly in concert with Defendants, and manage such investments for the benefit of the limited partners. However, they are alleged to have become mere instrumentalities of the fraudulent Ponzi scheme masterminded by Dragul, and facilitated by Defendants, becoming mere conduits of investors' money being transferred and dispersed on perpetually *ad hoc* bases. Obviously, receivers are often appointed for business entities that have been mismanaged or undercapitalized, and which, through ignorance, inexperience, poor business judgment, or some combination of those, but not fraudulent intent, have become insolvent. However, those business entities are usually not torn between their corporate duties and the desires of their principals, as the GDA entities are alleged to have been in this case. That being the case, the GDA entities which are, in the eyes of the law, separate and distinct from Dragul, might have claims which are unique and distinct, and which the Receiver is obligated to pursue.

c. Question of Law

Finally, Receiver opposes Defendants' Motion on the basis that the issue upon which they seek certification is not a pure question of law, but rather a mixed question of law and fact, and therefore inappropriate for certification for interlocutory appeal, relying on *Rich v. Ball Ranch Partnership*, 345 P.3d 980 (Colo. App. 2015). The court rejects this argument. In *Rich*, the defendants brought an interlocutory appeal of the court's resolution of a motion for determination of question of law, in which the court had merely ruled on the meaning of a section of a partnership agreement. In dismissing the defendants' petition, the court interpreted the phrase "question of law" in both the statute and the rule as meaning a pure question of law, "as opposed to the mere application of settled legal principles to the facts." 345 P.3d at 982.

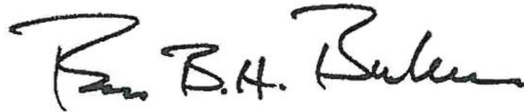
Here, the court's orders denying Defendants' motions to dismiss necessarily imply the court's rejection of their principal arguments that the Receiver lacks standing to pursue the claims against them because those claims properly belong to the creditors, including the investors, and not the Receivership Estate. Therefore, this case presents a pure question of law in the sense required by *Rich*. Put another way, the issue here is not whether the court properly applied a settled rule of law to the facts, but rather *what is the rule of law* in Colorado with respect to the standing of a receiver to pursue claims for injuries to entities which are part of the receivership estate, but which are also alleged to have played a causal role in defrauding investors?

CONCLUSION

For all the foregoing reasons, pursuant to C.R.S. §13-4-102.1 and C.A.R. 4.2, the court GRANTS the Defendants' Motion, and CERTIFIES FOR INTERLOCUTORY APPEAL the question of whether the Receiver has standing to bring the claims against Defendants which he has asserted in the First Amended Complaint, filed June 1, 2020. Defendants shall file their petition seeking an interlocutory appeal with the court of appeals pursuant to the procedure and time frames set out in C.A.R. 4.2. This matter shall be AUTOMATICALLY STAYED pending resolution of the Defendants' petition in the court of appeals. C.A.R. 4.2(e)(2).

DATED this 18th day of March, 2021.

BY THE COURT:



Ross B.H. Buchanan
Denver District Court Judge