

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>Court Address: 1437 Bannock St., Denver, CO 80202</p> <hr/> <p>Plaintiffs:</p> <p>HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p>Defendants:</p> <p>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.</p>	<p>DATE FILED: March 18, 2021 CASE NUMBER: 2020CV30255</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2020 CV 30255</p> <p>Ctrm: 414</p>
<p>ORDER RE: DEFENDANT GARY DRAGUL’S MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF UNIQUE ISSUE UNDER C.A.R. 4.2(a) PURSUANT TO C.R.S. §13-4-102.1(1)</p>	

THIS MATTER is before the court on Defendant Gary Dragul’s Motion for Certification of Interlocutory Appeal of Unique Issue under C.A.R. 4.2(a) Pursuant to C.R.S. §13-4-102.1(1), 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.

INTRODUCTION

Contemporaneously with this order, the court has filed its 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)(“Collective Motion”). The court hereby incorporates the Factual and Procedural Background, Legal Standard, and Analysis sections of that order herein, and they will not be repeated here.

This Motion pertains to an issue which is unique to Defendant Dragul, which is that he is simultaneously a portion of the Receivership Estate and yet has been named as a Defendant in this case brought by the Receiver. Although the GDA entities are also part of the Receivership Estate, they are not named Defendants in this litigation.

Receiver filed a single Response to the Defendants' Collective Motion and Defendant Dragul's Motion on December 17, 2020. However, no portion of that Response was directed to the unique issue pertaining to Defendant Dragul. The court notes that "failure of a responding party to file a responsive brief may be considered a confession of the motion." C.R.C.P. 121, §1-15.3. More to the point, C.A.R. 4.2(c) provides that the trial court may, in its discretion, certify an order as immediately appealable "but if all parties stipulate, the trial court must forthwith certify the order." On these two bases, the court could regard the matter as stipulated, and certify the order on that basis.

However, it is clear that the court of appeals expects the trial court to carefully examine those questions of law which it is asked to certify for interlocutory appeal, and certainly not all who seek such remedy should receive it. *See, Rich v. Ball Ranch Partnership*, 345 P.3d 980, 982 (Colo. App. 2015) ("[W]e have not held that every legal issue that we would review de novo on direct appeal constitutes a 'question of law' for purposes of discretionary interlocutory appeal.") Accordingly, the court will proceed with the analysis.

ANALYSIS

The court concludes that the unique issue pertaining to Defendant Dragul is also appropriate for interlocutory appeal pursuant to C.R.S. 13-4-102.1(1) and C.A.R. 4.2(a) in the analytical framework set forth in *Independent Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015).

First, appellate resolution of the question of the Receiver's authorization and standing to sue Defendant Dragul would clearly be dispositive of the litigation pertaining to him. While claims may remain on behalf of the GDA entities, if the Receiver has no authority to sue a person who is part of the receivership estate, the case would be over with respect to Defendant Dragul.

With respect to whether the court's order involves a controlling issue of law, again the analysis is very similar to that recited in the court's Order on the Defendants' Collective Motion. It is certainly a matter of public interest as to whether a Receiver, as distinct from defrauded investors, can sue one of the parties in the receivership estate. The resolution of that issue will avoid inconsistent outcomes, where individual investors might also assert claims directly against Mr. Dragul.

Finally, this issue is also unresolved under Colorado law, because it does not meet the narrow definition of that term set forth in C.A.R. 4.2 (b)(2). There is no Colorado appellate opinion addressing the issue, let alone resolving it.

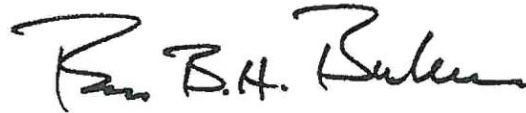
Accordingly, for all these reasons, as well as all those set forth in the Order on the Defendants' Collective Motion, the court finds that it is appropriate to certify the unique issue presented by Defendant Dragul.

CONCLUSION

For all the foregoing reasons, pursuant to C.R.S. §13-4-102.1 and C.A.R. 4.2, the court GRANTS Defendant Dragul’s Motion, and CERTIFIES FOR INTERLOCUTORY APPEAL the question of whether the Receiver has standing to bring the claims against Defendant Dragul, as set forth in the First Amended Complaint, filed June 1, 2020, in light of the fact that he is part of the receivership estate. Defendants shall file their petition seeking an interlocutory appeal with the court of appeals pursuant to the procedure and timeframes 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