DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: April 1, 2021 6:37 PM FILING ID: B96A22FB1C657 CASE NUMBER: 2020CV30255
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; MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; OLSON REAL ESTATE SERVICES, LLC, a Colorado Limited Liability Company; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10.	▲ COURT USE ONLY ▲
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NOTICE OF FILING AND SERVICE OF PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2

Pursuant to C.A.R. 4.2(d)(3)(D), Defendants Gary J. Dragul, Marlin S. Hershey, and Performance Holdings, Inc. hereby give notice and serve upon the Parties and District Court Gary Dragul's, Marlin Hershey's, and Performance Holdings, Inc.'s Petition for Interlocutory Appeal Pursuant to C.A.R. 4.2, filed on this 1st day of April, 2021 with the Colorado Court of Appeals, and which is attached hereto as Exhibit A.

Dated this 1st day of April, 2021.

JONES & KELLER, P.C.

s/ *Christopher S. Mills*
Paul L. Vorndran, #22098
Christopher S. Mills, #42042

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2021, a true and correct copy of the foregoing **NOTICE OF FILING AND SERVICE OF PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2** was filed and served via the Colorado Court E-filing system to the following:

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DATE FILED: April 1, 2021 6:37 PM
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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Petition for Interlocutory Appeal From: DENVER DISTRICT COURT Honorable Ross B.H. Buchanan District Court Case Number: 2020CV30255	
DEFENDANTS-APPELLANTS: GARY J. DRAGUL, MARLIN S. HERSHEY, PERFORMANCE HOLDINGS, INC., v. **PLAINTIFF-APPELLEE:** HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC.	▲COURT USE ONLY▲ Court of Appeals Case No.

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GARY DRAGUL'S, MARLIN HERSHEY'S, AND PERFORMANCE HOLDINGS, INC.'S PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2

EXHIBIT A

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief complies with all applicable requirements of C.A.R. 4.2, C.A.R. 28, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Opening Brief complies with the applicable word limits set forth in C.A.R. 28(g). It contains 8,326 words. The Opening Brief complies with all other requirements of C.A.R. 4.2, C.A.R. 28 (to the extent applicable), and C.A.R. 32. It contains the identities and status of the parties in the proceeding below, the orders being appealed, the reasons why immediate review may promote a more orderly disposition or establish a final disposition of the litigation and why the orders involve controlling and unresolved questions of law, the issues presented, the facts necessary to understand the issues presented, arguments and points of authority explaining why the Petition should be granted and why the relief requested should be granted, a list of supporting documents, and a certificate of service identifying the names, addresses, email addresses, and telephone and fax numbers of the parties to the proceeding below or their counsel. Appellants are concurrently serving this Petition upon the District Court and each Party below.

s/ Christopher S. Mills
Christopher S. Mills, # 42042
Attorney for Defendant-Appellant Gary Dragul

TABLE OF CONTENTS

EXHIBIT A

TABLE OF AUTHORITIES

Cases

EXHIBIT A

Statutes

Other Authorities

Rules

INTRODUCTION

The Petition concerns the constitutional and legal scope of a receiver's authority. It seeks this Court's guidance to answer two questions: (1) Does a receiver have standing to assert claims belonging to third-party creditors of the receivership estate?; and (2) May a receiver sue a person over whom the receiver serves as receiver? These questions implicate the District Court's subject matter jurisdiction and leaving them unanswered could result in full post-judgment reversal if it is later determined that the District Court lacked jurisdiction to hear the case. This Court's review will also provide much-needed clarity for anyone involved in or affected by a receivership, now or in the future.

The proceeding below began in 2018, when the Colorado Securities Commissioner had a receiver appointed over Defendant-Appellant Gary Dragul, and two of Mr. Dragul's companies, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC (the two GDA companies are referred to as "GDA Entities"). Mr. Dragul turned over his assets and information, including attorney-client privileged information, to the Receiver. A year and a half later, the Receiver filed a civil suit for damages against Mr. Dragul, Defendants-Appellants Marlin Hershey and Mr. Hershey's company Performance Holdings, Inc., and several other defendants. The Receiver asserted claims belonging to third-party creditors

of the receivership estate, and sued Mr. Dragul even though Mr. Dragul is personally in the receivership. Mr. Dragul, Mr. Hershey, Performance Holdings, Inc., and several other defendants moved to dismiss, arguing, among other grounds, that the Receiver lacks standing to assert third-party creditors' claims that the creditors had not assigned to the Receiver. Mr. Dragul also argued that the Receiver may not sue Mr. Dragul since Mr. Dragul is personally in the receivership.

In response, the Receiver filed an amended complaint which again asserted third-party creditors' claims and again sued Mr. Dragul even though Mr. Dragul is in the receivership. The same defendants moved to dismiss the amended complaint on the same grounds. While no Colorado appellate court has ruled upon these legal issues, the motions to dismiss were supported by analogous bankruptcy cases and myriad cases from other jurisdictions.

However, the then-presiding District Court Judge entered orders denying the motions to dismiss with a "DENIED BY COURT" stamp. The District Court provided no reasoning for the denials.

Mr. Dragul, Mr. Hershey, Performance Holdings, Inc., Mr. Fox, and ACF Property Holdings, Inc. filed a motion to certify for interlocutory appeal the legal question of whether a receiver has standing to assert third-party creditors' claims.

Mr. Dragul also filed a motion to certify for interlocutory appeal the legal question of whether a receiver may sue a person over whom the receiver serves as receiver.

On March 18, 2021, the District Court, now with a new presiding Judge, granted both motions to certify these legal questions for interlocutory appeal in lengthy reasoned orders. It held that both legal questions are unresolved in Colorado, are controlling and potentially case-dispositive, would at a minimum lead to a more orderly disposition of the litigation even if they did not result in a final disposition, and involve matters of great public importance. The District Court's certification of these legal questions for interlocutory appeal is supported by ample authority and careful analysis. As the District Court held, these issues are not only appropriate for this Court of Appeal's immediate review, but could cripple the case below if unanswered, resulting in complete post-judgment reversal. For those same reasons, this Court should grant the Petition and hear the appeal.

The Court should also answer both legal questions presented in the negative: A receiver does *not* have standing to assert third-party creditors' claims, even if the order appointing the receiver purports to grant that power, as the receiver can only assert those claims belonging to the individuals or entities in receivership. And a receiver may *not* sue a person over whom the receiver serves as receiver, as the

receiver stands in that individual's shoes, meaning that person is suing him- or herself. It would also allow the receiver to collect a double-recovery. This Court would be in good company if it so held. Analogous bankruptcy cases and courts from other jurisdictions have uniformly reached the same conclusions. Both sound legal reasons and important matters of public policy compel such a result.

IDENTITIES OF PARTIES BELOW AND STATUS

- Plaintiff-Appellee is Harvey Sender, as Receiver for Defendant-Appellant Gary Dragul, and for Mr. Dragul's two companies, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC.
- Defendant-Appellant Gary J. Dragul is a Defendant below and is an Appellant here.
- Defendant-Appellant Marlin S. Hershey is a Defendant below and is an Appellant here.
- Defendant-Appellant Performance Holdings, Inc. is Mr. Hershey's company and is a Defendant below and an Appellant here.
- Benjamin Kahn is a Defendant below. He answered the Receiver's complaint and asserted counterclaims, but also joined in part of the other defendants' motions to dismiss. He is not participating in this appeal.

- The Conundrum Group, LLP is Mr. Kahn's law firm, and is a Defendant below. It answered the Receiver's complaint and asserted counterclaims, but also joined in part of the other defendants' motions to dismiss. It is not participating in this appeal.
- Susan Markusch is a Defendant below. She has indicated she intends to file a joinder in this appeal.
- Olson Real Estate, LLC is Mrs. Markusch's company and is a Defendant below. It has indicated it intends to file a joinder in this appeal.
- Alan C. Fox was a Defendant below. He settled with the Receiver and was dismissed from the proceeding below on December 31, 2020. He is not participating in this appeal.
- ACF Property Management, Inc., which is Mr. Fox's company, was a Defendant below. It settled with the Receiver and was dismissed from the proceeding below on December 31, 2020. It is not participating in this appeal.
- Juniper Consulting Group, LLC was a Defendant below. It settled with the Receiver and was dismissed from the proceeding below on December 28, 2020. It is not participating in this appeal.

ORDERS BEING APPEALED

Defendants-Appellants seek to appeal the following District Court orders:

- October 28, 2020 Order Denying Defendant Gary J. Dragul's Motion to Dismiss First Amended Complaint. (Ex. 8.)
- October 28, 2020 Order Denying Defendants Marlin S. Hershey's and Performance Holdings, Inc.'s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5). (Ex. 9.)

REASONS WHY IMMEDIATE REVIEW IS APPROPRIATE

The question of law whether a receiver may assert claims belonging to third-party creditors of the receivership estate (without getting assignments from those third parties) is appropriate for immediate review for several reasons. First, since most if not all of the Receiver's claims are third-party creditor claims, if the Receiver lacks standing to assert those claims, that will result in a final disposition of the case, or at a minimum greatly streamline it for a more orderly disposition. Second, this is a controlling question of law because its incorrect disposition would require reversal of a final judgment. It is also of widespread public concern because the public has a strong interest in seeing that receivers act within the scope of their powers and constitutional constraints and do not usurp claims properly belonging to creditor members of the public. Additionally, because receivers are

officers of the court, their actions impact the public's confidence in the court. Immediate appellate review would also avoid the risk of inconsistent results in different proceedings since otherwise both the receiver and creditors can assert the same claims against the same defendants. Finally, no Colorado appellate court has addressed this issue and thus it is an unresolved question of law.

The question of law whether a receiver may assert claims for damages against a person over whom the receiver serves as receiver is also appropriate for immediate review for multiple reasons. First, if the Receiver may not sue Mr. Dragul here, that would be case-dispositive at least as to Mr. Dragul, and would significantly streamline the case as to all other defendants. Second, this is a controlling question of law in that if incorrectly decided by the District Court, it would require reversal of a final judgment. It is also of widespread public interest because the answer will inform whether parties seek to have a receiver appointed, what the receiver's powers will be, whether parties should consent or oppose being included in the receivership, and whether creditors should support or oppose appointing a receiver. Resolving this question would also avoid a risk of inconsistent rulings if both the Receiver and creditors may assert the same claims against Mr. Dragul. Last, this is an unresolved question of law in that no Colorado appellate court has addressed it.

ISSUES PRESENTED

Defendants-Appellants present the following questions of law for review:

(1) Does a receiver have standing to assert claims belonging to third-party creditors of the receivership estate?

(2) May a receiver sue a person over whom the receiver serves as receiver?

FACTUAL & PROCEDURAL BACKGROUND

Mr. Dragul is involved in the real estate acquisition and investment business. In 2014, the Colorado Securities Commissioner began investigating Mr. Dragul and his two companies, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC (collectively the "GDA Entities") after purportedly receiving complaints from investors. (Ex. 2, First Amended Complaint ("FAC") ¶ 44.) On August 15, 2018, the Commissioner filed a complaint for injunctive and other relief against Mr. Dragul and the GDA Entities (Case No. 2018CV33011). The Commissioner immediately moved to appoint a receiver over the GDA Entities and Mr. Dragul personally. Harvey Sender was appointed Receiver on August 30, 2018. (*See* Ex. 1, August 30, 2018 Stipulated Order Appointing Receiver ("Receivership Order")). Mr. Dragul turned over to the Receiver his assets that were related directly or indirectly to investor funds or the alleged solicitation of

securities, and the entire GDA server on which was saved both information about the properties and investors and Mr. Dragul's communications including his personal attorney-client privileged communications Mr. Dragul had with counsel.

On January 21, 2020, the Receiver filed a civil suit for damages against Mr. Dragul, Mr. Dragul's attorney Benjamin Kahn, Mr. Kahn's firm, The Conundrum Group, LLP, Susan Markusch, Allen C. Fox, ACF Property Management, Inc., Marlin S. Hershey, Performance Holdings, Inc., Olson Real Estate Services, LLC, and Juniper Consulting Group, LLC (collectively "Defendants"). Kahn and the Conundrum Group answered and asserted counterclaims, but Mr. Dragul, Alan Fox, ACF Property Management, Inc., Marlin Hershey, Performance Holdings, Inc., Susan Markusch, and Olson Real Estate Services, LLC ("Dismissing Defendants") filed motions to dismiss (in which Mr. Kahn and Conundrum Group joined in part). The Receiver then filed his First Amended Complaint (Ex. 2, FAC), which like the original complaint asserted claims for Colorado Securities Act ("CSA") violations, negligence, negligent misrepresentation, civil theft, COCCA violations, breach of fiduciary duty, fraudulent transfer, and unjust enrichment against the same Defendants including Mr. Dragul, Mr. Hershey, and Performance Holdings, Inc. Also like in the original complaint, the Receiver

asserted these claims either expressly or as a matter of law on behalf of third-party creditors of the Receivership Estate.

The Dismissing Defendants, including Defendants-Appellants, then moved to dismiss the FAC. (Exs. 3, 4.) Among other reasons, (1) Defendants-Appellants argued the Receiver lacks standing to assert third-party creditors' claims; and (2) Mr. Dragul argued the Receiver may not sue Mr. Dragul since Mr. Dragul is in the Receivership. The Dismissing Defendants' motions to dismiss the FAC, the Receiver's response (Ex. 5), and the replies (Exs. 6, 7), totaled 170 pages of briefing. On October 28, 2020, the District Court denied the motions to dismiss the FAC. It did so by stamping "DENIED BY COURT" on the proposed orders. (Exs. 8, 9.) The District Court did not provide any reasoning for its decision.

On November 12, 2020, Mr. Dragul, Mr. Fox, ACF Property Management, Inc., Mr. Hershey, and Performance Holdings, Inc. filed their Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2 Pursuant to C.R.S. § 13-4-102.1(1), seeking certification to appeal the legal question of whether a receiver has standing to assert third-party creditors' claims. (Ex. 10.) Mr. Dragul also filed his 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), which sought to appeal the legal question of whether a receiver may sue a person over whom the receiver serves as

receiver. (Ex. 11.) The Receiver filed a combined response (Ex. 12), and Defendants-Appellants filed replies (Exs. 13, 14). Shortly thereafter, Defendants Alan Fox and ACF Property Management, Inc. settled with the Receiver and were dismissed from the case. On March 18, 2021, the District Court, now with a new presiding Judge, granted both motions to certify these issues for interlocutory appeal. (Exs. 15, 16.) This Petition followed.

ARGUMENT

I. Immediate Review Will Likely Establish a Final Resolution, But at a Minimum Will Promote a More Orderly Disposition, and The Issues Presented Involve Controlling and Unresolved Questions of Law

Immediate appellate review of a certified question of law is appropriate when:

> (1) "The trial court certifies that immediate review may provide a more orderly disposition or establish a final disposition of the litigation"; and
>
> (2) "The order involves a controlling and unresolved question of law."

C.R.S. § 13-4-102.1 (2021). This standard is reiterated in C.A.R. 4.2. Here, the District Court certified these two questions of law for interlocutory appeal to this Court. Because the two questions of law meet the applicable test and are a matter of significant public interest, this Court should grant the Petition and hear the appeal.

Colorado courts have held that interlocutory appeal is appropriate when: "(1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order from which an appeal is sought involves a controlling question of law; and (3) the order from which an appeal is sought involves an unresolved question of law." *Indep. Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015), *aff'd*, 372 P.3d 1047 (Colo. 2016); *Wahrman v. Golden W. Realty, Inc.*, 313 P.3d 687, 688 (Colo. App. 2011); *Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011). These criteria are met here.

A. As the District Court Held, Whether a Receiver Has Standing to Assert Third-Party Creditors' Claims is Appropriate for Immediate Review

1. The Receiver's Standing to Assert Third Parties' Claims is an Unresolved Question of Law

Taking the criteria enumerated in *Pandy* in reverse order, 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) (2021). The question must be one of "law," as opposed to a mixed question that involves the application of well-established legal principles to the unique facts at hand. *See Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 611 (Colo. App. 2019), *reh'g denied*

(Oct. 10, 2019), *cert. denied*, No. 19SC864, 2020 WL 1887932 (Colo. Apr. 13, 2020); *see also Clyncke v. Waneka,* 157 P.3d 1072, 1076 (Colo. 2007) (issues of statutory interpretation are questions of law). A receiver's standing to bring claims on behalf of third-party creditors is a pure question of law. While the Receiver argued otherwise, the District Court rejected that argument, holding that whether "the Receiver lacks standing to pursue the claims against them because those claims properly belong to creditors, including the investors, and not the Receivership Estate . . . presents a pure question of law in the sense required by *Rich* [*v. Ball Ranch Partnership*, 345 P.3d 980, 982 (Colo. App. 2015)]." (Ex. 15 at 8.)

It is also an unresolved question of law. As the District Court noted, "[n]either 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."[1] (Ex. 15 at 5.)

The Colorado Court of Appeals has decided an analogous question with respect to a bankruptcy trustee. In *Sender v. Kidder Peabody*, 952 P.2d 779 (Colo.

[1] The District Court further noted that because a state-court appointed receiver's standing "is a matter of state, not federal, law, there is also no controlling precedent from the United States Supreme Court." (Ex. 15, at 5 n.5.)

App. 1997), the court considered the bankruptcy trustee's standing to assert claims of creditors of the bankruptcy estate. The Court held that a bankruptcy trustee had no standing to do so. *Id.* at 781. Although the Colorado Court of Appeals' rationale in *Sender v. Kidder* supports the Receiver's lack of standing here, that case did not directly resolve the standing question in the context of a receivership.

Since no Colorado appellate court has decided whether a receiver has standing to assert third-party creditors' claims, let alone resolved it in favor of standing, the District Court held that this question "is clearly 'unresolved' within the meaning of Rule 4.2(b)(2)." (Ex. 15 at 5.) The District Court's conclusion is correct under C.R.S. § 13-4-102.1 and C.A.R. 4.2, which supports this Court granting the Petition and hearing the appeal.

2. The Receiver's Standing to Assert Third Parties' Claims is a Controlling Question of Law

Criterion (2) from the *Pandy* test is whether the question is "controlling." In making this determination, a court should consider the following factors: "(1) whether the issue is one of widespread public interest; (2) whether the issue would avoid the risk of inconsistent results in different proceedings; (3) whether the issue is case dispositive; and (4) whether the case involves extraordinary facts." *Affiniti*, 461 P.3d at 612 (internal quotations omitted). "There is no doubt[, however,] that a question is 'controlling' if its incorrect disposition would require reversal of a

final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district court proceedings." *Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colorado, Inc.*, 389 P.3d 888, 893 (Colo. App. 2013).

Here, these factors favor interlocutory appeal. First, a receiver's standing to bring claims on behalf of creditors is one of widespread public interest because the public has a strong interest in ensuring that receivers act within the scope of their powers and within constitutional constraints. *See Cargill, Inc. v. HF Chlor-Alkali, LLC*, No. 16-2506, 2016 U.S. Dist. LEXIS 123785, at *12 (D. Minn. Sept. 12, 2016) (declining to appoint receiver where party seeking same did not make adequate showing that appointing receiver would be in the public interest). This interest is particularly acute when members of the public may be creditors whose claims the receiver seeks to usurp. Moreover, because receivers are officers of the court, *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2981 (3d ed. 1975), when they purport to bring claims for which they lack standing, they undermine the public's confidence not only in receiverships but also in the court. *Id.*

Analogy to federal law further demonstrates Congress's recognition that the conduct of a receiver is a matter of public interest that may warrant immediate

review. Under Section 1292(a)(2) of Title 28 of the United States Code, the federal courts of appeal have jurisdiction to review "interlocutory orders… to take steps to accomplish the purposes [of the receivership], such as directing sales or other disposals of property." The interlocutory orders to which this statute refers have been defined as "orders in the nature of 'executions before judgment,' and in effect either ousting parties from the possession of property or injuriously controlling the management and disposition of property." *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2986 (3d ed. 1975); *see also S.E.C. v. Bartlett*, 422 F.2d 475, 477 (8th Cir. 1970) (holding that where a trial court denied a motion to vacate a receivership, such interlocutory ruling was appealable under 28 U.S.C. § 1292). The Receiver's assertion of third-party creditors' claims is akin to an attempt to dispose of property that does not belong to the Estate. Such an order would be immediately appealable under federal law.[2]

In certifying this issue for interlocutory appeal, the District Court further noted that the Commissioner's request to appoint the Receiver and the

[2] *See Adams v. Corr. Co. of Am.*, 264 P.3d 640, 643 (Colo. App. 2011) ("Some of the language in [C.R.S. § 13-4-102.1] is similar to the federal interlocutory appeal statute, 28 U.S.C. § 1292(b). When a federal law is similar to a Colorado statute, federal cases may be useful, although not determinative, in analyzing comparable language in the Colorado provision.").

Receivership Order itself evidences a purpose to use the court-appointed Receiver to pursue remedies for investors, but that "receivers must still function within the confines of the law, and may only assert claims properly belonging to the receivership estate." (Ex. 15 at 5-6.) The District Court concluded that "the question of law as to which Defendants seek certification is of widespread public interest, not only in this case, but in future ones." (*Id*. at 6.) Indeed, the answer to this question will impact a party's decision to seek appointment of a receiver, how the order appointing the receiver is drafted, the receiver's powers, and creditors' decisions whether to support or oppose appointment of a receiver.

Second, resolution of the standing issue would also avoid the risk of inconsistent results in different proceedings because the creditors on whose behalf the Receiver purports to sue are fully capable of filing lawsuits on their own behalf. While the Receivership Order requires creditors to refrain from independently prosecuting claims against Mr. Dragul and the GDA Entities as a condition of submitting a claim in the equitable claims pool (Ex. 1 ¶ 16), it does not restrict those who do not file claims in the pool or govern what happens after the receivership terminates. It also does not restrict claims against third parties to the Receivership Order like Mr. Hershey and Performance Holdings, Inc. As the District Court held (Ex. 15 at 6), the appellate court's immediate resolution of the

standing issue would prevent inconsistent rulings and duplicative litigation and liability for these parties.[3]

Third, the standing issue is case dispositive because, as more fully discussed below, it underlies each of the claims asserted by the Receiver against Appellants. If Appellants are required to wait until the proceedings are concluded to file their appeal and the appellate court determines the Receiver lacked standing to bring his claims, that decision will require a complete reversal, and would result in an enormous waste of judicial and party resources. *See Pandy,* 383 P.3d at 66 (statute of limitations issue was "controlling" because if it bars the Bank's complaint, then any disposition rendered by the district court would be vacated).

Triple Crown, 389 P.3d 888, is instructive. There, the court concluded that the question whether claims were properly sent to arbitration was "controlling" because "a decision that the order was incorrect would require a reversal of a final judgment." *Id.* at 893. The order therefore "could cause the needless expense and delay of litigating an entire case in a forum that had no power to decide it." *Id.* Like in *Triple Crown*, here too, if the case proceeds to judgment and the Court of

[3] This is not a merely theoretical concern. For example, the Receiver asserted allegations in the FAC concerning matters that were actively litigated by Mr. Dragul's creditors in the Denver District Court in the case captioned *GDA DU Student Housing A LLC v. Alan C. Fox*, Case No. 2019CV32374. (*See e.g.*, Ex. 2, FAC ¶¶ 67-71.)

Appeals ultimately determines that the Receiver had no standing to bring his claims, everything the District Court will have done in this case will be nullified, as all actions undertaken without standing necessarily lack subject matter jurisdiction and would consequently be void. *Cunningham v. BHP Petroleum Gr. Brit. PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005). Thus, the District Court held that resolution of this question "may very well be case dispositive", but even if not, it "will certainly narrow the issues going forward." (Ex. 15 at 7, 8.)

Finally, the District Court also held this case involves "extraordinary facts," primarily stemming from the Receiver's allegations that the Defendants used the GDA Entities as instrumentalities in their allegedly unlawful activity, potentially giving rise to claims that could be asserted on behalf of the GDA Entities. (Ex. 15 at 8.) In fact, the District Court raised this as a separate legal question—whether the Receiver may assert claims alleging injuries to the entities in receivership even if those entities participated in the wrongful actions—that the District Court believed appropriate for appellate review. (*Id*. at 6-7, 8). Appellants have not sought interlocutory review of this question, but would not object if the Court chooses to consider it. If the Court decides to hear this issue, Appellants request supplemental briefing to address it.

3. The Receiver's Standing Would Likely Establish a Final Disposition of the Case, But at a Minimum Will Promote a More Orderly Disposition

Criterion (1) from *Pandy* is satisfied when the order being appealed is potentially case dispositive. *Pandy*, 383 P.3d at 66 (certification for interlocutory appeal granted where statute of limitations issue was potentially case dispositive). However, even if an issue is not case dispositive, it is appropriate for immediate review if its early resolution would promote the "orderly disposition" of the case. *See Affiniti*, 461 P.3d at 612 (review of the attorney-client privilege issue was certified for interlocutory appeal because, while not resolving the entire litigation, it played a central role in the court's resolution of a key immunity issue).

While the factual question of which of the Receiver's claims are third-party creditor claims may be beyond the scope of the legal questions presented on appeal and more appropriate for remand, the fact that all or nearly all of the claims qualify bears on whether this issue is case dispositive. Here, it is case dispositive because the Receiver has either expressly brought each of his claims against Appellants on behalf of creditors of the Estate, or because the claims can only be brought by such third-party creditors as a legal matter.

First through third claims for relief: The Receiver expressly alleges he brings the first through third claims solely on behalf of Mr. Dragul's investors

and/or Special Purpose Entities ("SPEs"), all of which he described as "creditors of the Receivership Estate." (Ex. 2, FAC ¶¶ 315, 319–20, 325–26, 336, 338, 356, 361.) The Receiver conceded, as he must, that he brought the second and third claims solely on behalf of the GDA investors. (Ex. 5 at 14.)[4]

Fourth claim for relief: Civil theft can be asserted only by the injured party, which the FAC alleges were only the "GDA Entity investors." (Ex. 2, FAC ¶ 377.)

Fifth and Sixth Claims for Relief: Violations of COCCA and aiding and abetting can be asserted only by those injured by one or more predicate acts. C.R.S. § 18–17–106(7). Again, the FAC alleges that only Mr. Dragul's investors sustained such injury. (Ex. 2, FAC ¶¶ 379, 393.)

Seventh claim for relief: The Receiver alleges under the seventh claim for breach of fiduciary duty against Mr. Dragul that Mr. Dragul owed a fiduciary duty to "the GDA Entities and their member investors". (Ex. 2, FAC ¶ 409.) But he alleges no facts to demonstrate what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered. The only facts he articulates in the FAC are to allege a duty owed to investors and how investors

[4] Claims for negligence and negligent misrepresentation are premised on a duty of care that the Receiver claims the Defendants owed "to investors and prospective investors." (Ex. 2, FAC ¶¶ 357 & 360.) Therefore, the Receiver could not bring those claims on behalf of Dragul and the GDA Entities even if he wanted to do so.

were purportedly injured. (*Id.* ¶¶ 410, 412-415.) Thus, the only plausibly-pled fiduciary duty claim is brought on behalf of third-party investor-creditors, not the GDA Entities.

Eleventh and twelfth claims for relief: The Receiver fails to allege a basis for his purported standing to assert his fraudulent transfer and unjust enrichment claims, but neither of them can be asserted on behalf of the parties in receivership. The relief afforded by the Colorado Uniform Fraudulent Transfer Act ("CUFTA") is expressly available only to creditors of the Estate. C.R.S. § 38-8-108(1) (2021) ("In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in section 38-8-109, may obtain" relief); *see also Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008) (receiver lacked standing to assert fraudulent conveyance claim because he did not represent any creditor); *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277 (7th Cir. 1997) (receiver appointed for trader who allegedly defrauded investors lacked standing to sue the defendant because the trader had no possible claim and the receiver had no standing to act on investors' behalf); *see also 2 Clark on Receivers* § 364 (3d ed. 1959) (a receiver "acquires no right ... to the property fraudulently transferred for the reason that the transfer is valid against the debtor and cannot be set aside by the

receiver as the debtor's successor"). The same analysis applies to the unjust enrichment claim.

The Receiver's standing to sue on behalf of creditors is potentially case dispositive because none of the Receiver's claims against the Defendants can be asserted on behalf of Mr. Dragul or the GDA Entities—the only parties in receivership on whose behalf he may have standing to sue. Without standing, subject matter jurisdiction is lacking, rendering actions taken by the Receiver, as an officer of the Court, void. *Cunningham*, 427 F.3d at 1245.

Even if this Court or the District Court concludes that some of the claims can be asserted on behalf of Mr. Dragul or the GDA Entities, that determination likely would still eliminate most of the claims, significantly narrow the scope of the case, and make for a more manageable, focused, and streamlined litigation. Resolution of the standing issue would therefore at least promote the orderly disposition of the litigation, even if it does not dispose of it completely.

B. As the District Court Held, The Issue of Whether the Receiver Can Sue a Party Over Whom He or She Serves as Receiver is Appropriate for Immediate Review

1. Whether a Receiver May Sue a Party Over Whom He or She Serves as Receiver is an Unresolved Question of law

Neither the Receiver nor any of the Defendants below were able to find any Colorado appellate decision ruling on whether a receiver may sue a person or

entity over whom the receiver serves as receiver. The District Court also noted that "[t]here is no Colorado appellate opinion addressing the issue, let alone resolving it." (Ex. 16 at 2.)

2. Whether a Receiver May Sue a Party Over Whom He or She Serves as Receiver Involves a Controlling Issue of Law

The question of whether a receiver may sue a person or entity over whom the receiver serves as receiver is also a controlling issue of law because (1) it is a matter of widespread public interest, (2) addressing the question would avoid the risk of inconsistent results in different proceedings, and (3) the issue is case dispositive. *See Affiniti*, 461 P.3d at 612.

This issue is a matter of widespread public interest because, like the standing issue, it affects everyone who is or could be involved in or affected by a receivership. It will inform a party's decision whether to seek to have a receiver appointed, how the order appointing the receiver should be drafted, the receiver's powers once appointed, the decision whether a person or entity should stipulate to or object to being placed in receivership, and whether third-party creditors should support or object to appointment of a receiver. Since a receiver is appointed by the court and serves as a fiduciary of the court, *e.g*, *K-Partners III, Ltd. v. WLM Hosp. Corp*., 883 P.2d 604, 606 (Colo. App. 1994), perceptions of whether the receiver is overreaching also impact the public's view of the judiciary. The District Court

properly held that "[i]t 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." (Ex. 16 at 2.)

Resolving the question whether a receiver can sue a person or entity in that receivership will also avoid inconsistent outcomes, particularly when the receiver is attempting to assert third-party creditors' claims as the Receiver does here. Those same third-party creditors by definition have claims against the people and entities in the receivership. That is why the District Court held that appellate review of this issue "will avoid inconsistent outcomes, where individual investors might also assert claims directly against Mr. Dragul." (Ex. 16 at 2.) If the Receiver asserts the same or similar claims as he does here, the potential for inconsistent rulings is manifest.

Finally, resolving whether a receiver can sue a person or entity in the receivership is potentially dispositive of the Receiver's case against Mr. Dragul. If the Receiver cannot sue Mr. Dragul, "the case would be over with respect to Defendant Dragul." (Ex. 16 at 2.)

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3. Immediate Review of Whether a Receiver May Sue a Party Over Whom it Serves as Receiver Will Lead to Final Disposition of the Case Against Mr. Dragul

As addressed above, the first *Pandy* factor is satisfied here because the resolution of the issue whether the Receiver can sue Mr. Dragul is dispositive of the case as to Mr. Dragul. If the Receiver cannot sue Mr. Dragul, as a matter of law none of the claims against Mr. Dragul can proceed. Even if that left claims against the other Defendants, it would still streamline the case and enable a more orderly resolution of the litigation by eliminating the claims against the main defendant.

II. A Receiver Lacks Standing to Assert Claims of Third-Party Creditors of the Receivership Estate

The Court should determine, consistent with analogous cases and cases from other jurisdictions, that a receiver lacks standing to assert third-party creditors' claims.

A. A Receiver Stands in the Shoes of the Entity or Individual in Receivership

"The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). "Resolution of a standing issue presents two considerations: whether the complaining party has

alleged an actual injury from the challenged action; and whether the injury is to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions." *Sender v. Kidder Peabody*, 952 P.2d at 781.

> The 'injury-in-fact' requirement is dictated by the need to assure that an actual controversy exists so that the matter is a proper one for judicial resolution, for consistent with the separation of powers doctrine embodied in Article III of the Colorado Constitution, [c]ourts cannot, under the pretense of an actual case, assume powers vested in either the executive or legislative branches of government.

Conrad v. City and County of Denver, 656 P.2d 662, 668 (Colo. 1982) (internal quotations omitted).

"[G]enerally a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve." *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989). That does not extend to asserting third-party creditors' claims.[5] While no Colorado appellate case has determined whether a receiver has standing to assert such third parties' claims, federal and state courts in other jurisdictions have repeatedly held that a receiver lacks standing to sue on behalf of creditors of the receivership estate.

[5] If the Receiver had obtained valid assignments from the third-party creditors, this might be a different case. Here, none of the creditors assigned their claims to the Receiver, and it is not even clear they are aware the Receiver is asserting their claims.

The Sixth Circuit held that a receiver "stand[s] in the shoes of the entity in receivership" and therefore "lack[s] standing to bring suit unless the receivership entity could have brought the same action." *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009) (citations omitted). In *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003), the court explained "although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors." (citations omitted).

Other federal courts, including the Tenth Circuit, have held the same. As the Second Circuit put it,

> [T]he plaintiff in his capacity of receiver has no greater rights or powers than the corporation [in receivership] itself would have. A receiver may commence lawsuits, but stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted.

Eberhard v. Marcu, 530 F.3d 122, 132 (2d Cir. 2008) (citations omitted); *see also Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (equity receiver did not have standing to bring claims on behalf of investors); *Commodity Futures Trading Comm'n. v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1481 (10th Cir. 1983) (receiver can assert claims only for the corporate fund in receivership, and cannot seek "damages on the claims for the investors").

State courts in other jurisdictions have reached a similar conclusion. *See e.g., Forex Capital Markets, LLC v. Crawford*, No. 05-14-00341-CV, 2014 WL 7498051, at *3 (Tex. App. Dec. 31, 2014) ("As a general rule, a receiver may sue only for claims of the entities in receivership, and may not assert claims for injuries directly suffered by the investors."); *GTR Source, LLC v. FutureNet Grp., Inc.*, 62 Misc. 3d 794, 807–09, 89 N.Y.S.3d 528, 539–40 (N.Y. Sup. Ct. 2018) (same).

Though no Colorado appellate court has addressed the issue, authority from other jurisdictions uniformly holds that a receiver lacks standing to assert third-party creditors' claims.

B. The Receivership Order Cannot Confer Standing Where None Exists

In the District Court, the Receiver argued Section 13(s) of the Receivership Order (Ex. 1) gives him standing to sue on behalf of third-party creditors. However, an order appointing a receiver cannot bestow standing where none exists in law or equity. Courts have routinely rejected similar arguments by receivers, explaining that "the appointment of a receiver is inherently limited by the jurisdictional constraints." *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990); *see also Fleming*, 922 F.2d at 24–25 (although the district court empowered the receiver "to prevent irreparable loss, damage and injury to commodity customers and clients," the receiver lacked standing to sue for claims

belonging to investors); *Marwil v. Farah*, No. 1:03–CV–0482–DFH, 2003 WL 23095657, at *5–7 (S.D. Ind. Dec. 11, 2003) (receiver lacked standing to represent the investors notwithstanding the language of the receivership court order). An order appointing a receiver is insufficient to create standing because "the ability to confer substantive legal rights that may create standing [under] Article III is vested in [the legislature] and not the judiciary." *Id.* at 1421 n.6; *see also Liberte Capital Grp. v. Capwill*, 248 F. App'x 650, 657–59 (6th Cir. 2007) (receiver lacked standing despite receivership order's language purporting to authorize such claims); *Wimberly*, 570 P.2d at 538 (same considerations applicable to Article III standing also guide Colorado courts). If "a district court could confer individual creditors' standing on a receiver simply by ordering it so, such an exception would completely swallow the general rule that receivers may only sue on behalf of the entity they are appointed to represent, not on behalf of creditors . . . directly." *Liberte Capital,* 248 F. App'x at 664.

Nor does it matter that the Receivership Order was stipulated. Since standing is jurisdictional, *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004), it is not subject to waiver, *e.g.*, *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003); *National Labor Relations Board v. Somerville Constr. Co.*, 206 F.3d 752, 755 (7th Cir. 2000). "Even where the

parties agree that a plaintiff has Constitutional standing, courts must satisfy themselves that the jurisdictional requirement is met." *Native Am. Arts*, 253 F. Supp. at 1048. Since standing is an element of the court's subject matter jurisdiction, "no action of the parties can confer subject-matter jurisdiction upon a federal court [and] [t]hus, the consent of the parties is irrelevant . . . and principles of estoppel do not apply." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (internal citations omitted). For that reason, the District Court correctly held that "[t]o 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." (Ex. 15 at 4 (citing *Dept. of Trans. v. Auslaender*, 94 P.3d 1239, 1241 (Colo. App. 2004)).)

III. A Receiver May Not Sue a Party Over Whom the Receiver Serves as Receiver

A. As a Matter of Law, a Receiver May Not Sue a Person or Entity in the Receivership

Both in this proceeding, and in the District Court below, Mr. Dragul's name appears on both sides of the "v." That cannot happen as a matter of law. In *Sender v. Kidder Peabody*, 952 P.2d at 781—the case in which the Receiver here was also

the trustee-plaintiff—the court held that a bankruptcy trustee "stands in the shoes of the debtor and may properly assert claims belonging to the debtor." A receiver also stands in the shoes of the people and entities in receivership, and may properly assert their claims. *E.g.*, *Good Shepherd*, 789 P.2d at 425. Since Mr. Dragul is in the receivership, the Receiver acts on Mr. Dragul's behalf. Thus, the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. Mr. Dragul cannot sue himself. *See, e.g., BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013) (noting a party may not sue itself even if the party is serving in different legal capacities) (collecting cases).

Indeed, the court in *Sender v. Kidder Peabody* went further and held that because the trustee stands in the shoes of the debtor, the trustee may not even sue third parties with whom the debtor coordinated. There, the court considered whether the trustee could sue third parties who allegedly participated in a Ponzi scheme with James Donahue, who was the principal of the debtors in bankruptcy (Donahue was not personally a debtor in the bankruptcy). 952 P.2d at 780-81. The trustee, Harvey Sender (the Receiver here), alleged losses by the debtors (i.e., the parties for whom he was trustee) for which he might otherwise have standing. *Id*. at 781. But the court held that he lacked standing under the doctrine of *in pari delicto*. *Id*. at 781-82. Specifically, the court noted that while the losses were

suffered by the debtors, they were caused by a scheme orchestrated by the debtors' principal, Donahue, and the defendants. *Id*. at 781. Citing authority, the court held that "a bankruptcy trustee does not have standing to pursue claims against a third party for injury to the debtor when the debtor has joined with the third party in defrauding its creditors." *Id*. at 782 (citing cases). This flows from "the principle . . . that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed *in pari delicto*, and the law will aid neither, but rather, will leave them where it finds them." *Id*. (citing cases). Thus, the court held that because the debtors "obtained the money they now seek to recover through fraudulent means, we conclude that Sender, standing in their shoes, cannot show injury to a legally protected right[,]" and the court therefore affirmed summary judgment against Sender for lack of standing. *Id*.

If a trustee, and by extension a receiver, cannot sue *third parties* who participated in the debtor's/person in receivership's alleged scheme, it is untenable that a receiver could sue the actual person *in* receivership, who the receiver asserts not only participated in the scheme but was the central figure. Such a person in receivership would have benefited from—not been injured by—this alleged wrongdoing just like a third-party participant. Nor can the entities in receivership

assert claims against an individual also in receivership, as under the holding in *Sender v. Kidder Peabody*, they were also part of the alleged scheme and the receiver lacks standing to assert their claims against the individual in receivership. *Id*. at 782.

There are also important public policy reasons why a receiver cannot sue a person or entity over whom he or she serves as receiver. While the answer to the question of law before the Court does not turn on the particular facts of this Receivership, those facts do illustrate the policy considerations.

First, in a receivership the receiver virtually always takes over the assets of the persons or entities in receivership—that is precisely what happened here. Those assets are intended to pay creditors' claims. If the receiver may then sue the same people or entities in receivership whose assets the receiver seized, the receiver would receive an unlawful double recovery if he or she prevailed. The receiver already seized the very assets that would otherwise satisfy a judgment on the receiver's claims for damages. A double-recovery would be barred as a matter of law. *Andrews v. Picard*, 199 P.3d 6, 11 (Colo. App. 2007).

Typically, receivers also seize all information, including attorney-client privileged information, held by the persons or entities in receivership. The Receiver did so here. If a receiver may then sue the person in receivership, the

receiver could use that individual's privileged information against that person. Again, that appears to be what happened here: the Receiver sued Mr. Dragul *and* Mr. Dragul's attorney, alleging a concerted scheme.

For all these reasons, the Court should rule that a receiver may not sue a person or entity over whom the receiver serves as receiver.

LIST OF SUPPORTING DOCUMENTS

Exhibit 1: Order: (Proposed) Stipulated Order Appointing Receiver also filed on behalf of Defendants Gary Dragul and GDA Real Estate Service, and GDA Real Estate Management LLC, entered August 30, 2018

Exhibit 2: The Receiver's First Amended Complaint, filed June 1, 2020

Exhibit 3: Defendant Gary Dragul's Motion to Dismiss First Amended Complaint, filed July 6, 2020

Exhibit 4: Defendants Marlin S. Hershey's and Performance Holdings, Inc.'s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5), filed July 6, 2020

Exhibit 5: Receiver's Omnibus Response to Defendants' Motions to Dismiss, filed August 17, 2020

Exhibit 6: Defendant Gary Dragul's Reply in Support of Motion to Dismiss the First Amended Complaint, filed September 8, 2020

Exhibit 7: Defendants Marlin S. Hershey's and Performance Holdings, Inc.'s Reply in Support of Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5), filed September 8, 2020

Exhibit 8: Order Denying Gary J. Dragul's Motion to Dismiss the First Amended Complaint, entered October 28, 2020

Exhibit 9: Order Denying Marlin S. Hershey's and Performance Holdings, Inc.'s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5), entered October 28, 2020

Exhibit 10: 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

Exhibit 11: 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

Exhibit 12: Receiver's Response to Defendants' Motions for Certification of Interlocutory Appeal Under C.A.R. 4.2(A) Pursuant to C.R.S. §13-4-102.1(1), filed December 17, 2020

Exhibit 13: Defendants Marlin S. Hershey's, Performance Holdings, Inc.'s, and Gary Dragul's Reply in Support of Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) Pursuant to C.R.S. § 13-4-102.1(1), filed December 31, 2020

Exhibit 14: Defendant Gary Dragul's Reply In Support of Motion for Certification of Interlocutory Appeal of Unique Issue Under C.A.R. 4.2(a) Pursuant to C.R.S. § 13-4-102.1(1), filed December 31, 2020

Exhibit 15: 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), entered March 18, 2021

Exhibit 16: 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), entered March 18, 2021

CONCLUSION

The questions of law presented here deal with the constitutional and legal limits of a receiver's power. While receivers serve an important role, the position can sometimes be abused and receivers can overreach. Receiverships often return very little money to creditors. Sometimes that is in spite of, but often it is because of, the receiver's overreach. Receivers and creditors alike will benefit from clarity about a receiver's powers. So will the individuals and entities in receivership, district courts overseeing receiverships, and anyone else who is or may be involved in or affected by a receivership. The Court should grant the Petition, hear this appeal, and rule that a receiver may not assert third-party creditors' claims, and may not sue an individual or entity over whom the receiver serves as receiver.

Respectfully submitted,

JONES & KELLER, P.C.

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Christopher S. Mills
Paul L. Vorndran
Attorneys for Defendant-Appellant Gary J. Dragul

GOODREID & GRANT, LLC

s/ Thomas E. Goodreid
Thomas E. Goodreid
Paul M. Grant
Attorneys for Defendants-Appellants Marlin S. Hershey and Performance Holdings, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2021, a true and correct copy of this **GARY DRAGUL'S, MARLIN HERSHEY'S, AND PERFORMANCE HOLDINGS, INC.'S PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2** was filed and served via Colorado Courts E-filing upon the counsel of record for all parties, and to the District Court:

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EXHIBIT A

s/ Renae K. Mesch

Renae K. Mesch

EXHIBIT A

EXHIBIT INDEX TO PETITION

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DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	DATE FILED: August 30, 2018 8:27 AM CASE NUMBER: 2018CV33011
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF v. **Defendant(s)** GARY DRAGUL et al.	⚠ **COURT USE ONLY** ⚠ Case Number: 2018CV33011 Division: 424 Courtroom:

Order: (Proposed) Stipulated Order Appointing Receiver also filed on behalf of Defendants Gary Dragul and GDA Real Estate Service, and GDA Real Estate Management LLC)

The motion/proposed order attached hereto: SO ORDERED.

Issue Date: 8/30/2018

MARTIN FOSTER EGELHOFF
District Court Judge

EXHIBIT A

DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202	
GERALD ROME, Securities Commissioner for the State of Colorado, Plaintiff, v. GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC Defendants.	▲ COURT USE ONLY ▲
BY THE COURT	Case No.: 2018 CV 33011 Courtroom: 424

STIPULATED ORDER APPOINTING RECEIVER

THIS MATTER having come before this Court on the Stipulated Motion to Appoint Receiver (the "Motion") filed by the Plaintiff Gerald Rome, Securities Commissioner for the State of Colorado and Defendants Gary Dragul ("Dragul"), GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, Inc. ("GDAREM"), and the Court, being otherwise fully advised in the premises,

HEREBY FINDS:

1. The Court has jurisdiction and venue is proper pursuant to C.R.C.P. 98(a).

2. Dragul is an individual and a resident of Colorado, and the manager of

GDARES and GDAREM, among other businesses.

3. GDARES is a Colorado limited liability company with its principal place of business at 5690 DTC Blvd., Suite 515, Greenwood Village, Colorado 80111.

4. GDAREM is a Colorado corporation with its principal place of business at 5690 DTC Blvd., Suite 515, Greenwood Village, Colorado 80111.

5. The Parties have stipulated to the appointment of a Receiver without bond or other security for Dragul, GDARES, and GDAREM, as well as for their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses as set forth herein.

6. The appointment of a receiver is reasonable and necessary for the protection of the assets and the rights of the parties in this case. Based on the standards set forth in C.R.C.P. 66 and case law thereunder, the Parties have stipulated that the Commissioner is entitled to entry of this Order.

7. Nothing in this stipulated Order shall be deemed an admission by Dragul to any allegations or as a waiver of any defenses thereto or limit Dragul's 4th, 5th, or 6th Amendment rights or other Constitutional and statutory protections and privileges afforded to any criminal defendant, or prevent him from invoking such rights in his personal capacity. Nothing in this Order operates as a waiver or an abrogation of the attorney-client privilege held by Dragul in his personal capacity.

8. Harvey Sender of Sender & Smiley LLC, has been determined to be suitable to serve as Receiver for Dragul (as such term is defined below in this

Order), GDARES and GDAREM, as set forth in this Order. Mr. Sender's business address is 600 17th Street, Suite 2800, Denver, Colorado 80202.

IT IS THEREFORE ORDERED THAT:

9. Harvey Sender ("the Receiver") is hereby appointed as Receiver for Dragul (limited to the definition of the "Receivership Property" or "Receivership Estate" as defined herein), GDARES, GDAREM, and all of their assets, including, but not limited to, all real and personal property, including tangible and intangible assets, their interests in any subsidiaries or related companies, management and control rights, claims, and causes of action, wherever located, including without limitation the "LLC Entities" identified in the Commissioner's Motion and Complaint for Injunctive and Other Relief, or assets (including those of Dragul) of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the Complaint, or derived indirectly or indirectly from investor funds (the "Receivership Property," and altogether this "Receivership Estate"). Except that the personal residence of Dragul, located at 10 Cherry Vale Drive, Englewood, Colorado 80113, shall not be considered "Receivership Property" or part of the "Receivership Estate," unless the Receiver determines that an improvement to or increase in equity in such residence is directly related to the proceeds from the sale of the securities or matters referenced in the Complaint, in which case the improvements or equity shall be considered "Receivership Property" or part of the "Receivership Estate." Consistent with

Colorado's dissolution statutes and applicable law, and as set forth in greater detail below, the Receiver may, in the exercise of his reasonable judgment, investigate any claims and causes of action which may be pursued for the benefit of Dragul, GDARES, GDAREM, their creditors, members, and equity holders, and make recommendations to interested parties and this Court regarding the prosecution of any such claims and causes of action; establish a process for the assertion of claims against the Receivership Estate; make recommendations to this Court for the allowance and payment of such claims; and investigate and make recommendations to this Court for the ongoing operation, sale or distribution of any remaining Receivership Property, or the proceeds thereof, pursuant to the terms hereof.

10. Dragul, GDARES, and GDAREM, and all persons in active participation them, including without limitation, their officers and directors, partners, managers, employees, agents, representatives, attorneys, accountants, banks, contractors, subcontractors, and all who claim under them (collectively, the "Representatives"), are hereby ordered to deliver immediately to the Receiver or his agents all of the Receivership Property and to fully cooperate with the Receiver including, but not limited to, providing the Receiver all reasonably requested documents, records, bank accounts, trust accounts, deposit accounts, savings accounts, money market accounts, and all other demand deposit accounts, inventory, supplies, contracts, accounts receivable, computer databases, sales and marketing materials; together with stock certificates or other indicia of

ownership of any subsidiaries or related companies, and any and all reasonably requested documents, records, bank accounts, trust accounts, deposit accounts, savings accounts, money market accounts, and all other demand deposit accounts, inventory, supplies, contracts, accounts receivable, computer databases, sales and marketing materials, related to the operation of any subsidiaries or related companies. Dragul, GDARES, and GDAREM and their Representatives, when necessary or when requested (subject to Dragul's Constitutional protections, including the Fifth Amendment), shall explain the operation, maintenance and management of the Receivership Property, including any subsidiaries or related entities or companies, to the Receiver or his agents, without compensation therefor. Any claims for nonpayment for services shall not be used as a defense to turning over Receivership Property. All privileges in connection with professional representation of GDARES and GDAREM shall accrue to the sole benefit of the Receiver and the Receivership Estate and may only be waived by the Receiver, except that Dragul maintains all such privileges in his personal capacity. The Receiver may request supplemental authority from this Court upon proper motion, if necessary, to obtain the cooperation of any Representatives or any other foregoing persons acting on behalf of or for Dragul, GDARES and GDAREM, to comply fully and completely with this Order.

11. Any creditors of Dragul, GDARES or GDAREM that are in the possession of, or have taken any action to seize any books, records, or assets of the Receivership Estate (hereinafter called "Creditors") and all persons in active

participation with such Creditors, including without limitation, such Creditors' officers, managers, members, employees, agents, representatives, attorneys, accountants, banks, contractors, subcontractors, and all who claim under them (hereafter called "Creditors' Representatives") are hereby ordered to deliver immediately to the Receiver all of the Receivership Property in such Creditors' or Creditors' Representatives' possession, and to fully cooperate with the Receiver in connection with such turnover. Any claims against Dragul, GDARES or GDAREM shall not be used as a defense to turning over as set forth in this paragraph. The Receiver may request supplemental authority from this Court upon proper motion, if necessary, to obtain the cooperation of Creditors or Creditors' Representatives or any other foregoing persons acting on behalf of or for the Creditors to comply fully and completely with this Order.

12. If the Receiver determines, after reasonable inquiry that a person or entity is in violation of the turnover provisions set forth in Paragraphs 9 and 10 of this Order, the Receiver is instructed to give written notice thereof to the person or entity violating such provisions, with a copy of this Order attached, demanding turnover of such Receivership Property. If the person or entity in possession fails or refuses to turn over the Receivership Property after receiving notice, the Receiver shall file a Request for an Order to Show Cause with this Court.

13. The Receiver shall have 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 which the Receiver may execute without further order of this Court, except as expressly provided herein:

(a) To take from Dragul's, GDARES' and GDAREM's Representatives, and all persons acting in participation with Dragul, GDARES and GDAREM, and from Creditors and Creditors' Representatives, immediate possession and control of all of the assets of Dragul, GDARES and GDAREM, including the Receivership Property, to the exclusion of Dragul, GDARES and GDAREM, and their Representatives or all persons acting in participation with Dragul, GDARES and GDAREM, and Creditors and Creditors' Representatives;

(b) To exercise such control over all subsidiaries and related companies owned or managed by Dragul, GDARES and GDAREM, consistent with the governance documents or operating agreements applicable to the subsidiaries and related companies, including to exercise all rights of Dragul, GDARES and GDAREM to elect new officers, directors, or management of the subsidiaries and related companies, in their respective capacities and not as an assignee;

(c) To take charge of the subject Receivership Property, regardless of where such property is located, including, but not limited to, bank accounts, cash, checks, drafts, notes, security deposits, bonds, books, records, contracts, claims, leases, files, furniture, certificates, licenses, fixtures and equipment, property located in any real property either owned or leased by Dragul, GDARES and GDAREM and any personal property located in storage facilities;

(d) As appropriate, to take possession of offices of Dragul, GDARES

and GDAREM and to change any and all locks on such offices and to limit access to such offices to the Receiver and his agents, subject to any privileges maintained by Dragul in his personal capacity;

(e) To collect in a timely fashion all accounts receivable and other obligations due to Dragul, GDARES and GDAREM, including, as necessary to negotiate and deposit checks made payable to them into accounts maintained by the Receiver and as necessary to review mail directed to Dragul, GDARES and GDAREM and their Representatives in order to collect incoming accounts receivable and other obligations due and owing to Dragul, GDARES and GDAREM;

(f) To contract for and obtain such services as utilities, supplies, equipment and goods as is reasonably necessary to manage, preserve, and protect the Receivership Property as the Receiver may reasonably deem necessary; however, no contract shall extend beyond the termination of the Receivership without the permission of the Court;

(g) To obtain, review and analyze Dragul, GDARES and GDAREM books and records relating to the Receivership Property, including without limitation accounting records, banking records, tax records, and any other books or documents necessary to perform the duties of the Receiver;

(h) To pay, at the Receiver's discretion, any obligations incurred by Dragul, GDARES and GDAREM prior to the appointment of the Receiver that are deemed by the Receiver to be necessary or advisable for the preservation or protection of the Receivership Property;

(i) To borrow from third parties on such reasonable terms as may be acceptable to the Receiver, such funds that may be required for the fulfillment of the Receiver's obligations hereunder, and to meet the needs of the Receivership Estate in excess of the income from the Receivership Estate. The Receiver may issue Receiver's Certificates secured by all assets of the Receivership Estate, including, but not limited to, all claims on insurance policies, surety bonds, and similar assets of the Receivership Estate, in exchange for funds advanced during the term of this receivership, and such Receiver Certificates shall be a first and prior lien and preference claim upon the Receivership Property or a portion of it at the Receiver's election;

(j) To open and maintain accounts at a financial institution insured by the federal government in the name of the Receiver and to deposit all sums received by the Receiver into such account and to make such withdrawals as are necessary to pay the reasonable costs and expenses incurred by the Receiver;

(k) To exercise all rights of an owner incidental to the ownership of the Receivership Property;

(l) To hire and pay general counsel, accounting, and other professionals as may be reasonably necessary to the proper discharge of the Receiver's duties, and to hire, pay and discharge the personnel necessary to fulfill the obligations of the Receiver hereunder, including the retention of companies affiliated with the Receiver, or other third parties to assist the Receiver in the performance of its duties hereunder, all within the Receiver's discretion;

(m) In the Receiver's discretion as appropriate, to hire and pay employees with the necessary skills and experience to operate GDARES and GDAREM efficiently and with least amount of cost or expense, and to preserve the assets of GDARES and GDAREM and the Receivership Estate.

(n) After consultation with the Commissioner and agreement on the amount and funding of a budget related thereto, to institute such legal actions as the Receiver deems reasonably necessary, including actions necessary to enforce this Order to protect the Receivership Property, and to prosecute causes of action of Dragul, GDARES and GDAREM against third parties in this or any other jurisdictions, including foreign countries;

(o) After consultation with the Commissioner and agreement on the amount and funding of a budget related to anticipated out of pocket expenses related thereto, to retain special counsel, and other professionals as needed, on a contingency fee basis containing commercially reasonable terms, as determined by the Receiver in the exercise of his reasonable business judgment, 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, including claims premised on fraudulent transfer or similar theories, in this or any other jurisdictions, including foreign countries;

(p) To notify any and all insurers under insurance policies and issuers of surety bonds affecting the Receivership Property of the pendency of these proceedings, and that any proceeds paid under any such insurance policy or surety

bond shall be paid to the Receiver to be administered for the benefit of all creditors of Dragul, GDARES and GDAREM;

(q) To pay, at the Receiver's discretion, any obligations incurred by Dragul, GDARES and GDAREM prior to the appointment of the Receiver that are deemed by the Receiver to be necessary or advisable for the preservation or protection of the Receivership Property;

(r) To notify and make demands on any insurers under insurance policies and issuers of any such policies or surety bonds affecting Receivership Property for the turnover and payment of proceeds to the Receiver for the benefit of Creditors, and as necessary, and after consultation with Plaintiffs and agreement on the amount and funding of a budget related thereto, commence litigation against such insurers and/or sureties in order to recover the proceeds of such insurance policies and surety bonds for the benefit of Dragul, GDARES and GDAREM and their creditors; and further provided that, in connection with any such claims or causes of action, the Receiver shall not be deemed to be asserting claims of Dragul, GDARES and GDAREM pursuant to any "insured vs. insured" exclusions that may be set forth in such insurance policies or surety bonds, but rather shall, in accordance with subparagraph (p) below, be deemed to be prosecuting claims of creditors of Dragul, GDARES and GDAREM in connection therewith;

(s) To prosecute claims and causes of actions held by Creditors of Dragul, GDARES and GDAREM, and any subsidiary entities for the benefit of

Creditors, in order to assure the equal treatment of all similarly situated Creditors;

(t) In the Receiver's discretion as appropriate, to consider the potential sale of assets of Dragul, GARDES, and GARDEM to a third-party or to sell or otherwise dispose of any personal property of the Receivership Estate, provided that Court approval shall not be required of any sale or disposition of any property being sold for a sales price of less than $10,000;

(u) To establish a procedure for the assertion of claims against Dragul, GDARES and GDAREM or the Receivership Property, for the resolution of any disputes regarding such claims, and for the distribution of the proceeds of the Receivership Property;

(v) To issue subpoenas, institute, prosecute, defend, compromise, or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as may in his discretion be advisable or proper for the protection, preservation and maintenance of the Receivership Assets or proceeds therefrom;

(w) To do such other and further lawful acts as the Receiver reasonably deems necessary for the effective recovery of the Receivership Property, and to perform such other functions and duties as may from time to time be required and authorized by this Court, by the laws of the State of Colorado, or the laws of the United States; and

(x) To do any and all acts necessary, convenient or incidental to the foregoing provisions of this Order and this equity receivership.

14. The Receiver is further directed to review the books and records of Dragul, GDARES and GDAREM, to account for receipts and disbursements of their funds, and to provide a report and accounting of their operations, for a period of time determined by the Receiver to be reasonable under the circumstances, to this Court and to the Commissioner, and any parties that have filed an entry of appearance herein. An initial report shall be filed with the Court within ninety (90) days of entry of this Order. In such report, the Receiver shall identify any claims and causes of action of Dragul, GDARES and GDAREM, identified as of the date of such report, including under insurance policies, on surety bonds, against any of their representatives or third parties, or arising under the Uniform Fraudulent Transfer Act, or any similar statute; and the Receiver's recommendations related thereto. The Receiver shall be authorized to act on his recommendations upon agreement with the Commissioner regarding budgets related to the prosecution thereof, and funding of such litigation, as set forth in this Order.

15. To the extent they have not already done so, Dragul, GDARES and GDAREM and their representatives, Creditors, and Creditors' Representatives, and their agents, are ordered to deliver over immediately to the Receiver, or his agents, all Receivership Property, including, but not limited to, unpaid bills, bank accounts, cash, checks, drafts, notes, security deposits, books, records, contracts, claims, leases, deeds, files, furniture, certificates, licenses, fixtures, escrow, sales contracts, equipment, and stock certificates or other evidence of ownership related to the Subsidiaries, relating to the Receivership Property and shall continue to

deliver immediately to the Receiver any such property received at any time in the future.

16. Any parties holding claims against Dragul, GDARES and GDAREM or the Receivership Estate shall not be entitled to participate as creditors in the distribution of recoveries from the Receiver's administration of the Receivership Estate and collection and liquidation of the assets thereof, unless such parties: (I) agree not to file or prosecute independent claims such parties may have (a) on insurance policies and surety bonds issued in connection with Dragul, GDARES and GDAREM operations, or (b) against Dragul, GDARES and GDAREM or any of their Representatives, and (II) promptly dismiss any lawsuits currently pending in connection therewith.

17. If necessary, the Receiver may request of this Court letters rogatory or commissions or supplemental orders as necessary to require out-of-state directors, officers, employees, agents, representatives, managers, attorneys, accountants, banks, contractors, or any other person acting in t participation with Dragul, GDARES and GDAREM and their Representatives, through the appropriate court of appropriate jurisdiction, to comply with any of the Orders of this Court.

18. The Receiver shall be compensated for his services at the rate of $400 per hour, together with reimbursement for all reasonable costs and expenses incurred in connection with his duties, which compensation and reimbursement shall be paid from the assets of the Receivership Estate, proceeds of the disposition of Receivership Property, or the proceeds of loans secured by the Receiver.

19. Except as may be expressly authorized by the Court, Dragul, GDARES and GDAREM and all persons in active participation them, including without limitation, their officers and directors, partners, managers, employees, agents, representatives, attorneys, accountants, banks, contractors, subcontractors, and all who claim under them, are enjoined from:

(a) Collecting any revenues from the Receivership Property, or withdrawing funds from any bank or other depository account relating to the Receivership Property;

(b) Binding, or purporting to bind, Dragul, GDARES and GDAREM or the Receivership Estate, to any contract or other obligation;

(c) Holding themselves out as, or acting or attempting to take any and all actions of any kind or nature as Representatives of Dragul, GDARES and GDAREM, or subsidiary entities they own or control, or in any other purported capacity, except with the permission of the Receiver or by further order of this Court; and

(d) Otherwise interfering with the operation of the Receivership Property, or the Receiver's discharge of his duties hereunder.

20. Upon receipt of a copy of this Order, or upon actual knowledge of the entry of this Order, any other person or business entity shall also be bound by this Order.

21. Should the Receiver determine that tax returns were not filed for periods prior to the entry of this Order for which tax returns were required of

Dragul, GDARES and GDAREM, as funds are available in the Receivership Estate, the Receiver shall use reasonable efforts to have prepared and filed tax returns for any missing periods prior to the entry of this Order. To the extent it is determined that any outstanding tax obligations are due to the Internal Revenue Service, the Colorado Department of Revenue, or any other taxing authorities for any period of time prior to the entry of this Order, such taxes shall be paid, as funds are available in the Receivership Estate. The Receiver shall not be considered a responsible person, or otherwise have any personal liability, for any unpaid tax obligations of Dragul, GDARES and GDAREM (including for any trust fund taxes, such as payroll or sales tax) withheld but not paid to the proper taxing authority for any period prior to the entry of this Order. The Receiver shall file tax returns for periods commencing on the date of the entry of this Order through completion of the dissolution of Dragul, GDARES and GDAREM and discharge of the Receiver, as required by applicable federal, state, or local law.

22. The Receiver is directed and empowered to apply revenues, incomes and sales proceeds collected by the Receiver:

(a) First, to payment of costs and expenses of the Receivership Estate, and including the costs and expenses of preserving and liquidating the Receivership Property, taxes incurred from the appointment of the Receiver through the conclusion of the Receivership Proceeding and discharge of the Receiver, and to compensation due the Receiver and any employees, consultants, or professionals retained by the Receiver or employed by the Receiver to operate

GDARES or GDAREM;

(b) Second, to the payment of any outstanding Receiver's Certificates;

(c) Third, to creditors holding obligations secured by the Receivership Property, in the order of their priority of record;

(d) Fourth, to the payment of any unsecured tax obligations determined to be due for periods prior to the entry of this Order, pursuant to the tax filing obligations imposed on the Receiver;

(e) Fifth, to the payment of unsecured creditors determined to hold legitimate claims against Dragul, GDARES and GDAREM pursuant to the claims administration procedure adopted by the Receiver, in their legal order of priority; and

(f) Sixth, to the preferred and common partners, members, or other equity interest holders of Dragul, GDARES and GDAREM, as their rights are defined in their governing documents, with the exception of any rights or interests held or owned by or for the benefit of Dragul, GDARES or GDAREM, or any insiders or related parties, with all such rights or interests to be determined by the Court.

23. The debts or liabilities incurred by the Receiver in the course of his operation and management of the Receivership Property, whether in the Receiver's name or in the name of the Receivership Property, shall be the debts and

obligations of the Receivership Estate only, and not of the Receiver in a personal capacity.

24. The Receiver shall enjoy and have the judicial immunity usually applicable to receivers in law and equity. All who are acting, or have acted, on behalf of the Receiver at the request of the Receiver are protected and privileged with the same judicial immunity as the Receiver has under this Order.

25. Nothing herein contained shall be construed as interfering with or invalidating any lawful lien or claim by any person or entity.

26. It is further Ordered that all actions in equity or at law against the Receiver, Dragul, GDARES and GDAREM, or the Receivership Estate are hereby enjoined (and any actions already pending are hereby stayed), pending further action by this Court. The Receiver is instructed to file a request for an Order to Show Cause if any business, entity, or person commences or continues the prosecution of any action in any other court seeking relief in equity or at law against the Receiver, Dragul, GDARES and GDAREM or the Receivership Estate without first seeking relief from this stay of proceedings.

27. The Receiver shall continue in possession of the Receivership Property until the completion of the disposition of this litigation which may anticipate the wind-up of the affairs of Dragul, GDARES and GDAREM.

28. Dragul, GDARES and GDAREM, and their Representatives, or anyone else in possession of records related to the Receivership Property, shall respond in a timely fashion to requests and inquiries from the Receiver concerning

such records, record keeping protocols, filing systems, information sources, algorithms and processes used to store, compile, organize, or manipulate data, and similar matters. With respect to any information or records stored in computer-readable for or located on computers Dragul, GDARES and GDAREM, and their Representatives, the person in possession of such information or records shall provide the Receiver full access to all media on which such records are located and all computers and the necessary application, system, and other software necessary to review, understand, print, and otherwise deal with such computerized records and all passwords and security codes necessary to access such computerized records, regardless of whether such records are separate or commingled with other information, except that information subject to the attorney-client privilege held by Dragul in his personal capacity shall remain privileged. Any such claimed privileged information, or information that may reasonably be considered to be privileged information, obtained by Receiver or commingled with other information shall be disgorged by the Receiver and notice given to Dragul regarding the privileged information and its disposition by the Receiver. In the event that the Receiver questions or disputes that any such information is privileged, the dispute shall be submitted to the Court, together with the disputed information for in camera review.

29. The Receiver may at any time, on proper and sufficient notice to all parties who have appeared in this action, apply to this Court for further

instructions whenever such instructions shall be deemed to be necessary to enable the Receiver to perform the duties of his office properly.

30. Notwithstanding anything to the contrary contained in this Order, the Receiver shall not take any action with regard to ownership, operation, control, storage, generation, or disposal of (a) any substance deemed a "hazardous substance", "pollutant," "contaminant", or similar substance under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675, the Conservation and Recovery Act of 1976, the Solid Waste Amendments of 1984, the Superfund Amendments and Reauthorization Act of 1986, and any other amendments; or (b) any other chemical, toxin, pollutant or substance defined as hazardous or dangerous to human health under any other federal, state or local law, regulation, rule or ordinance, including, without limitation thereto, petroleum, crude oil, or any fraction thereof (all collectively referred to herein as "Hazardous Substances"), without first applying for an obtaining an Order of this Court specifically setting forth the action or actions proposed to be taken and to be taken by the Receiver. Without first applying for and obtaining such an Order of this Court, the Receiver shall have no ownership, control, authority or power (neither shall receiver have any obligation to exercise ownership, control, authorize or power) over the operation, storage, generation or disposal of any Hazardous Substance. All decisions relating to the ownership, operation, control, storage, generation and disposal of any Hazardous Substances shall be resolved by this Court.

31. The Receiver shall take appropriate action as necessary with respect to the January 20, 2015 “CDPHE Stipulation and Order," as defined and with background provided in the Motion Appointing Receiver.

32. Pursuant to C.R.C.P. 66(d)(3), the Receiver shall provide written notice of this action and entry of this Order to any persons in possession of Receivership Property or otherwise affected by this Order, including all known Creditors of Dragul, GDARES and GDAREM, subsidiaries and any their respective Representatives.

33. After the initial report required pursuant to this Order, the Receiver shall make periodic reports of the condition of the Receivership Estate on intervals to be agreed to by the Receiver and the Commissioner as is reasonably necessary to provide timely reporting of the operations of the Receivership Estate to all interested parties, without imposing undue burden and expense on the Receivership Estate. The Receiver shall not be required to, but as reasonably necessary, may follow generally accepted accounting principles or use auditors or accountants in the preparation of his reports to the Court.

34. Court approval of any motion filed by the Receiver shall be given as a matter of course, unless any party objects to the request for Court approval within ten (10) days after service by the Receiver or written notice of such request. Service of motions by facsimile and electronic transmission is acceptable.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this action for all purposes. The Receiver is hereby authorized, empowered and

directed to apply to this Court, with notice to the Commissioner for issuance of such other Orders as may be necessary and appropriate in order to carry out the mandate of this Court.

IT IS FURTHER ORDERED that this Order shall be effective immediately and will remain in effect until terminated or modified by further Order of this Court.

DATED this _____ day of August, 2018.

BY THE COURT:

_____
MARTIN F. EGELHOFF
Denver District Court Judge

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: June 1, 2020 5:11 PM FILING ID: B5F0907F4E9FF CASE NUMBER: 2020CV30255
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 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1900 Denver, Colorado 80202 Phone Number: (303) 534-4499 pvellone@allen-vellone.com mwolf@allen-vellone.com rsternlieb@allen-vellone.com	Case No: 2020CV30255 Division/Courtroom: 414

FIRST AMENDED COMPLAINT

EXHIBIT A

TABLE OF CONTENTS

Plaintiff, Harvey Sender, solely in his capacity as Receiver for the "Estate" described below (the "**Receiver**"), brings the following First Amended Complaint (the "**Amended Complaint**"):

I. INTRODUCTION

1. This case arises from a fraudulent commercial real estate scheme orchestrated by Gary Dragul in concert with Marlin Hershey, Alan Fox, Susan Markusch, and Benjamin Kahn, in which investors lost millions of dollars. Dragul, in concert with the other defendants solicited more than $52 million from hundreds of investors purportedly to purchase ownership interests in numerous single purpose entities ("**SPEs**").

2. Dragul and the other Defendants lured investors into investing millions under false and misleading pretenses. Adopting strategies he learned from his mentor and former business partner, Alan Fox, Dragul stole millions from investors who, in some instances, invested their entire savings to support his extravagant lifestyle.

3. Dragul, who has been indicted on fourteen counts of securities fraud, is the defendant in a pending civil enforcement action brought by the Securities Commissioner for the State of Colorado, and he consented to the appointment of the Receiver in that action.

4. Dragul was able to carry on this fraudulent scheme for more than 20 years as a direct result of the participation, assistance, and efforts of the other

Defendants in this action. Each defendant played a distinct and important role in carrying out Dragul's scheme.

5. Hershey – who is currently embroiled in civil litigation brought against him, his partner, and their various entities, by the Securities Exchange Commission (the "**SEC**"), for violating federal securities laws – solicited individual investors for Dragul by distributing solicitation materials containing material misrepresentations, and received substantial illegal and undisclosed commissions from each investment made in Dragul's fraudulent scheme originated by Hershey .

6. Alan Fox, Dragul's mentor and former business partner, has been sued by numerous investors in California for engaging in the same type of fraudulent conduct for which Dragul has been indicted. Fox prepared and distributed to Dragul's defrauded investors materially false and misleading solicitation materials for investments in the ACF Property Management, Inc. ("ACF") portfolio to solicit investments therein, in furtherance of Dragul's fraudulent scheme. Like Hershey, Fox and his company, ACF, received undisclosed and illegal commissions. Fox and Dragul also transferred investor properties between the two of them and improperly inflated transfer prices to obtain undisclosed and fraudulent commissions.

7. Markusch, Dragul's loyal and most trusted employee, effected the illegal and undisclosed comingling of millions of investor dollars. In addition to the handsome salary Dragul paid her, Markusch profited from undisclosed and illegal

real estate commissions through two of her wholly-owned companies, Olson Real Estate Services, LLC ("Olson") and Juniper Consulting Group, LLC ("Juniper").

8. Finally, Benjamin Kahn, Dragul's long-standing ally, co-conspirator and counsel for Dragul, GDA and the Fox Defendants, participated in and profited from Dragul's fraudulent scheme in his representation and counsel of Dragul, GDA the related SPEs, and Fox, in furtherance of the fraudulent scheme.

9. Demonstrating their unwavering loyalty to Dragul, like Dragul, Fox, Kahn, and Markusch also withheld documents and information from the Receiver and his team, while continuing to help Dragul conceal and purloin Estate assets, transferring ownership and management rights of Estate assets, and interfering with the Receiver's efforts to discover and liquidate Estate assets.

II. PARTIES

10. On August 30, 2018, the Court in *Chan v. Dragul, et al.* Case No. 2018CV33011, District Court, Denver, Colorado (the "**Receivership Court**") entered a Stipulated Order Appointing Receiver (the "**Receivership Order**") appointing Harvey Sender of Sender & Smiley, LLC, as receiver for Gary Dragul ("**Dragul**"), GDA Real Estate Services, LLC ("**GDA RES**"), GDA Real Estate Management, LLC ("**GDA REM**"), (GDA RES and GDA REM are collectively referred to as, "**GDA**"), and a number of related entities and single purpose entities (the "**GDA Entities**"), and their assets, interests, and management rights in related affiliated and subsidiary

businesses (the "**Receivership Estate**" or the "**Estate**"). *See* Receivership Order, previously attached to original Complaint as **Exhibit 1** ("**Compl. Ex. 1**").[1]

11. The Receivership Order grants the Receiver the authority to recover possession of Receivership Property from any persons who may wrongfully possess it and to prosecute claims premised on fraudulent transfer and similar theories. **Compl. Ex. 1**, at ¶ 13(o).

12. The Receivership Order also grants the Receiver the authority to prosecute claims and causes of action against third parties held by creditors of Dragul and the GDA Entitles, and any subsidiary entities for the benefit of creditors of the Estate, "in order to assure the equal treatment of all similarly situated creditors." **Compl. Ex. 1**, at ¶ 13(s).

13. The Receiver's principal place of business is at 600 17th Street, Suite 2800, Denver, CO 80202.

14. Defendant Gary Dragul is an individual who is a resident of the State of Colorado. His present address is unknown.

[1] **Exhibits 1 through 20** that were previously submitted with and attached to original Complaint filed on January 21, 2020 are not being re-submitted herewith with the exception of Exhibit 6 (Fox Defendants' Commission Summary), which is amended and substituted with this filing. References in this Amended Complaint to "Compl. Ex." shall mean and refer to those Exhibits 1 through 20 submitted with the Original Complaint.

15. Defendant Benjamin Kahn ("**Kahn**") is an individual who resides at 229 ½ F Street, Salida, Colorado 81201. At all relevant times, Kahn was general counsel for GDA REM and GDA RES, and the GDA Entities.

16. Defendant the Conundrum Group, LLP ("**CG**") is a Colorado Limited Liability Partnership with its principal place of business 229 1/2 F Street, Salida, CO 81201. Its registered agent is Megan Rae Kahn, at the same address. (Kahn and CG are referred to as the "**Kahn Defendants**"). At all relevant times, Kahn was an agent of Defendant CG.

17. Defendant Susan Markusch, ("**Markusch**") resides at 6321 South Geneva Circle, Englewood, CO 80111. At all relevant times, Markusch was the controller and chief financial officer of GDA RES, GDA REM, and the GDA Entities.

18. Defendant Olson Real Estate Services, LLC ("**Olson RES**") is a Colorado limited liability company with its principal place of business located at 6321 South Geneva Circle, Englewood, CO 80111. Olson RES's registered agent is Andrew Solomon, 10794 E Berry Ave., Englewood, Colorado 80111.

19. Defendant Juniper Consulting Services, LLC ("**Juniper**") was a Colorado limited liability company with its principal place of business located at 11425 Cimmaron Drive, Englewood, Colorado 80111. Juniper filed articles of dissolution with the Colorado Secretary of State on November 24, 2019. (Markusch, Olson RES and Juniper are referred to as the "**Markusch Defendants**").

20. Defendant Alan C. Fox ("**Fox**") is an individual who resides at 2081 Jeremy Lane, Escondido, California 92027-1159.

21. Defendant ACF Property Management, Inc. ("**ACF**") is a California corporation with its principal place of business located at 12411 Ventura Boulevard, Studio City, California, 91604. At all relevant times, ACF was registered to do business in the State of Colorado. ACF's registered agent is Moye White, LLP: Registered Agent Department, at 1400 16th Street, 6th Floor, Denver, Colorado, 80202. (Fox and ACF are referred to as the "**Fox Defendants**").

22. At all relevant times, Fox owned and controlled ACF, the entity through which he funneled commissions and other payments from Dragul and the GDA Entities.

23. At all relevant times herein, ACF utilized and shared the employees of GDA RES and GDA REM, including Defendant Markusch, to carry on the business of ACF without declaring such employees for taxation or other employment regulatory purposes.

24. Neither Fox nor ACF were licensed or registered brokers with the Financial Industry Regulatory Authority ("**FINRA**"), the State of Colorado or the SEC; nor were they affiliated or associated with a FINRA or SEC licensed or registered broker-dealer for any time period relevant to the allegations in this Complaint.

25. Defendant Marlin Hershey ("**Hershey**") is an individual who resides at 15514 Fisherman's Rest Ct., Cornelius, North Carolina 28031-7646.

26. Defendant Performance Holdings, Inc. ("**PHI**") is a Florida corporation with its principal place of business in Huntersville, North Carolina (Hershey and PHI are referred to as the "**Hershey Defendants**").

27. At all relevant times, Hershey owned and controlled PHI through which he funneled commissions from Dragul and the GDA Entities.

28. Neither Hershey nor PHI were licensed or registered brokers with FINRA, the State of Colorado or the SEC; nor were they affiliated or associated with a FINRA or SEC licensed broker-dealer for any time period relevant to the allegations in this Complaint.

29. Dragul, Kahn, CG, Markusch, Olson RES, Fox, ACF, Hershey, and PHI are collectively referred to as the "**Defendants**."

30. Upon information and belief, John and Jane Does 1 – 10 are individuals whose names and addresses are presently unknown.

31. Upon information and belief, XYZ Corporations 1 – 10 are corporations and other legal entities, the names and addresses of which are presently unknown.

III. JURISDICTION AND VENUE

32. Jurisdiction is proper under COLO. REV. STAT. § 13-1-124 and the Colorado Constitution, Article VI, Section 9, because, since 2007, Defendants have

had ongoing and systematic contacts with Dragul and the GDA Entities in Colorado in furtherance of a scheme to defraud innocent investors.

33. Venue is proper under C.R.C.P. 98(c), because the Receiver's principal place of business is in the City and County of Denver and service can be made on one or more of the Defendants in the City and County of Denver.

IV. GENERAL ALLEGATIONS

A. General Factual Background – Key Players in the Fraudulent Scheme

34. This action arises from a multi-million-dollar fraud and Ponzi scheme perpetrated by Dragul in concert with the other Defendants in violation of the Colorado Securities Act (the "**Act**").

35. From 1995 through 2018, Dragul as the President of GDA RES and GDA REM, operated a real estate investment business through the use of a variety of investment vehicles in which various persons and entities invested (the "**Sham Business**").

36. Since approximately 1996, Dragul's mentor and joint venture business partner, Fox, has operated ACF, a similar real estate investment business whose offices are in Ventura, California.

37. Upon information and belief since GDA was formed until approximately August 2018, ACF used GDA's employees to conduct ACF's business including all aspects of ACF's acquisitions process, leasing, property management, tenant relations, marketing and sale of properties, roll-over investments, and other matters.

38. Upon information and belief, while employees of GDA worked for ACF as de facto employees, the Fox Defendants did not report or otherwise declare these individuals of ACF employees for tax or other purposes.

39. For more than 20 years, Markusch worked with Dragul as GDA's controller and CFO. Markusch's duties as controller and CFO entailed oversight and management of all accounting, bookkeeping, banking, financial reporting and recordkeeping, taxes and the like, as well as office manager of the GDA Entities.

40. As controller and CFO of the GDA Entities, Markusch was a signatory and authorized user of all GDA and SPE bank accounts, and thus had full control, authority, and access to funds therein.

41. The Hershey Defendants furthered Dragul's fraudulent scheme by identifying and soliciting investors for the Sham Business.

42. For his successful solicitation efforts, Hershey received a percentage of the total investment made by each investor as an undisclosed and illegal finder's fee or commission.

43. Hershey was directly involved in, and in some instances, drafted false and misleading communications Dragul sent to investors, as more specifically described herein.

44. The Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors.

45. On April 12, 2018, Dragul was indicted by a Colorado State Grand Jury on nine counts of securities fraud (the "**First Indictment**"). The First Indictment is attached as **Exhibit 21.**

46. On March 1, 2019, Gary Dragul was indicted by a Colorado State Grand Jury on an additional five counts of securities fraud (the "**Second Indictment**"). The Second Indictment is attached as **Exhibit 22.**

47. In or about March 2018, one month before Dragul's First Indictment, Markusch began maintaining all accounting reconciliations for all GDA Entities in handwritten notes, as opposed to electronically, where it had previously been stored on the company's servers as had been GDA's practice before the indictments.

48. In or about April 2019, the Receiver executed a writ of assistance at Markusch's home, where 11 boxes of Estate documents and records were discovered, including over 100 pages of handwritten reconciliations for accounts in Dragul's and the GDA Entities' names.

49. Upon information and belief, Markusch removed the 11 boxes of documents from GDA and stored them at her home to conceal them from the Receiver and the Commissioner.

50. Kahn has served as outside general counsel to the GDA Entities and the SPEs for numerous years, and drafted solicitation documents, operating agreements, and other legal documents for Dragul and the GDA Entities, and for the SPEs, and in that capacity gained knowledge of the Sham Businesses.

51. Since the Receiver's appointment, Kahn has conspired with Dragul and Markusch to conceal documents and assets from the Receiver, and to transfer management rights and ownership interests in entities subject to the Receivership.

52. Without disclosure to investors, Kahn was also paid legal fees from the escrow of certain properties for work unrelated to the specific SPEs from which the funds were paid.

B. Dragul's Ponzi Scheme

53. Dragul, in active concert with the other Defendants (collectively, the "**Non-Dragul Defendants**"), solicited investors to purchase membership interests in various limited liability companies/SPEs that were engaged in the business of acquiring and managing commercial real estate, primarily retail shopping malls.

54. According to the Complaint for Injunctive and Other Relief filed on behalf of the Commissioner, from January 2008 until December 2015, Dragul, through GDA, sold more than $52 million worth of interests in 14 SPEs to approximately 175 investors (collectively referred to as, the "**GDA Entity Investors**"). **Compl. Ex. 2.**

55. The following is a list of the 14 SPEs included in the Commissioner's Complaint with the amount raised for each by Dragul from investors and the approximate date of the securities offerings:

Property	SPE Owner(s) of the Property	Bank Accounts Associated with Offering	Amount Raised	Approx. Date(s) of Offering
Broomfield	Broomfield Shopping Center 09 A, LLC	GDA Broomfield 09, LLC	$800,000	2009
Clearwater	Clearwater Collection 15 LLC; Clearwater Plainfield 15, LLC	Clearwater Collection 15, LLC; GDA Clearwater 15, LLC	$6,224,904	2015
Crosspointe	Crosspointe 08 A, LLC	Crosspointe 08 A, LLC	$4,519,667	2008
Fort Collins	Highlands Ranch Village Center II (HR II 05 A, LLC)	Fort Collins WF 02, LLC	$2,679,669[2]	2008-2009
	Southwest Commons 05 A, LLC			2008-2009
	Meadows Shopping Center 05 A, LLC			2008-2009
	Laveen Ranch Marketplace 12, LLC			2012
	Trophy Club 12, LLC			2012
Market at Southpark	Market at Southpark 09, LLC	GDA Market at Southpark LLC; Market at Southpark 09, LLC	$255,000	2010
Loggins Corners				2012
Trophy Club				2012
High Street Condos	2321 S High Street, LLC	2321 South High Street, LLC	$1,000,000	2014
	2329 S High Street, LLC	2329 South High Street, LLC		
PMG (Plaza Mall of Georgia North)	Plaza Mall North 08 B Junior, LLC	Plaza Mall North 08 A Junior, LLC; Plaza Mall North 08 B Junior, LLC	$9,025,765	2008 – 2016

[2] The total funds raised include at least $50,000 in "roll-over" investments, and as such, real funds were not put into the SPE or the property. Moreover, this amount also includes interests purportedly held by Dragul, and several Dragul insiders including is parents, his mother-in-law, two close personal friends, and Markusch. It is unlikely that these purported investors actually contributed real funds to the deal.

Property	SPE Owner(s) of the Property	Bank Accounts Associated with Offering	Amount Raised	Approx. Date(s) of Offering
Plainfield Commons	Plainfield 09 A, LLC	Plainfield 09 A, LLC	$2,598,750	2009 – 2013
Prospect Square	Prospect Square 07 A, LLC, Prospect Square 07 B, LLC, Prospect Square 07 C, LLC, Prospect Square 07 D, LLC, PS 16, LLC and PS 16 Member, LLC	Prospect Square 07 A, LLC; GDA PS Member LLC; GDA PS16 Member LLC; PS 16 LLC	$4,890,079	2007 and 2016
Rose	Rose, LLC	Rose, LLC /Rose, LLC (Not a duplicate - two different accounts)	$4,980,830	2011 – 2013
Syracuse	Syracuse Property 06, LLC	Syracuse Property 06, LLC	$2,625,000	2008 – 2009
Village Crossroads	Village Crossroads 09, LLC	GDA Village Crossroads LLC	$1,707,100	2009 – 2012
Walden	Walden 08 A, LLC	Walden 08 A, LLC; Walden 08 A, LLC; Walden 08 A, LLC (not duplicates - three different accounts)	$4,705,000	2008
Windsor	Windsor 15, LLC	GDA Windsor Member LLC; Windsor 15 LLC; Windsor 15 LLC (not a duplicate)	$6,478,715	2015
TOTAL AMOUNT RAISED			**$52,490,479**	

56. The above-listed SPEs and amounts raised therefor represent only a portion of the SPEs for which Dragul solicited and raised investor funds. Dragul and the GDA Entities solicited and raised substantial amounts from investors for SPE properties outside of the Commissioner's period of review.

57. These SPEs were Dragul's investment vehicles at the time of the Commissioner's Complaint. Before forming these SPEs, Dragul, in concert with Non-

Dragul Defendants, used multiple other SPE investment vehicles to defraud investors including the sale of promissory notes, and forced roll-over investments from one property to another.

C. The Financial Operations of GDA

58. Upon receiving investor funds at closing of real estate purchases made by the SPEs, Markusch, as CFO of the GDA Entities, typically transferred funds that should have been segregated in SPE accounts into GDA RES accounts and then into accounts held in Dragul's name, individually. The shortfalls were financed by mortgage loans. In some instances, the SPEs were unable to reduce even the principal amount of those mortgage loans, since the SPE's cash flows were insufficient to cover the operating expenses and fictitious profits paid to investors.

59. Beginning at least as early as 2008 and continuing through August 2018, Markusch would provide Dragul with daily account balances for his and his family's bank accounts as well as all of the GDA Entities' accounts, noting what the balances were on the bank's records, in GDA's records, and noting pending transactions that had not yet posted. Markusch advised Dragul how much total was needed to ensure that certain pending transactions would post and in return, Dragul would instruct Markusch which account(s) to transfer the funds from and to on any given day. Markusch completed each transaction, improperly comingling funds among and between the GDA Entities by moving money from account to account.

60. Over time, if a particular SPE was either suffering losses or was disposed of by Dragul for personal profit, rather than paying investors their pro rata share of profits, or allocating pro rata losses to them, Dragul would hold investors hostage in a deal and require them to "rollover" investors' equity positions into a newly formed SPE, and would induce investors to contribute additional funds for their new equity position in the rollover SPE. In this manner, Dragul sold more than 100% of the equity interests in at least one SPE, and perhaps more.

61. For example, from approximately 2009 through 2014, Dragul solicited and received investment funds in Plainfield 09 A, LLC ("**Plainfield 09**"), which owned the Plainfield Shopping Center in Indiana. Ultimately, Dragul sold over 194% of the membership interests in Plainfield 09 to approximately 30 investors (the "**Plainfield Investors**"), raising over $2.5 million, which includes over $1.5 million of new cash investments. *See* Plainfield Investor Summary Chart, attached as **Exhibit 23.** Without consent of the Plainfield Investors, on March 11, 2015, Dragul sold the Plainfield property for $5,563,500, for more than a $1.1 million profit. From escrow, GDA received an undisclosed $75,000 "consulting fee." *See* **Ex. 22 (**Second Indictment).

62. Again, without giving them the option, Dragul forced the Plainfield Investors to "roll-over" their investment into a new SPE, Clearwater Collection 15, LLC ("**Clearwater**") which owned property in Clearwater Florida, while also selling interests to new investors. On October 5, 2015, Dragul wrote to the Plainfield

Investors telling them that the Plainfield sales proceeds had been reinvested in the Clearwater property and enclosed Solicitation Materials that Dragul had prepared. Importantly, the solicitation materials, like those discussed below contained material misrepresentation and omissions, including inter alia, overstating the purchase price for the property by $900,000, and failing to disclose the unauthorized commissions in the amount of $187,100 and $100,000 that Dragul paid himself (through GDA) and ACF, respectively. *See* Oct. 5, 2010 Letter and Clearwater Solicitation Materials, attached as **Exhibit 24**.

63. Dragul also used promissory notes to further his fraudulent enterprise and Ponzi scheme. When he was unable to repay the promissory notes as they became due, he would either extend the notes or convert them to equity positions in SPEs without contributions of additional capital. This effectively diluted existing investors' interests without notice to them and without any benefit to the particular SPE.

64. For Example, as alleged in the First Indictment, Dragul's scheme also involved offering investors promissory notes with varying interest rates and durations (typically between three and eighteen months). From approximately 2007 through 2013, solicited by Hershey who had represented that Dragul and GDA were very successful and that Dragul was worth millions of dollars, Dragul sold $6.4 million worth of promissory notes, most of which were to be repaid over an eighteen-month period at an interest rate of 10%, with interest-only payments for the first six months followed by twelve monthly payments of principal and interest. Dragul did

not register these offerings with either the SEC or the Colorado Division of Securities and was never licensed to sell securities. Dragul defaulted on most of the notes during the interest only payment period, and when investors complained, Kahn stepped in to purportedly "handle it" by continuing to "gaslight" these investors.

65. By the end of 2012, Dragul owed more than $4 million to investors pursuant to promissory notes issued in 2007 and 2008. Notwithstanding, he offered and sold new promissory notes to 21 new investors, raising approximately $2.4 million more, without disclosing the unpaid notes presently in default. In some instances, Dragul would convert unpaid, due or past-due notes into membership interests in various SPEs as an alternative way to pay these investors, who Dragul and Kahn referred to as "friends of the house." *See* **Ex. 22** (Second Indictment), at 3-5.

66. Dragul also obtained personal loans from investors and secured them with real property owned by various SPEs. In some cases, this was done in violation of express provisions of the governing operating agreements and loan agreements. Dragul represented to investors who purchased promissory notes that their funds would be used for particular purposes related to SPE real estate assets, when in fact Dragul used those funds to support his extravagant lifestyle.

67. For example, one such loan is presently the subject of a pending lawsuit filed against Fox to invalidate a lien on property previously held by the Receivership Estate. *See GDA DU Student Housing A, LLC v. Alan C, Fox*, Case No. 2019CV32374

(Denver District Court) (the "**DU Litigation**"). In or about 2014, Dragul, with the assistance of Hershey, solicited and raised approximately $1 million[3] from seven (7) individual investors, R.L., C.L., M.R., S.L.P. Trust, E.S. K.S. and L. W.[4] (the "**High Street Investors**"), through the sale of membership interests in the High Street Condo Project, LLC ("**High Street**"). *See* High Street Investor Detail Chart, attached as **Exhibit 25.** Dragul and the Hershey Defendants misrepresented in the offering materials provided these investors that High Street would be developing residential condominiums and the investment proceeds would be invested in the acquisition and renovation of three parcels of identified real property. Upon information and belief Hershey knew these representations were false and misleading and were made to persuade individuals to invest in the project.

68. Unbeknownst to the High Street investors, in December 2017 and January 2018, Dragul sold the three parcels of real property as well as an Architect's contract for the project, to two newly formed Dragul controlled SPEs, GDA DU Student Housing 18 A, LLC ("**GDA DU A**"), and GDA DU Student Housing 18 B, LLC ("**GDA DU B**"). Dragul did not roll over the investors into the new SPEs and instead, continued paying distributions to investors at least through June 2018

[3] This amount includes a total of $150,000 that Dragul "rolled-over" from a prior, failed investment, Crosspointe, in which two of the investors E.S. and K.S. had previously invested.

[4] For the privacy and confidentiality of the GDA Entity Investors, initials are used in the complaint. The investor lists submitted as exhibits and filed as "protected" herewith contain the Investors' full names.

representing to the High Street Investors that these distributions were actual returns on their investments.

69. GDA DU A consisted of three members – GDA Student Housing Member, LLC (15.79%) (wholly owned by Dragul), and two entities comprised of Israeli investment funds – Hagshama Denver Colorado 2, LLC (56.61%) and Cofund 9, LLC (27.60%) (collectively, the "**Hagshama Members**"). GDA DU A was to be managed by another SPE, GDA DU Student Housing Management, LLC, which in turn, is managed by GDA REM. The December 28, 2017 GDA DU A operating agreement specifically prohibited the manager from encumbering the property unless certain, limited circumstances permitted it. However, on April 11, 2018 – one day before the First Indictment – Fox loaned Dragul $300,000 as evidenced by a promissory note and purportedly secured by a first deed of trust on one parcel of the three DU properties, both of which were signed by Dragul on behalf of the GDA DU entities. As alleged in the DU litigation, upon information and belief, Dragul and Fox fraudulently created the deed of trust predating the First Indictment. The deed of trust was not recorded, however, until June 11, 2018.

70. Then, on July 25, 2018, more than one month before the Receiver's appointment, Dragul again fraudulently encumbered the very same property. Fox again loaned Dragul another $600,000 as evidenced by a promissory note of the same date and executed a second deed of trust transferring that same property to the Public Trustee of Denver County Fox's benefit. The second deed of trust was not recorded

until July 26, 2018. Neither loan or deed of trust were disclosed to the Hagshama Members, and both were in violation of the GDA DU A operating agreement.

71. Of the $900,000 loaned by Fox in 2018, none actually went to or benefitted either of the DU SPEs, the properties, or otherwise benefitted the investment. Rather, all money was diverted to and used by Dragul for personal and other purposes. The July 25th $600,000 loan was deposited into the GDA RES Fortis bank account No. x3186 and thereafter, $575,000 was paid to Fox for his interest in HC Shoppes 18, LLC; $21,000 was transferred into Dragul's personal account, and $4,000 was transferred to various unrelated SPE accounts. Similarly, the May 14th $300,000 loan from Fox was first deposited directly into the GDA RES Chase bank acct no. x5225, and subsequently, $92,700 was paid as a distribution to Aaron Steinberg, a relative of Dragul's long-time friend and trusted ally, Marty Rosenberg; $65,000 was paid to Xin Nick Liu who had a lien on Dragul's residence as collateral for significant personal loans made to Dragul; $75,000 was paid to Chad Hurst, another long-time friend and investor of Dragul's who oftentimes extended personal loans when Dragul was in need; $33,800 was transferred to the Rose, LLC SPE bank account; $30,597.04 was comingled with other funds in the GDA RES Fortis account no. x3186 and ultimately used to make distribution payments to SPE investors; and $2,092.96 was used for GDA operations. As a result, the buyer of the Estate's interest in the DU entities now seeks to invalidate Fox's liens and have both declared fraudulent transfers. *See* DU Litigation.

72. Instead of treating the SPEs as separate legal entities, Dragul and Markusch, with the Kahn Defendants' knowledge and active assistance, routinely diverted money from SPE accounts to GDA RES accounts and from there to Dragul's personal account. Markusch effected the transfers. Dragul and Markush thus commingled SPE funds with other SPE accounts, Dragul's personal funds, and funds of Dragul's family members.

73. Dragul and Markusch routinely reversed the comingling process and transferred money from Dragul's personal account to GDA RES and then to SPE accounts at the end of financial reporting periods so they could falsely represent to investors the financial condition of the various SPEs. Immediately after such reporting, Dragul and Markusch transferred the funds once again, but this time, out of the SPE accounts, and would then begin the churning process anew.

74. This scheme resulted in investors not having their funds held or invested in the particular projects and properties where Dragul represented they would be held or invested. Dragul and Markusch used the GDA RES account and the SPE accounts as if they were interchangeable. This commingling of funds was one of the mechanisms Dragul and Markusch used to defraud investors. None of the investor funds transferred in to or out of any particular SPE can be identified substantially as an asset of any SPE, and as a result, the investor funds have lost their identity and have become untraceable. There was no legitimate business reason

for this comingling, which was undertaken to such an extent that it is impossible to know the true ownership of the commingled funds.

75. From GDA's inception in 1995, Dragul's investment scheme was insolvent, due to Dragul's pilfering of the SPEs and his unauthorized and undisclosed use of investor funds for his personal benefit, and for the benefit of his employees and family.

76. While Dragul created SPEs did generate cash flow, the cash flow was not sufficient to pay investors the promised returns. Dragul and Markusch diverted investor funds to Dragul and their family's personal use and to pay fictitious returns or redemptions to other investors.

77. Commencing at least by 2007 and continuing through 2018, Dragul was operating his entire business enterprise as a Ponzi scheme. Dragul and Markusch concealed this ongoing fraud in an effort to hinder, delay, and defraud other current and prospective investors and creditors from discovering the fraud. Money that Dragul received from investors was used to make distributions to, or payments on behalf of, earlier investors. Funds provided to Dragul as loans and for investment purposes were used to keep the operation afloat and enrich Dragul and others.

D. Solicitation of Investor Funds – Private Offerings

78. Dragul, together with the Fox and Hershey Defendants, solicited funds from investors for the stated purpose of purchasing and operating specific commercial properties, primarily retail shopping centers. Each SPE was purportedly a separate

legal entity in which investors were promised profits from the operation, leasing, and eventual sale of the property.

79. Upon information and belief, Fox, has orchestrated a virtually identical fraudulent scheme for many years. As a result, investors have filed numerous lawsuits against the Fox Defendants for the same deceitful and fraudulent conduct he taught Dragul and set forth herein, including, but not limited to the following:

a. *Fayne et al v. Fox et al*, San Francisco County Superior Court Case No. CGC-10-502073, filed on July 30, 2010 (settled and dismissed with prejudice on August 27, 2013);

b. *Konkel v. Fox et al.*, Los Angeles County Superior Court ("LASC"), Case No. BC 482 484, filed on April 6, 2012 (settled and dismissed with prejudice on February 4, 2013);

c. *Steve Belkin v. Fox*, Superior Court of Massachusetts, Case No. 1581CV1267, filed April 13, 2015, later removed to Federal Court (settled on appeal);

d. *Ross v. Fox*, LASC Case No. BC 576 879, filed on March 26, 2015. Ross, an investor in the Market at Southpark investment (discussed below), sued the Fox Defendants, Dragul, and several others for (i) Breach of Fiduciary Duty; (ii) Fraud; (iii) Securities Fraud; (iv) Elder Abuse (on behalf of Jerry only); and (v) Accounting. Ultimately, the jury returned a plaintiff's verdict for approximately $14 million, including $8 million

in punitive damages. On June 27, 2019, the Fox Defendants filed a motion for a new trial, which was ultimately granted on the grounds that the verdict was allegedly inconsistent because the jury found for the plaintiff on the fraud and breach of fiduciary duty claims, but not on the elder abuse claim. [5]

e. *Lockie v. Fox*, LASC Case No. 20STCV13841 filed on April 9, 2020 (pending);

f. *Gadi Maier, et al. v. Alan C. Fox, et al.,* LASC Case No. BC670829 (Settled);

g. *Blackford v. Fox*, LASC Case No. BC 679 692 (pending);

h. *Shofler v. Fox,* LASC Case No. BC 679 693 (pending);

i. *Positano v. Fox*, LASC Case No. BC 722 995 (pending)

j. *Kerner v. Fox*, LASC Case No. BC 723 521 (pending);

k. *Mokotoff v. Fox*, LASC Case No. 18STCV01178 (pending);

l. *Abrams v. Fox*, LASC Case No. 18STCV02200 (pending);

m. *Berman v. Fox*, LASC Case No. 18STCV05912 (pending);

n. *Burger v. Fox*, LASC Case No. 19STCV11976 (pending);

o. *Stewart v. Fox*, LASC Case No. 19STCV16404 (pending);

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[5] On June 27, 2019, the plaintiffs appealed the court's ruling granting Defendants' Motion for a New Trial which set aside the plaintiff's judgment, and on July 22, 2019, Fox cross-appealed. Plaintiffs' opening brief has been filed, the respondents' brief and cross-appellants' opening brief are due shortly. Oral arguments are likely to be scheduled for the end of 2020.

p. *Aepli v. Fox*, LASC Case No. 19STCV43821(pending);

q. *Gerzberg v. Fox*, LASC Case No. 19STCV44851(pending);

r. *Alon v. Fox*, LASC Case No. 19STCV45048 (pending);

s. *Menkes v. Fox*, LASC Case No. 19STCV45365 (pending); and

t. *Reker v. Fox*, LASC Case No. 20STCV00211 (pending).

80. On or about September 3, 2018 the Kahn Defendants sent a $30,000 invoice to ACF stating it was for the following service: "Reimbursable expense: August Retainer for Ross Judgment Appeal. Mitigation and Containment Advisement (approximately 100 hours)." The Kahn Defendants sent a second invoice for the month of September reflecting the same amount with an identical description of the work included in the invoice as the prior months. Copies of the invoices are collectively attached as **Exhibit 26.** The September 3rd invoice was sent four days after the Receiver was appointed.

81. Importantly, the Kahn Defendants never entered an appearance in the Ross matter on behalf of Dragul, the named GDA entities, the Fox Defendants, or any other Defendant. Notwithstanding this, upon information and belief, the Fox Defendants paid the Kahn Defendants for legal advice to mitigate and contain.

82. The SEC has instituted a civil enforcement action against Hershey, his business partner, Dana Bradley, PHI, and a number of their other joint venture entities for violations Section 17(a) of the Securities Exchange Act of 1993 [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. §78j(b)] and

Rule 10b-5 thereunder [17 C.F.R. §240.10b-5], and Section 15(a)(1) of the Exchange Act [15 U.S.C. § 78(o)(a)(1)]. *See SEC v. Bradley, Hershey*, et al.; Case No. 3:19-cv-00490 (U.S. District Court, W.D. N.C., Charlotte Division). The conduct for which the Receiver asserts claims against the Hershey Defendants is substantially similar to the conduct is the basis of the claims asserted by the SEC: fraudulently solicitating investors and pocketing millions in undisclosed and illegal commissions.

83. To solicit investor funds, Dragul, in concert with the Fox and Hershey Defendants, sent prospective investors offering materials that contained executive summaries, financial projections, and other information (collectively, the "**Solicitation Materials**"), which purportedly provided investors with the material information needed to evaluate whether or not to invest in Dragul's Sham Business.

84. Generally, the Solicitation Materials sent to prospective investors were created by or at the direction of Dragul and his staff, and in some instances the Fox Defendants.

85. The Solicitation Materials contained information material to prospective investors, including historical information about the property, the cost of acquiring the property, the amount of the down payment, the amount to be borrowed, the anticipated closing costs, and the amount needed to be raised from investors for any particular offering. The financial projections included projections of acquisition costs and expenses.

86. The Solicitation Materials contained false and misleading information, including inflated purchase prices and inflated closing costs for the properties and in some instances misrepresented the structure of the investment.

87. As discussed in detail below, in soliciting investments, Dragul and the other Defendants, told prospective investors that the properties to be acquired cost substantially more than they actually did. These misrepresentations about purchase price were designed to allow Dragul, the Fox Defendants and the Hershey Defendants to pay themselves impermissible commissions and fees as set forth below:

Defendant	Total Commissions Received
Gary Dragul	$19,148,047.10
Markusch Defendants	$310,196.67
Kahn Defendants	$1,701,441.92
Fox Defendants	$10,200,304.81
Hershey Defendants	$3,175,655.54

Summary charts reflecting the above commissions are attached as **Compl. Exs. 3, 4, 5, 7,** and an updated version of the summary chart reflecting the Fox Defendants Commissions, is attached as **Amended Exhibit 6**.

88. In most instances, the properties had already been purchased when Dragul, and the Fox and Hershey Defendants distributed the Solicitation Materials to prospective investors, but the Solicitation Materials failed to disclose this material fact.

89. The undisclosed and illegal fees Dragul, the Markusch Defendants, the Kahn Defendants, the Fox Defendants and the Hershey Defendants received in

connection with this scheme were deducted as closing costs; some fees were charged during the ownership of the property, typically during refinancing; and some were charged in connection with the sale of certain properties as reflected in the following three examples:

i. The Market at Southpark
(7901-8051 S. Broadway, Littleton, CO)

90. On or about January 26, 2010, Fox sent Dragul Solicitation Materials prepared by ACF to solicit investment funds for a property known as the Market at Southpark.

91. The Executive Summary prepared by the Fox Defendants, and which the Fox Defendants knew would be and in fact were distributed to prospective investors by both Dragul and Hershey in 2010, stated that the purchase price for the property was $24,750,000, and that it would be necessary to raise $10,500,000 from investors. The Solicitation Materials the Fox Defendants prepared misrepresented and failed to disclose material information including the actual purchase price, estimated closing costs, and other material financial information. *See* **Compl. Ex. 8.**

92. Once received from Fox, Dragul forwarded the Market at Southpark Solicitation Materials to Hershey to distribute to prospective investors in or about April 2010.

93. Upon receipt in April 2010 and thereafter, Hershey distributed the Market at Southpark Solicitation Materials to prospective investors, who relied on them for their investment decision.

94. By distributing the Solicitation Materials to induce investors and prospective investors in 2010, Hershey deliberately withheld or failed to disclose material information to prospective investors concerning the Market at Southpark including the actual purchase price, estimated closing and other costs, material financial information, and that the Hershey Defendants stood to profit from any investment they would make in the SPE.

95. At or about the same time, and with the actual intent to induce investors to invest in the property, Dragul sent the Market at Southpark investors written financial projections misrepresenting that the purchase price of the Property was $24,750,000 and closing costs were estimated to be $300,000, and that he would establish an operating reserve of $950,000 with the funds raised from the offering *See* **Compl. Ex. 8**.

96. Upon information and belief, the Fox Defendants never maintained an operating reserve for the property. Instead, Fox, like Dragul, comingled the funds that should have been earmarked as reserved with funds from the rest of ACF's operations and when necessary, moved money from account to account.

97. In fact, the purchase price of Market at Southpark was $22,000,000, $2.75 million less than Dragul and the Fox and Hershey Defendants represented to investors. *See* **Compl. Ex. 9**.

98. On August 11, 2009, Market at Southpark 09, LLC, an entity owned and/or controlled by the Fox Defendants, purchased the Southpark property for

$22 million. At closing, ACF received a $950,000 "consulting fee," Dragul, through GDA received $300,000 as a "consideration fee," and through his SSC 02, LLC entity, another $50,000 in fees. *See* **Compl. Ex. 9**.

99. The "Financial Projections" contained in the Solicitation Materials, which Fox and Dragul knew were false and misleading, since at the time the purchase escrow had already closed and the real figures were available, failed to account for undisclosed and unauthorized commissions taken from escrow by Fox and Dragul.

100. The "commissions" taken from escrow on the property were used in furtherance of Dragul and Fox's overall scheme to defraud. On August 10, 2009, Fox informed Dragul the $350,000 in "fees" paid to Dragul from escrow on the property would be transferred into yet another SPE account for the September 2009 loan payment on an airplane owned by Dragul and Fox.

101. Between June and August 2010, several months after the property had been purchased, Dragul raised approximately $255,000 from six individual investors (the "**Southpark Investors**") from the sale of 100% of the membership interests in GDA Market at Southpark, LLC, which in turn, held a 6% interest in Market at Southpark 09, LLC, an entity formed and controlled by the Fox Defendants. *See* Southpark Investor Detail Chart, attached as **Exhibit 28.** The Southpark Investors reasonably relied on the statements and information contained in the Solicitation Materials and the statements made by the Hershey Defendants who distributed the Solicitation Materials.

102. The Market at Southpark Solicitation Materials that Dragul and the Hershey Defendants distributed to prospective investors failed to disclose that the membership interests being offered were interests in an SPE – GDA Market at Southpark, LLC – that was a member in yet another entity controlled by the Fox Defendants which owned the real estate. The misleading Solicitation Materials completely omitted any disclosure regarding the actual ownership structure of the investment (*i.e.* that they were investing in an entity which held a 6% interest in another entity that owned the property) and as such, Dragul and the Hershey Defendants' material misstatements led the Southpark Investors to believe that their investments were in the SPE directly owning the property.

103. Moreover, Fox offered and sold membership interests in Market at Southpark at different rates to different categories of investors (i.e., gave greater percentage interests for less money to close family and friends), effectively diluting the Southpark Investors membership interests. For instance, on July 20, 2009, Fox instructed his employee that ACF's total investment for 100% in Market at Southpark would be $8.5 million for some Fox family members and $9.5 million for others. In the Solicitation Materials provided to Southpark Investors, Fox and Dragul represented that a minimum investment of $52,500 would purchase a 0.500% membership interest, yet at least one of Fox's family members, Sara Fox purchased a 1.500% interest at the reduced price of $127,500 (a $30,000 discount). *See* 07/20/2009 Fox Email, attached as **Exhibit 27.**

104. These misstatements and omissions were designed by Dragul, Fox and Hershey to mislead prospective investors and induce them into investing in the Market at Southpark SPE.

105. On May 13, 2011, the Fox Defendants sent an update letter to the members of Market at Southpark 09, LLC, including to Dragul as the manager of GDA Market at Southpark, LLC, concerning a proposed sale of the property seeking approval by a majority of members to sell the property and roll over investments into an unidentified exchange property. In the letter, Fox makes false and misleading statements to obtain consent to the sale and exchange by a majority of the Members. For instance, the Fox Defendants represented that the total original investment in the property was $10.5 million in August 2009, suggesting that all membership interests offered were sold. Upon information and belief, the Fox Defendants did not sell all interests offered and an amount significantly less than that was raised and invested in the property.

106. Dragul did not provide his investors with any update or information concerning the prospective sale of the property in which they had invested, and instead, on May 17, 2011, as manager of GDA Market at Southpark, LLC, Dragul executed a ballot authorizing ACF to sell the property "for a net price of not less than $28,350,000.00 before paying off the loan."

107. The Fox Defendants sent another property update letter to the investors, which Dragul again received again as manager of GDA Market at

Southpark, LLC, concerning the still pending sale of the property. Enclosed with the letter was a "client summary report" for GDA Market at Southpark, LLC's investment reflecting that is now held a substantially reduced interest in Market at Southpark 09, LLC of 2.429%. Again Dragul never disclosed any of this information contained in the correspondence to the Southpark Investors.

108. As was common practice, Dragul and his staff sent periodic updates for investors that provided leasing and income information for each property. For properties for which Hershey solicited and raised investor funds, Dragul allowed and even invited Hershey to edit and comment on property updates before sending them to investors.

109. Both the August and November 2011 Market at Southpark property updates drafted by Dragul with input from Hershey that were sent to investors did not include any mention of a plan to market and sell the property or Dragul's decision to do so as manager of GDA Market at Southpark, LLC. *See* **Compl. 10A** and **10B**.

110. Both Dragul and Hershey knew of the plan to sell the property, as the transaction was pending when the November 2011 property update was prepared, but that information was not disclosed to investors, and Dragul continued to make distributions to them as fictitious profits on their Market at Southpark investment.

111. On November 15, 2011, five days after Dragul sent the November 2011 Property Update letter to Southpark Investors, Dragul and the Fox Defendants sold the Market at Southpark property for $30 million. At closing, ACF and Dragul

(through GDA) received commissions of $600,000.00 and $300,000, respectively. *See* **Compl. Exhibit 11**.

112. Notwithstanding the $13,038,594.47 net proceeds received at closing, Dragul and the Fox Defendants required the Market at Southpark investors to "roll over" their investments into two new properties rather than allowing them to cash out by collecting their pro rata share of the sales proceeds.

113. Dragul and the Fox Defendants received at least $2.2 million in undisclosed fees in connection with the acquisition and sale of the Market at Southpark, which were never disclosed to investors. The misrepresentations as to the purchase price of the property helped to further disguise these undisclosed fees and commissions from investors.

114. In March 2012, Dragul finally provided an investor update letter to the Southpark Investors telling them the property had been sold. In the letter, Dragul misrepresented that GDA Market at Southpark, LLC, which holds a 6.00% interest in Fox's SPE (and a 2.49% interest in the property), "was not in a position to control the outcome with respect to the sale and vote to exchange into another property." Dragul failed to disclose that he had executed a ballot approving the sale and voting for an exchange several months before.

115. Having received the GDA letter, disgruntled Southpark Investors began reaching out to Hershey demanding answers and expressing concern that they had not been informed about the sale and asking why their distributions had been

suspended for the past two months. Upon information and belief, the Hershey Defendants knew the property had been sold before the March 2011 letter was sent but failed to disclose it to the Southpark Investors.

116. On March 16, 2012, one of Dragul's employees, Elizabeth Freestone, responded to emails from D.H., one of the Southpark Investors demanding an explanation as to what happened and why he was not informed. Freestone, stated again that the Dragul-controlled entity GDA Market at Southpark, LLC held only a minority interest, and misrepresented that "the 1031 exchange of the proceeds into two new properties is now complete and investment information on both properties will be provided shortly. Combined distributions on the two properties will be 28% higher than distributions on Market at Southpark and will result in an 8.06% annual return on exchanged investment and a 10.57% annual return on your original investment."

117. Dragul required that he give his approval of all proposed investor correspondence in advance of his employees mailing or emailing same. Thus, the statements and representations made to the Southpark Investors, including the foregoing misrepresentations made to D.H. were expressly authorized by Dragul.

118. Upon information and belief, Fox did not obtain approval from a majority of members of Market at Southpark 09, LLC to sell the property and exchange the proceeds into new investments. Nonetheless, Fox sold the property and on February 1, 2012 told the investors, including Dragul on behalf of GDA Market at

Southpark, LLC, that the first of two exchange properties had been identified – Loggins Corners, a shopping center at 1681 Old Pendergrass Road, Jefferson Georgia ("**Loggins**"), which had been purchased on January 31, 2012.

119. As was customary, GDA's so-called "acquisition team" employees conducted the due diligence and identified the Loggins property for and on behalf of ACF.

120. A total of $1,937,500.00 was exchanged from the sale of Southpark into Loggins pursuant to Section 1031 of the Internal Revenue Code.

121. Fox's February 1, 2012 letter to the investors, including to Dragul as manager of GDA Market at Southpark, stated that GDA Market at Southpark, LLC would own 2.824% of the new property.

122. Enclosed with the February 1, 2012 investor letter from the Fox Defendants were Solicitation Materials for Loggins which stated that the purchase price for the property was $7,187,500. In fact, the property was purchased for $5.25 million – Fox and Dragul thus knowingly overstated the price by nearly $2 million. *See* 2/01/12 ACF Letter and Loggins Solicitation Materials, attached as **Exhibit 29,** at 2.

123. The Loggins Solicitation Materials also represented that $3.75 million in cash was required, factoring in the inflated purchase price of $7.817 million, loan and closing costs of $200,000, operating reserves of $300,000 less a new $3,937,500 loan. The purported "projections" omitted GDA's $150,000 commission taken from

escrow of the Loggins purchase on January 12, 2012, which was not authorized by or disclosed to the Southpark Investors. *Id.*

124. Moreover, upon information and belief, the Fox Defendants never maintained an operating reserve of $300,000 as represented in the Loggins Solicitation Materials. Rather, like Dragul, Fox comingled all of the funds from ACF's operations, including investment funds, in an account other than the designated SPE account. *See id,* at p. 2.

125. In February 2012, Fox and Dragul represented to Southpark Investors, through the distribution of the Loggins Solicitation Materials, that they could acquire a 1.000% interest in the property for a minimum investment of $37,500. Upon information and belief, as he did with Southpark, Fox offered and sold membership interests to insiders at an undisclosed reduced rate, thereby diluting the Southpark Investors' interests therein without commensurate consideration. *See id.*

126. On February 9, 2012, the Fox Defendants provided investors, including Dragul on behalf of GDA Market at Southpark, with information regarding the second exchange property for Market at Southpark had been recently acquired, Tower Plaza, a shopping center located at 3471-3511 North Salida Court, Aurora, Colorado ("**Tower Plaza**"). In the investor letter, Fox represented that GDA Market at Southpark, LLC would own 2.927% of the property, which would have an estimated cash flow of 8.06% and a projected annual return of 10.08%. *See* ACF Investor Letter and Tower Plaza Solicitation Materials, attached as **Exhibit 30,** at 2.

127. Enclosed with the February 9, 2012 investor letter from the Fox Defendants were the Solicitation Materials for Tower Plaza which stated that the purchase price for the property was $18.25 million when in fact,, the property had already been purchased for $17.025 million. *See id.*

128. In February 2012, Fox and Dragul represented to Southpark Investors, through the distribution of the Loggins Solicitation Materials, that they could acquire a 0.750% interest in the property for a minimum investment of $58,500. Upon information and belief, as he did with Southpark, Fox offered and sold membership interests in Tower Plaza to Fox insiders at an undisclosed reduced rate, thereby diluting the Southpark Investors' interests therein without consideration.

129. The Tower Plaza Solicitation Materials also represented that $7.8 million in cash was required, factoring in the inflated purchase price of $18.25 million, loan and closing costs of $250,000, operating reserves of $300,000 less the new $7.8 million loan. The purported "projections" omitted GDA's $180,000 commission and ACF's $545,000 commission taken from escrow of the Tower Plaza closing on February 9, 2012, neither of which were authorized or disclosed to the Southpark Investors. *See* **Ex. 30**, at 3.

130. Moreover, upon information and belief, the Fox Defendants never maintained an operating reserve of $300,000 as represented in the Solicitation Materials. Rather, upon information and belief, like Dragul, Fox comingled all of the

funds from ACF's operations, including investment funds, in an account other than the designated SPE account. *See id*.

131. In or about March 2012, Dragul provided the Loggins and Tower Plaza Solicitation Materials to the Southpark Investors. Because Dragul's employees were involved in all aspects of the acquisitions of both properties, he knew the Solicitation Materials contained materially false and misleading information about the investment and armed with such knowledge, he convinced the Southpark Investors to stay in the investment when they had the right to liquidate their interests.

132. Fox knew and expected Dragul would provide both the Loggins and Tower Plaza Solicitation Materials that he prepared to the Southpark Investors and that the investors would reasonably rely on the facts and material information contained therein.

133. On February 20, 2016, the Fox Defendants closed a refinance of the Loggins loan used to acquire the property in 2012. From the new $4.5 million loan, ACF received an undisclosed and unauthorized commission of $45,000, which represented equity in the property to which the Southpark Investors were entitled.

134. Dragul never disclosed the 2016 Loggins refinance, or ACF's commission taken therefrom to the Southpark Investors.

135. On April 23, 2018, shortly after Dragul's First Indictment, the Fox Defendants sold Loggins for $6.625 million.

136. From escrow of the sale, GDA received $99,371 in so-called fees, which were deposited in the GDA RES account and distributed as follows:

Amount	Description
$99,371.00	"GDA Fee" from escrow of Loggins sale
($57,000.00)	Gary Dragul (personal account)
($27,321.00)	Replenish negative balance on GDA RES Fortis account no. x2984 (Investor Note Payment account)
($7,500.00)	Ronen Sadeh Consulting
($7,500.00)	Transferred to various GDA SPE property accounts
($50.00)	Bank Fees
$0.00	**Total**

137. Upon information and belief, the Fox Defendants did not obtain approval from a majority of the members of the ACF controlled SPE that owned the Loggins property to sell it.

138. On June 25, 2018, the Fox Defendants reported to Dragul, as manager of GDA Market at Southpark, LLC, that the Loggins sale had closed and enclosed a check for $70,767.55 representing the GDA Market at Southpark, LLC's share of the sales proceeds. Fox knew or should have known that Dragul would not distribute those funds to the Southpark Investors, whose identities Fox knew because Dragul had given him the Membership Purchase Agreements. Despite that knowledge, Fox did nothing to ensure or confirm that Dragul's downstream Southpark Investors actually received their distributions.

139. Of the Loggins sales proceeds deposited on July 5, 2018, into the GDA RES Fortis bank account number x3186, Dragul, who did not own a membership interest in GDA Market at Southpark, LLC and was therefore not entitled to any of the proceeds, spent the money as follows:

Amount	Description
$70,767.55	GDA Market at Southpark, LLC's Loggins Corners Sale Proceeds
($56,981.12)	Transferred to GDA RES Fortis Acct. No. x 2984[6]
($6,500.00)	Transferred to GDA Client Trust Fortis Acct No. x3151[7]
($3,071.42)	Transferred to Gary Dragul's personal account
($2,200.00)	Cornerstar Wine & Liquor, LLC
($1,909.50)	Audrey Ahrendt (Dragul's mother-in-law)
($105.51)	Bank Fees
$0.00	**Total**

140. As of the date the Receiver was appointed, Dragul never disclosed to the Southpark Investors that Loggins had been sold or that he kept all of the proceeds owed to GDA Market at Southpark, LLC and the Southpark Investors. When, on November 18, 2018, the Receiver asked Dragul about the Loggins investment, Dragul misrepresented to the Receiver that had been sold in the summer of 2018 and that

[6] Of the $56,981.12 transferred into the GDA RES account, $50,071.63 was used to pay down an American Express credit card balance.

[7] The $6,500 transferred to the GDA Trust Account was eventually used, along with other improperly transferred funds, to make distributions to other Dragul investors, but not to pay the Southpark Investors.

distributions of $70,000 were to be made to investors, but were not because of the filing of the Enforcement action.

141. Only after the Receiver's comprehensive analysis of the GDA server, emails, and other document collections obtained from third parties was it uncovered that Dragul kept the Loggins sales proceeds for his personal use and benefit, and failed to pay them to the Southpark Investors.

142. Moreover, upon information and belief, Dragul and the Fox Defendants misappropriated more money from investors and the property than is represented on the settlement statements, through additional undisclosed fees and/or secret profits.

ii. Plaza Mall of Georgia North
(3410 & 3420 Buford Drive, Buford, Georgia, 30519)

143. Beginning in or about 2008 and continuing through 2016, Dragul provided prospective investors with at least three different versions of an Executive Summary and Financial Projections for a property in Buford, Georgia known as Plaza Mall of Georgia, North ("**PMG**") for the purpose of soliciting investments therein. *See* **Compl. Ex. 12** (PMG Solicitation Materials, V.1); the PMG Solicitation Materials, V.2 attached as **Exhibit 31**; PMG Solicitation Materials, V.3, attached as **Exhibit 32.**

144. The first version of the Executive Summary prepared by Dragul and distributed to prospective investors, upon information and belief from 2008 through 2012 represented that the purchase price for the property was $26,979,567.00, and that it would be necessary to raise $7,667,346.00 from investors with $100,000

minimum investments on which they could expect an 8% return. *See* **Compl. Ex. 12**, at 1.

145. On November 14, 2008, per Dragul's instructions, his staff forwarded the first version of the PMG Solicitation Materials to Hershey, for the express purpose of his distributing the Materials to prospective investors in PMG for which Hershey would receive a 10% commission from Dragul. *Id.*

146. At or about the same time, and with the actual intent to induce investors to invest in the property, Dragul sent prospective PMG investors written financial projections for the property misstating the $26,979,567 purchase price and representing that loan and closing costs were estimated at $300,000, and providing for an operating reserve of $950,000 and loans payable in the amount of $19,930,221. *See id,* at 2.

147. In fact, the purchase price of PMG was only $25.92 million, or $1,059,567 less than Dragul represented in the Solicitation Materials. *See* **Compl. Ex. 13**.

148. The subsequent versions of the PMG Solicitation materials also contained material misrepresentations as to the purchase price of the property, and contained varying figures for both the projected returns on the investment, and the minimum investment required. For instance, in a second version which, upon information and belief, Dragul and Hershey distributed to investors in 2013, represented that the purchase price for the property was $29,113,618 and for a

minimum investment of $100,000 investors would get a 7% return on their investment. *See* **Ex. 31.** In yet a third version Dragul and Hershey distributed to investors from 2014 to 2015, Dragul represented the purchase price was $28.47 million and for a minimum investment of $100,000, investors could expect an 8% return on their investment. *See* **Ex. 32.**

149. Based on the three versions of the PMG Solicitation Materials, Dragul raised $2,740,150 in new cash from 46 investors (the "**PMG Investors**") from 2008 through 2016. *See* PMG Investor Detail Chart, attached as **Exhibit 33**. Dragul "rolled over" approximately $2,449,850 from some of the 46 investors' prior investments in various failed GDA SPEs.

150. On December 24, 2008, Dragul, through Plaza Mall North 08 B Junior, LLC ("North 08 B"), purchased the PMG Property from Windward Star Associates, LLC ("Windward") for $25.92 million, $1.06 million less than the amount represented in the Solicitation Materials. *See* **Compl. Ex. 13**.

151. Dragul also created a separate entity, Plaza Mall North 08 A Junior, LLC ("North 08 A") which became a member of North 08 B, the owner of the Plaza Mall property. The operating agreement for North 08 B stated that North 08 A made an initial capital contribution of $4.766 million to the company; Windward, which also became of a member of North 08 A, and was credited with a contribution of $1.204 million, an amount reflecting $5.17 million in equity minus a distribution of $3.966 million. *See* **Compl Ex. 2**, at ¶ 14; *see also* **Compl Ex. 13**.

152. Upon completion of the transaction, North 08 A and Windward held 76.7% and 23.3% interests, respectively, in North 08 B, and thus, the property. *Id*.

153. Through the escrow for Dragul's purchase of PMG, ACF was paid a "consulting fee" of $500,000.00; GDA was paid a fee of $300,000.00 with Dragul's "SSC" entity receiving another $75,000 in fees. *See* **Compl Ex. 13**.

154. Of the $9,858,000 Dragul used to acquire North 08 A and, the 76.7% interest in North 08 B, Fox through his irrevocable trust (the "**Fox Trust**") loaned Dragul $5.2 million to complete the acquisition, with the understanding that Dragul would repay Fox with funds raised from investors. On December 4, 2008, Dragul told Fox that he could raise $1.25 million by December 31, 2008, $1 million by February 15, 2009, $1 million by March 31, 2009, $1.5 million by July 31, 2009 and $2.5 million by September 31, 2009. Ultimately, Dragul repaid Fox $990,000 in the months following the closing, making the Fox Trust's net investment in North 08 A $4.21 million.

155. In 2015, in reliance on the misleading third version of the PMG Solicitation Materials distributed by Dragul and the Hershey Defendants, Dragul induced several of the PMG Investors to "roll over" a total of $413,000 previously invested in other failed GDA SPEs, or converted from outstanding promissory notes sold by Dragul in prior years, to acquire ownership interests in the North 08 B entity. *See* **Ex. 33.**

156. To give these additional new "investors" their membership interests in North 08 B entity, Dragul diluted the interests of existing PMG Investors who had invested real money in the deal. Upon information and belief, Dragul did not disclose the dilution to the existing PMG Investors.

157. On April 1, 2016, the Fox Trust entered into an agreement to sell its entire interest in North 08 A to another newly-formed Dragul SPE, Plaza Mall North 16, LLC ("**North 16**") for $3.8 million. At that time, the Fox Trust held a 45.098% interest in North 08 A, which represented a 34.56% interest in the North 08 B entity and thus, the PMG property. *See* **Compl. Ex. 2**, at ¶ 18. The transaction was accomplished in two phases. The transaction was reflected in a Membership Interest Purchase Agreement dated February 17, 2016 and amended on March 30, 2016 in which the Fox Trust sold 45.098% of its interest in North 08 A to North 16.

158. The funding for North 16's purchase of the Fox Trust's interest in North 08 A came from Hagshama, an Israeli real estate investment company, which contributed capital through two SPEs: Hagshama Atlanta 19 Buford, LLC and CoFund 3, LLC. In exchange for Hagshama's payment of $4.6 million ($2,631,579 from Hagshama Atlanta and $2 million from CoFund 3), the Fox Trust transferred its 45.098% interest in North 08 A to North 16. As a result, Hagshama, through its interest in North 16, obtained a 34.59% ownership interest in North 08 B. The transaction closed on April 1, 2016, and from escrow, GDA received an "acquisition fee" of $100,000, a $24,600.00 "fee" was paid to CG despite $100,000 already paid in

legal fees to a different law firm, and a "consulting/loan assumption fee" of $25,400 was paid to Markusch. *See* **Compl. Ex. 14**; *see also* **Compl. Ex. 2**, at ¶ 18.

159. On April 27, 2017, Dragul, through North 08 B, sold the PMG property (*via* transfer of the entirety of North 08 B's interest in the property to an unrelated third-party buyer) for $32 million. At closing, GDA received a "fee" of $560,000, Windward was paid $1.204 million for its membership interest, and other expenses were deducted. The net sales proceeds were $9.867 million. *See* **Compl. Ex. 15.**

160. Of the $9.867 million in net sale proceeds, the two largest investors were paid first: CoFund 3 received $2.447 million and Hagshama Atlanta received $3.22 million. For its part, GDA received $4.191 million, an amount sufficient to repay less than half of what Dragul raised from and owed to his smaller, non-preferred investors. However, not only did Dragul fraudulently conceal that the PMG property had been sold, he continued to make monthly payments of fictitious profits to these smaller PMG Investors as though the Plaza Mall property were still owned by North 08 A.

161. From April through September 2018, one year after the sale of the Plaza Mall property, the Kahn Defendants incurred $25,045.64 in legal fees for work done in furtherance of Dragul's fraudulent Scheme. Knowing Dragul had not informed PMG Investors that the Plaza Mall property had been sold in April 2017, in his capacity as counsel for Dragul and the GDA Entities, Kahn provided consultation and legal advice to Dragul regarding purported "reconciliation" of investor distributions

from PMG sales proceeds, "Manager advisement," tax filings, post-tax filing reconciliations, retroactively remedying entity organizational gaps, winding down and dissolution of the entities, including "attendant risk, funding needs and liability mitigation." *See* 7/23/2018 CG PMG Invoice, attached as **Exhibit 34.**

162. In 2018, Kahn even assisted in drafting correspondence to the PMG Investors to be sent under Dragul's signature regarding PMG.

iii. Fort Collins WF 02, LLC Highlands Ranch, Meadows Shopping Center, Southwest Commons, Laveen Ranch and Tower Plaza

163. On October 15, 2002, Dragul formed and organized the SPE, Fort Collins WF 02, LLC ("**FC WF 02**") and on January 23, 2003, Dragul and Fox executed its operating agreement showing they owned 51% and 49% respectively.

164. Upon information and belief, FC WF 02 had originally owned a Whole Foods center at 2201 S. College Avenue, Fort Collins, Colorado, until it had been sold on or about May 6, 2005.

165. The proceeds from the Whole Foods sale were subsequently exchanged into three new properties, ultimately owned by Fox SPEs – (1) Highlands Ranch Village II Center, in Highlands Ranch Colorado ("**Highlands Ranch**"); (2) Meadows Shopping Center ("**Meadows**"), in Lone Tree Colorado; and (3) Southwest Commons ("**SW Commons**") in Denver Colorado.

166. On May 19, 2005, newly formed Fox SPE's purchased Highlands Ranch for a total purchase price of $29.125 million. From escrow, Dragul received $300,000 and ACF received $300,000 as "consideration."

167. The portion of proceeds rolled over and attributed to FC WF 02, a member in the Fox SPE that owned the property, was $750,000 for a 7.5% interest in the Fox SPE, which owned the Highlands Ranch property.

168. On June 9, 2005, newly created Fox SPE's purchased the second replacement investment property, Meadows, for a total purchase price of $33 million. Dragul received a $400,000 commission directly from escrow.

169. Upon information and belief, upon the acquisition of Meadows, FC WF 02 had an 8.264% interest in the real property, Meadows.

170. On August 18, 2005, the third and final replacement investment property, SW Commons, was purchased. But this one was first purchased by GDA RES for $55.821 million and on the very same day, in a separate transaction, GDA RES sold the property to newly formed Fox SPEs, Southwest Commons 05 A through I, LLC, for $59.5 million, a $3.69 million profit. FC WF 02 was the sole member of Southwest Commons 05 E, LLC, and owned a 5.5% interest in the real property, SW Commons.

171. Fox and Dragul each took undisclosed and unauthorized commissions from escrow in the second sale of SW Commons of $400,000 and $500,000, respectively.

172. Beginning in 2008, Dragul began sending solicitation materials to prospective investors fraudulently representing that their investment would be used for the three investment properties, Highlands Ranch, SW Commons and Meadows, when in fact, Dragul was soliciting funds to repay nearly $3.3 million Fox had loaned him for personal and business purposes unrelated to the FC WF 02 properties.

173. In addition to Dragul's solicitation efforts, in or about April 2008, Dragul provided Hershey with materials on the three properties in which FC WF 02 held an interest for the purpose of Hershey to solicit prospective investors to buy membership interests in those properties. Specifically, Dragul authorized Hershey to sell up to $650,000 in membership interests, for which Hershey would receive a 6% commission on each investment made.

174. On April 24, 2008, Dragul told Hershey that he should tell prospective investors that the return on their investments would be 7% and provided copies of the rent rolls for the properties assuming that these rent rolls would be of more value to prospective investors than formal Solicitation Materials.

175. In soliciting investors in 2008, neither Dragul nor Hershey provided material information to prospective investors for the three properties, that would allow them to make informed decisions, such as the purchase price of each property, the total amount being offered, financial projections, information on any of the three loans in place, the projected length of the investment, and the like.

176. As of March 22, 2009, Dragul had sold all of the membership interests in FC WF 02, LLC to approximately 40 investors who collectively invested $2.36 million in cash and $292,000 in "roll-overs" ($192,000 from Southlake 07 D, LLC and $100,000 from Walden 08, LLC) (the "**FC Investors**"). *See* FC Investor Detail Chart, attached as **Exhibit 35.**

177. On February 5, 2009 one of the FC Investors, R.G., whose investment had been solicited by Hershey, reached out to Hershey and asked what his options were to cash out his $100,000 investment in the FC WF 02, LLC deal due to financial strains. Hershey forwarded the email to Dragul for instruction, Dragul responded on June 9, 2009 but did not provide an option to cash out due to Dragul and GDA's own financial strains.

178. There is no provision in the October 15, 2002 FC WF 02 operating agreement, the Solicitation materials or the Membership Purchase Agreements that this investor executed and received from Dragul that limits how or when an investor such as R.G. could cash out of a deal. Nonetheless, Dragul held this investor – and others in the coming years – hostage, in the deal because the funds invested in this and all other deals were never actually held in the SPE for which they were intended, and Dragul's Ponzi Scheme left GDA with insufficient capital to satisfy its obligations, including complying with investors' cash-out requests.

179. At some point in 2009, Dragul diluted all FC Investors' membership interests in the SPE, upon information and belief, without their knowledge or

consent, in order to "gift" membership interests to "friends of the house," none of whom invested actual funds into the deal, but still received monthly distributions from 2009 through 2018. These additional FC Investors included Dragul's mother-in-law, Audrey Ahrendt (3.603%); Dragul (4.3132%); Dragul's parents, Paul Dragul (1.8022%) and Paulette Dragul (1.8022%); long-time friends of Dragul, Russel Becker (3.6034%) and Robert Kauffman through Prima Center 07, LLC (0.4491%); and Dragul's loyal employees, Defendant Markusch (1.8022%) and Kristen O'Donoghue (3.034%). *See* **Ex. 35.**

180. On November 20, 2011, Fox, with the assistance of Dragul and the GDA staff sold the Highlands Ranch property in which FC WF 02 held a 7.5% interest in the Fox SPE that ultimately owned the property, for $27,634,052 from which Fox and Dragul took $110,600 and $55,200 in commissions, respectively.

181. Neither Fox nor Dragul provided any notice of the sale to or obtained consent or approval of any of the FC Investors before the sale, which upon information and belief, was required by the governing Fox SPE operating agreement.

182. On December 13, 2011, the Fox Defendants sent an update letter to the investors in Highlands Ranch, including Dragul on behalf of and as manager of FC WF 02, advising that the property had been sold and the proceeds would be exchanged into a new property that had not yet been identified, but that the investors could expect a 20% increase in regular monthly distributions. While the proceeds were being held by the exchange company, Fox suspended all monthly distributions.

183. On January 11, 2012 Dragul informed the FC Investors of the sale and upon information and belief, fraudulently represented that a majority of the owners of HR II 05, LLC voted to sell the property and exchange it into another and the FC Investors "were not in a position to control the outcome." Dragul provided the FC Investors with three fictitious options: (1) maintain the investment in FC WF 02 and reinvest any proceeds from the sale of Highlands Ranch into an exchange property; (2) a Fox-owned SPE would purchase half of an investment if an FC Investor wished to cash out, but such payment would not be made until after closing on the exchange properties and the investor would not receive any distributions for the remaining half of their investment – essentially surrendering that half to Fox and Dragul; or (3) Fox would use "best efforts" to find a new investor to buy out those who wished to cash out, which according to Fox, would take approximately 45 days after the exchange was completed and would forego all monthly distributions.

184. Almost immediately after Dragul sent the January 11, 2012 "update" about the sale of Highlands Ranch, several angry FC Investors contacted both Hershey and Dragul expressing outrage that they were neither informed about the sale of the property nor given an opportunity to consent to its sale or exchange.

185. In January and February 2012, two different FC Investors S.L. and K.S., not only raised these same concerns about the sale but also questioned Dragul and Fox's representation that they could expect a 20% increase in monthly cash

distributions when, in the same letter, they also represented that a replacement property had not yet been identified.

186. As was common, instead of responding to these investor inquiries with information and explanation as to the topic at hand, Dragul instead responded to one of the two FC Investor's questions with a lengthy email pointing out all of the hard work and long hours he and his staff had been working on a bankruptcy filing for an unrelated SPE – Walden Park. Dragul disingenuously went on: "Education is power and I welcome you to come and get educated about what we are doing at GDA daily in favor of our investors." Ultimately, Dragul provided the investor with no material information and instead shifted blame to Fox whom he represented had not responded to his requests for the same information when in fact, Dragul and his GDA staff had been working directly with Fox and ACF to identify and close on two new replacement properties.

187. Both Dragul and Fox knew all details about the replacement properties but withheld that information from the Investors in order to avoid investor objections or questions about the new acquisitions. In fact, Dragul, on behalf of GDA RES executed the initial purchase and sale agreement for one of the two replacement properties (Laveen Ranch Marketplace) on January 12, 2012, and ultimately assigned it to Fox's SPE.

188. Upon information and belief, Dragul and Fox intentionally withheld material information about the two replacement properties from the FC Investors

when specifically asked until after escrow closed on both in order to ensure these Investors' funds could be used to acquire the new properties and to conceal the fraudulent transfers made to both Defendants from the closings.

189. In light of the flurry of angry investor calls and emails received by Hershey and Dragul, Hershey drafted an investor update letter to be sent by GDA under Dragul's signature, providing the same false and misleading, vague and unhelpful statements Dragul had previously provided to S.L and K.S.

190. On March 23, 2012 ACF sent investor update letters, including to Dragul as manager of FC WF 02, with information on the two newly acquired exchange properties the FC Investors' Highlands Ranch investments were exchanged into – Trophy Club Plaza in Trophy, Texas ("**Trophy Club**") and Laveen Ranch Marketplace in Phoenix, Arizona ("**Laveen**").

191. Enclosed in Fox's March 23, 2012 letter to the FC WF 02 Investors were the Trophy Club and Laveen Solicitation Materials, both of which were prepared by the Fox Defendants, which contained materially false and misleading statements and figures, and which were intended to and did in fact, induce the FC Investors to keep their money in the deal. *See* 3/23/12 ACF Letter encl Trophy Club and Laveen Solicitation Materials, attached as **Exhibit 36.**

192. The Trophy Club Solicitation Materials represented that the purchase price of the property was $16.9 million, when in fact it was purchased by Fox's newly formed SPE, Trophy Club 12, LLC, on March 15, 2012 for $14.9 million – inflating

the price by nearly $2 million. *See* **Ex. 36**, at 2; and 3/16/12 Trophy Club Settlement Statement, attached as **Exhibit 37.**

193. The Trophy Club Solicitation Materials also represented that $3.887 million in cash was required, factoring in the inflated purchase price of $16.9 million, loan and closing costs of $250,000, operating reserves of $500,000 less the new $13.736 million loan. The purported "projections" omitted ACF's $298,000 commission taken from escrow of the Trophy Club purchase on March 16, 2012, which was not authorized or disclosed to the investors. *Id.*

194. Moreover, upon information and belief, the Fox Defendants never maintained an operating reserve of $500,000 as represented in the Solicitation Materials. Rather, like Dragul, Fox comingled all of the funds from ACF's operations, including investment funds, in an account other than the designated SPE account. *See* **Ex. 36**, at 2.

195. Also enclosed in the March 23, 2012, ACF investor letter sent to Dragul for and on behalf of WF FC 02 were the solicitation materials for Laveen prepared by Fox, which contained false and misleading representations intended to induce the FC Investors to stay in the deal. *See id.*

196. The Laveen Solicitation Materials prepared and distributed by Fox to the FC Investors stated that the purchase price was $4.5 million, when it was actually purchased on March 14, 2012 for $3.88 million - $460,000 less than stated in the

Solicitation Materials. *See* **Ex. 36**, at 5-6; *see also* 03/14/12 Laveen Settlement Statement, attached as **Exhibit 38.**

197. The Laveen Solicitation Materials also represented that $2.234 million in cash was required, factoring in the inflated purchase price of $4.5 million, loan and closing costs of $150,000, operating reserves of $300,000, less the new $2.716 million loan. The purported "projections" omitted GDA's $50,000 and ACF's $75,992.99 commissions taken from escrow of the Laveen purchase on March 14, 2012 neither of which were authorized or disclosed to investors. *See id.*

198. Moreover, upon information and belief, the Fox Defendants never maintained an operating reserve of $300,000 as represented in the Solicitation Materials. Rather, like Dragul, Fox comingled all of the funds from ACF's operations, including investment funds, in an account other than the designated SPE account.

199. Upon information and belief, Fox offered and sold membership interests in Trophy Club and Laveen at different rates to different categories of investors (*i.e.*, gave greater percentage interests for less money to close family and friends), effectively diluting the FC Investors membership interests.

200. Months after the purchase of Laveen and Trophy Club, on April 27, 2012, Dragul informed the FC Investors that Fox had closed escrow on the two replacement properties for Highlands Ranch, Trophy Club and Laveen. Without any intention of locating investors to buy out those who wished to cash out, Dragul advised that none had been located yet but the efforts were ongoing. Dragul enclosed

the Trophy Club Solicitation Materials prepared and distributed by Fox with actual knowledge that the representations therein were false and misleading, including but not limited to those set forth in paragraphs 192 through 195 and 197 through 200, above.

201. On March 24, 2016, the Fox Defendants closed on a refinance of Laveen, for which Fox obtained a new $3.173 million loan from Morgan Stanley. As was customary for Fox and Dragul, Fox misappropriated $37,120 from the refinance as a purported "commission."

202. On March 20, 2016, Fox informed Laveen investors, including Dragul for and on behalf of FC WF 02 and its Investors, that he had closed on the refinance. However, Fox failed to disclose the unauthorized commission taken therefrom. Because the commission was paid from funds representing equity in the property, the FC Investors were entitled to their pro rata share which had been misappropriated by Fox.

203. Also, in the March 20, 2016 letter to investors, Fox represented that the net loan proceeds from the refinance were $861,196, which "will be reinvested to earn approximately 4% annually which will add more than $34,000 to annual income."

204. On September 13, 2018, shortly after the Receiver was appointed, Fox sent an update letter to the investors in Laveen, including to Dragul for and on behalf of FC WF 02 and the Investors therein, representing that he had executed a contract to sell Laveen and seeking investor approval for the sale and authorization to

exchange the investment proceeds into a new property. *See* 9/13/18 ACF Laveen Sale Letter, attached as **Exhibit 39.** In the September 13th letter, Fox represented to the FC Investors that a contract was in place to sell the property for $5.795 million, which Fox represented, would result in at least $3 million available to distribute to the investors or exchange into a new property.

205. To obtain the consent of investors to sell the property and exchange the proceeds into a new property, Fox misstated that $2.334 million in membership interests had been sold in March 2012 so he could represent an inflated return on the investment of 34%. In fact, Fox did not sell all membership interests in the project and as such, the investors' return was less than 34%. *Id.*

206. Also to induce the investors to consent to the sale and exchange, upon information and belief, Fox represented that "a large number of the investor accounts [were] negative as of December 31, 2017," but failed to include a statement of WF FC 02's investor account in the letter and did not advise as to the current balance. *Id*.

207. Fox asked investors to execute the ballot attached to the letter and return it no later than September 30, 2018. *Id.*

208. Neither Dragul nor Fox produced the September 13th Laveen sale letter or ballot to the Receiver – the only individual with the authority to execute the ballot approving the sale and exchange – until several months later.

209. On April 1, 2019, Dragul directed his employee to forward the September 13, 2018 ACF letter to the Receiver and to induce the Receiver to agree to

the sale and exchange, represented the sale would produce $71,913 in proceeds to FC WF 02. *See* 4/01/19 Email, attached as **Exhibit 40**.

210. In response, the Receiver requested asked for information about the investment, including financials, business organization documents and the like, but received nothing more. The Receiver did not execute the ballot and therefore did not consent to the sale of the property or the exchange.

211. Upon information and belief, Fox did not obtain consent from a majority of the investors in Laveen to sell the property. Nonetheless, on April 25, 2019 – only 24 days after the Receiver was first provided with the notice and ballot – Fox sold Laveen for $6.575 million - $780,000 more than he represented to investors and the Receiver in his September 30th letter. *See* Laveen Real Estate Transaction History Report, attached as **Exhibit 41.**

212. Fox still refuses to produce the governing organizational documents, syndication and investor records, financial records, purchase and sale documents, and other relevant materials the Receiver has requested concerning Laveen Ranch and the Estate's other ACF investments. Thus, is it unknown at this time what proceeds the Estate is entitled to from the sale of the Laveen property, how much Fox and Dragul misappropriated from escrow in "commissions," or other details about this investment.

213. Since the Receiver's appointment on August 30, 2018, through the present, the Fox Defendants have withheld monthly distributions of at least $26,248

for various projects, including Trophy Club, to which FC WF 02 is entitled. These distributions are property of the Receivership Estate and as such, the Receiver has been forced to file a turnover motion to recover the withheld distributions and obtain relevant documents, which remains pending in the Receivership Court.

214. Fox has claimed he is withholding distributions out of concern that they will not be paid to downstream investors (*i.e.*, the FC Investors). He expressed no such concern, however, in the years he made the distributions to Dragul for and on behalf of FC WF 02, LLC, with actual and/or constructive knowledge that Dragul was pocketing most of the funds for himself or diverting them elsewhere.

E. Real Estate Transfers Between Dragul and Fox – Prospect Square

215. The Fox Defendants and Dragul routinely transferred SPE properties to each other at inflated prices in order to pay themselves undisclosed fees at the expense of investors.

216. For example, in or about October 11, 2007, Dragul, through his newly created SPE, Prospect Square 07 A, LLC, purchased a shopping center located at 9690 Colerain Avenue, Cincinnati, Ohio known as Prospect Square (the "Prospect Property").

217. The purchase of the Prospect Property was financed with a $12.9 million loan from Royal Bank of Canada, evidenced by an October 10, 2007, promissory note, which was subsequently assigned and transferred three times before MSCI 2007-IQ16 Retail 9654, LLC (the "Prospect Lender") acquired it.

218. The Prospect Property was owned as tenants-in-common by five different SPEs – Prospect Square 07 A, LLC (57.35%), Prospect Square 07 B, LLC (2.21%), Prospect Square 07 C, LLC (5.54%), Prospect Square 07 D, LLC (4.16%), and Prospect Square 07 E, LLC (30.74%). The foregoing entities are referred to as the "Prospect SPE's").

219. In the Solicitation Materials prepared by Dragul and provided to prospective investors, he represented that the purchase price for the property was $18.33 million, when in fact he purchased the property for $16 million, $2.33 million less than represented to investors. **Compl. Ex. 16.**

220. In reliance upon the false and misleading Solicitation Materials distributed by Dragul and the Hershey Defendants in or about 2007, investors ultimately contributed approximately $5 million through their purchase of ownership interests in the SPE that owned the Prospect Property.

221. Hershey was paid $306,000 at the Prospect closing as an undisclosed and illegal "commissions." *See* **Compl. Ex. 17.**

222. On January 29, 2014, Dragul on behalf of the five Prospect SPEs filed petitions for bankruptcy under chapter 11 of the U.S. Bankruptcy Code (all five cases were consolidated into Case No. 14-10896-EEB, U.S. Bankruptcy Court, District of Colorado).

223. On October 1, 2014, the Prospect SPE debtors filed a motion seeking bankruptcy court approval of a purchase and sale agreement for the sale of the

Prospect Property to Park City Commercial Properties, LLC ("Park City") for $16.15 million (the "First Prospect PSA"). *See* Dkt. No. 171 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

224. In connection with the prospective sale of the Prospect Property, the Prospect SPE debtors entered into a stipulation and settlement agreement with the Prospect Lender whereby the Lender agreed to accept a reduced payoff on its loan, which was in default, provided it was paid by December 1, 2014. *See* Dkt. No. 174 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

225. Edward Delava, the managing member and signatory for the Park City purchaser in First Prospect PSA, had been Defendant ACF's CFO since the 1990's.

226. Neither the Prospect SPE debtors nor the prospective buyer disclosed the insider relationship among Delava, Fox, and ACF to either the bankruptcy court or the Prospect Lender.

227. The bankruptcy court approved both the settlement agreement with the Prospect Lender and the First Prospect PSA on October 21, 2014. *See* Dkt. No. 182 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

228. On January 5, 2015, the Prospect Lender filed a Motion for Relief from the Automatic Stay seeking to foreclose on the Prospect Property because the sale to Park City had not closed. The Prospect SPE debtors had not provided notice to the bankruptcy court of the failed sale. *See* Dkt. No. 196 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

229. In response to the Prospect Lender's foregoing motion, the Prospect SPE debtors objected to the motion for relief from stay citing extenuating circumstances beyond the debtors' control that had prevented the sale from closing:

> After entering into the settlement agreement and a third-party sale agreement that both depended on the current tenant make-up and rental income stream, the anchor tenant Kroger announced its intention to expand and relocate elsewhere. The result was immediate uncertainty as to the future tenant income stream, and the possibility that retail income from the property and associated valuations could drop precipitously. This dramatic turn of events spooked Debtors' buyer and the lending community in the immediate term and will require the Debtors to engage in rehabilitative leasing and tenant improvement efforts related to Kroger space. Until the Debtors have completed such transitional needs, the valuation, sale and financing opportunities for the property are compromised or worse.

See Dkt. No. 202 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 9.

230. Upon information and belief, Dragul and his GDA employees, including Markusch, knew about Kroger's desire to expand and intention not to renew its lease upon its expiration in February 2018 at the time of the First Prospect PSA.

231. Notwithstanding this, Dragul, on behalf of the Prospect SPEs, represented to the bankruptcy court in the objection to the Lender's motion for relief from stay that he had no knowledge of this material fact when the settlement agreement with the Lender and the First Prospect PSA were executed. *See* Dkt. No. 202 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

232. Upon information and belief, the First Prospect PSA was a "stalking-horse" bid from a related party to the ultimate purchaser – the Fox Defendants – both of whom were intimately connected to Dragul and the GDA Entities.

233. The Prospect SPE Debtors contended that Kroger's decision not to renew its lease, which was set to expire in February 2018, resulted in a significant decrease in the fair market value of the Prospect Property and that finding a suitable replacement anchor tenant would take time and money. *See* Dkt. No. 202 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

234. In February 2015, the parties eventually reached an agreement pursuant to which the Prospect Lender was granted leave from the automatic stay to have a receiver appointed pursuant to its loan documents, among other terms. *See* Dkt. No. 204 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo).

235. On June 30, 2015, the Prospect Lender and the SPE debtors entered into a second settlement agreement, pursuant to which, the Lender agreed to accept a discounted amount of $12.2 million in satisfaction of the $12,418,135.53 outstanding balance on its loan. *See* Dkt. No. 230 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

236. On July 2, 2015, the Prospect SPE debtors filed a motion seeking bankruptcy court approval of a second purchase and sale agreement to sell the Prospect Property to ACF at a a significantly reduced price of $12.2 million, $3.95

million less than the First Prospect PSA (the "Second Prospect PSA"). *See* Dkt. No. 227 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 7.

237. Under the terms of the Second Prospect PSA, the Prospect SPE debtors provided an $800,000 credit to the buyer (*i.e.* ACF), for "Seller's reasonable transaction costs," including *inter alia,* $350,0000 in attorney's fees to CG. This amount was deducted from the reduced payoff amount agreed to by the Lender. *Id*.

238. Nowhere in the motion seeking bankruptcy court approval of the Second Prospect PSA are the Fox Defendants' long-standing relationship and business dealings with Dragul and, thus, their status as Insiders as defined in the Bankruptcy Code, disclosed.

239. On July 31, 2015, following ACF's assignment of the purchase and sale agreement to Fox's newly created SPE, Prospect Square 15, LLC, the sale of the Prospect Property closed for $12.2 million. *See* **Compl. Ex. 18.**

240. A total of $818,645.61 for "additional charges" was paid at the closing of ACF's July 31, 2015 purchase of the Prospect Property from the chapter 11 bankruptcy estate:

PAYEE	CATEGORY	AMOUNT
Legal Fees from Escrow:		
Brownstein Hyatt Farber Schreck, LLP	Legal fees	$164,588.36
Seygarth Shaw LLP	Lender's legal fees	$26,200.00
Robins Calley Patterson & Tucker	Legal fees	$18,885.26
Kutner, Brinen, Garber P.C.	Debtors' (sellers) legal fees	$39,073.99
The Conundrum Group	Legal fees	$350,000.00
Strauss Troy Co.	Local legal opinion	$4,600.00
Keating Meuthing & Klekamp	Lender local legal fees	$1,663.00
Brownstein Hyatt Farber Schreck, LLP	Additional legal fee	$32,100.00
Legal fees from escrow sub-total		**$637,110.61**

PAYEE	CATEGORY	AMOUNT
Other Fees:		
Hanley Investment Group	Consulting services fee	$110,000.00
Indigo Consulting Services dba Indigo Management Services	Consulting services fee	$5,500.00
Transpacific Real Estate Consultants	Consulting services fee	$35,000.00
Global Realty Services Group	Environmental & Phase I Reports	$2,250.00
The Planning and Zoning Resource Company	Zoning Report	$985.00
Thomas Graham & Associates	Survey	$2,800.00
Park City Commercial Properties	Commission	$25,000.00
Other fees sub-total		**$181,535.00**
TOTAL ADDITIONAL CHARGES FROM ESCROW		**$818,645.61**

See **Compl. Ex. 18.**

241. Defendant CG received $350,000 from escrow for a purported "legal fee," notwithstanding that approximately $637,110.61 was taken from escrow to pay legal fees to at least five other law firms. *See* **Compl**. **Ex. 18**.

242. While the Prospect SPE debtors filed an application to employ the Kahn Defendants, there is no description or statement as to precisely what legal services Kahn would provide to the debtors – "The Debtors desire to employ the services of [the Kahn Defendants] to continue its non-bankruptcy legal services, including general corporate and business matters." *See* Dkt. No. 89 (Case No. 14-10896-EEB, U.S. Bankr. Court, D. Colo), at ¶ 10.

243. When the Prospect SPE debtors filed their bankruptcy petitions, the Kahn Defendants held a general unsecured claim of $27,277.83 for prior legal services. *Id* at ¶ 5.

244. Upon information and belief, the Kahn Defendants did no legal work in connection with the sale of the Prospect property for which legal fees would have been warranted or properly due and owing from the escrowed funds.

245. The initial stalking-horse buyer of the Prospect Property, Park City Commercial Properties, which was owned and managed by ACF's CFO Delava, received a "commission" of $25,000.00 at closing.

246. Upon information and belief, neither Park City nor Delava were licensed real estate agents entitled to receive such a commission, nor was such commission disclosed to the bankruptcy court.

247. The Prospect Square chapter 11 bankruptcy case was closed on November 4, 2015.

248. On January 22, 2016, nearly six months after the Fox Defendants' purchase of the Prospect Property, through a newly created SPE, PS 16, LLC, Dragul repurchased the Prospect Property for $13.8 million, giving the Fox Defendants a profit of approximately $1.6 million for holding the property for less than six months. *See* **Compl. Ex. 18**.

249. At the closing on Dragul's repurchase of the Prospect Property, GDA received $207,000.00, purportedly to reimburse its "due diligence" expenses and earnest money deposits, CG received $31,727, again, under the guise of legal fees, and Delava's entity, Park City, received another $25,0000 "commission." *Id.*

250. Dragul's repurchase of the Prospect Property was financed with a new $12.97 million loan, $4.335 million from Dragul's institutional investor, Hagshama and $481,675 in funds ultimately contributed by investors.

251. Even though Dragul's second purchase of the Prospect Property closed in January 2016, beginning in or about February 2016, Dragul and the GDA Entities sent Solicitation Materials to prospective investors seeking investments in GDA PS Member, LLC, a member in PS 16, LLC with 10% interest therein. *See* **Compl. Ex. 20**.

252. In these Prospect Solicitation Materials, Dragul made the following material misrepresentations to prospective investors:

> The 66,846 square foot Kroger store currently does extremely well with sales in excess of $700 per square foot which equates to well over $46,000,000 per year. Kroger is currently paying $7.75 per square foot and their lease expires February 28, 2018. We have received word that they plan to move to a much larger newly developed store across the intersection. The ownership welcomes the opportunity to have Kroger's space back as market rent for this space is upward of $13.75 per square foot. In fact, the ownership has already received an offer on the space. Furthering the strength of this property is the lack of available commercial land in the submarket limiting competition and allowing an investor to benefit from rising market rental rates.

Compl. Ex. 20, at 1. This was directly contrary to the representations made by Dragul to the Bankruptcy Court which attributed the decreased value of the Prospect to Kroger's departure and the difficulty of finding a replacement tenant. In fact, as of

the date of the Receiver's appointment, Dragul had not identified a replacement tenant or re-leased the Kroger space.

253. In reliance on this misrepresentation, four investors who had received the Prospect Solicitation Materials invested $555,000 in GDA PS Member, LLC (the "Prospect Investors"). In addition to these investors that contributed cash, Dragul also "gifted" interests in GDA PS Member, LLC to a friend and his three children, Charli, Samuel and Spencer Dragul, who did not actually put money into the deal. *See* Prospect Investor Detail Chart, attached as **Exhibit 42.**

254. Dragul informed the Prospect Lender in or about January 2018, that he would not be able to pay the $12.97 million loan he obtained to finance the purchase of the Property, which was due in February 2018.

255. As of the date of the Receiver's appointment, Kroger provided notice of its intent to terminate the lease early and paid $1.75 million to the Prospect Lender as an early termination fee, which was credited towards the defaulted loan balance.

256. Dragul and the Prospect lender executed a forbearance agreement on January 31, 2018, pursuant to which the lender agreed to forebear exercising its default remedies until May 1, 2018, to allow Dragul time to obtain refinancing.

257. Given his First Indictment, Dragul was unable to refinance the Property, and defaulted on the forbearance agreement by failing to make May, June, July, and August 2018 payments.

258. On November 29, 2018, the Prospect lender instituted a civil action in Ohio state court seeking to foreclose on the Property notwithstanding the stay provisions contained in the Receivership Order.

F. Dragul, Markusch, the Kahn and Fox Defendants' Conduct Designed to Thwart the Receiver's Efforts and Conceal or Impermissibly Transfer Receivership Estate Assets

259. The Receiver could not have discovered these above-detailed misrepresentations made to the GDA Entity Investors prior to August 30, 2018 through reasonable diligence because he did not have access to the GDA books and records, and Dragul refused to produce the SPE books and records to GDA Entity Investors for inspection despite periodic requests.

260. 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. When requested, Dragul and his staff provided inaccurate or incomplete information to the Receiver.

261. Since approximately 2004, Fox and Dragul owned a Rayethon-Hawker Beechjet 400XP (Serial No. RK-0504, Registration No. N202TT) (the "**Airplane**"). As of the date of the Receiver's appointment, the Airplane was owned by SSC Aviation 06, LLC ("**SSC A 06**"), which in turn was wholly-owned by SSC Aviation 04, LLC ("**SSC A 04**").

262. Pursuant SSC A 04's First Amended Operating Agreement dated April 1, 2011, Dragul and Fox are the sole members holding 66.67% and 33.3% of the membership interests therein, respectively.

263. Dragul was the sole manager of SSC A 06 pursuant to a June 2, 2007 transfer and assignment executed by the prior owner in favor of SS A 04 and Dragul as its sole member and manager.

264. In or about September 2018, shortly after the Receiver's appointment, at a time when the Receiver did not have access to any of the GDA server files, books or records, and was otherwise without access to information regarding this investment, Fox and Dragul represented to the Receiver that the Airplane's value was less than the debt it secured and Fox offered to assume the deficiency on the loan and dispose of the Airplane.

265. At the same time, in September 2018, Fox and Dragul were working with L&L International to market and sell the Airplane, but neither disclosed this to the Receiver.

266. Fox, Kahn and Markusch each had actual knowledge that Dragul was the sole manager of SSC A 06, and therefore, those management rights, and the 66.67% interest in the Airplane were property of the Receivership Estate. Notwithstanding this knowledge, Fox, Kahn and Markusch conspired to create false, back-dated organizational documents for both entities in order to vest control and management rights in Fox so that he could sell the Airplane without the consent or

Receivership Court approval and keep the profits from the sale beyond the reach of the Receiver.

267. Kahn realized in November 2018 that the SSC A 04 and SSC A 06 entities were missing key organizational documents that transferred management rights of SSC A 06 to Fox so he could sell the Airplane without the Receiver's knowledge.

268. In emails with the prospective buyer in November 2018, Kahn on behalf of Fox and Dragul, represented to the prospective buyer that Fox was the manager of SSC A 04 and therefore "ha[d] effective control." In these emails, on which Dragul, Fox and Markusch were copied, Kahn acknowledges that any gap in the organizational documents could normally be fixed with an amendment, but "in this particular instance we are precluded from doing so because of the existing receivership order – which is why Mr. Fox is acting as the Manager for SSC [A] 04."

269. Apparently satisfied with this explanation, the Airplane was sold for $1.5 million on December 12, 2018.

270. On December 21, 2018, Fox wired $30,000 to Shelly Dragul's (Dragul's wife), Chase bank account with a memo referencing "Sale of Beechjet." Fox knew the proceeds were property of the Receivership Estate but he conspired with Dragul and Kahn to pay them to Dragul instead of the Estate.

271. In January 2019, following the sale, Kahn, having recognized the entity organization gaps, fraudulently drafted new organizational documents purportedly

to address those gaps and ensure that the Fox Defendants could file a claim against the Receivership Estate for expenses incurred for the Airplane since the Receiver's appointment.

272. On January 23, 2019, Kahn with the assistance of Markusch, drafted and transmitted to Fox, Edward Delava, Eric Diamond (ACF's new CFO), and Dragul, the following SSC A 04 entity documents requesting their signatures:

a. A First Amended Operating Agreement, fraudulently back-dated to June 2, 2007, adding Fox as a manager of the entity, together with Dragul;

b. A Second Amended Operating Agreement, fraudulently back-dated to June 14, 2007 to bring the operating documents in conformance with the loan documents and subsequent Colorado Secretary of State filings; and

c. A Notice of Termination/Dissolution to the Members of SSC A 04 fraudulently back-dated to December 21, 2018, in an effort to resolve two pending lawsuits filed against the entity.

273. The same day, Kahn sent a second set of fraudulent drafted and back-dated organizational documents to the same recipients that addressed the entity organization gaps in SSC A 06:

a. A Second Amended Operating Agreement, fraudulently back-dated to August 1, 2018, to reflect a change in the Manager from Dragul to Fox.

b. A Notice of Capital Contributions fraudulently back-dated to August 1, 2018, which Kahn "designed as a forward thinking document" and instructed Fox to insert overestimated expenditures for the fictitious capital call. Kahn added: "This document will become the basis for any SSC [A] 04 equitable claims submission to the Receivership Estate;" and

c. A Notice of Termination/Dissolution to the Members of SSC A 06 fraudulently back-dated to December 31, 2018 with directions to dissolve the entity "once it resolves any capital contribution or equitable claims efforts, and once SSC 06 has closure."

274. Kahn fraudulently created and back-dated all of the foregoing entity organization documents for SSC A 04 and SSC A 06 for the express purpose of manufacturing a purported pre-receivership change in management and a capital call entitling the Fox Defendants to submit a false claim against the Receivership Estate for expenses he incurred for the Airplane.

275. Also after the Receiver's appointment, Fox has systematically refused to produce documents in response to the Receiver's numerous requests beginning in February 2019 and continuing through the present for documents and records concerning the Estate's interests in several Fox SPEs, in an effort to conceal Fox and Dragul's continuing and pervasive fraud in furtherance of Dragul's Scheme.

276. Upon information and belief, Fox refuses to provide basic, readily-available documents such as detailed financial statements, appraisals, and evidence

of the debt encumbering the properties held by the Fox Entities to further conceal his and Dragul's fraudulent conduct.

277. On June 4, 2019, the Receiver filed a Turnover Motion (the "Dragul Turnover Motion") with the Receivership Court demanding that Dragul turnover various Estate assets he had been concealing and withholding from the Receiver, including those held by SSC 02, LLC ("**SSC 02**") – an entity purportedly owned by Dragul's children and managed by his wife. The Dragul Turnover Motion asserted that SSC 02 was property of the Estate and that all of its assets must be turned over to the Receiver.

278. Dragul and his family members conceded as much and the Court approved a settlement agreement on December 17, 2019, that required all of SSC 02's assets to be turned over to the Receiver.

279. The Dragul Turnover Motion was served on Fox, his attorneys and ACF's CFO via email on June 4, 2019, because Fox and ACF are purported creditors of the Estate and are therefore entitled to notice of filings therein.

280. SSC 02's assets included membership interests in three Fox Entities – Kenwood Pavilion 14 A, LLC (0.581% interest), Fenton Commons (0.221%), and College Marketplace (0.115%). Both felony charges against Dragul and this Receivership put Dragul in financial distress. Pursuant to their long-standing relationship, Fox agreed to assist Dragul by diverting money owed to the Estate. Notwithstanding his actual notice of the June 4th Dragul Turnover Motion, which

asserted that SSC 02 was property of the Estate, in July 2019, Fox purchased SSC 02's interests in Kenwood, Fenton, and College Marketplace for $60,000.

281. On January 12, 2019, Dragul told Fox he was in desperate financial condition and asked him for $1 million as Fox had regularly made personal loans to Dragul disguised as investments for at least the previous 10 years. On April 9, 2019, the Receiver's counsel conferred with Dragul's counsel regarding SSC 02 stating:

> we have determined that SSC 02, LLC was funded with money from various accounts in which investor funds were deposited and comingled. . . . Considering this information, *the Receiver retracts any authority previously provided* ***to sell the storage unit or any other asset owned by SSC 02, LLC***. *Further, we need a full accounting of all* items in the storage facility as well as the *assets held by SSC 02, LLC,* ***including membership interests in any ACF owned entity as reflected by the attached check***.

See 01/12/19 Dragul and Fox Emails, attached as **Exhibit 43** (emphasis added). A copy of the check referred to in the above-referenced email (attached as **Exhibit 44**) specifically identifies SSC 02's interests in Kenwood, Fenton, and College Marketplace, the very interests Fox paid $60,000 for three-and-a-half months later.

282. Within minutes of Dragul learning the Receiver was onto SSC 02, Dragul forwarded the Receiver's April 9 email to Fox with the following note**: "*Alan, See below. Can we discuss.*"** *See* Email Forwarding Turnover Conferral, attached as **Exhibit 45** (emphasis added). Fox had actual knowledge ***on April 9th*** that the Receiver was seeking turnover of SSC 02's interests in Kenwood, Fenton, and College

Marketplace. Nevertheless, without the Receiver's knowledge or consent, and without Court approval, Fox paid Dragul $60,000 for these interests in July 2019.

283. In another transaction taking place in November 2018 and continuing through February 2019, designed to conceal payments to Dragul in violation of the Receivership Order, Fox surreptitiously purchased Dragul's interests in yet another Fox-owned SPE that was property of the Estate.

284. In 2015, Dragul acquired a 7.317% membership interest in the Shoppes at Bedford 15A, LLC (one of the Fox Entities), an interest purportedly then worth $654,871.50**.** On November 1, 2015, Dragul "gifted" 50% of his Bedford interest to his friend, lender, and frequent investor Marty Rosenbaum.

285. In November 2018, months after the Receiver was appointed, Rosenbaum agreed to a proposed transaction in which Dragul would secure a $200,000 loan from Fox with both his and Rosenbaum's 3.6585% Bedford interests. But that transaction apparently did not occur. Instead, Rosenbaum sold his Bedford interest to Fox for $100,000, which Rosenbaum then funneled to Dragul, and at the same time Fox paid Dragul an additional $25,000.

286. On November 9, 2018, Fox wired $25,000 to Dragul's wife Shelly "as a deposit re Bedford LLC Member Interest" with the intention of concealing the funds concealed from the Receiver.

287. On November 15, 2018, Rosenbaum transmitted an executed $100,000 "promissory note" and membership interest purchase agreement and confirmed in

the email that "**Once I receive the wire . . . I will turn around and wire to Shelly's account.**"

288. On November 16, 2019, Shelly Dragul received both the $25,000 wire from Fox in her personal Chase bank account, and the $100,000 wire from Rosenbaum.

289. Without disclosing the completed November 2018 Rosenbaum transaction to the Receiver, in February 2019, Dragul asked the Receiver to consent to Dragul selling his 3.6585% Bedford interest to Fox for $20,000, one-fifth what Fox paid Rosenbaum a few months before. GDA's February 13, 2019, email stated "to get this [Dragul's Bedford interest] out of the receivership estate, Alan is willing to purchase Gary's beneficial interest for $20,000, payable immediately to the estate." Fox confirmed the offer with the Receiver on March 12, 2019.

290. In March 2019, the Receiver asked Fox for various documents, including tax returns, necessary to value the Estate's interest in Bedford, and assess the potential tax implications of the proposed purchase to determine whether the transaction was in the Estate's best interest.

291. The Receiver also had periodic communications with Fox's CFO on various issues. Fox had actual knowledge that Dragul's interest in Bedford was property of the Estate and understood that the Receiver needed to approve its sale.

292. Less than one hour after Fox and Dragul once again asked the Receiver to approve Fox's purchase of Dragul's Bedford interest, Dragul forwarded Fox a copy

of the Receiver's April 9, 2019, email demanding that SSC 02's interests in Kenwood, Fenton, and College Marketplace be turned over to the Estate. Just like Bedford, Fox knew he could not lawfully purchase the SSC 02 interest without the Receiver's consent and Court approval, but he went ahead and did so anyway.

G. Payment of Unauthorized Commissions

293. According to Dragul's records, 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 almost $9 million in personal gambling debts, to impermissibly pay millions to Dragul's family members 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."

294. Various SPEs were used to fraudulently transfer funds to Defendants, including, but not limited to, AP Plaza 07 A, LLC, Fort Collins WF 02, LLC, GDA Clearwater 15, LLC, Crosspointe 08 A, LLC, GDA Hickory 17, LLC, GDA Housing, LLC, GDA PS Member, LLC, GDA Windsor Member, LLC, Grandview 06 A, LLC, HC Shoppes 18 A, LLC, Market at Southpark 09, LLC, Plainfield 09 A, LLC, Plaza Mall North 08 A Junior, LLC, Plaza Mall North 08 B, LLC, Prospect Square 07 A, LLC, Rose, LLC, Southlake 07 A, LLC SSC 02, LLC, Standley Lake 07 A, LLC, Syracuse Property 06 A, LLC, Summit 06, A, LLC, Village Crossroads 09, LLC, Walden 08 A, LLC, West Creek 06 A, LLC, Yale & Monaco 02, LLC and YM Retail 07

A, LLC. These SPEs were funded with money Defendants obtained by defrauding investors.

295. The Receiver's forensic analysis has been hampered by Dragul's concealment of records, his use of SPEs to channel funds under the guise of purported "commissions" and other fees to the Defendants, and the vast commingling among the various Dragul accounts. The Receiver reserves the right to recover additional commissions that may be uncovered in discovery and proven at trial.

296. All of the commissions set forth below represent the transfer of funds Defendants obtained by fraud from investors who invested money by purchasing ownership interests in SPEs. These investment vehicles were used to fraudulently transfer funds masked as illegal and undisclosed "commissions" to Dragul, the Kahn Defendants, Markusch, and the Fox and Hershey Defendants.

297. Dragul and the Non-Dragul Defendants paid each other millions of dollars in unauthorized, undisclosed and illegal commissions from the escrow of real estate closings and from the SPE accounts as follows (collectively, the "Commissions"):

Defendant	Commissions from Escrow	Commissions from GDA Entities	Total Commissions Received
Gary Dragul	$18,822,421.55	$325,625.55	$19,148,047.10
Markusch Defendants	$212,796.67	$97,300.00	$310,196.67
Kahn Defendants	$661,026.87	$1,040,415.05	$1,701,441.92
Fox Defendants	$9,714,804.81	$485,500.00	$10,200,304.81
Hershey Defendants	$578,500.00	$2,597,155.54	$3,175,655.54

See **Compl. Exs. 3**, **4**, **5**, **6 (as amended)**, and **7**.

i. The Dragul and Fox Commissions

298. As detailed and set forth in the chart above, Dragul took millions of dollars in unauthorized, undisclosed, and illegal commissions from the closing and refinance of numerous properties (the "Dragul Commissions"). *See* **Compl. Ex. 3.** Exhibit 3, which is incorporated herein by reference, sets forth the date, payee, property and amount of each Dragul Commission.

299. From 2002 to 2018, Dragul took approximately $18.6 million from the escrow of real estate closings (both purchases and sales) of various SPE associated properties both in GDA and ACF's portfolios, to which neither he nor any GDA Entity was entitled. *See* **Compl. Ex. 3.**

300. Not only did Dragul fail to disclose these unlawful and unauthorized commissions to investors in the Solicitation Materials, he also failed to disclose, and actually concealed them in the information provided to investors regarding the sale of at least one SPE associated property in which they had invested – PMG.

301. Dragul likewise paid the Fox Defendants over $9.7 million in "commissions" at the closing on various Dragul properties, and another $485,500 for purported commissions from the GDA Entities' bank accounts (the "Fox Commissions"). *See* **Amd**. **Ex. 6.** Amended Exhibit 6, which is incorporated herein by reference, sets forth the date, payee, property and amount of each Fox Commission.

302. The Dragul and Fox Commissions were illegal because neither Fox nor Dragul was a licensed real estate agent entitled to receive them.

ii. The Markusch Commissions

303. For her role as CFO and controller of GDA, Markusch received a sizeable salary, not including bonuses and benefits.

304. In addition to her sizeable salary and benefits, the Markush Defendants also received undisclosed and illegal commissions from the closing on both commercial and residential properties through Juniper and Olson RES, which is the sole member (the "Markusch Commissions"). *See* **Compl. Ex. 4.** Exhibit 4, which is incorporated herein by reference, sets forth the date, property and amount of each Markusch Commission.

305. From 2014 through 2018, the Markusch Defendants received approximately $284,796.67 in undisclosed and unlawful commissions from GDA and the SPE entities. *See* **Ex. 4.**

306. In at least four instances, the Markusch Defendants' commissions were taken from the closing of various properties in which defrauded investors made investments in reliance on the Solicitation Materials – Rose, LLC, Upper High Street 15, LLC, AP Plaza 07 A, LLC and Summit 06 A, LLC. *See* **Ex. 4.**

307. Like the Dragul and Fox Commissions, the Markusch Commissions were never disclosed to prospective investors.

308. The Markusch Defendants were not licensed or registered brokers with FINRA, the State of Colorado or the SEC, nor associated with a FINRA or Commission-registered broker-dealer at any time relevant herein.

309. Likewise, upon information and belief the Markusch Defendants are not and have never been a licensed real estate agents in Colorado or any state entitling her to receive commissions from the closing of real estate transactions.

iii. The Hershey Commissions

310. Rather than taking "commissions" from the property closings, the Hershey Defendants received commissions from Dragul separately, all based on an agreed percentage of the funds Dragul received from investors solicited by Hershey.

311. As set forth in the table above, from 2001 to 2014 the Hershey Defendants received approximately $2,891,155.54 in commissions for funds solicited by Hershey from investors. *See* **Compl. Ex. 7.** Exhibit 7, which is incorporated herein by reference, sets forth the date, payee, property, and amount of each Hershey Commission.

312. In addition to these commissions, Dragul paid the Hershey Defendants $194,000 in "commissions" from the sales of properties owned by AP Plaza 07 A, LLC and Grandview 06 A, LLC (collectively referred to as the "Hershey Commissions"). *See* **Compl. Ex. 7.**

313. The Hershey Defendants were not licensed or registered brokers with FINRA, the State of Colorado or the SEC, nor associated with a FINRA or Commission-registered broker-dealer at any time relevant herein.

V. FIRST CLAIM FOR RELIEF: Violations of the Colorado Securities Act Colo. Rev. Stat. §§ 11-51-501 and 11-51-604(1), (2)(A), (3), and (5)

314. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

315. The Receiver has standing to prosecute this claim both on behalf of the SPEs and the GDA Entity investors, all of whom are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

A. Securities Registration Violations, C.R.S. §§ 11-51-604(1) and 11-51-301 (Against Dragul and the Fox Defendants)

316. As set forth in the preceding paragraphs of this Amended Complaint, Dragul and the Fox Defendants sold securities in this State in violation of C.R.S. § 11-51-301, because between 2003 through August 2018, Dragul and Fox sold securities that were not registered under Article 51 of the Colorado Revised Statutes. C.R.S. § 11-51-604(1).

317. Specifically, Fox's solicitation of and sale to the Southpark Investors from 2009-2010 and to the FC Investors from 2008 through 2019, of membership interests in the specific SPE whose sole asset was real property and whose sole purpose was to own and manage the property, required registration of the securities being sold and Fox failed to do so.

318. Likewise, Dragul's solicitation and sale to the GDA Entity Investors from 2003 through August 2018 of both membership interests in the GDA Entities and of promissory notes (the "Investment Contracts") required that he register the securities being sold, but he failed to do so.

319. Neither the Receiver nor the GDA Entity Investors could have discovered the above-detailed conduct and transactions prior to August 30, 2018, at the earliest, through reasonable diligence because (1) 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.

320. The Receiver is therefore entitled to recover damages, interest, costs, and attorneys' fees pursuant to C.R.S. § 11-51-604(1).

B. Licensing and Notice Filing Violations, C.R.S. §§ 11-51-604(2)(a) and 11-51-401 (Against Dragul and the Fox and Hershey Defendants)

321. Dragul and the Hershey Defendants acted as "broker-dealers" as defined in C.R.S. § 11-51-201((2) in the following respects:

a. Dragul and the Hershey Defendants' solicited and sold of membership interests in Fox-formed SPEs that owned and operated property

including but not limited to Market at Southpark, Loggins Corners, Tower Plaza, Highlands Ranch, Southwest Commons, Meadows Shopping Center, Laveen Ranch and Trophy Club to the GDA Entity Investors from 2009 through 2018 (*See* ¶¶ 5, 41-43, 67, 78, 83, 87-95, 101-102, 145, 148, 145, and 173-175, *supra*);

b. Dragul and the Hershey Defendants' solicited and sold promissory notes (Investment Contracts) to the Note Investors from 2008 through August 2013 (*See* ¶¶ 5, 27-28, 64, *supra*).

322. Neither Dragul nor the Hershey Defendants were licensed or exempt from licensure, as either "broker-dealers" or "sales representatives," nor were they registered in any capacity with the Commissioner as required by C.R.S. §§ 11-51-401 and 402 in violation of C.R.S. § 11-51-401(1). *See* ¶¶ 5, 27-28, and 64, *supra*.

323. Moreover, the Fox Defendants are considered "issuers" under C.R.S. § 11-51-201(10) because they issued securities in the form of SPE membership or joint venture interests in Market at Southpark 09, LLC, Tower Plaza 12, LLC, Loggins Corners 12, LLC, HR 05 A, LLC, Meadows Shopping Center 05 A, LLC, Southwest Commons 05, A, LLC, Laveen Ranch 12, LLC, and Trophy Club 12, LLC to the GDA Entity Investors in this State. *See* ¶¶ 6, 55, 78, 83, 90-142, and 163 – 214, *supra*.

324. The Fox Defendants employed or otherwise engaged Dragul, an unlicensed sales agent to act as sales representative in Colorado in violation of C.R.S. § 11-51-604(2). *See id.*

325. Neither the Receiver nor the GDA Entity Investors could have discovered the above-detailed conduct and transactions 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.

326. As such, the Receiver, on behalf of the defrauded GDA Entity Investors and the Estate, is entitled to an award of damages, interest, costs, and attorneys' fees pursuant to C.R.S. § 11-51-604(2).

C. Securities Fraud in Violation of C.R.S. §§ 11-51-604(3) - (4) and 11-51-501(1)(a)-(c) (against Dragul and the Fox Defendants).

327. Dragul and the Fox Defendants, in connection with the offer, sale, or purchase of securities, directly or indirectly, operated and employed the Sham Business Scheme or artifice to defraud the Southpark Investors, the PMG Investors, the Prospect Investors, the FC Investors, and the other GDA Entity Investors from 2003 through August 2018 (the "Scheme"). C.R.S. § 11-51-501(a). *See*

328. The Scheme effectively defrauded GDA Entity investors and prospective investors by making false and misleading material misrepresentations to induce the

purchase of purported ownership interests in SPEs or joint ventures established by Dragul and the Fox Defendants, which constitute securities under C.R.S. § 11-51-201(17). The GDA Entity investors relied on the representations made both in the Solicitation Materials and directly by Dragul and the Fox and Hershey Defendants in soliciting their investments. The funds ultimately invested by the GDA Entity investors in reliance on Dragul and the Fox and Hershey Defendants' representations were either transferred into Dragul's personal accounts, used to pay undisclosed and illegal commissions, and/or to pay off old debts, without the authority or knowledge of those investors. *See* ¶¶ 1-8, 34-44, 53-78, 83-89, 90-142, 143-163, 163-124, and 216-258 *supra*.

329. Dragul and the Hershey and Fox Defendants perpetuated this fraud by soliciting investors to purchase membership interests in various SPEs for the stated purpose of purchasing and operating commercial properties. However, Dragul and the Fox and Hershey Defendants did not invest funds where represented, but instead used those funds to pay down other debt and for these Defendants' own personal benefit. *See id*.

330. The above-detailed Scheme was carried out by Dragul and the Fox Defendants from approximately 2003 through August 2018.

331. In connection with the offer, purchase, and sale of securities, including North 08, GDA Market at Southpark, LLC, Fort Collins WF 02, LLC, PS 16, LLC and others, Dragul, and the Fox Defendants, either directly or indirectly, made untrue

statements of material fact or failed to disclose to investors material facts which were necessary to make the statements made to investors, under the circumstances in which they were made, not misleading in violation of C.R.S. § 11-51-501(b) and (c). The omitted and untrue statements of material fact that investors did not know and could not have known included, but were not limited to the following:

a. Dragul failed to disclose to the GDA Entity Investors that he would sell/assign over 194% of the total membership interests in Plainfield 09 A, LLC and the Plainfield Commons Shopping Center. *See* **Ex. 22,** at 3; and ¶¶ 60-62 *supra*.

b. Dragul failed to disclose the actual risk associated with the investments in the GDA Entities and in the Fox-owned SPEs. *See* **Ex. 22,** at 3; *see also* ¶¶78, 83-89, 90-142, 143-163, 163-214, and 216-258, *supra.*

c. Dragul and the Fox Defendants failed to disclose to the GDA Entity Investors from 2008 through August 2018 the actual financial condition and substantial debt of GDA and Dragul which Fox had actual knowledge by virtue of his demand for periodic budgets and financial information (both personal and SPE) from Dragul. *See* **Ex. 22,** at 3; *see also* ¶¶78, 83-89, 90-142, 143-163, 163-214, and 216-258, *supra.*

d. Dragul and the Fox Defendants failed to disclose to the FC Investors that they would sell membership interests to family members and insiders at reduced costs and gift membership interests to Dragul

insiders, effectively diluting FC Investor membership interests. *See* ¶¶ 163-214. *supra*

e. Dragul and the Fox Defendants made untrue statements that that the properties constituting the sole asset of the SPEs in which the investors purchased interests, would be operated with profits derived therefrom being distributed to investors on a monthly basis, when in fact, the GDA Entity Investors distributions were not based on actual performance of the investment, but rather Dragul and the Fox Defendants paid varying amounts of distributions not from the profits, but from extensively comingled funds from other investors, other loans and/or the operations of GDA and ACF, respectively. *See* Second Indictment; and ¶¶ 59, 71-77, 96, 124, 130, 194, and 198, *supra*

f. Dragul and the Fox Defendants made untrue statements that the GDA Entity Investors' investments and the amount of operating reserves represented in the financial projections included in the Solicitation Materials for Market at Southpark, Loggins Corners, Trophy Club, PMG, Shoppes at the Meadows, Southwest Commons, Laveen Ranch, and Trophy Club were not actually held in the specific Fox SPE or GDA Entity associated bank accounts, but rather were comingled with the funds from all operations of GDA and ACF. *See* **Compl. Exs. 8, 12, 16,**

20 (attached to Original Complaint), and **Exs. 24, 29, 30, 31, 35**; ¶¶ 78, 83-89, 90-142, 143-163, and 163-214, *supra*

g. Dragul and the Fox Defendants made untrue statements that the proceeds from any sale would be distributed to the GDA Entity Investors in accordance with their *pro rata* share membership interests, when in truth, they failed to disclose to individual investors the sale of various properties before they were sold including the properties associated Highlands Ranch and Market at Southpark in 2011, Loggins Corners in 2018, and Laveen Ranch in 2019, and instead, forced the investors to roll-over their investments into new properties, and in one case, failed to disclose the sale of the PMG property in April 2017 to the PMG Investors and failed to return the PMG Investors' capital consistent with the governing documents. *See* ¶¶ 53-56, 104-113, 118 -140159-161, 180-183, 187-200, 204-211, *supra*

h. Dragul's and the Fox Defendants made untrue statements that the funds invested by the GDA Entity Investors in the Market at Southpark from 2009-2010, PMG from 2008-2016, FC WF 02 from 2008-2012, Prospect Square 2007-2016, and other SPE-owned properties would not be comingled with the funds of other investors in unrelated ventures and/or with Dragul's own personal funds, when in truth they were commingled and treated as fungible rather than being used for the

purpose that Dragul and Fox represented they would be used in the Solicitation Materials as set forth in **Exhibits, 8, 12, 16, 20** (attached to Original Complaint), and **Exhibits 24, 29, 30, 31, 32, 36, 39,** and (attached hereto), and in paragraphs ¶¶ 78, 83-89, 90-142, 143-163, and 163-214, above.

i. The Fox Defendants made untrue statements that the GDA Entity Investor funds invested the Market at Southpark from 2009-2020, FC WF 02 from 2008-2020, and other SPE-owned properties would not be comingled with the funds of other investors in unrelated ACF ventures and/or with the funds of other investors in unrelated ventures and/or with Dragul's own personal funds, when in truth they were commingled and treated as fungible rather than being used for the purpose that Dragul and Fox represented they would be used in the Solicitation Materials as set forth in **Exhibits 8, 12, 16, 20** (attached to Original Complaint), and **Exhibits 29, 30, 36, and 39** (attached hereto), and in paragraphs 78, 90-142, and 163-214, above;

j. Dragul and the Fox Defendants failed to disclose that they offered and sold interests in the SPEs which owned the property at a reduced rate or in some instances, for no consideration, thereby diluting the GDA Entity Investor's investments as set forth in paragraphs 63, 103, 125, 128, 156, and 179, above.

k. Dragul and the Fox Defendants failed to disclose to the Southpark Investors, the FC Investors, the PMG Investors, the Prospect Investors, and other GDA Entity Investors that the investment funds contributed in reliance on the Solicitation Materials prepared and distributed by Dragul and the Fox and Hershey Defendants between 2009 through 2018 would be used to improperly pay commissions to these Defendants and other Non-Dragul Defendants in the amounts and on the dates set forth in Compl. Ex. 3, 4, 5, 6 (as amended), and 7. *See also* ¶¶ 5-7, 22, 27, 42, 62, 82, 87, 89, 98-100, 111, 113, 121-123, 127-129, 131-137, 143-145, 168, 170-171, 173-175, 180, 191-193, 201-203, 211-213 ,293-313;

l. Dragul and the Fox Defendants made untrue statements from 2008 through 2018 to the Southpark Investors, the FC Investors, the PMG Investors, the Prospect Investors, and other GDA Entity Investors concerning the purchase price of various properties, their closing costs, and the financial projections in the Solicitation Materials for the investments, including but not limited to those detailed in paragraphs 62, 83-89, 90-100, 104, 121-132, 143-150, 155-156, 172-175, 190-211, 219-221, 251-253, 299-300, *supra*, on the dates stated therein;

m. Dragul and the Fox Defendants made untrue statements in the Loggins Corners, Tower Plaza, Trophy Club, and Laveen Ranch Solicitation Materials following the unauthorized sale of the real estate owned by

the SPEs including but not limited to those set forth and described in detail in paragraphs 53-56, 104-113, 118 -140159-161, 180-183, 187-200, and 204-211, above, in order to induce their consent to sell the sole asset of the SPE in which they invested and to induce roll-over investments into the replacement properties;

n. The Fox Defendants' failed to disclose that Fox would misappropriate a substantial amount of property equity from escrow of Laveen Ranch and Loggins Corners when he refinanced those properties in 2016, which was money that he represented would be, and which should have been, paid to the Southpark Investors. *See* ¶¶ 133-134 and 201-203 *supra.*

o. Dragul and the Fox Defendants' made untrue statements to the Southpark Investors, FC Investors, Prospect Investors, and other GDA Entity Investors between 2009 through 2018 that that they could not cash out their investments including but not limited to those set forth in paragraphs 60-62, 177-178, 183-189, and 200, above, when the respective Solicitation Materials, Membership Interest Purchase Agreements, or the governing entity documents did not require the investments to be held for any specific number of years. *See id.*

p. Dragul and the Fox Defendants failed to disclose that they would engage in a course of business which diluted the value of membership interests including Dragul's gifting of membership interests in FC WF 02 in or

about 2008 to insiders and Fox's sale of Market at Southpark interests at varying prices to members of his family in 2009. *See* Second Indictment; and ¶¶ 63, 103, 125, 128, 156, and 179, *supra*

332. The Scheme was also employed through Dragul's offering of promissory notes (Investment Contracts) from 2007 through 2013 pursuant to which he raised $6.4 million from more than thirty-one individual investors all of whom are identified in the First Indictment (the "Note Investors"). *See* First Indictment; and ¶¶ 57, 63-65, and 155-156, *supra.*

333. The promissory notes issued by Dragul constitute securities pursuant to C.R.S. § 11-51-201(17).

334. In soliciting the promissory notes (Investment Contracts), Dragul made material, untrue statements and omissions of material facts, including but not limited to:

a. Failing to disclose the actual risk associated with the investments;

b. Failing to disclose to the Note Investors that GDA had negative equity of over $8.5 million, including over $4 million in unpaid, overdue promissory notes issued in 2007 and 2008;

c. Failing to disclose to the Note Investors that Dragul and GDA were named as defendants in numerous civil lawsuits brought by Note Investors for failing to timely repay promissory notes issued prior to 2013.

d. Failing to disclose to the Note Investors that Dragul was using the funds from the notes to pay personal expenses, including but not limited to repayment of personal loans to Fox, millions of dollars in payments to Las Vegas Casinos, maintenance and upkeep costs for the Airplane owned by Dragul and Fox, renovations on his former home, payments to credit card companies, and liquor stores that he and his wife purportedly owned; and

e. Failing to disclose that he would selectively repay the Note Investors - paying insiders and "friends of the house" or rolling their unpaid notes (Investment Contracts) into an SPE investment while defaulting on all others.

See **Ex. 22.**

335. Dragul and Fox recklessly, knowingly, and with the intent to defraud employed the Scheme from 2003 through August 2018.

336. Neither the Receiver nor the GDA Entity Investors could have discovered the above-detailed material misrepresentations and omissions made to the GDA Entity Investors 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.

337. The GDA Entity Investors reasonably relied on the above-detailed material misrepresentations and omissions made by Dragul and the Fox Defendants, who knew or should have known of their reliance, to their detriment.

338. As a direct and proximate result of Dragul and the Fox Defendants' Scheme from 2003 through August 2018 in violation of C.R.S. §§ 11-51-501 and 11-51-604(3) and (4), the GDA Entity Investors and the Estate, on whose behalf the Receiver asserts these claims, have been damaged in an amount to be shown at trial.

D. Control Person Liability, C.R.S. § 11-51-604(5)(a) and (b) (against Dragul and Fox)

339. In carrying out the Scheme as set forth herein, Dragul acted as a direct control person of the Non-Dragul Defendants and Fox as a control person of Dragul within the meaning to C.R.S. § 11-51-604(5)(a).

340. At all times relevant herein, both Fox and Dragul are considered issuers as defined in C.R.S. § 11-51-201(10).

341. By virtue of his ownership of, high level position in, and participation in and/or awareness of the operations of GDA RES, GDA REM, and the GDA Entities on whose behalf Hershey acted as a contract consultant in soliciting investments, Markusch who served as CFO of GDA RES, and Kahn who served as outside general

Counsel for GDA RES, GDA REM and the GDA Entities, Dragul had the power to influence the control and did influence the control, directly or indirectly, the decision-making of the Hershey and Kahn Defendants and Markusch including the distribution and making of false and misleading statements and in the material omissions contained in the Solicitation Materials and in untrue statements.

342. Likewise, by virtue of his role as Dragul's mentor, business partner-lender, use of the GDA employees for ACF operations, and his, participation in and/or awareness of the daily operations of GDA RES, GDA REM, and the GDA Entities, 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 the material omissions contained in the Solicitation Materials.

343. Both Dragul and Fox had direct and supervisory involvement in the day-to-day operations of GDA RES, GDA REM and the GDA Entities, and therefore, are presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein and exercised same.

344. As such, Fox and Dragul are jointly and severally liable pursuant to C.R.S. § 11-51-604(5)(a) and (b).

E. Substantial Assistance Claims, C.R.S. § 11-51-604(5)(c) (Against the Kahn Defendants, the Fox Defendants, the Hershey Defendants, Markusch)

345. As alleged in the preceding paragraphs, Dragul and the Fox Defendants recklessly, knowingly, and/or with the intent to defraud the GDA Entity Investors and the Note Investors, sold securities – *i.e.,* the membership interests in Dragul and Fox-formed SPEs or joint ventures and promissory notes, in violation of C.R.S. § 11-51-501. *See* § V.C, *supra*.

346. Dragul and the Fox Defendants offered and sold securities by means of untrue statements of material fact or omissions to state material facts necessary in order to make statements, in light of the circumstances under which they were made, not misleading (the Investors not knowing of the untruths or omissions). *Id.*

347. Markusch, and the Kahn and Hershey Defendants knew or had reason to know that Dragul and the Fox Defendants, engaged in conduct which constituted violations of C.R.S. § 11-51-604(3) and (4) through the operation of the Scheme, pursuant to which all Defendants received substantial unauthorized and undisclosed commissions both from escrow of the properties owned by the various SPEs, and from their respective bank accounts in which investor funds and reserves were to be held and maintained for the benefit of the GDA Entity Investors.

348. The Hershey Defendants' provided substantial assistant to the illegal conduct of Dragul pursuant to C.R.S. § 11-51-604(3) and (4) through:

a. The solicitation of investors in the GDA Entities since approximately 2001;

b. Their receipt of unauthorized and undisclosed commissions in the amount of $3,175,655.54 for each investment successfully solicited and promissory note sold on Dragul's behalf from 2001-2013; and

c. Other acts which may be shown at trial.

349. The Fox Defendants' provided substantial assistance to the illegal conduct of Dragul pursuant to C.R.S. § 11-51-604(3) and (4) through:

a. The sharing in misappropriated investor funds from the purchase, refinance, and sale of properties in which the GDA Entity Investors were members;

b. Making material misstatements to the GDA Entity Investors to induce their investment in both Fox and Dragul formed and controlled SPEs;

c. Their receipt of unauthorized and undisclosed commissions in the amount of $10,200,304.81 from both the escrow of properties purchased and sold by the Fox SPEs and the GDA Entities from 2002-2018; and

d. Other acts which may be shown at trial.

350. The Kahn Defendants provided substantial assistance to the illegal conduct of Dragul and the Fox Defendants pursuant to C.R.S. § 11-51-604(3) and (4) by:

a. Providing counsel and advice to Dragul with respect to the unauthorized and undisclosed sale of PMG and concealment from the PMG Investors in or about 2017 and 2018;

b. Aiding and facilitating Dragul's and the Fox Defendants' violations of the Receivership Order to transfer and sell Estate Assets without the Receiver's knowledge and consent from August 2018 through the present;

c. Their receipt of $1,701,441.92 in unauthorized and undisclosed commissions from both the escrow of properties purchased and sold by the Fox SPEs and the GDA Entities from 2012-2018; and

d. Other acts which may be shown at trial.

351. Markusch provided substantial assistance to the illegal conduct of Dragul pursuant to C.R.S. § 11-51-604(3) and (4) through:

a. Her actions undertaken in her capacity as CFO of GDA, specifically the extensive comingling of funds that were required to be held in particular GDA Entity accounts in order to perpetrate Dragul's Ponzi Scheme and prevent its detection;

b. Her receipt of $310,196.67 in unauthorized and undisclosed commissions from both the escrow of properties purchased and sold by the Fox SPEs and the GDA Entities from 2014-2018; and

c. Other acts which may be shown at trial.

352. The acts, actions, practices and omissions of all Defendants as set forth in this claim for relief substantially harmed the GDA Entity Investors and the Estate.

353. 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.

354. Accordingly, Markusch, and the Kahn and Hershey Defendants are therefore jointly and severally liable to the same extent as Dragul and the Fox Defendants to the Receiver, who pursues these claims on behalf of and for the GDA Entity Investors and the Estate, pursuant to C.R.S. § 11-51-604(5)(c).

VI. SECOND CLAIM FOR RELIEF:
Negligence
(against Dragul and the Fox and Hershey Defendants)

355. The Receiver incorporates the previous allegations of the Complaint as if fully set forth herein.

356. The Receiver has standing to prosecute these claims both on behalf of the SPEs and on behalf of the GDA Entity investors, all of whom are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

357. Dragul, the Fox and the Hershey Defendants each owed a duty of care to investors and prospective investors.

358. These defendants failed to exercise reasonable care or competence in preparing and distributing Solicitation Materials to prospective GDA Entity investors and in making representations to investors.

359. These defendants' negligence was a cause of Plaintiff's injuries and injuries to investors.

VII. THIRD CLAIM FOR RELIEF: Negligent Misrepresentation *(Against Dragul and the Fox and Hershey Defendants)*

360. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

361. The Receiver has standing to prosecute these claims on behalf of the GDA Entity investors, the latter of which are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

362. Through Dragul's fraudulent Scheme, Dragul and the Fox and Hershey Defendants negligently induced the GDA Entity investors to invest and/or to continue to invest (through roll-overs of prior investment) significant sums of money in various

SPE Entities by making misrepresentations of material fact concerning the investments.

363. More specifically, Dragul, and the Fox and Hershey Defendants made false and misleading material misrepresentations concerning the source and use of funds to induce investors and prospective investors to purchase purported ownership interests in SPEs, including but not limited to those set forth in ¶¶ 53-56, 59, 62, 71-77, 78, 83-89, 90-100, 104, 121-132, 143-150, 155-156, 172-175, 190-211, 219-221, 251-253, 299-300, above.

364. These Defendants gave such information to investors in the course of their business and in connection with transactions in which they had a financial interest.

365. These Defendants gave the false and misleading information to investors for the investors' use in business transactions, and these Defendants were negligent in obtaining or communicating the information.

366. The GDA Entity investors relied on the representations made both in the Solicitation Materials and directly by Dragul and the Fox and Hershey Defendants in soliciting their investments. The funds ultimately invested by the GDA Entity investors in reliance on these Defendants' representations were either transferred into Dragul's personal accounts, used to pay undisclosed and illegal commissions, and/or to pay off old debts, without the authority or knowledge of those investors. *See* **Compl. Exs. 3, 4, 5, 6 (as amended),** and **7***; see also* ¶¶ 5-7, 22, 27,

42, 59, 62, 71-77, 82, 87, 89-142, 143-149, 155-156, 168, 170-171, 173-175, 180, 191-194, 198, 201-203, 211-213, and 293-313, *supra.*

367. The negligent misrepresentations made by Dragul and the Fox and Hershey Defendants were material and were made without reasonable care for the guidance of others, namely the GDA Entity investors.

368. Dragul and the Fox and Hershey Defendants provided materially misleading information or omitted disclosure of material information, intending or knowing GDA investors would reasonably rely upon those negligent misrepresentations in investing in the SPE entities. *See* ¶¶ 5-7, 22, 27, 42, 53-56, 59, 62, 71- 77, 78, 83-142, 143-150, 155-156, 168, 170-171, 172-178, 181-211, 190-211, 219-221, 251-253, 299-300, *supra.*

369. GDA Entity investors reasonably and justifiably relied upon the negligent misrepresentations of Dragul, and the Hershey and Fox Defendants in making their decision to invest in the GDA Entities.

370. As a direct and proximate cause of their reliance on Dragul and the Fox and Hershey Defendants' negligent misrepresentations, the GDA Entity investors sustained substantial damages and losses.

VIII. FOURTH CLAIM FOR RELIEF: Civil Theft -- Colo. Rev. Stat. § 18-4-401 *(Against All Defendants)*

371. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

372. The Receiver has standing to prosecute these claims on behalf of the Estate, the SPEs, and on behalf of the GDA Entity Investors, the latter of which are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

373. Defendants knowingly exercised control over GDA Entity investors' funds.

374. Without investors' knowledge or authorization, Defendants exploited their control over those funds by causing them to be used for Defendants' personal benefit. *See* ¶¶ 1-4, 1-8, 34-44, 47-49, 50-78, 87, 89, 96, 124, 130, 194, 198, 220, and 293-313, *supra.*

375. Defendants intended to permanently deprive investors of their investments.

376. GDA Entity investors were in fact permanently deprived of their funds.

377. GDA Entity investors have been damaged by Defendants' theft in an amount to be proven at trial and are therefore entitled to treble damages, costs, and reasonable attorney's fees.

IX. FIFTH CLAIM FOR RELIEF: Violations of the Colorado Organized Crime Control Act ("COCCA") Colo. Rev. Stat. § 18-17-101, *et seq.* *(Dragul, the Fox Defendants, and the Hershey Defendants)*

378. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

379. The Receiver has standing to prosecute these claims both on behalf of Estate, the SPEs, and on behalf of the GDA Entity Investors, the latter of which creditors of the Receivership Estate. *See* Compl. **Ex. 1,** at ¶ 13(s).

380. At all relevant times, Dragul, the Fox and the Hershey Defendants were considered "persons" within the meaning of the Colorado Organized Crime Control Act ("COCCA"), C.R.S. § 18-17-103(4).

381. At all relevant times, the Estate, SPEs, and GDA Entity Investors were considered "persons" aggrieved or injured within the meaning of COCCA, C.R.S. §§ 18-17-106(6) and (7).

382. At all relevant times, Dragul, the Fox and Hershey Defendants, formed an association-in-fact for the purpose of defrauding the Estate and GDA Entity Investors and prospective investors. *See* ¶¶ 1-4, 34-44, 47-52, 53-78, 83-89, 90-142, 143-163, 163-214, 216-258, 261-247, 277-291, and 303-309, *supra*.

383. As described in detail in this Amended Complaint, Dragul and Fox employed a sham business, the Scheme, with the substantial assistance of Hershey, Kahn and Markusch, which included distribution of Solicitation Materials containing false and misleading statements and material omissions in order to solicit investors to purchase membership interests in various SPEs and in Dragul's sale of promissory notes. Hershey directly assisted in this Scheme by soliciting numerous investors to purchase both SPE membership interests as well as promissory notes. For each investment made that Hershey solicited, Dragul would pay him a percentage, usually

equal to 10%. Contrary to the representations made to convince investors to buy into any given deal, Dragul and Fox did not, invest those funds where the investors intended them to be invested and instead used those funds to pay down other debt, to pay distributions to other investors in other Dragul or Fox deals, and/or for Dragul and Fox's own personal benefit. Dragul and Fox trapped investors in deals in which they had the right to cash out, in order to keep their operation and Scheme running from 2002 through August 2018 as set forth in detail ¶¶ 1-4, 34-44, 47-52, 53-78, 83-89, 90-142, 143-163, 163-214, 216-258, 261-247, 277-291, and 303-313, above.

384. This association-in-fact of Dragul, Fox, Hershey in carrying out the Scheme set forth in detail herein constitutes an "enterprise" within the meaning of COCCA, C.R.S. § 18-17-103(2).

385. Dragul, and the Fox and Hershey Defendants conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a "pattern of racketeering activity" within the meaning of COCCA, C.R.S. § 18-17-103(3), in violation of COCCA, C.R.S. § 18-17-104(3) to further their Scheme and plans related thereto, and where all such schemes, devices, and actions were related to the conduct and in furtherance of their enterprise.

386. Specifically, as alleged herein, these Defendants committed at least two, related predicate acts of as set forth below in accordance with C.R.S. § 18-17-103:

a. Violations of the Colorado Securities Act, under C.R.S. § 11-51-401 (Dragul and the Hershey Defendants); C.R.S. § 11-51-301 (Dragul and

the Fox Defendants); C.R.S. § 11-51-501(1) (Dragul and the Fox Defendants). *See* C.R.S. § 18-17-103(b)(XIII).

b. Wire fraud, under 18 U.S.C. § 1343; civil theft under C.R.S. § 18-4-401; and/or at least two predicate acts of bankruptcy fraud under 18 U.S.C. § 157. Each of these crimes are incorporated into COCCA by C.R.S. § 18-17-103(5). *See* C.R.S. § 18-17-103(a).

387. As stated in the preceding allegations of this Amended Complaint, the Dragul, and the Fox, Hershey Defendants directly participated in the affairs of the enterprise and committed a pattern of racketeering in the following non-exclusive respects:

a. Dragul and the Fox Defendants violated the Colorado Securities Act when from 2006 through 2018, in connection with the offer, sale, or purchase of securities, they employed a devise, scheme, or artifice to defraud the GDA Entity investors, the Estate's creditors and other parties in interest. As set forth above, Dragul, the Hershey and the Fox Defendants provided false and misleading Solicitation Materials to prospective investors to induce investments in SPEs owned and controlled by Dragul and/or the Fox Defendants. Additionally, all Defendants received illegal and undisclosed commissions from the sales of properties and/or the SPE accounts. The Scheme involved the investment of money in a common enterprise with profits that were

wrongfully derived from GDA Entity investors, the Estate's creditors and other parties in interest. C.R.S. §§ 11-21-501(1) and 11-51-604. *See* § V. A. – E., First Claim for Relief, at ¶¶314-354, *supra.*

b. Dragul, the Fox and Hershey Defendants committed wire fraud under 18 U.S.C. § 1343 from 2006 through 2018, when they 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. Defendants used interstate or foreign wire communications to carry out the Scheme with the intent to defraud and obtain money through false pretenses, misrepresentations or promises, which in fact deprived innocent investors of their money. This Scheme was reasonably calculated to deceive persons of ordinary prudence or comprehension. *See* **Compl. Exs. 3, 4, 5, 6 (as amended), 7, 8, 16, 20, 24, 29, 30,31, 32, 36,** and **39**; *see also* ¶¶ 5-7, 22, 27, 42, 59, 62, 71-77, 82, 87, 89-142, 143-149, 155-156, 168, 170-171, 173-175, 180, 191-194, 198, 201-203, 211-213, and 293-313, *supra.*

c. Dragul, the Fox and Hershey Defendants committed theft under C.R.S. § 18-4-401, and thus engaged in racketeering activity from 2006 through 2018 when each of them knowingly and without authorization took illegal and undisclosed commissions from escrow upon the purchase or sale of various SPE properties and the comingled GDA Entity bank accounts, through deceptive and material misstatements. Defendants intended to permanently deprive the GDA Entity investors of such funds, notwithstanding that such funds were property of the GDA Entity investors. *See* **Compl. Exs. 3, 4, 5,** 6 (as amended), and **7**; *see also* ¶¶ 5-7, 22, 27, 42, 62, 82, 87, 89, 98-100, 111, 113, 121-123, 127-129, 131-137, 143-145, 168, 170-171, 173-175, 180, 191-193, 201-203, 211-213, and 293-313, *supra*.

d. Dragul and the Fox Defendants committed bankruptcy fraud under 18 U.S.C. § 152(5) and (8), and thus, engaged in racketeering activity. First, the Fox Defendants knowingly received a material amount of property from the Prospect Debtor after the petition date with the intent to defeat the provisions of title 11. Next, by intentionally devising a scheme or plan to defraud the Prospect SPEs' creditors through false and misleading representations and omissions to the bankruptcy court and the Prospect SPEs' creditors regarding the sale of the Prospect Property. Next, Dragul knowingly and fraudulently concealed, destroyed,

falsified, and/or made false entries in recorded information, including the Prospect Debtor's books, documents, records, and papers relating to the property and financial affairs of the Debtor. The Prospect Debtors' declaration of bankruptcy served as the tool to execute a fraudulent scheme that was designed to and did defraud innocent GDA Entity Investors. *See* ¶¶ 216-258, *supra*.

388. These acts of racketeering, which occurred within ten years of each another, are related and constitute a "pattern of racketeering activity" per C.R.S. § 18-17-103(3).

389. The above acts committed as part of the scheme to defraud investors, the Estate's creditors and interested parties, were related to each other by virtue of common participants, a common class of victims, a common method of commission (solicitation of investments based on false representations), and the common purpose and common result was to defraud GDA Entity investors, to the benefit of Defendants.

390. It is unlawful for any person employed by or associated with an enterprise to conduct the affairs of an enterprise through a pattern of racketeering, or for any person to conspire or endeavor to commit a violation of COCCA, C.R.S. §§ 18-17-104(3) and (4).

391. As a direct and proximate result of Defendants' COCCA violations, Defendants pilfered the SPEs thereby damaging the GDA Entities, their investors,

the Estate and its creditors, who are entitled to treble damages, costs, and reasonable attorney's fees pursuant to C.R.S. § 18-17-106(7).

X. SIXTH CLAIM FOR RELIEF: Aiding and Abetting Violations of COCCA Colo. Rev. Stat. § 18-17-101 *et seq.* *(Against Markusch, and the Kahn, Fox, and Hershey Defendants)*

392. The Receiver realleges and incorporates by reference the previous allegations of the Amended Complaint as if fully set forth herein.

393. The Receiver has standing to prosecute these claims both on behalf of the Estate, the GDA Entities, and on behalf of the GDA Entity investors, the latter of which are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

394. At all relevant times, the Non-Dragul Defendants were "persons" within the meaning COCCA, C.R.S. §§ 18-17-103(4).

395. At all relevant times, the GDA Entity Investors, the Receivership Estate's creditors and parties in interest, were considered "persons" aggrieved or injured within the meaning of COCCA, C.R.S. §§ 18-17-106(6) and (7).

396. At all relevant times, Non-Dragul Defendants knowingly participated in the enterprise which was an association-in-fact designed to defraud GDA Entity Investors, the Estate's creditors and other parties in interest, while enriching all Defendants as evidenced by the following:

a. All Defendants' receipt of undisclosed and unauthorized commissions from escrow of the properties owned by the associated SPE in which investors purchased membership interests. *See* **Compl. Exs. 3, 4, 5, 6**

(as amended), and **7;** *see also* ¶¶ 5-7, 22, 27, 42, 62, 82, 87, 89, 98-100, 111, 113, 121-123, 127-129, 131-137, 143-145, 168, 170-171, 173-175, 180, 191-193, 201-203, 211-213, and 293-313, *supra*.

b. The Fox Defendants' actual knowledge of and participation in the Scheme as Dragul's mentor and business partner, purchasing Estate assets without the Receiver's knowledge or consent in violation of the Receivership Order, improperly withholding GDA Entity Investor distributions and entity organizational documents; falsifying organizational documents to transfer control and management rights post-receivership in order to sell the Airplane, Fox's dilution of the GDA Entities' purchased membership interests, Fox's payment of funds to Dragul for the Estate's membership interest in Fox Entities held through SSC 02, and other conduct as alleged herein. *See* ¶¶ 6, 22-23, 36-38, 59, 63, 71-77, 87, 89, 96, 103, 124-125, 128, 130, 156, 179, 194, 198, 212-214, 261-247, 275-284, 285-291, and 298-302, *supra.*

397. This association-in-fact was an "enterprise" within the meaning of COCCA, C.R.S. § 18-17-103(2). *See* ¶¶ 1-4, 34-44, 47-52, 53-78, 83-89, 90-142, 143-163, 163-214, 216-258, 261-247, 277-291, and 303-313, *supra*.

398. The Non-Dragul Defendants conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs through a "pattern of racketeering activity" within the meaning of COCCA, C.R.S. § 18-17-103(3), in violation of COCCA,

C.R.S. § 18-17-104(3) to further the fraudulent scheme set forth herein and plans related thereto, and where all such schemes, devices, and actions were related to the conduct and in furtherance of their enterprise. *See id*.

399. Specifically, at all relevant times, the Non-Dragul Defendants, through aiding and abetting and the provision of substantial assistance to Dragul, engaged in racketeering within the meaning of C.R.S. § 18-17-103(5), when they conspired to commit and did commit violations of the Colorado Securities Act, under C.R.S. §§ 11-21-501(1) and 11-51-604; wire fraud, under 18 U.S.C. § 1343; theft under C.R.S. § 18-4-401; and/or bankruptcy fraud under 18 U.S.C. § 157.

400. The Non-Dragul Defendants participated in the affairs of the enterprise and committed a pattern of racketeering including but not limited to those set forth in ¶¶ 1-4, 34-44, 47-52, 53-78, 83-89, 90-142, 143-163, 163-214, 216-258, 261-247, 277-291, and 303-313, above., above.

401. These detailed acts of racketeering occurred within ten years of one another and constitute a pattern of racketeering activity within the meaning of C.R.S. § 18-17-103(3).

402. The above-detailed acts committed as part of Dragul's fraudulent scheme were related to each other by virtue of common participants, a common class of victims (*i.e.*, the GDA Entity investors, the Estate's creditors and other parties in interest), a common method of commission (several years' worth of unauthorized transfers of investor funds for Non-Dragul Defendants' Defendants' use and benefit),

and the common purpose and common result was to defraud the GDA Entity investors, and the Estate's creditors, to the benefit of Defendants.

403. It is unlawful for any person employed by or associated with an enterprise to conduct the affairs of an enterprise through a pattern of racketeering, or for any person to conspire or endeavor to commit a violation of COCCA, C.R.S. §§ 18-17-104(3) and (4).

404. In violation of C.R.S. § 18-17-104(3), the Non-Dragul Defendants conspired with and endeavored to violate the provisions of COCCA, C.R.S. § 18-17-104(3), by aiding and abetting Dragul as described in ¶¶ 1-4, 34-44, 47-52, 53-78, 83-89, 90-142, 143-163, 163-214, 216-258, 261-247, 277-291, and 303-313, above.

405. As set forth above, the Non-Dragul Defendants and Dragul conspired with the common purpose of fraudulently, illegally, and without authorization, misappropriating funds through a series of fraudulent representations, inducements, transactions, and wire transfers among and between the GDA Entity bank accounts, the Non-Dragul Defendants' personal bank accounts, and title company escrow accounts. *Id*.

406. Through their fraudulent Scheme, the Non-Dragul Defendants and Dragul pilfered the SPEs for their own benefit and thus, have injured the GDA Entity investors and the Receivership Estate, including its creditors and parties in interest.

407. As a direct and proximate result of the Non-Dragul Defendants' aiding and abetting, participating in, and conspiring with Dragul to violate COCCA, C.R.S.

§ 18-17-104(3), the SPEs and thus, the GDA Entity investors and the Estate, including its creditors and parties in interest, have been damaged and are therefore entitled to treble damages, costs, and reasonable attorney's fees to C.R.S. § 18-17-106(7).

XI. SEVENTH CLAIM FOR RELIEF: Breach of Fiduciary Duty *(Against Dragul)*

408. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

409. As manager of the GDA Entities, Dragul a fiduciary duty to the GDA Entities and their member investors, which required him to use reasonable care and skill in managing the properties and associated SPEs.

410. Dragul also owed a fiduciary duty to the GDA Entity investors to ensure the truth and accuracy of the representations made prior to and during the GDA Entities' ownership of the associated properties and to ensure that those representations remained true throughout the ownership of the properties.

411. Dragul breached his fiduciary duties as set forth above, and in the following non-exclusive respects, as set forth in ¶¶ 104, 33-44, 53-78, 83-89, 91-95, 97-102, 104, 106-142, 143-160, 171-214, 215-258, 259-260, 293-313, above:

412. Failing to provide honest and accurate material information to the investors prior to and during ownership of the associated properties;

413. Failing to disclose that he and the Non-Dragul Defendants received illegal and unauthorized Commissions from escrow of the sale of SPE properties and from the SPE accounts;

414. Receiving undisclosed and unearned commissions and/or payments from escrow of closing on the sale of certain SPE properties and from the SPE accounts;

415. Placing his own and the Non-Dragul Defendants' financial interests above the GDA Entities and their investors;

416. Failing to act in the best interest of the GDA Entities and instead placing his own interests and the Non-Dragul Defendants' interests above those of the GDA Entities; and

417. Other acts or omissions which may be identified through discovery and shown at trial.

418. Dragul's acts or omissions as described in the allegations and claims for relief set forth herein constituted breaches of the fiduciary duties he owed to the GDA Entities and their member investors, and were intentional, willful, and wanton.

419. Dragul's actions or omissions were intentionally designed to enrich himself to the detriment of the GDA Entities and their member investors, and were intentionally designed to conceal material information from the GDA Entity investors, all to their detriment.

420. As a proximate cause of the Dragul's breaches of his fiduciary duties, the Estate suffered damages and losses.

XII. EIGHTH CLAIM FOR RELIEF:
Aiding and Abetting Dragul's Breach of Fiduciary Duties
(Against the Kahn Defendants)

421. The Receiver realleges and incorporates by reference the previous allegations of the Amended Complaint as if fully set forth herein.

422. The Receiver has standing to prosecute these claims both on behalf of the Estate, the GDA Entities, and on behalf of the GDA Entity investors, the latter of which are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

423. The Kahn Defendants, in their capacity as counsel for the GDA Entities, aided and abetted Dragul's breach of the fiduciary duties he owed to the GDA Entities and their member investors for the purpose of advancing their own interests over those of the GDA Entities and their investors.

424. As set forth above, the Kahn Defendants obtained direct financial benefits from colluding in or aiding and abetting Dragul's breaches.

425. As a direct and proximate result of the Kahn Defendants' aiding and abetting, participating in, and conspiring with Dragul to breach the fiduciary duties that he owed to the GDA Entities and their member investors, the SPEs and thus, the GDA Entity investors and the Estate, including its creditors and parties in interest, have been damaged.

XIII. NINTH CLAIM FOR RELIEF:
Negligence
(Against the Kahn Defendants)

426. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

427. The Receiver has standing to prosecute these claims on behalf of the SPEs all of whom are creditors of the Receivership Estate. *See* **Compl. Ex. 1,** at ¶ 13(s).

428. The Kahn Defendants represented the GDA Entities, which included handling general representation and litigation matters for each of the GDA Entities.

429. In doing so, the Kahn Defendants owed the GDA Entities a duty to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out services for their clients.

430. The Kahn Defendants were negligent in the following non-exclusive respects, as set forth in ¶¶ 8, 50-52, 80-81, 59, 71- 77, 96, 124, 130, 161-162, 194, 198, and 261-247, above:

a. Negligently providing legal advice to Dragul as to the impermissible and undisclosed comingling of investor dollars and the formation and management of the SPEs;

b. Negligently providing legal advice to Dragul upon the sale of PMG concerning the failure to pay distributions to investors and concealing from investors that the property had been sold but instead of

distributing funds to investors, Dragul kept those proceeds for his own use;

c. Negligently preparing or assisting in the preparation of false and misleading updates to investors;

d. Negligently preparing and back-dating fraudulent entity organizational documents in concert with Dragul, Markusch and Fox, to transfer assets of the Estate without the consent or knowledge of the Receiver;

e. Negligently advising, assisting, and otherwise providing legal services to Dragul and his staff, including Markusch, and Fox regarding their continued violations of the Receivership Order, and

f. All other acts which may be uncovered through discovery and which may be shown at trial.

431. The Kahn Defendants' failure to exercise the requisite due care in representing the GDA Entities, including providing legal advice and assisting to effect Dragul's fraudulent scheme and taking undisclosed and illegal commissions, was a proximate cause of the Estate damages and losses.

XIV. TENTH CLAIM FOR RELIEF: Breach of Fiduciary Duty *(against the Kahn Defendants)*

432. The Receiver realleges and incorporates the previous allegation ns of the Amended Complaint as if fully set forth herein.

433. The Kahn Defendants represented the GDA Entities, which included handling general representation and litigation matters for them.

434. The Kahn Defendants owed the GDA Entities fiduciary duties of loyalty and due care.

435. The fiduciary duty of loyalty required the Kahn Defendants to place the interests of the clients – *i.e.*, the GDA Entities, including their investors– over the interests of themselves, Dragul, or Fox, and further required the Kahn Defendants to communicate honestly and truthfully with the GDA Entity investors.

436. The Kahn Defendants' duty of loyalty and duty to provide conflict-free representation, required them to exercise independent professional judgment on behalf of the GDA Entities to determine if Dragul's decisions or instructions were adverse to, or not in the best interest of the GDA Entities and the investors.

437. In addition to the fiduciary duty of loyalty and duty to provide conflict-free representation the Kahn Defendants owed fiduciary duties of utmost candor, communication, and utmost honesty.

438. The Kahn Defendants breached their fiduciary duties as set forth above, and in the following non-exclusive respects, as set forth in **Comp. Ex. 5,** and in ¶¶ 8, 50-52, 80-81, 59, 71- 77, 96, 124, 130, 161-162, 194, 198, and 261-247, above:

a. Failing to disclose their receipt of unearned and undisclosed commissions and/or payment on fees from escrow of the sale of SPE Properties, including PMG, the Prospect Property, Grandview

Marketplace, AP Plaza, and Standley Lake, and from the SPE associated accounts;

b. Failing to disclose that they also represented Fox and ACF at the same time they represented the GDA Entities, and in connection with their representation of Fox and ACF, that they took action that was harmful to the GDA Entities.

c. Failing to advise the GDA Entities that Dragul and Fox's interests were adverse to those of the Entities;

d. Placing their own, Dragul and Fox's financial interests above the GDA Entities and their Investors;

e. Failing to act in the best interest of the GDA Entities and instead placing the Kahn and Fox Defendants' interests and Dragul's interests above those of the GDA Entities; and

f. Other acts or omissions which may be identified through discovery and shown at trial.

439. The Kahn Defendants' acts or omissions as described in this claim for relief were breaches of the fiduciary duties described above that they owed to the GDA Entity investors and were intentional as well as willful and wanton.

440. The Kahn Defendants' actions or omissions were intentionally designed to enrich themselves to the detriment of the GDA Entity investors and were

intentionally designed to conceal material information from the GDA Entity investors, all to their detriment.

441. As a proximate cause of the Kahn Defendants' breaches of their fiduciary duties, the Estate suffered damages and losses.

XV. ELEVENTH CLAIM FOR RELIEF: Fraudulent Transfer – Colo. Rev. Stat. § 38-8-105(1)(A) *(against all Defendants)*

442. The Receiver realleges and incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

443. At all times relevant hereto, and with respect to the illegal and undisclosed Commissions, there existed one or more creditors whose claims arose either before or after their payment.

444. The Commissions identified with particularly on Exhibits **Compl. Exs. 3, 4, 5, 6 (as amended), and 7** were transfers made in furtherance of Dragul's Ponzi Scheme with the actual intent to hinder, delay, and defraud creditors. *See* ¶¶ 5-7, 22, 27, 42, 62, 82, 87, 89, 98-100, 111, 113, 121-123, 127-129, 131-137, 143-145, 168, 170-171, 173-175, 180, 191-193, 201-203, 211-213, and 293-313, *supra*.

445. Pursuant to C.R.S. § 38-8-110(1)(a), the Receiver is entitled to recover the entire amount of the illegal and undisclosed Commissions.

446. Pursuant to C.R.S. §§ 38-8-108(1)(a) and 38-8-109(2), the Receiver is entitled to a judgment avoiding the payment of all Commissions to Defendants,

directing the Commissions be set aside, and recovering the Commissions, or the value thereof, from Defendants for the benefit of the Estate.

XVI. TWELFTH CLAIM FOR RELIEF: Unjust Enrichment *(against all Defendants)*

447. The Receiver realleges incorporates the previous allegations of the Amended Complaint as if fully set forth herein.

448. By virtue of the Commissions and other payments, Defendants have each received benefits at the Estate's expense and at the expense of other creditors that would make it unjust for them to retain those benefits without paying the Estate the value thereof.

PRAYER FOR RELIEF

The Receiver requests that judgment enter in his favor and against Defendants for:

A. Compensatory damages in an amount to be proven at trial;

B. Awarding treble damages pursuant to COCCA, C.R.S. § 18-17-106(7) and C.R.S. § 18-4-405;

C. Pre- and post-judgment interest as allowed by law; and

D. Costs and attorney's fees as allowed by law; and

E. For such other relief as may be just and proper in the circumstances.

Dated: June 1, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: /s/ *Patrick D. Vellone*

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ATTORNEYS FOR THE PLAINTIFF

EXHIBIT A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of June, 2020 a true and correct copy of **the First 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.

EXHIBIT A

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: July 6, 2020 5:03 PM FILING ID: DBD86B9B115DB CASE NUMBER: 2020CV30255
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 Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2020CV30255 Courtroom: 414

DEFENDANT GARY DRAGUL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

In response to Defendant Gary Dragul's motion to dismiss the original complaint, the Plaintiff, Receiver Harvey Sender ("Receiver"), filed his 127-page First Amended Complaint ("Amended Complaint" or "FAC"). Despite the length, the Amended Complaint fails to remedy the defects in the original complaint. The Receiver, who was appointed Receiver *for* Mr. Dragul

EXHIBIT A

EXHIBIT 2

and two of his entities, is still suing Mr. Dragul even though Mr. Dragul is part of the Receivership. But as a matter of law, he cannot sue the people or entities in receivership. Since he stands in their shoes, that would mean those people or entities are suing themselves.

The Receiver also still purports to assert investors' claims to recover their damages from an alleged fraudulent scheme undertaken by Mr. Dragul and the other Defendants. The Receiver cannot do that. His power is based upon the people and entities in receivership. He can control claims against those people and entities. He can also assert claims belonging to those people and entities against third parties. What he cannot do as a matter of law, however, is assert third parties' claims, including those of investors. He has no standing to do so. Additionally, many of the claims are time-barred, and the equitable claims cannot be pled when there is an adequate remedy at law, as there is here.

The Receiver's lack of standing, inability to assert claims against Mr. Dragul who is in receivership, and failure to assert claims before the limitations periods expired cannot be cured by repleading. The Court should dismiss the Amended Complaint with prejudice pursuant to C.R.C.P. 12(b)(1) and 12(b)(5).

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Gary J. Dragul conferred with counsel for the Receiver, and the Receiver opposes this Motion.

BACKGROUND

The Receiver alleges that, in 2014, the Colorado Securities Commissioner and Attorney General began investigating Mr. Dragul, GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, LLC ("GDAREM") (GDARES and GDAREM are collectively referred to as "GDA Entities") after purportedly receiving complaints from investors. (FAC ¶

44.) Four years later, on April 12, 2018, the State indicted Mr. Dragul on alleged securities fraud charges (though the State seems now to have abandoned that indictment). On August 15, 2018, the Commissioner filed a complaint for injunctive and other relief against Mr. Dragul and the GDA Entities (the "Receivership Action"; Case No. 2018CV33011). The Commissioner immediately moved to appoint a receiver over the GDA Entities *and* Mr. Dragul personally. Harvey Sender was appointed Receiver on August 30, 2018. (*See* FAC/Compl. Ex. 1, August 30, 2018 Receivership Order ("Receivership Order")). Since the indictment was hindering Mr. Dragul's ability to manage the properties in which investors had invested, and lenders were threating to declare default based on the indictment, Mr. Dragul believed a receivership would be the most effective way for investors to avoid losses. Thus, Mr. Dragul consented to the appointment of receiver expecting a cooperative process in which the Receiver, Mr. Dragul, and the GDA Entities would manage the properties to maximize investor recovery. When the Receiver was appointed on August 30, 2018, Mr. Dragul began to and then completed turning over all his assets that were derived directly or indirectly from investor funds or the alleged solicitation of securities. At the Receiver's request, Mr. Dragul also turned over the entire GDA server on which was saved not only information about the properties and investors, but all of Mr. Dragul's communications including his personal attorney-client privileged communications that Mr. Dragul had with counsel.

For a while, those involved in the receivership process did work cooperatively. Unfortunately, that changed. On January 21, 2020, the Receiver filed his original complaint. Mr. Dragul and several other Defendants moved to dismiss, and in response, the Receiver filed the Amended Complaint. The Amended Complaint asserts claims against Mr. Dragul for: (1) violations of the Colorado Securities Act, C.R.S. §§ 11-51-301, 11-51-401, 11-51-501, 11-51-

501(1)(a)-(c) and 11-51-604(1), (2)(A), (3), (4), and (5)(a)-(b); (2) negligence; (3) negligent misrepresentation; (4) civil theft, C.R.S. § 18-4-401; (5) COCCA violations, C.R.S. § 18-17-101, *et seq*.; (7)[1] breach of fiduciary duty; (11) fraudulent transfer, C.R.S. § 38-8-105(1)(a); and (12) unjust enrichment.

STANDARD

A motion to dismiss for lack of jurisdiction under C.R.C.P. 12(b)(1) is appropriately granted when the plaintiff lacks standing to assert the claims.[2] *Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011) (affirming district court's dismissal for lack of standing under C.R.C.P. 12(b)(1)). "If a court determines that standing does not exist, then it must dismiss the case." *Hickenlooper v. Freedom from Religion Found. Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

A motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim tests the formal sufficiency of a plaintiff's complaint. *Dwyer v. State*, 357 P.3d 185, 196 (Colo. 2015). Dismissal under Rule 12(b)(5) is appropriate when the allegations fail, as a matter of law, to support the claim for relief. *E.g.*, *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). The allegations must satisfy Colorado's "plausibility" standard. *Warne v. Hall*, 373 P.3d 588, 591, 595 (Colo. 2016). While the factual allegations in the complaint must generally be accepted as true, that does not apply to legal conclusions or

[1] The sixth, eight, ninth, and tenth claims are not asserted against Mr. Dragul, but against other defendants.
[2] A motion to dismiss for lack of jurisdiction under C.R.C.P. 12(b)(1) is limited to 25 pages. C.R.C.P. 121, § 1-15(1)(a).

conclusory factual allegations. *Warne*, 373 P.3d at 591, 594, 596; *see also Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) (courts are "not required to accept as true legal conclusions that are couched as factual allegations."). Under *Warne*, conclusory allegations do not suffice, *id.* at 596, and instead, the factual allegations must contain sufficient detail to "raise the right to belief 'above the speculative level'", *Warne*, 373 P.3d at 591 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

ARGUMENT

I. The Receiver Lacks Standing to Assert Investors' Claims

A receiver's role is to gather and preserve the assets of the entities or people in receivership for later distribution to creditors of those same entities or people in receivership. Consistent with that role, a receiver is often authorized to prosecute claims *held by* the entities or people in receivership against third parties. The resulting recovery is then added to the asset pool for later distribution to creditors. The receiver's power to assert those claims stems from the receiver's control over those entities or people in receivership.

As a matter of law, however, a receiver lacks authority to assert claims held by entities or people who are not in the receivership. Here, that means the Receiver may not assert claims of the investors who are creditors of the Receivership Estate.

A. All of the Claims Here Are Investor-Creditor Claims

The Receiver asserts he has standing to prosecute the first claim for violations of the Colorado Securities Act ("CSA") on behalf of the Special Purpose Entities ("SPEs") and investors "all of whom are creditors of the Receivership Estate." (FAC ¶ 316.) And as a matter of law, only creditors, and not the Receiver, can bring such a claim. C.R.S. § 11-51-604(1) authorizes "the person buying the security"—not a receiver and not any person or entity in receivership—to sue for a failure to register under C.R.S. § 11-51-301. Similarly, C.R.S. § 11-

51-604(2)(a) only authorizes "the person buying the security[,]" and not a person or entity in receivership or a receiver, to assert a claim for failure to be licensed under C.R.S. § 11-51-401.

C.R.S. § 11-51-604(3) authorizes "the person buying or selling such security" and 11-51-604(4) authorizes "the person buying the security"—not a receiver and not any person or entity in receivership—to sue for selling or buying a security in violation of section 11-51-501(1) & 501(1)(b). And "control person liability" under C.R.S. §§ 11-51-604(5)(a) & (b) for control over persons violating the above sections provides for liability only "to the same extent as such controlled person" and thus fails for the same reasons—only the buyer or seller of the security has standing to sue for the underlying violation.

The Receiver similarly alleges the second claim for negligence on behalf of SPEs and investors, "all of whom are creditors of the Receivership Estate." (FAC ¶¶ 361.) And he alleges Mr. Dragul owed a duty of care "to investors and prospective investors"—not the Estate. (FAC ¶ 357.) The same is true for the third claim for negligent misrepresentation, which alleges that Mr. Dragul "negligently induced . . . investors to invest and/or to continue to invest" and that investors (only) sustained damages and losses. (*Id*. ¶¶ 362, 370.)

The Receiver alleges he has standing to prosecute the fourth claim for civil theft on behalf of the Estate, SPEs, and investors, the latter two of which he alleges are creditors. (*Id*. ¶ 372.) Contrary to the pleading standard under *Warne v. Hall*, 373 P.3d at 591, 594, 596, he alleges no facts to support that the Estate was injured by civil theft, and his allegations show it was not. The Receiver states Defendants "exercised control over GDA Entity *investors'* funds[,]" and without "*investors*' knowledge or authorization" controlled those *investors*' funds, with the intent to "permanently deprive *investors* of their investment[,]" that "*investors* were in

fact permanently deprived of their funds[,]" and that "*investors* have been damaged[.]" (FAC ¶¶ 372-77 (emphasis added).)

For the fifth claim for COCCA violations, the Receiver also alleges standing on behalf of the Estate, SPEs, and investors. (FAC ¶¶ 379.) But he alleges no facts to support the speculative assertion the Estate was injured—he asserts securities violations for making misrepresentations *to investors* (*id*. ¶¶ 383, 386(a), 387(a)), wire fraud and civil theft involving fraud on *investors* and *investors*' money (*id*. ¶¶ 386(b), 387(b), 387(c)), and bankruptcy fraud which defrauded *creditors* (*id*. ¶¶ 386(b), 387(d)).[3] Plus, the Receiver alleges that the purported scheme undertaken by the COCCA enterprise extended only "through August 2018" (FAC ¶ 383), meaning the Receiver could not have been injured by any COCCA violation since he was not appointed until August 30, 2018. And the GDA Entities also lack standing to sue an officer or director alleged to be a participant in the enterprise, such as Mr. Dragul, because, as a matter of law, they can show no injury proximately caused by the racketeering activity. *See Mendelovitz v. Vosicky*, 40 F.3d 182, 187 (7th Cir. 1994) ("Thus, under RICO, a corporation does not have standing to sue for damages allegedly accruing from the actions of its directors or officers against third parties, because there can be no proximate cause."); *see also New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1370 (Colo. App. 1993) (RICO cases instructive on similar provisions under COCCA). Thus, the COCCA claim is solely an investor-creditor claim too.

For the seventh claim for breach of fiduciary duty, the Receiver alleges that Mr. Dragul

[3] As Mr. Dragul noted in his first motion to dismiss, bankruptcy fraud under 18 U.S.C. § 157 is not a COCCA predicate act. C.R.S. §§ 18-17-103(5)(b) (not identifying 18 U.S.C. § 157), 103(5)(a) (incorporating RICO's predicate acts under 18 U.S.C. § 1961(1)(A), (B), (C), and (D)); 18 U.S.C. § 1961(1) (not identifying 18 U.S.C. § 157). In fact, bankruptcy fraud under 18 U.S.C. § 157 is expressly excluded from being a racketeering activity predicate act. 18 U.S.C. § 1961(1)(D).

owed a fiduciary duty to "the GDA Entities and their member investors," and simply asserts the duty to the GDA Entities was breached and the GDA Entities were injured. (FAC ¶¶ 409, 415-16, 418-20.) While he alleges the duty owed to investors and how investors were purportedly injured (*id*. ¶ 410, 412-415), he alleges no facts to demonstrate what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered, contrary to the *Warne v. Hall* pleading standard.

The Receiver alleges C.R.S. § 38-8-110(1)(a) entitles him to recover "illegal and undisclosed Commissions" under the eleventh claim for fraudulent transfer. (FAC ¶¶ 445.) That is incorrect as a matter of law and under the facts alleged. The Receiver alleges that transfers were made to defraud *creditors*, not the Receiver or anyone else. (*Id*. ¶¶ 443, 444). And CUFTA provides remedies only to *creditors.* C.R.S. §§ 38-8-105, 108. While CUFTA claims are commonly asserted by receivers, that is when the entity in receivership is the creditor who was injured by a fraudulent transfer to a third party. Here, the Receiver alleges third-party investor-creditors were defrauded (FAC ¶ 444 & paragraphs cited therein), not that Mr. Dragul or the GDA Entities were defrauded. Thus, the eleventh claim is also an investor-creditor claim.

And for the twelfth claim for unjust enrichment, the Receiver asserts that Mr. Dragul received benefits "at the Estate's expense and at the expense of other creditors" but alleges no facts to show what benefits Mr. Dragul received, or how they came at the Estate's expense, making this allegation pure speculation and the statement of a legal conclusion, contrary to *Warne v. Hall*. (*Id*. ¶ 448.)

Thus, all of the Receiver's claims against Mr. Dragul are actually investor-creditors' claims.

B. The Receiver Lacks Standing to Assert Creditor-Investor Claims

As a matter of law, the Receiver lacks standing to assert investor-creditor claims.[4] "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly*, 570 P.2d at 539. "Resolution of a standing issue presents two considerations: whether the complaining party has alleged an actual injury from the challenged action; and whether the injury is to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions." *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 781 (Colo. App 1997).

> The 'injury-in-fact' requirement is dictated by the need to assure that an actual controversy exists so that the matter is a proper one for judicial resolution, for consistent with the separation of powers doctrine embodied in Article III of the Colorado Constitution, '[c]ourts cannot, under the pretense of an actual case, assume powers vested in either the executive or legislative branches of government.'

Conrad v. City and Cty of Denver, 656 P.2d 662, 668 (Colo. 1982).

The Receiver in this matter has at least once before argued that he may assert creditors' claims. The court there rejected that argument. In *Sender v. Kidder Peabody*, 952 P.2d at 780,

[4] In support of his claimed authority to assert creditors' claims, the Receiver cites Paragraph 13(s) of the Receivership Order. (*Id*. ¶¶ 12, 315, 356, 361, 372, 379, 393, 422, 427.) But the Receivership Order may not grant the Receiver powers he cannot wield as a matter of law. A trial court lacks jurisdiction to expand its jurisdiction, or the jurisdiction of another trial court, by fiat. "[T]he appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990). "Granting a receiver authority to bring claims held by others would violate those limitations, as 'the ability to confer substantive legal rights that may create standing [under] Article III is vested in Congress and not the judiciary.'" *Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012) (quoting *Scholes*, 744 F. Supp. at 1421 n.6)). It is up to this Court to determine whether the Receiver has standing, and thus whether this Court has jurisdiction, according to the constitutional test for standing. Nor does it matter that the Receivership Order was stipulated. In Colorado, the issue of standing is jurisdictional. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Because standing is jurisdictional, it is not subject to waiver. *See, e.g.*, *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003).

the Receiver served as a bankruptcy trustee and filed a complaint alleging aiding and abetting breach of fiduciary duty, negligence, and breach of fiduciary duty against third-party financial institutions. The trial court granted summary judgment in favor of the defendants based on *in pari delicto* and lack of standing. The Receiver appealed, and the Colorado Court of Appeals affirmed, holding among other things that "[a] bankruptcy trustee cannot assert the claims of creditors or third parties but stands in the shoes of the debtor and may properly assert claims belonging to the debtor." *Id*. at 781 (citing *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996); *Miller v. Accelerated Bureau of Collections, Inc.*, 932 P.2d 824 (Colo. App. 1996)). Myriad other courts have similarly held that receivers and trustees lack standing to assert creditor claims. *See, e.g., In re M & L Business Machine Co., Inc.*, 160 B.R. 850, 851 (D. Colo. 1993) (holding that a bankruptcy trustee, analogous to the Receiver here, lacked standing to assert creditors' claims against third parties; collecting cases); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) ("[A]lthough the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors."); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (An "equity receiver may sue only to redress injuries to the entity in receivership.").

"[G]enerally, a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve." *Good Shepherd Health Facilities of Colorado, Inc. v. Department of Health*, 789 P.2d 423, 425 (Colo. App. 1989) (citing *Seckler v. J.I. Case Co.*, 348 P.2d 368 (Colo. 1960)); *see also Kelley*, 901 F. Supp. 2d at 1128 ("[A]n equity receiver may sue only on behalf of the entity (or person) in receivership, not third parties. This is because a receiver 'stands in the shoes' of the receivership entity.").

The office of a receiver is akin to that of a trustee. *See, e.g.*, *Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 33 (Colo. 1931) ("[T]he office of receiver is in the nature of that of a trustee, and those who have lawful claims against the receivership estate are *cestuis que trustent*."); *see also Kelley*, 901 F. Supp. 2d at 1128 ("A federal equity receiver is akin to a bankruptcy trustee.") Just as a bankruptcy trustee may not assert creditors' claims, *Sender*, 952 P.2d at 779 (citing cases), a receiver may not assert creditors' claims, *Kelley*, 901 F. Supp. 2d at 1128. Federal courts have noted that the role of an equity receiver is "to maximize the receivership estates' assets for the benefit of creditors, . . . but contrary to [the receiver's] assertion it does *not* give him standing to sue on their behalf." *Kelley*, 901 F. Supp. 2d at 1128 (emphasis in original). Further, the Colorado Court of Appeals has stated:

> If a cause of action alleges only indirect harm to a creditor (that is, an injury that derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC, 166 P.3d 166, 180 (Colo. App. 2007).

The Receivership Order also demonstrates the Receiver may not assert creditors' claims. Paragraph 16 provides that "[a]ny parties holding claims against Dragul, GDARES and GDAREM or the Receivership Estate shall not be entitled to participate as creditors in the distribution of recoveries from the Receiver's administration of the Receivership Estate and collection and liquidation of the assets thereof, unless such parties agree not to file or prosecute independent claims such parties may have . . . against Dragul, GDARES and GDAREM[.]" Under the literal language of Paragraph 16, the Receiver is waiving those investors' rights to participate in the distribution of recoveries from the Receivership when he asserts those

creditors' claims. And since the money the Receiver seeks to recover through the Amended Complaint will go to the Receivership Estate first and not directly to those investors, that means the investors will have no recovery. The Receiver lacks authority to so waive those investors' claims and recovery. And doing so is contrary to the Receiver's purpose to collect Receivership Property in order to pay creditors. (Receivership Order ¶ 22(c), (e), (f).)

If the Receiver wanted to assert creditors' claims, he had an easy way to do so legitimately: get the creditors to assign their claims to him. He did not do that. In fact, it is unclear whether any investor-creditors even know the Receiver is asserting their claims. Since the claims of creditors are not claims held by the person or entities in receivership, and the Receivership Order precludes the Receiver from asserting creditors' claims, the Receiver lacks standing as a matter of law. Consequently, the claims against Mr. Dragul must be dismissed.

II. The Receiver May Not Sue Gary Dragul Because Mr. Dragul is In Receivership

A. As a Matter of Law, a Receiver May Not Sue a Person or Entity in Receivership

In *Sender v. Kidder Peabody*, 952 P.2d at 781—the case in which the Receiver here was also the plaintiff—the court held that a bankruptcy trustee "stands in the shoes of the debtor and may properly assert claims belonging to the debtor." The Receiver here stands in the shoes of the people and entities in receivership, and may properly assert their claims. Since Mr. Dragul is in receivership, the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. Mr. Dragul cannot sue himself. *See, e.g., BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013) (noting a party may not sue itself even if the party is serving in different legal capacities) (collecting cases).

Indeed, the court in *Sender v. Kidder Peabody* went further and held that because the trustee stands in the shoes of the debtor, the trustee may not even sue third parties with whom the

debtor coordinated. There, the court considered whether the trustee could sue third parties who allegedly participated in a Ponzi scheme with James Donahue, who was the principal of the debtors in bankruptcy (Donahue was not personally a debtor in the bankruptcy). 952 P.2d at 780-81. The trustee, Harvey Sender (the Receiver here), was alleging losses by the debtors (i.e., the parties for whom he was trustee) for which he might otherwise have standing. *Id*. at 781. But the court held that he lacked standing under the doctrine of *in pari delicto*. *Id*. at 781-82. Specifically, the court noted that while the losses were suffered by the debtors, they were caused by a scheme orchestrated by the debtors' principal, Donahue, and the defendants. *Id*. at 781. Citing authority, the court held that "a bankruptcy trustee does not have standing to pursue claims against a third party for injury to the debtor when the debtor has joined with the third party in defrauding its creditors." *Id*. at 782 (citing cases). This flows from "the principle . . . that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed *in pari delicto*, and the law will aid neither, but rather, will leave them where it finds them." *Id*. (citing cases). Thus, the court held that because the debtors "obtained the money they now seek to recover through fraudulent means, we conclude that Sender, standing in their shoes, cannot show injury to a legally protected right[,]" and the court therefore affirmed summary judgment against Sender for lack of standing. *Id*.

If a trustee, and by extension a receiver, cannot sue *third parties* who participated in the debtor's/person in receivership's scheme, it is untenable that the Receiver here could sue the actual person *in* receivership, Mr. Dragul, who the Receiver asserts not only participated in the scheme but was the central figure. Assuming the Amended Complaint's allegations of wrongdoing as true as required on a motion to dismiss, Mr. Dragul would have benefited—not

been injured—from this wrongdoing just like a third-party participant. Nor can the GDA Entities in receivership assert claims against Mr. Dragul, as under the holding in *Sender v. Kidder Peabody*, they were also part of the scheme and the Receiver lacks standing to assert their claims against Mr. Dragul. *Id*. at 782.

Moreover, under the reasoning in *Sender v. Kidder Peabody*, the Receiver is also barred from asserting claims against third parties whom the Receiver alleges participated in the purported fraudulent scheme with Mr. Dragul. *Id*. That means the Receiver is barred from asserting claims against all of the other defendants in this action.

B. Equitable Considerations and the Receivership Order Bar the Receiver from Suing Mr. Dragul

This rule that the receiver may not sue a person or entity in receivership is further supported by myriad equitable considerations and the Receivership Order itself.

As the Receiver alleges in Paragraph 12 of the Amended Complaint, the Receivership Order purports to authorize him to "prosecute claims and causes of action *against third parties*[.]" Mr. Dragul is not a third party.

Moreover, pursuant to Paragraph 26 of the Receivership Order, "all actions in equity or at law against the Receiver, *Dragul*, GDARES and GDAREM, or the Receivership Estate are hereby enjoined . . . pending further action by this Court." (emphasis added). Here, the Receiver sued Mr. Dragul. Under the plain language of Paragraph 26, the Receiver was enjoined from doing so without first seeking relief from the stay. The Receiver never sought relief from the stay, and thus he lacks authority to assert claims against Mr. Dragul here.

Paragraph 10 of the Receivership Order required Mr. Dragul to turn over to the Receiver all of his assets that related to, or directly or indirectly derived from, investor funds from the solicitation or sale of alleged securities (except Mr. Dragul's personal residence). While the

Receiver disputes that Mr. Dragul turned over everything and there may be disputes over what counts as related to such investor funds, Mr. Dragul did turn over all assets he believed subject to the Receivership Order. Those assets are intended to pay creditors' claims, meaning they are intended *to pay the very claims the Receiver brings here*. Thus, Mr. Dragul has already turned over the assets the Receiver seeks to recover by way of a judgment in this action. Consequently, if the Receiver obtains a judgment, one of two things will happen. Either the Receiver will receive a double-recovery from Mr. Dragul for the same creditor injuries, or the judgment must be paid out of the Receivership Estate. A double-recovery would be barred as a matter of law. *Andrews v. Picard*, 199 P.3d 6, 11 (Colo. App. 2007). And if the Receiver satisfies the judgment out of the Receivership Estate, there is no point in suing Mr. Dragul. The Receiver already has what he might receive from the judgment, and all he would accomplish with the lawsuit is depleting the funds in the Estate by prosecuting the case and increasing his own fees. (Even on contingency, the Receiver himself would incur fees even if his counsel would not, plus there would be costs—including significant expert costs—born by the Estate.)

The Receivership Order also required Mr. Dragul to turn over and/or give the Receiver access to all information related to the receivership property, investors and their investments, the operation and management of the GDA Entities, and virtually any other potentially relevant (and in many cases irrelevant) information. (Receivership Order ¶¶ 10, 13(d), 13(g), 28.) Specifically, Paragraph 10 required Mr. Dragul and two related entities to provide to the Receiver all documents related to the Receivership Action, along with explaining the operation, maintenance and management of companies at issue. In other words, the very information Mr. Dragul needs to defend himself against the criminal indictments and this civil suit. In accordance with the Receivership Order, Mr. Dragul gave the Receiver access to his and the

GDA Entities' entire server, which included *all* of Mr. Dragul's communications, including privileged communications he had with counsel. Per the Receivership Order, Mr. Dragul did so without attempting to invoke any of the rights under C.R.C.P. 26 or other discovery rules that any other litigant would have to narrow the scope of discovery or protect confidential *or privileged* information. Subsequently, the Receiver seized the server and denied Mr. Dragul access to it or a full copy.

Paragraph 7 of the Receivership Order provides that "[n]othing in the Order operates as a waiver or an abrogation of the attorney-client privilege held by Dragul in his personal capacity." With respect to "all privileges in connection with the professional representation of [Gary Dragul], . . . Dragul maintains all such privileges in his personal capacity." (Receivership Order ¶ 10.) And the Receiver's authority to take possession of Mr. Dragul's offices and limit access to the Receiver and his agents is expressly "subject to any privileges maintained by Dragul in his personal capacity[.]" (*Id*. ¶ 13(d).) Additionally, though the Receiver may seize information including computerized records, "information subject to the attorney-client privilege held by Dragul in his personal capacity shall remain privileged. Any such claimed privileged information, or information that may reasonably be considered privileged information, obtained by Receiver or commingled with other information shall be disgorged by the Receiver and notice given to Dragul regarding the privileged information and its disposition by the Receiver." (*Id*. ¶ 28.)

While the Receivership Order requires the Receiver to disgorge all of Mr. Dragul's attorney-client privileged information, the Receiver has never done so in this or the Receivership Action. Indeed, rather than disgorging, the fact that the Receiver here sues Mr. Dragul *and* Mr. Dragul's former counsel, Benjamin Kahn and the Conundrum Group, alleging a concerted

scheme, suggests the Receiver and his counsel are actively using that very information against Mr. Dragul here.

And even if the Receiver had disgorged the privileged information, the damage would be done. Receipt and review of the opposing party's privileged information is a bell that cannot be un-rung. Opposing counsel's receipt of a party's privileged information often irreparably taints the integrity of a judicial proceeding so severely that, even though it is an extreme remedy, disqualification of the offending counsel may be appropriate. *In re Estate of Meyers*, 130 P.3d 1023, 1025 (Colo. 2006) (citations omitted); *see also, MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (D. Conn. 1991) (noting that "[e]ven the appearance of impropriety may, under the appropriate circumstances, require prompt remedial action [such as disqualification]" and "any doubt is to be resolved in favor of disqualification") (internal quotation omitted). For that reason, here, the Court would either need to disqualify the Receiver's counsel (and possibly the Receiver himself), or dismiss the Amended Complaint against Mr. Dragul. Since there are myriad other legal defects with the Amended Complaint, the fact that this case is irreparably tainted by the Receiver's and his counsel's possession of Mr. Dragul's privileged information, and the Receiver's seizing of the very information Mr. Dragul needs to defend himself, are but additional reasons the case must be dismissed.[5]

III. The Receiver's Counsel is Not Authorized to Prosecute Most of the Claims

The Receiver and his counsel converted their fee arrangement to contingency for work on

[5] Had Mr. Dragul known the Receiver would seize Mr. Dragul's information which he needs to defend, and would seize Mr. Dragul's attorney-client privileged information and not disgorge it, and then use all of that information to sue Mr. Dragul, he would not have stipulated to the Receivership Order.

this case, effective November 1, 2019. (Ex. A.)[6] However, paragraph 13(o) of the Receivership Order allows the Receiver to hire counsel on contingency 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[.]" Receivership Property only encompasses assets related to or derived from investor funds (Rec. Order ¶ 9), not damages. The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, (and possibly the twelfth) claims either expressly or as a matter of law seek to recover damages, not Receivership Property. (FAC ¶¶ 320, 326, 338, 359, 370, 377, 391, 407, 420, 425, 431, 441, 448.) Thus, the Receiver may not assert these claims unless and until he either hires new counsel on an hourly basis or converts his current counsel to hourly. In the meantime, the claims must be dismissed for lack of authority.

IV. The Receiver's Claims are Time-Barred or Not Cognizable

A. The First Claim for Violation of the Colorado Securities Act is Time-Barred Under the 3-Year Statute of Limitations and 5-Year Statute of Repose

The Receiver's first claim for violations of the CSA is also time-barred. While C.R.S. § 11-51-604(1) & (2) authorizes investors to sue for failure to register the security or failure to be licensed under C.R.S. §§ 11-51-301 & 401, and subsection 604(5)(a) for control person liability for the same violations, C.R.S. § 11-51-604(8) bars such claims filed "more than two years after the contract of sale[.]" The same subsection also imposes a statute of limitation and statute of repose for claims for fraud, material misstatement or omission, and control person liability under C.R.S. §§ 11-51-501(3), (4), & (5)(b)-(c):

> 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

[6] Pleadings filed in another court proceeding are subject to judicial notice and a court may consider them without converting a motion to dismiss into a motion for summary judgment. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006).

> should have been made by the exercise of reasonable diligence and in no event more than five years after the purchase or sale[.]

C.R.S. § 11-51-604(8).

"In the context of securities fraud, the Tenth Circuit has held that the statute of limitations begins to run 'once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.'" *In re Qwest Communications Intern., Inc. Securities Litigation*, 387 F. Supp. 2d 1130, 1141 (D. Colo. 2005) (quoting *Sterlin v. Biomune Systems*, 154 F.3d 1191, 1201 (10th Cir. 1998)).[7] "The standard outlined in *Sterlin* and similar cases is viewed often as a two-step process: 1) the date when the plaintiff was on 'inquiry notice' of the possibility of fraud; when there existed 'sufficient storm warnings' to alert a reasonable person to the possibility that misleading statements or significant omissions had been made; and 2) the period thereafter during which a diligent investor should have discovered the facts underlying the alleged fraud." *Id.* Notably, this test turns on when the investor knew or should have known of misleading statements or omissions, not when he or she knew or should have known he or she was injured.

While the statute of limitations or repose is generally an affirmative defense, under the CSA, the timeliness of the claim is an element the plaintiff must prove. "When a statute creates a right unknown at common law, and also establishes a time period within which the right may be asserted, the time limit is a substantive provision which qualifies or conditions the right, as distinguished from a statute of limitations which must be asserted as a defense." *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co. of Denver*, 937 P.2d 855, 861 (Colo. App. 1996) (citing *People v. Riley*, 708 P.2d 1359 (Colo. 1985) (federal securities law is highly

[7] The date the Receiver learned of the alleged wrongdoing (FAC ¶ 319) is of no import. Since, as addressed above, this claim is an investor-creditor claim, the claim accrued when the investor-creditors knew.

persuasive in interpreting the CSA); J. Hicks, *Civil Liabilities: Enforcement & Litigation Under the 1933 Act* § 6.01[1] at 6-274 (§ 13 is 'substantive, rather than procedure; it establishe[s] an essential ingredient to a private cause of action') (1989); *In re Longhorn Securities Litigation*, 573 F. Supp. 255 (W.D. Okla. 1983) (Securities Act of 1933 includes statute of limitation and repose which constitute elements of the claim which must be pled in complaint; because statute of limitation is not included in Securities Exchange Act of 1934, it must be asserted as affirmative defense)). Relying on these cases, the court in *First Interstate Bank of Denver* held that the CSA's limitations and repose periods constitute a substantive element of a securities claim and do not implicate a court's subject matter jurisdiction. 937 P.2d at 861.

Thus, section 604(8) of the CSA provides both a limitation period and a period of repose that are substantive elements of the Receiver's claim that must be pled in the complaint. But here, the Receiver failed to plead that the investors on whose behalf he purports to assert the CSA claim first learned of the alleged violations within the limitations period. Instead, the Receiver asserts that "[t]he Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors" (Am. Comp. ¶ 44), indicating that the investors on whose behalf the Receiver apparently brings this action discovered the facts giving rise to the claim at least as early as 2014. Indeed, the Receiver alleges that the "Southpark Investors" complained about not being informed about property transactions in March 2012. (FAC ¶¶ 114-15.) And upon receiving an investor "update",[8] "FC Investors" complained to Hershey and Mr. Dragul in early 2012. (FAC ¶¶ 184-

[8] Which was not made in the connection with any offer of securities (FAC ¶ 183), and thus is not relevant to a securities fraud claim in any event. *E.g., In re JWP, Inc. Securities Litigation*, 928 F. Supp. 1239, 1253 (S.D.N.Y. 1996).

85.) Thus, not only does the Receiver fail to plead facts to show the claim is timely, but his allegations demonstrate it is time-barred.

With respect to the failure to register claim under C.R.S. § 11-51-301 and failure to be licensed claim under C.R.S. § 11-51-401, which are both subject to a two-year statute of repose running from the date the alleged security was sold under C.R.S. §§ 11-51-604(8), the Receiver asserts Mr. Dragul sold securities "between 2003 through August 2018[.]" (FAC ¶ 316.) But paragraph 321 (and the paragraphs reference therein), and his attached exhibits (*see* FAC Exs. 23, 25, 28, 33, 35, & 42), show there was not a single investment occurring within two years of the January 21, 2020 filing of the original complaint. Thus, all of subparts A and B of his first claim under the CSA are time-barred.

With respect to claims under C.R.S. §§ 11-51-501(1)-(c) and 604(3)-(4) for securities fraud or material statement or omission, and 11-51-604(5)(b) & (c) for control person liability for the same (denominated subparts C and D in the Amended Complaint), the Receiver's Exhibits show very few investments within the 5-year statute of repose under C.R.S. § 11-51-604(8):[9]

[9] The Receiver alleges that Mr. Dragul "solicited and received investment funds in Plainfield 09" from "approximately 2009 through 2014" (FAC ¶ 61; *id*. Ex. 23), so all securities claims based on the Plainfield Investors are facially time-barred. He alleges that "from 2007 through 2013" Dragul sold promissory notes solicited by Hershey (FAC ¶ 64; *see also id*. ¶ 65 (noting Dragul owed money on promissory notes "[b]y the end of 2012")), which is also facially time-barred. The Receiver alleges "in or about 2014" Dragul and Hershey solicited investment from the "High Street Investors" (FAC ¶ 67 & *id*. Ex. 25). The solicitation materials for the Market at Southpark property were allegedly sent in 2010. (FAC ¶¶ 90-95.) The Receiver alleges Mr. Dragul raised money from "Southpark Investors" "[b]etween June and August 2010" and possibly in 2012. (FAC ¶¶ 101, 125-28, 131; *id*. Exs. 28-30.) For the Fort Collins WF 02 properties, the Receiver alleges investor solicitation in 2008 and 2009, and communications to induce investors not to try to cash out in 2012. (FAC ¶¶ 172-76, 191, 195.) (Alleged attempts to induce investors not to withdraw investments are not actionable as securities fraud, and thus claims based on such allegations fail as a matter of law for that additional reason. *E.g., Ashland Inc. v. Morgan Stanley & Co., Inc.*, 700 F. Supp. 2d 453, 467 (S.D.N.Y. 2010).) And the vast

RECEIVER EXHIBITS SHOWING ALL INVESTMENTS AND DATES	
EXHIBIT NUMBER	SHOWS INVESTMENTS THROUGH
23	2013
25	2014
28	2010
33	April 1, 2016
35	2009
42	May 1, 2017

Only Exhibits 33 and 42 show any investments that are not facially time-barred, and there are only seven post-dating January 21, 2015 in Exhibit 33, and only nine in Exhibit 42, for investments in Plaza Mall of Georgia North 08 A Junior LLC, and GDA PS Member, LLC for Prospect Square, respectively. But the rest of the Receiver's allegations show he fails to meet his burden to show the claims based on Plaza Mall and Prospect Square are timely under the three-year statute of limitations subject to the discovery rule. He alleges Mr. Dragul provided material to solicit investments in Plaza Mall of Georgia North "in or about 2008 and continuing through 2016" (FAC ¶ 143; *see also id*. ¶ 150), indicating the vast amount of alleged solicitation in that property is time-barred. But worse, the most recent of the solicitations the Receiver alleges Mr. Dragul provided to investors was provided only up until 2015 (FAC ¶ 148), and the alleged solicitation material itself shows *projections* starting in 2009, indicating it must have been prepared and circulated far earlier than the Receiver alleges. (FAC Ex. 32.)

The Receiver also alleges Mr. Dragul distributed false and misleading solicitation materials for the Prospect Property in 2007 and early 2016. (FAC ¶¶ 220, 251-53.) But the allegedly material misstatement in 2016 was that Mr. Dragul received an offer for vacating

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majority of the purported "impermissible" commissions pre-date five years before the complaint was filed as well (*see, e.g.*, FAC ¶ 87 & Exs. 3-7), though that is irrelevant since the statute of repose runs from the date of the sale of the security, not the date of the failure to disclose. Finally, the Receiver alleges the offer of promissory notes only through 2013 (FAC ¶ 332), which is facially time-barred.

tenant Kroger's space, which the Receiver alleges was false because when the Receiver was appointed, "Dragul had not identified a replacement tenant or re-leased the Kroger space." (FAC ¶¶ 252-53.) Those are not inconsistent—Mr. Dragul could have received an offer that was not acceptable, and still not have identified a replacement tenant or re-leased the property for that very reason.[10] The Receiver fails to meet his burden of demonstrating when the investors learned of any fraud or material misstatements or omissions, and his own allegations and exhibits demonstrate it was assuredly far earlier than three years before the complaint was filed on January 21, 2020.

Thus, the first claim is time-barred under both the statutes of repose and limitations.

B. The Eleventh Claim for Fraudulent Transfer is Time-Barred

Under C.R.S. § 38-8-110(1)(a), a claim for fraudulent transfer under C.R.S. § 38-8-105(1)(a), as the Receiver brings here, must be 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." Here, all alleged fraudulent transfers that were made before January 21, 2016 are time-barred unless the one-year discovery rule applies. And the vast majority of the transfers alleged—the "Commissions"—pre-dated January 21, 2016. (*See* FAC/Compl. Exs. 3-7; FAC ¶ 293 (alleging commissions from 2003 to August 2018).) Indeed, though the Receiver alleges Mr. Dragul took money from escrow of real

[10] Most of the factual assertions regarding the alleged misstatements or omissions fail under the very exhibits the Receiver points to for support. For example, not one of the exhibits he cites in paragraphs 331(f), (h), and (i) to support his allegations that Mr. Dragul made "untrue statements" that the investments and operating reserves would be "held in the specific Fox SPE or GDA entity associated bank accounts" and "not comingled" shows any statement that in any way suggests the investments and reserves would be held in specific Fox SPE or GDA bank accounts or not comingled. (*See* FAC Exs. 8, 12, 16, 20, 24, 29, 30, 31 & 35 (cited in ¶ 331(f)); Exs. 8, 12, 16, 20, 24, 29, 30, 31, 32, 36, & 39 (cited in ¶ 331(h)); & Exs. 8, 12, 16, 20, 29, 30, 36, & 39 (cited in ¶ 331(i)).)

estate closings from 2002 to 2018 in the Amended Complaint itself, the exhibit the Receiver cites in support shows payments to Mr. Dragul *only in 2008 and 2009*. (FAC ¶ 299; *id*. Ex. 3.) And the Receiver alleges the Mr. Dragul paid Hershey commissions from 2001 to 2014, but the Receiver's exhibit shows them only through 2013. (FAC ¶ 311; *id*. Ex. 7.)

Under the discovery rule, in *Lewis v. Taylor*, the Colorado Supreme Court noted that, "the transfer was or could reasonably have been discovered by the Receiver on the date of his appointment[.] Thus, section 38–8–110(1)(a) would bar any claim not filed by . . . one year after the [Receiver was appointed]." 375 P.3d 1205, 1207 (Colo. 2016). Thus, even under the discovery rule, any claim for a fraudulent transfer would have needed to be filed no later than one year after the Receiver was appointed—i.e., no later than August 30, 2019. And if one looks to when the investor-creditors knew or should have known of the allegedly fraudulent transfers, the claim is still time-barred as the filing of the preliminary injunction on August 15, 2018 in the Receivership Action and subsequent appointment of the Receiver on August 30, 2018 would have given them notice.

C. The Twelfth Claim for Unjust Enrichment is Time-Barred and Not Cognizable When Pled With a Fraudulent Transfer Claim

While equitable claims such as unjust enrichment are technically subject to equitable laches rather than statutes of limitation, courts generally apply the statute of limitations applicable to an analogous claim at law. *Sterenbuch v. Gross*, 266 P.3d 428, 436-37 (Colo. App. 2011). Here, the unjust enrichment claim seeks the same relief as the fraudulent transfer claim—that Mr. Dragul return to the Receivership Estate whatever he received at the Estate's or creditors' expense. Thus, the fraudulent transfer limitations period applies, and the unjust enrichment claim is time-barred for the same reasons the fraudulent transfer claim is time-barred.

Moreover, equitable claims are not available, and must be dismissed at the pleading stage, when there is an adequate remedy at law. *See Szaloczi v. John Behrmann Revocable Trust*, 90 P.3d 835, 842 (Colo. 2004) ("We have long held that equity will not act if there is a plain, speedy, adequate remedy at law."); *Kelley*, 901 F. Supp. 2d at 1132 (equitable claim must be dismissed at pleading stage when adequate legal remedy is available). Here, the fraudulent transfer claim provides an adequate remedy at law (in fact the same remedy), and the equitable unjust enrichment claim is not cognizable.

CONCLUSION

The Receiver here is trying to exercise power he does not have. His power derives from the people or entities in receivership. As a matter of law, he lacks standing to assert claims of creditors, who are not in receivership. Standing in the shoes of the people or entities in receivership, he also is barred as a matter of law from suing those same people or entities, as that would mean the person in receivership is suing himself for alleged wrongdoing from which he himself benefited. And many of the claims are time-barred or otherwise not cognizable.

The entire Amended Complaint fails as a matter of law and must be dismissed. Since repleading will not imbue the Receiver with standing he lacks as a matter of law or enable him to sue a person in the receivership such as Mr. Dragul, the Amended Complaint should be dismissed with prejudice.

Dated this 6th day of July, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills
Paul L. Vorndran, #22098
Christopher S. Mills, #42042

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

EXHIBIT A

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via the Colorado Court E-filing system to the following:

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EXHIBIT A

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

DATE FILED: July 6, 2020 4:28 PM
FILING ID: 55687DACCD838
CASE NUMBER: 2020CV30255

Plaintiffs: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC

vs.

Defendants: GARY DRAGUL; BENJAMIN KAHN; THE CONUNDRUM GROUP, LLP; SUSAN MARKUSCH; ALAN C. FOX; ACF PROPERTY MANAGEMENT, INC.; MARLIN S. HERSHEY; PERFORMANCE HOLDINGS, INC.; OLSON REAL ESTATE SERVICES, LLC; JUNIPER CONSULTING GROUP, LLC; JOHN AND JANE DOES 1-10; and XYZ CORPORATIONS 1-10

▲COURT USE ONLY ▲

Case Number: 20CV30255

Courtroom: 414

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DEFENDANTS MARLIN S. HERSHEY'S AND PERFORMANCE HOLDINGS, INC.'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and (5)

Defendants Marlin S. Hershey and Performance Holdings, Inc. (collectively, "Hershey") file their Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5) and, in support thereof, respectfully set forth as follows:

I. C.R.C.P. 121, § 1-15(8) CERTIFICATION

Prior to filing this Motion, the undersigned conferred with Rachel Sternlieb, counsel for the Receiver regarding the relief requested in this Motion. Ms. Sternlieb stated that the Receiver opposes the relief requested herein.

II. THE FIRST AMENDED COMPLAINT

A. Overview

On June 1, 2020, the Receiver filed his First Amended Complaint (the "Complaint"). In the Complaint, the Receiver alleges twelve (12) claims against ten (10) Defendants and up to twenty (20) unnamed parties based on an alleged fraudulent scheme perpetrated by Defendant Gary Dragul ("Dragul"). For the most part, the Receiver's claims are not alleged on behalf of the receivership estate but rather on behalf of unidentified creditors of the receivership estate. This is absolutely true as to Hershey. The Receiver alleges eight (8) claims against Hershey – violations of the Colorado Securities Act, negligence, negligent misrepresentation, civil theft, violations of the Colorado Organized Crime Control Act ("COCCA"), aiding and abetting violations of the COCCA, fraudulent transfer, and unjust enrichment. (Complaint at ¶¶ 315, 356, 361, 372, 379, 393, 443, 448). With respect to each claim, the Receiver asserts that he has standing to prosecute the claim on behalf of unnamed creditors of the receivership estate.

B. Allegations Against Hershey

The Receiver generally alleges that Hershey furthered Dragul's fraudulent scheme by identifying and soliciting investors for the scheme and participating in the drafting and sending of false communications to investors in the scheme. (Complaint at ¶¶ 41, 43). For his efforts, the Receiver alleges that Hershey was paid finder's fees or commissions totaling $3,175,655.54 from

January 19, 2001 through December 16, 2013. (Complaint at ¶¶ 42, 87, Ex. 7).

In support of his general allegations against Hershey, the Receiver specifically alleges that Hershey was involved in transactions involving four (4) properties/entities: The Market at Southpark in Littleton, Colorado, Plaza Mall of Georgia North in Buford, Georgia, a Whole Foods in Fort Collins, Colorado, and Prospect Square in Cincinnati, Ohio. (Complaint at ¶¶ 91-94, 97, 145, 148, 155, 173-177, 220-221). With respect to The Market at Southpark, the Receiver alleges that Hershey distributed solicitation materials to prospective investors in April 2010, Hershey distributed a property update to investors in August and November 2011, and investors were disgruntled and contacted Hershey in or about March 2012 "demanding answers and expressing concern that they had not been informed about the sale and asking why their distributions had been suspended for the past two months." (Complaint at ¶¶ 91-93, 109-110, 115). As to Plaza Mall of Georgia North, the Receiver alleges that Hershey distributed solicitation materials to investors in 2013 to 2015 and that, in reliance on such materials, several investors acquired ownership interests in the entity that owned the Plaza Mall; however, according to Exhibit 33 to the Complaint, only four (4) investors "rolled over" their investments after January 1, 2014, the latest being April 1, 2016. (Complaint at ¶¶ 148, 155, Exhibit 33).

Regarding the Whole Foods in Fort Collins, Colorado, the Receiver alleges that, following its sale in 2005, Hershey solicited prospective investors to purchase membership interests in three (3) properties in which Fort Collins WF 02, LLC had an interest and, no later than early 2012, angry investors contacted both Hershey and Dragul expressing outrage over their investments. (Complaint at ¶¶ 173-175, 177, 184). Finally, with respect to Prospect Square, the Receiver alleges that Hershey solicited investors in 2007 and received a commission of $306,000.00 for his efforts. (Complaint at ¶¶ 220-221). The Receiver does not allege that Hershey was involved in the Prospect Square transaction in any capacity after 2007.

III. STANDARD OF REVIEW

A complaint that states a plausible claim for relief survives a motion to dismiss. *Paradine v. Goei*, ___ P.3d ___, 2018 WL 1959474, *1 (Colo. App. April 19, 2018) (*citing Warne v. Hall*, 373 P.3d 588 (Colo. 2016)). "Under this standard, a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief." *Id.* (citation omitted). In considering a motion to dismiss, a court must accept as true all of the factual allegations, but not the legal conclusions, contained in a complaint. *Id.* Because standing is a threshold legal issue that must be satisfied before a case may be decided on the merits, *Adams v. Land Services, Inc.*, 194 P.3d 429, 430 (Colo. App. 2008), the Court does not have to accept the Receiver's legal conclusions that he has standing to pursue his claims set forth in the Complaint. Rather, whether the Receiver has standing to pursue his claims is determinative of the Court's subject matter jurisdiction to adjudicate such claims. *Ferguson v. Spalding Rehabilitation, LLC*, 456 P.3d 59, 61 (Colo. App. 2019). If the Receiver lacks standing, the Court does not have subject matter jurisdiction and must dismiss the claims pursuant to C.R.C.P. 12(b)(1). *Ferguson*, 456 P.3d at 61.

In addition to challenging the Receiver's standing to assert claims against him, Hershey also moves to dismiss some of the Receiver's claims because the claims are time-barred. While such a determination is normally a question of fact, a court may grant a motion to dismiss based on the statute of limitations if the complaint shows on its face that the claim was not timely filed. *Bell v. Land Title Guarantee Co.*, 422 P.3d 613, 615 (Colo. App. 2018) (*citing SMLL, L.L.C. v. Peak Nat'l Bank*, 111 P.3d 563, 564-65 (Colo. App. 2005)). Hershey executed a Tolling Agreement on August 30, 2019 pursuant to which he agreed to toll statutes of limitations applicable to the Receiver's claims against him from August 30, 2019 to March 31, 2020. (Exhibit A attached hereto). Accordingly, if on its face the Complaint shows that the statutes of limitations applicable to the Receiver's claims against Hershey expired prior to August 30, 2019,

such claims are time-barred and may be dismissed. *Bell*, 422 P.3d at 615; (Exhibit A at p. 2, ¶ 1).

IV. ARGUMENT

A. The Receiver Lacks Standing to Pursue His Claims Against Hershey

The Receiver alleges all eight (8) claims against Hershey on behalf of unidentified creditors of the receivership estate rather than the receivership estate itself.[1] The Receiver asserts that he has authority to bring claims on behalf of creditors of the receivership estate based on paragraph 13(s) of the Receivership Order entered in *Chan v. Dragul, et al.*, Case No. 2018cv33011, District Court for the City and County of Denver. Paragraph 13(s) of the Receivership Order purports to give the Receiver the authority "[t]o prosecute claims and causes of action held by Creditors of Dragul, GDARES and GDAREM, and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors…"

However, as Defendants Drugal, Susan Markusch, Alan Fox, and ACF Property Management, Inc., have argued in their respective motions to dismiss previously filed in this case in response to the Receiver's original complaint, regardless of the purported authority granted to the Receiver in paragraph 13(s) of the Receivership Order, the Receiver lacks standing to pursue claims on behalf of creditors of the receivership estate because "…generally a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve." *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) ("Since 1935 it has been well settled that 'the plaintiff in

[1] The Receiver does not state the basis for his assertion that he has standing to pursue his fraudulent transfer and unjust enrichment claims although both claims are brought to address wrongs or inequities perpetrated on the creditors of the receivership estate, not the receivership estate itself. (Complaint at ¶¶ 443-444, 448). The Receiver also purports to bring his claims for civil theft and violations of COCCA on behalf of the receivership estate. However, these claims are solely creditor claims as the Receiver alleges injury for civil theft to the "GDA Entity Investors" and COCCA claims only can be brought by those injured by one or more predicate acts. C.R.S. § 18-17-106(7).

his capacity of receiver has no greater rights or powers than the corporation itself would have.'"); *Scholes v. Schroeder*, 744 F.Supp. 1419, 1422 (N.D. Ill. 1990) (a receiver cannot pursue claims that belong not to the receivership estate but rather to those who may have an interest in the estate). Rather than repeat the standing arguments already competently briefed by Defendants Drugal, Susan Markusch, Alan Fox, and ACF Property Management, Hershey adopts such arguments as well as any supplements thereto and incorporates them herein by reference. *See* Defendants Alan C. Fox and ACF Property Management, Inc.'s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), 12(b)(5), and 9(b) filed on March 17, 2020 at pp. 8-12; Defendant Gary Dragul's Motion to Dismiss filed on March 17, 2020 at pp. 5-8; Defendant Susan Markusch's Motion to Dismiss filed on March 19, 2020 at pp. 3-4.

The Receiver no doubt will argue that he has standing to pursue claims on behalf of creditors of the receivership estate because the Receivership Order grants him such authority. While it is generally true that a receiver derives his authority from the order of appointment, *Francis v. Camel Point Ranch, Inc.*, ___ P.3d ___, 2019 WL 3227058, *2 (Colo. App. 2019), a court cannot exceed its power by conferring standing on a receiver that is prohibited by law. *Scholes*, 744 F.Supp. at 1422-1423. Yet, that is precisely the effect of paragraph 13(s) of the Receivership Order as it purportedly grants the Receiver authority to pursue claims on behalf of creditors of the receivership estate when it is settled law that a receiver cannot pursue such claims. *Scholes*, 744 F.Supp. at 1422 (*citing Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 429-434 (1972)). In such case, this Court should not enforce that portion of the Receivership Order that improvidently and incorrectly grants standing to the Receiver to pursue claims of creditors of the receivership estate. *Id.* at 1422-1423; *see also Liberte Capital Group, LLC v. Capwill*, 248 Fed.Appx. 650, 659 (6th Cir. 2007) (receiver did not have authority to pursue claims of investors, and trial court exceeded its authority in allowing receiver to do so). Absent the unlawful authority granted him in paragraph 13(s) of the Receivership Order, the

Receiver lacks standing to pursue all of his claims against Hershey and, therefore, all eight (8) claims should be dismissed pursuant to C.R.C.P. 12(b)(1).

B. The Receiver Fails to State a Claim for Civil Theft

In paragraphs 372 through 377 of the Complaint, the Receiver mechanically recites the elements of a claim for civil theft under Colorado's Rights in Stolen Property Statute, C.R.S. § 8-4-405 (mistakenly cited by the Receiver as C.R.S. § 18-4-401, which is the penal statute criminalizing theft). The Receiver asserts, *inter alia*, that Defendants, including Hershey, "knowingly exercised control over GDA Entity investors' funds", that "[w]ithout investors' knowledge or authorization, Defendants exploited their control over those funds by causing them to be used for Defendants' personal benefit", and that "Defendants intended to permanently deprive investors of their investments." (Complaint at ¶¶ 373-375). However, elsewhere, the Complaint is clear that Hershey did not receive money directly from investors or even from the closings on real estate in which the investors had invested. Rather, "the Hershey Defendants received commissions from Dragul separately, all based on an agreed percentage of the funds Dragul received from investors solicited by Hershey." (Complaint at ¶310). The Receiver does not allege, nor conceivably could he, that any particular set or sets of funds are directly traceable from the investors to Dragul and then to Hershey. Indeed, the Receiver alleges that various funds allegedly stolen by Defendants were commingled. (Complaint at ¶ 387(c)).

A claim for civil theft does not lie against Hershey under these putative circumstances. An allegation of civil theft fails if "it does not allege an intent to deprive [plaintiff] . . . of specific funds." *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 608 (Colo. 2016). C.R.S. § 18-4-405 "allows an owner to recover property 'against any person in whose possession he finds the property'" but a civil theft claimant "may not 'follow property into its product'". *Id*. Thus, where a party who has received allegedly stolen money no longer has possession of that money, "having used it for matters relating to its business", a civil theft claim under § 18-4-405 cannot be

maintained. *Cedar Lane Investments v. Am. Roofing Supply of Colorado Springs, Inc.*, 919 P.2d 879, 882 (Colo. App. 1996). Because the Complaint does not contain, and credibly could not contain, an allegation that Hershey has a specifically identifiable pot of money that was directly traceable back through Dragul or his entities to the investors, the civil theft claim against Hershey must be dismissed pursuant to C.R.C.P. 12(b)(5).

C. The Receiver Fails to State a Claim for Unjust Enrichment and/or the Receiver's Unjust Enrichment Claim Is Barred by the Defense of In Pari Delicto

To recover under an unjust enrichment theory requires a showing that (i) at plaintiff's expense, (ii) defendant received a benefit (iii) under circumstances that would make it unjust for defendant to retain the benefit without paying. *Dudding v. Norton Frickey & Assoc.,* 11 P.3d 441, 445 (Colo. 2000); *Redd Iron, Inc. v. International Sales and Services Corp.*, 200 P.3d 1133, 1136 (Colo. App. 2008). In support of his unjust enrichment claim against Hershey, the Receiver alleges that Hershey received benefits at the expense of the receivership estate. But, the Receiver does not allege any facts to support the conclusion that it would be unjust for Hershey to retain benefits provided to him by the receivership estate. In fact, the opposite is true as the Receiver acknowledges that Dragul, individually and through GDA RES and GDA REM, operated a Ponzi scheme that the Receiver globally refers to as the "Sham Business." (Complaint at ¶ 35). Thus, the Receiver admits that Dragul, GDA RES, and GDA REM were the primary participants in the allegedly fraudulent scheme in which he attempts to implicate Hershey and the other Defendants. In such circumstances, there is no basis to assert that Hershey was "unjustly enriched" at the expense of the receivership estate.

Moreover, even if the Receiver stated a plausible claim for unjust enrichment, the claim would be barred by the application of the doctrine of *in pari delicto*. According to such doctrine, in the case of equal or mutual fault, the position of the defending party is the better one. *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1275 (10th Cir. 2008). Thus, a plaintiff's

recovery may be barred by his own wrongful conduct. *Mosier*, 546 F.3d at 1275 (*citing Pinter v. Dahl*, 486 U.S. 622, 632 (1988)). Additionally, the doctrine of *in pari delicto* may bar an action by a bankruptcy trustee -and, by extension, a receiver – against third parties who participated in or facilitated wrongful conduct of the debtor. *Id.* at 1276. That is the case here as Dragul's and his entities' alleged wrongful conduct precludes the Receiver from pursuing claims against alleged participants based on the same wrongful conduct, including, without limitation, the Receiver's claim against Hershey for unjust enrichment.

D. Certain of the Receiver's Claims Are Time-Barred

1. The Receiver Steps Into the Shoes of the Creditors of the Receivership Estate on Whose Behalf He Asserts Claims

The Receiver purports to assert claims on behalf of creditors of the receivership estate. As argued above, the Receiver cannot do so as a matter of law. However, even if he can, the Receiver necessarily is the assignee of any such claims and, therefore, stands in the shoes of the creditors.[2] *See Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994) ("As a general principle of common law, an assignee stands in the shoes of the assignor."). As an assignee of the creditors' claims, the Receiver "has the same rights as the assignor in determining whether a claim is barred by the statute of limitations." *Tivoli Ventures*, 870 P.2d at 1248 (citations omitted). Thus, because the Receiver purports to supplant the creditors, he, as their assignee, may initiate an action so long as the creditors are not barred from doing so by the applicable statute of limitations. *Id.* at 1249.

2. The Receiver's Colorado Securities Act Claims Are Barred By the Applicable Statute of Limitations or Statute of Repose

The Receiver alleges that Hershey violated two (2) sections of the Colorado Securities Act. First, he alleges that Hershey was not registered to sell securities but did so in violation of

[2] Tellingly, however, the Receiver does not assert that any creditor has assigned to the Receiver his/her/its claims against any of the Defendants.

C.R.S. § 11-51-401(1). (Complaint at ¶ 322). C.R.S. § 11-51-604(2)(a) sets forth the civil remedy for a violation of C.R.S. § 11-51-401. No person may sue under subsection (2) of C.R.S. § 11-51-604 "more than two years after the contract of sale…" C.R.S. § 11-51-604(8) (2020). As set forth above, according to the Receiver, the last purchase of any security involving Hershey was April 1, 2016. (Complaint at Exhibit 33). Accordingly, the last date on which any claim against Hershey for violation of C.R.S. § 11-51-401(1) could have been brought was April 1, 2018, well before the effective date of the Tolling Agreement of August 30, 2019. Accordingly, the Receiver's claim against Hershey for violation of C.R.S. § 11-51-401(1) is time-barred.

Second, the Receiver alleges that Hershey substantially assisted Dragul with conduct that violated C.R.S. § 11-51-501(1). C.R.S. § 11-51-604(5)(c) sets forth the civil remedy for substantially assisting conduct that violates § 11-51-501(1). No person may sue under subsection 5(c) of C.R.S. § 11-51-604 "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…" C.R.S. § 11-51-604(8) (2020). Pursuant to the five-year statute of repose in C.R.S. § 11-51-604(8), no claim based on a purchase or sale that occurred before August 29, 2014 exists. *See Friedlob v. Trustees of Alpine Mut. Fund Trust*, 905 F.Supp. 843, 852 (D. Colo. 1995) (under a statute of repose, "not only is a remedy barred after three years, but the liability is extinguished"). The Receiver only alleges that Hershey was involved in four (4) transactions after August 29, 2014 – the "rollovers" in connection with the Plaza Mall of Georgia North. (Complaint at ¶¶ 148, 155, Exhibit 33). Accordingly, liability with respect to all other transactions allegedly involving Hershey, including, without limitation, those transactions related to The Market at Southpark, Plaza Mall of Georgia North, a Whole Foods in Fort Collins, and Prospect Square, have been extinguished pursuant to C.R.S. § 11-51-604(8). Additionally, because the last finder's fee or commission allegedly made to Hershey was on December 16,

2013 (Complaint at Exhibit 7), any claims under the Colorado Securities Act related to such payments also have been extinguished pursuant to the five-year statute of repose. C.R.S. § 11-51-604(8) (2020).

Because the Receiver generally alleges that the Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors (Complaint at ¶ 4), it also appears that even claims based on transactions occurring after 2014 were discovered or should have been discovered well before three (3) years before August 30, 2019. Accordingly, claims based on the alleged "rollovers" made in connection with the Plaza Mall of Georgia North in 2015 and 2016 also are time-barred. (Complaint at ¶¶ 148, 155, Exhibit 33).

3. The Receiver's Negligence and Negligent Misrepresentation Claims Are Barred By the Applicable Statute of Limitations

The Receiver alleges claims against Hershey for negligence and negligent misrepresentation based on the supposedly inaccurate statements contained in certain solicitation materials distributed to investors. A negligence claim must be filed two years from the date on which it accrues. C.R.S. § 13-80-102 (2020). A negligence claim accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. C.R.S. § 13-80-108(1) (2020). A negligent misrepresentation claim must be filed three years from the date on which it accrues.[3] C.R.S. § 13-80-101(1)(c) (2020); *Miller v. McCloud*, 2016 WL 524357, *4-5 (D. Colo. Feb. 10, 2016). A cause of action for misrepresentation accrues on the date the misrepresentation is discovered or should have been discovered by the exercise of reasonable diligence. C.R.S. § 13-80-108(3) (2020).

[3] Other courts have held that a negligent misrepresentation claim is subject to a two-year statute of limitations. *Miller v. McCloud*, 2016 WL 524357, *4-5 (D. Colo. Feb. 10, 2016). For purposes of Hershey's argument, though, it is immaterial whether the Receiver's negligent misrepresentation is subject to a two-year or three-year statute of limitations as, in either case, the Receiver's negligent misrepresentation claim, or at least the bulk of such claim, is time-barred.

The Receiver only identified four (4) transactions involving Hershey. (Complaint at ¶¶ 91-94, 97, 145, 148, 155, 173-177, 220-221). With respect to the The Market at Southpark and Fort Collins Whole Foods transactions, the Receiver acknowledges that investors were "disgruntled" or "outraged" about the transactions no later than 2012 (Complaint at ¶¶ 91-93, 109-110, 115, 173-175, 177, 184) and, therefore, clearly knew or should have known of the alleged negligence or misrepresentation at such time. As to the Prospect Square transaction, the Receiver only alleges Hershey's involvement in 2007 and does not allege that Hershey was negligent toward or misrepresented anything to the Prospect Square investors. (Complaint at ¶¶ 220-221). Accordingly, the Receiver's negligence and negligent misrepresentation claims against Hershey in connection with The Market at Southpark, Fort Collins Whole Foods, and Prospect Square transactions accrued no later than 2012 and, therefore, were time-barred as of 2104 and 2015, respectively.

Because the Receiver generally alleges that the Colorado Securities Commissioner and the Colorado Attorney General began to investigate Dragul and the GDA Entities in 2014 after receiving complaints from investors (Complaint at ¶ 4), it also appears that even claims based on transactions occurring after 2014 were discovered or should have been discovered well before three (3) years before August 30, 2019. Accordingly, claims based on the alleged "rollovers" made in connection with the Plaza Mall of Georgia North in 2015 and 2016 also are time-barred. (Complaint at ¶¶ 148, 155, Exhibit 33).

4. The Receiver's COCCA Claims Are Barred By the Applicable Statute of Limitations

A claim for violation of COCCA must be filed within five (5) years after the cause of action accrues. A cause of action shall be deemed to have accrued at such time as the alleged offense or conduct giving rise to the claim was discovered. C.R.S. § 13-80-103.8 (2020). The Receiver's COCCA claims against Hershey are largely time-barred for the exact reasons set forth

above – except for discrete conduct in which the Receiver alleges Hershey engaged in 2014 or 2015 with respect to the Plaza Mall of Georgia North, all of the wrongful conduct attributed to Hershey occurred in 2012 or earlier and was discovered by investors no later than 2012. (Complaint at ¶¶ 91-93, 109-110, 115, 173-175, 177, 184, 220-221). Thus, the deadline to file the COCCA claims expired five (5) years thereafter, well before the effective date of the Tolling Agreement of August 30, 2019. Accordingly, as shown on the face of the Complaint, the Receiver's COCCA claims based on all of Hershey's alleged conduct except for the discrete conduct alleged in 2014 and 2015 are time-barred and must be dismissed.

E. The Receiver Fails to Allege His Fraud-Based Claims With Particularity

The Receiver alleges at least four (4) fraud-based claims against Hershey: violations of the Colorado Securities Act, negligent misrepresentation, and violations of COCCA. Consequently, pursuant to C.R.C.P. 9(b), such claims must be alleged with particularity. To satisfy this requirement, "the complaint must sufficiently specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *State Farm Mut. Auto Ins. Co. v. Parrish*, 899 P.2d 285, 288 (Colo. App. 1994).

A glaring weakness in the Receiver's position that he can bring claims that belong to the creditors of the receivership estate is that the Receiver does not, and presumably cannot, identify the creditors on whose behalf he allegedly asserts claims. The Receiver's fraud-based claims against Hershey simply are based on the Receiver's speculation that fraud occurred but are unsupported by any specific facts establishing when, how, and to what extent the alleged fraud occurred. Thus, from Hershey's perspective, it is impossible to know if he communicated with a creditor who alleges fraud, when he communicated with a creditor who alleges fraud, what he communicated to any creditor who alleges fraud, whether any such creditor relied on his

communication, or whether the creditor suffered some damage as a result of any such reliance. Accordingly, the Receiver has failed to meet the pleading requirements of C.R.C.P. 9(b), and, therefore, the Receiver's claims for violations of the Colorado Securities Act, negligent misrepresentation, and violations of COCCA must be dismissed.

F. Adoption of Other Defendants' Arguments in Support of Their Motions to Dismiss

It is Hershey's understanding that Defendants Dragul, Alan Fox/ACF Property Management, Inc., and Susan Markusch/Olson Real Estate Services, LLC also will be filing motions to dismiss some of all of the Receiver's claims alleged against them. To the extent that any of the above Defendants make arguments that also are applicable to the Receiver's claims alleged against Hershey, Hershey adopts such arguments and incorporates them herein by reference.

Respectfully submitted this 6th day of July 2020.

By: /s/Paul M. Grant
Paul M. Grant

Attorneys for Performance Holdings, Inc. and Marlin Hershey

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 6th day of July 2020:

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CASE NUMBER: 2020CV30255

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

TABLE OF CONTENTS

EXHIBIT A

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.

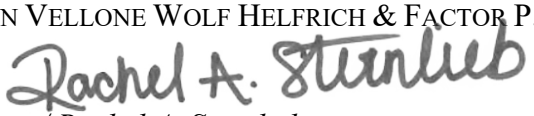

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EXHIBIT A

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.

EXHIBIT A

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: September 8, 2020 6:02 PM FILING ID: B65D8C3CAA36B CASE NUMBER: 2020CV30255
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 Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2020CV30255 Courtroom: 414

DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

EXHIBIT A

The Receiver complains Defendants' arguments "would render a receiver appointed by Colorado's Securities Commissioner . . . powerless to redress the very wrongs he was appointed to remedy." (Resp. 2.) That view explains the Receiver's overreaching here (and the $2,938,838.00 he billed the Estate, leaving only about $520,000 for distribution to creditors). Receivers are not appointed to "redress wrongs." That is the Commissioner's or prosecutor's job. Rather, as the Receiver concedes, "[t]he 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." (Resp. 2 (quoting *Hart v. Ed-Ley Corp.*, 482 P.2d 421, 425 (Colo. App. 1971).) The Receiver's *ultra vires* strategy to "redress wrongs" allegedly suffered by third-party investors, plus additional defects, justify dismissing the First Amended Complaint ("FAC").

ARGUMENT

I. The Receiver Lacks Standing to Assert Investor-Creditors' Claims

A. All of the Claims Are Investor-Creditor Claims

The Receiver does not contest that he brings *all* his claims against Mr. Dragul on behalf of investors. (*See* FAC ¶¶ 316, 357, 361, 362, 370, 372, 379, 409-410, 412-15, 443-44, 448.) Rather, he argues some of those claims were *also* brought on behalf of the Receivership entities. Consequently, as shown in the Motion and below, at a minimum, *all* of the claims against Mr. Dragul must be dismissed, at least in part, because they are undisputedly all brought at least in part on behalf of investor-creditors.

But it turns out all the claims are *solely* investor-creditor claims. (Mot. 5-8.) In his Response, the Receiver concedes he asserts the Colorado Securities Act ("CSA") claims against Dragul (i.e., "stemming from the GDA-managed properties and sale of promissory notes") only "on behalf of the individual investors." (Resp. 13.) He concedes the same—that duties were

owed to only "GDA Entity *Investors*"—for the negligence and negligent misrepresentation claims. (Resp. 14, emphasis added.)[1]

The Receiver cites FAC ¶¶ 61, 62, 100, 153, 171, 180, 193, 197, 201, 266, 270, 277-80, 293, 294, 297, 391, and 406 to argue he adequately alleged civil theft on behalf of the Estate. (Resp. 15.) None of those paragraphs allege Mr. Dragul stole money that belonged to the GDA Entities in the Receivership. (Many allege GDA *received* money. *E.g.*, FAC ¶¶ 61, 153.) The closest the Receiver comes is in FAC ¶¶ 391 and 406—which are in the COCCA claim, not civil theft—when he alleges Defendants "pilfered the SPEs thereby damaging the GDA Entities . . ." and "pilfered the SPEs [and] . . . have injured the GDA Entity investors and the Receivership Estate[.]" But since the SPEs are creditors (FAC ¶¶ 316, 372), that only alleges (and without any facts to rise beyond a speculative level[2]) that the Defendants stole from creditors, and that the GDA Entities suffered some indirect harm, which is insufficient to make out a civil theft claim by the GDA Entities. C.R.S. § 18-4-401. Rather, the Receiver alleges *investors'* property was taken. (FAC ¶¶ 372-77.)

For COCCA, the Receiver argues he 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." (Resp. 16.) But the Receiver cites no paragraph of the FAC to support this assertion. And since he only alleges injury beyond a speculative level to investors

[1] He vaguely asserts Mr. Dragul also owed duties to the "SPEs" (Resp. 14), but also alleges the SPEs are creditors (*e.g.*, FAC ¶¶ 316, 372.) Since the Receiver merely incorporates by reference his negligence and negligent misrepresentation claims to argue his breach of fiduciary duty claim is not merely asserted on behalf of investors (Resp. 17), that claim is solely an investor claim for the same reasons. (*See also* Mot. 7-8.)

[2] The Receiver cites myriad pre-*Warne* cases to argue the FAC need only provide notice of the claims. (Resp. 24-26.) The notice pleading standard is precisely what *Warne v. Hall*, 373 P.3d 588 (Colo. 2016), rejected. Now, a plaintiff must meet the "plausibility" standard by pleading sufficient facts to raise the right to relief beyond a speculative level. *Id*. at 591.

and not the Receivership entities (FAC ¶¶ 383, 386(a) & (b), 387(a)-(d)), he alleges no proximate cause for a COCCA claim against the Receivership entities' principal, like Mr. Dragul, flowing from some purported indirect harm even if it had been alleged. (Mot. 7); *Mendelovitz v. Vosicky*, 40 F.3d 182, 187 (7th Cir. 1994). (The Receiver's cases supposedly to the contrary (Resp. 16) involved direct harm to the receivership entities).

The Receiver argues he alleges the fraudulent transfer ("CUFTA") claim on behalf of not only creditors but also the GDA Entities. (Resp. 17-18.) But the FAC's factual allegations fail to support that. (*See* Mot. 8 & FAC ¶s cited therein.) As a matter of law, CUFTA claims may only be asserted by creditors, C.R.S. §§ 38-8-105, 108, so the Receiver would have to allege the GDA Entities were creditors, which he does not. Thus, all the case law he cites in which receivers or trustees pursued fraudulent transfer claims are inapposite not only because they are not binding in Colorado, but because the receivership entities or debtors there were the defrauded creditors. (Resp. 17-18.)

The Receiver's argument that he alleged the unjust enrichment claim on behalf of not just investors but also the Estate suffers the same defect. (Resp. 19.) The Receiver points to FAC ¶¶ 72-76, 293-94, 296-99, and FAC Ex. 3 to argue Mr. Dragul pilfered money that belonged to the GDA Entities. (Resp. 43.) But those paragraphs allege Mr. Dragul pilfered funds belonging to investors or unidentified SPEs, not belonging to the GDA Entities, even if the SPEs' funds were routed through GDA accounts. Since the SPEs are creditors (FAC ¶¶ 316, 372), the Receiver asserts this claim solely on behalf of creditors too.

Thus, all the claims against Mr. Dragul are investor-creditor claims.

B. The Receiver Lacks Standing to Assert Investor-Creditors' Claims

"[G]enerally, a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve." *Good*

Shepherd Health Facilities of Colorado, Inc. v. Department of Health, 789 P.2d 423, 425 (Colo. App. 1989). He thus cannot assert claims belonging to third parties, such as creditors. *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 781 (Colo. App. 1997); *In re M & L Business Machine Co., Inc.*, 160 B.R. 850, 851 (D. Colo. 1993); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (6th Cir. 2003); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995); *Kelley v. College of St. Benedict*, 901 F. Supp. 2d 1123, 1128 (D. Minn. 2012). (*See* Mot. 9-12.)

The Receiver tries to distinguish this authority. (Resp. 5-8, 10-12.) He argues *Sender v. Kidder Peabody*, 952 P.2d at 781, does not apply because it is a bankruptcy case. (Resp. 7-8.) Though it is a bankruptcy case in which the very Receiver here was serving as trustee, that distinction is of no import under Colorado law, as "[t]he office of receiver is in the nature of that of a trustee, and those who have lawful claims against the receivership estate are *cestuis que trustent*." *Rossi v. Colorado Pulp & Paper Co.*, 299 P. 19, 33 (Colo. 1931); (*see also* Mot. 11).[3] Indeed, the Receiver here expressly relied on bankruptcy law when seeking approval from the court that appointed him to abandon properties of the Estate. (Ex. B at ¶ 4.) He did not think bankruptcy law inapplicable then.

[3] The Receiver relies on *Hedged-Invs. Assoc., Inc.*, 84 F.3d 1281, 1285 n.5 (10th Cir. 1996) to argue bankruptcy cases are inapplicable. (Resp. 7-8.) In *Hedged*, 84 F.3d at 1285, the Tenth Circuit applied *in pari delicto* to trustees, contrary to the holding in *Scholes v. Lehmann*, 56 F.3d 750, that *in pari delicto* does not apply to receivers. *Hedged* did so because the Bankruptcy Code governed whether a trustee could bring a claim arising from wrongdoing of the debtor. 84 F.3d at 1285. It did not, as the Receiver asserts, say that bankruptcy law has no application to receiverships; it expressly declined to opine whether the *Scholes* holding would have any application to receiverships here. 84 F.3d at 1285 n.5. In *Hedged*, the same Receiver here, as Chapter 7 trustee, sued an innocent investor when she received a return that exceeded the amount of her investment. *Id*. at 1283. Reiterating its holding in *Sender v. Simon*, 84 F.3d 1299, 1304-05 (10th Cir. 1996), the Tenth Circuit noted that Sender had no greater rights to sue than the debtor, and that he could not assert the claim against the investor because that claim did not belong to the debtor. *Hedged*, 84 F.3d at 1284.

The Receiver argues *Good Shepherd* does not address standing (Resp. 6), but it is unclear how its holding that "a receiver . . . may assert no greater rights than the entity whose property the receiver was appointed to preserve[,]" 789 P.2d at 425, could mean anything other than that a receiver has the same standing as the entity in receivership, and no more. And to the extent *Good Shepherd* approved the receiver's retention of funds (Resp. 6), it did so under a statute, C.R.S. § 25-3-108, that modified the law generally applicable to receiverships when Medicaid payments are at issue. 789 P.2d at 425-26.

In *First Horizon Merchant Services, Inc. v. Wellspring Capital Management, LLC*, 166 P.3d 166, 180 (Colo. App. 2007), the court held the estate lacks standing to assert creditors' claims. The Receiver asserts this case is inapplicable because it addressed only a creditor's standing to pursue claims against a bankrupt's officers and directors. (Resp. 6.) In fact, as to one claim, the *First Horizon* court ruled that because the creditor was injured, the *estate did not have standing on that claim because the debtor was not the one injured*. *First Horizon*, 166 P.3d at 180-82. The *First Horizon* case is on all fours.

The Receiver's attempt to distinguish the federal authority Mr. Dragul cites (Resp. 10-12) fares no better. Though the parties agree standing in state court is controlled by state law, federal authority is consistent with Colorado's law and thus persuasive. In *Javitch*, 315 F.3d at 627, the Sixth Circuit held that "although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors[,]" that the receiver there was properly asserting the receivership entities' claims, and that the receiver was therefore subject to the receivership entities' arbitration agreements. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009), which the Receiver cites to try to distinguish *Javitch* (Resp. 9), noted that *Javitch* briefly considered

standing while addressing the question of arbitrability, but the *Wuliger* court then described at length that receivers lack standing to assert third party investors' claims. 567 F.3d at 794 (citing *Liberte Capital Group, LLC v. Capwill*, 248 Fed. Appx. 650, 652-54, 656-57 (6th Cir. 2005)). The *Wuliger* court then determined the receiver was asserting claims belonging to at least one receivership entity, not creditors' claims. *Id.* Thus, *Javitch*, *Wuliger*, *Liberte*, and the entire body of law in the Sixth Circuit demonstrates the Receiver here lacks standing to assert creditors' claims.

Kelley, 901 F. Supp. 2d at 1128, (*see* Mot. 10-11; Resp. 12), is also on point. There, the court explained at length, and cited myriad cases to support, that "an equity receiver may sue only on behalf of the entity (or person) in receivership, not third parties." *Id*. The Receiver's attempt to distinguish *Kelley* because the FDCPA claim there may only be asserted by the Government (Resp. 12) is unavailing, as the *Kelley* court simply applied the general rule that the receiver may not assert third parties' claims to hold the receiver could not assert the third party Government's claim. *Id*. (framing issue addressed).

And the Receiver's attempt to distinguish *Scholes v. Schroeder*, 744 F. Supp. 1419 (N.D. Ill. 1990), because it "ultimately confirmed that a receiver may bring claims . . . alleging harm to the corporation in receivership" fails on its face. (Resp. 12.) The problem here is that the Receiver is not "alleging harm to the [entities] in receivership[,]" but rather harm to creditors, for which he lacks standing. 744 F. Supp. at 1421, 1422-25.

C. The Receivership Order Cannot Grant the Receiver Standing He Otherwise Lacks

The Receiver argues the Receivership Order (FAC/Compl. Ex. 1) grants him standing to assert creditors' claims. (Resp. 2-6.) Not so. (*See* Mot. 5, 9-12 & *id*. 9 n.4.) "[T]he appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Scholes v. Schroeder*, 744 F. Supp. at 1421.

"Granting a receiver authority to bring claims held by others would violate those limitations, as 'the ability to confer substantive legal rights that may create standing [under] Article III is vested in Congress and not the judiciary.'" *Kelley*, 901 F. Supp. 2d at 1129 (quoting *Scholes*, 744 F. Supp. at 1421 n.6)). In rejecting the receiver's argument that he had standing to assert third parties' claims, the *Kelley* court noted that "courts have rejected attempts by receivers to use appointment orders to create standing to sue on behalf of non-receivership entities." *Id*. As the Sixth Circuit explained in *Liberte*, 248 Fed. Appx. at 664, if "a district court could confer individual creditors' standing on a receiver simply by ordering it so, such an exception would completely swallow the general rule that receivers may only sue on behalf of the entity they are appointed to represent, not on behalf of creditors[.]"[4] Though these cases are federal, the same standing test exists on the state level in Colorado. *E.g.*, *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977); *Conrad v. City and Cty of Denver*, 656 P.2d 662, 668 (Colo. 1982); *Sender v. Kidder Peabody,* 952 P.2d at 781.

Nor does Mr. Dragul's stipulating to the Receivership Order expand the Receiver's constitutional standing. Since standing is jurisdictional, *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004), it is not subject to waiver, *e.g.*, *Native American Arts, Inc. v. The Waldron Corp.*, 253 F. Supp. 2d 1041, 1048 (N.D. Ill. 2003); *National Labor Relations Board v. Somerville Constr. Co.*, 206 F.3d 752, 755 (7th Cir. 2000). "Even where the parties agree that a plaintiff has

[4] *See also Scholes v. Schroeder*, 744 F. Supp. at 1423 (holding "to the extent that the orders that appointed Scholes as receiver have purported to confer power on him to sue directly on behalf of investors, rather than in accordance with the just-stated principles, those orders exceed the power of the judiciary and will not be enforced in this action."); *Marwil v. Farah*, No. 1:03-CV-0482-DFH, 2003 WL 23095657, at *5-7 (S.D. Ind. Dec. 11, 2003) (holding receiver lacked standing to pursue creditors' claims and that "[n]otwithstanding the phrase included in an agreed court order negotiated among counsel . . ., the court simply does not have the power to transfer property (including causes of action) from non-parties (the note holders) to the conservator/receiver.").

Constitutional standing, courts must satisfy themselves that the jurisdictional requirement is met." *Native Am. Arts*, 253 F. Supp. at 1048. Since standing is an element of the court's subject matter jurisdiction, "no action of the parties can confer subject-matter jurisdiction upon a federal court [and] [t]hus, the consent of the parties is irrelevant . . . and principles of estoppel do not apply." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (internal citations omitted). Additionally, the Receiver's argument that parties have relied on their belief that the Receiver has standing to assert creditors' claims, even if true, is of no import. (Resp. 4, 5.) The Receiver cites no authority to suggest reliance will create standing that the constitution does not, and Mr. Dragul is aware of none. Since a court must always determine whether it has jurisdiction regardless of what the parties do, reliance plays no role.

D. The Receiver Cannot Borrow the Commissioner's Authority.

The Receiver argues he has standing derived from the Commissioner's authority under the "broad remedial provisions" of the CSA. (Resp. 3.) The Receiver never alleged in the Amended Complaint that he was asserting the Commissioner's claims. Moreover, he cannot. C.R.S. § 11-51-602(2) authorizes the Securities Commissioner, and not anyone else, to assert claims on behalf of injured parties. C.R.S. § 11-51-703(4) authorizes the Commissioner to delegate some of her powers, but only to "any officer of the division of securities"—not a third party. And the power to institute a CSA proceeding under C.R.S. § 11-51-602 is not one she can delegate even to another securities division officer; she must assert such claims herself.

E. Investor-Creditors Have Not Assigned Their Claims to the Receiver.

The Receiver argues that investor-creditors have "in effect assign[ed]" their claims to the Receiver when they certified that they had dismissed whatever suits they had pending and would not file new claims as a condition of participating in the equitable claims pool. (Resp. 4-5.) The Receiver does not say whether any of the investor-creditors even know the Receiver is asserting

they assigned him their claims. And an unclear assignment of a claim is unenforceable. *E.g.*, *People v. Adams*, 243 P.3d 256, 263 (Colo. 2010). Here, there is no language at all, let alone clear language, to suggest the investor-creditors were transferring their claims to the Receiver to pursue. Moreover, the November 13, 2018 Order Granting Receiver's Motion to Establish Claims Administration Procedure and to Set Claims Bar Date states on the last page that as a condition of participating in the equitable claims process, the creditor "shall dismiss (*without prejudice*) any claim or cause of action pending against Dragul[.]" (emphasis added). (Ex. C at 3.) This suggests creditors in the equitable distribution may be free to assert claims against Mr. Dragul once the Receivership concludes. If so, they cannot have assigned their claims to the Receiver, as they would necessarily still have those claims to assert.

II. In Pari Delicto Bars the Receiver's Claims for Two Reasons

Even if the Receiver were asserting the Receivership entities' claims, which he is not, *in pari delicto* bars them as an issue of standing, and as a defense.

While the Receiver cites authority from other jurisdictions to argue *in pari delicto* is a defense and not a consideration for standing (Resp. 7-8), that authority has no effect where it conflicts with Colorado precedent as here. The law in Colorado, as articulated in *Sender v. Kidder Peabody*, is that:

> Although the doctrine of *in pari delicto* is usually applied as a defense on the merits, we conclude that it is appropriately raised with respect to the second prong of the standing test when, as here, the allegations of the amended complaint and the undisputed facts presented on summary judgment demonstrate that all the parties are participants in an illegal act.

952 P.2d at 782.[5] Here, the Receiver lacks standing to assert creditors' claims as a matter of law. But *even if* the Receiver were asserting claims belonging to the GDA Entities or Mr. Dragul, he

[5] The Receiver points to an unpublished Denver County District Court order in *Joseph v. Mueller*, 2010CV3280, which distinguished *Sender v. Kidder Peabody* on the basis that in the

lacks standing because those people and entities are *in pari delicto* with the Defendants, and under *Sender v. Kidder Peabody* and *Hedged-Invs. Assoc.*, *in pari delicto* is not only a defense but an issue of standing.

Additionally, no Colorado court has followed *Scholes v. Lehmann* and held a receiver is not subject to the defense of *in pari delicto* when asserting claims belonging to the entities in receivership. (Resp. 8-10.)[6] Thus, the *in pari delicto* defense remains viable as well.

III. The Receiver May Not Sue Gary Dragul Because Mr. Dragul is In Receivership

The Receiver stands in the shoes of the people or entities in receivership and asserts their claims. *Sender v. Kidder Peabody*, 952 P.2d at 781; *Scholes v. Lehmann*, 56 F.3d at 753. (*See also* Mot. 12.) Since Mr. Dragul is in the Receivership, that means the Receiver is asserting Mr. Dragul's claims against Mr. Dragul. But Mr. Dragul cannot sue himself. *BNB Paribas Mortg. Corp. v. Bank of Am. N.A.*, 949 F. Supp. 2d 486, 498-500 (S.D.N.Y. 2013). This is completely

Sender case: (1) many investor claims were already settled; (2) the claim was asserted on behalf of the debtor but in *Joseph* the receiver was pursuing creditors' claims; and (3) there was no arbitration agreement unlike in *Joseph*. (Resp. 8 & Resp. Ex. 1 at 4.) The *Joseph* court then relied on *Scholes v. Lehmann*, 56 F.3d 750 (5th Cir. 1995), to hold the receiver there had standing to assert creditors' claims. (Resp. Ex. 1 at 5-6.) The holding in *Joseph* is both contrary to binding Colorado precedent in *Sender v. Kidder Peabody*, and contrary to *Scholes v. Lehmann*. Neither the *Joseph* court nor the Receiver here explain why the settlement of some investor claims or the existence of an arbitration agreement would have any bearing on standing. Since standing is jurisdictional and subject to a constitutional test, such considerations are irrelevant. And while the Seventh Circuit in *Scholes v. Lehmann* rejected *in pari delicto* as a consideration for standing, it still held that a receiver lacks standing to assert creditors' claims, noting that "[l]ike a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership[.]" 56 F.3d at 753 (citing cases).

[6] The Receiver points to *Lewis v. Taylor*, 2018 CO 76, ¶ 23, to argue *Scholes* somehow applies in Colorado on the issue of *in pari delicto*. (Resp. 9.) But in *Lewis*, the court merely string cited *Scholes* for a completely different proposition: that one line of federal cases holds that payments innocent investors received in excess of the amount of principal they invested are avoidable as fraudulent transfers. *Lewis*, 2018 CO at ¶ 23.

separate from *in pari delicto*, and the Receiver never responds to this argument. The Court can grant the Motion and dismiss the claims against Mr. Dragul on that basis alone.

Separately, the Receiver may not sue Mr. Dragul under the doctrine of *in pari delicto* as it applies in Colorado per *Sender v. Kidder Peabody*, 952 P.2d at 780-81. Because Mr. Dragul was alleged to be not only a participant but the mastermind of the purported ponzi scheme, the Receiver both lacks standing under, and fails under the defense of, *in pari delicto*, as addressed above.[7] Even *Scholes v. Lehmann*, which unlike Colorado refused to apply *in pari delicto* to receivers, noted the result would likely be different there if the defendant, like Dragul, were in receivership. 56 F.3d at 754 ("If the money stopped with Douglas, a certain awkwardness might arise from the fact that Scholes is the receiver both for Douglas and for the corporations which would be suing him for that money. But that is not our case and we need not consider it.").

Paragraph 26 of the Receivership Order also bars the Receiver from suing Mr. Dragul. It does not contain the phrase "actions by third-parties" as the Receiver asserts. (Resp. 20.) Rather, Paragraph 26 enjoins and stays all actions "against the Receiver, Dragul, GDARES and GDAREM, or the Receivership Estate" by anyone—it contains nothing limiting it to third parties' claims. Thus, it enjoins the Receiver from suing Dragul. The Receiver tries to skirt Mr. Dragul's argument that the Receiver will either receive an unlawful double recovery or have to pay a judgment against Mr. Dragul out of the Estate per Paragraph 10 of the Receivership Order (Mot. 14-15) by arguing a judgment may be satisfied by assets Mr. Dragul acquired after the

[7] The cases the Receiver cites (Resp. 20, citing *CFTC v. Chilcott*, 713 F.2d 1477, 1480 (10th Cir. 1983); *Marwil*, 2003 WL 23095657, at *5-7) do not change this result as neither are binding in Colorado and they are contrary to Colorado law which retains *in pari delicto* both as to a receiver's standing and as a defense. *E.g.*, *Sender v. Kidder Peabody*, 952 P.2d at 780-81. And in both *CFTC* and *Marwil*, the receiver was suing third parties, not a person or entity in receivership as the Receiver argues. *Chilcott*, 713 F.2d at 1480; *Marwil*, 2003 WL 23095657, at *1.

Receiver was appointed (Resp. 20). Setting aside whether there exist any such assets, since the Receiver already seized Mr. Dragul's assets for the purpose of paying creditors' equitable claims, there would necessarily be at least a majority double-recovery. Nor is it clear why Mr. Dragul's purported status as a necessary party (which the Receiver never explains), or the Receiver's expectation that the other Defendants will seek to apportion fault to Mr. Dragul (Resp. 20), has any bearing on whether the Receiver may sue Mr. Dragul.

The fact that the Receiver possesses and appears to be using Mr. Dragul's attorney-client privileged information against Mr. Dragul is another reason the Receiver cannot sue Mr. Dragul. (Mot. 15-17.) The Receiver responds by disparaging Mr. Dragul with myriad factual assertions, most irrelevant, which appear nowhere in the FAC, and which have never been proven. (Resp. 22-23.) The Receiver asserts that after the Receiver was appointed, Mr. Dragul "could have no expectation of privacy or privilege for information on the GDA server[.]" (Resp. 23.) That is remarkable both because the privileged information on the GDA server included information predating the Receiver's appointment, and because Paragraphs 7, 10, 13(d), and 28 of the Receivership Order all expressly state that Mr. Dragul maintains all privileges held in his personal capacity. And since the Receiver is using Mr. Dragul's privileged information to sue Mr. Dragul and his former attorney in *this* proceeding, under *this* FAC, it is up to *this* Court, not the Receivership Court, to address the resulting taint to this proceeding. (*See* Resp. 23.)

IV. The Receiver is Not Authorized to Pursue Claims for Damages on Contingency

Paragraph 13(o) of the Receivership Order authorizes the Receiver to retain counsel on contingency "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, including claims premised on fraudulent transfer or similar theories[.]" The Receiver argues the language

"including claims premised on fraudulent transfer" permits him to assert claims for damages (Resp. 21-22). But the "including" phrase denotes a non-exclusive list of examples (Resp. 20), *all* of which must be claims to recover possession of Receivership Property. Receivership Property only encompasses the Receivership entities' assets and assets related to or derived from investor funds (Rec. Order ¶ 9), not damages. (*See also* Mot. 17-18.) Since he is now on contingency (Mot. Ex. A), the Receiver's damages claims must be dismissed because the Receivership Order does not authorize him to bring them.

V. Most of the Receiver's Claims are Time-Barred

A. The Colorado Securities Act Claims are Time-Barred

The Receiver argues statute of limitations is an affirmative defense Defendants bear the burden to prove. (Resp. 44, 48.) That is false as to the CSA claims because timeliness is an element the Receiver bears the burden to properly allege (and later prove). (*See* Mot. 19-20.) The Receiver never addresses this fact. And he fails to allege his CSA claims are timely.

The Receiver's C.R.S. §§ 11-51-301, 401, 604(1) & (2), and 604(5) claims are all barred if filed "more than two years after the contract of sale[.]" C.R.S. § 11-51-604(8). FAC paragraph 321 (and paragraphs referenced in it), and FAC exhibits 23, 25, 28, 33, 35, & 42, show there was not a single investment occurring within two years of the January 21, 2020 filing of the original complaint. The Receiver points to FAC ¶¶ 204-212 & FAC Ex. 39 to argue there was a sale of securities "as late as 2018." (Resp. 50.) Those paragraphs and exhibit relate solely to a letter about the sale of a property, not solicitation or sale of a security. He also points to FAC ¶ 316 (Resp. 50), but that paragraph contains no factual allegations about any particular 2018 sale of a security. Finally, the Receiver points to Exhibit 3 to the original complaint to argue "Dragul consummated four sales of unregistered securities after January 21, 2018[.]" (Resp. 50-51.) But

that exhibit purports to show payments between entities, generally as part of settlement statements for real property, not any sales of securities. These claims are time-barred.

The vast majority of investments alleged to support the Receiver's C.R.S. §§ 11-51-501(1)-(c) and 604(3)-(4), and 11-51-604(5)(b) & (c) claims, are outside the C.R.S. § 11-51-604(8) statute of repose, (Mot. 21-23 & 21 n.9), as the Receiver concedes (Resp. 40, 46 n.22). All such claims based on those allegations must be dismissed.

The CSA claims also fail under the statute of limitations. Since as a matter of law, only investors may assert CSA claims, not the Receiver, C.R.S. §§ 11-51-604(1), 604(2)(a), 604(3), 604(5)(a) & (b), it is the date the investors discovered the violations, not when the Receiver discovered them, that matters. And since the Receiver bears the burden to prove the timeliness of the CSA claims, that means the Receiver must plead when the investors learned or should have learned of the violations. (Mot. 19-20.) Though the Receiver argues Defendants hid information from investors, he never alleges when they learned or should have learned, and his allegations show it was not within the limitations period. (*See* Mot. 20-23 & FAC ¶s cited therein.)

B. The Fraudulent Transfer and Unjust Enrichment Claims are Time-Barred.

While the Receiver asserts "many" of the allegedly fraudulent transfers were made within the four-year limitations period (Resp. 53), he appears to concede many of them were not, (Resp. 53; *see also* Mot. 23-24.) He tries to save the time-barred allegations by arguing he did not learn of them before the one-year limitations period under the discovery rule, and attempts to make this a fact dispute by attaching an affidavit. (Resp. 53; *see also* C.R.S. § 38-8-110 (setting forth 4-year limitations period, or one-year period under discovery rule).) But under *Lewis v. Taylor*, 375 P.3d 1205, 1207 (Colo. 2016), a receiver's fraudulent transfer claim accrues under the

discovery rule on the date of his appointment. The Receiver argues the receiver in *Lewis* actually knew, as a factual matter, of the claim on the date of his appointment. (Resp. 54.) But it would be impossible for a receiver to actually learn of a claim then, when he would not have even received the records relating to the receivership entities, let alone had a chance to review them and identify claims. *Lewis* necessary means that under the discovery rule as it applies to receivers, the receiver is deemed as a matter of law to have discovered the claim on the date of appointment, regardless of when he actually discovers it. Thus, the fraudulent transfer claim was stale by August 30, 2019 (a year after the Receiver was appointed).

Similarly, the Receiver's unjust enrichment claim is time-barred because, as the Receiver concedes, it is subject to the same statutes of repose and limitations as the fraudulent transfer claim. (Mot. 24; Resp. 54.)

CONCLUSION

The entire First Amended Complaint exceeds what the Receiver may do as a matter of law. It should be dismissed with prejudice.

Dated this 8th day of September, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills
Paul L. Vorndran, #22098
Christopher S. Mills, #42042

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed and served via the Colorado Court E-filing system to the following:

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EXHIBIT A

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

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CASE NUMBER: 2020CV30255

Plaintiffs: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC

vs.

Defendants: GARY DRAGUL; BENJAMIN KAHN; THE CONUNDRUM GROUP, LLP; SUSAN MARKUSCH; ALAN C. FOX; ACF PROPERTY MANAGEMENT, INC.; MARLIN S. HERSHEY; PERFORMANCE HOLDINGS, INC.; OLSON REAL ESTATE SERVICES, LLC; JUNIPER CONSULTING GROUP, LLC; JOHN AND JANE DOES 1-10; and XYZ CORPORATIONS 1-10

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Case Number: 20CV30255

Courtroom: 414

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DEFENDANTS MARLIN S. HERSHEY'S AND PERFORMANCE HOLDINGS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and (5)

Defendants Marlin S. Hershey and Performance Holdings, Inc. (collectively, "Hershey") file their Reply in Support of Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5) and, in support thereof, respectfully set forth as follows:

I. INTRODUCTION

As noted in the Motion, the Receiver only specifically alleges that Hershey was involved in transactions regarding four (4) properties/entities. (Complaint at ¶¶ 91-94, 97, 145, 148, 155, 173-177, 220-221).[1] Additionally, with respect to those four (4) properties/entities, the Receiver alleges that, after January 1, 2014, Hershey only was involved with four (4) discrete transactions – the "rollover" of four investments related to the Plaza Mall of Georgia North. (Complaint at ¶¶ 148, 155, Exhibit 33). Finally, the Receiver acknowledges that all of the finder's fees or commissions that the Receiver seeks to recover from Hershey were paid between January 19, 2001 and December 16, 2013. (Complaint at ¶¶ 42, 87, Ex. 7).

From these underwhelming and stale allegations, the Receiver manufactures eight (8) claims against Hershey, including at least four (4) fraud-based claims. It is the paucity of specific allegations against Hershey that defines the Receiver's approach to Hershey. Rather than allege specific facts against Hershey, presumably because he cannot do so, the Receiver has lumped Hershey with the other defendants and merely made broad and conclusory allegations in an attempt to implicate Hershey in the entirety of the alleged fraudulent scheme, despite the fact that the Receiver acknowledges that Hershey barely has been involved with the other defendants since 2013. The Receiver's attempt is futile as his claims against Hershey must be dismissed because the Receiver lacks standing to bring them, they are not properly pled, or they are barred

[1] The Receiver also vaguely asserts that Hershey was involved in the High Street project "in or about 2014" but provides no details regarding Hershey's alleged involvement. (Complaint at ¶ 67). Interestingly, despite the Receiver's allegations that Hershey was involved in a few discrete transactions with Dragul from 2014 through 2016, the last payment to Hershey was made on December 16, 2013, Hershey only received a total of six (6) payments in 2013, and Hershey did not receive a single payment in either 2011 or 2012. (Complaint at Ex. 7). These facts are inconsistent with the Receiver's vague allegations that Hershey continued to solicit investors for projects in 2014 and later.

by applicable statutes of limitations or repose.

II. ARGUMENT

A. The Receiver Lacks Standing to Pursue His Claims Against Hershey

1. Other Than Pursuant to Paragraph 13(s) of the Receivership Order, the Receiver Does Not Have a Basis or Authority to Assert Claims on Behalf of Creditors of the Receivership Estate

The Receiver argues that multiple provisions of the Receivership Order authorize him to bring claims on behalf of creditors of the receivership estate, but he is mistaken. Paragraph 9 of the Receivership Order permits the Receiver to "investigate any claims and causes of action which may be pursued *for the benefit of Dragul, GDARES, GDAREM, their creditors, members, and equity holders*…", but paragraph 9 does not authorize the Receiver to assert creditors' claims.

Similarly, paragraph 13(o) of the Receivership Estate does not authorize the Receiver to bring creditors' fraudulent transfer claims but rather only permits the Receiver to pursue fraudulent transfer claims to "recover possession of the Receivership Property." Thus, while both provisions are consistent with the Receiver's responsibility to preserve the receivership estate for the benefit of creditors, neither provides the Receiver with the authority to pursue claims belonging to creditors. *See Javitch v. First Union Securities, Inc.*, 315 F.3d 619, 627 (6th Cir. 2003) ("…[A]lthough the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors.").

The Receiver also does not derive any authority to bring creditors' claims from the statute permitting the securities commissioner to pursue such claims. C.R.S. § 11-51-602 authorizes the securities commissioner to enforce the Colorado Securities Act by, *inter alia*, including in any enforcement action "…a claim for damages under 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) (2020); *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 29-30 (Colo. 2001). However, the statute does not allow the securities commissioner to assign its enforcement role to a third party nor does the statute permit a receiver to enforce its provisions. Additionally, the Receivership Order does not authorize the Receiver to exercise the securities commissioner's enforcement role. Indeed, in *Chan v. Dragul, et al.*, Case No. 2018cv33011, District Court for the City and County of Denver (the "Receivership Case"), the securities commissioner himself is pursuing damages on behalf of creditors of the receivership estate. (Receivership Case Complaint at ¶¶ 32-33, 41-42). Accordingly, to allow the Receiver also to pursue claims and/or damages on behalf of creditors of the receivership estate would force certain Defendants to defend against the same claims twice and could result in inconsistent determinations of the same claims and/or a double recovery of damages.

The Receiver further argues that he has standing to bring creditors' claims pursuant to equitable principles. However, none of the cases cited by the Receiver stands for such a proposition. In fact, none of them even address a receiver's standing to assert claims on behalf of creditors of a receivership estate.

Finally, the Receiver asserts that creditors of the receivership estate, in effect, assigned their claims to him when they filed a claim in the Receivership Case. However, the language in the cited claim form is not an assignment of a creditor's claim but rather an agreement not to diminish the receivership estate by individually pursuing claims against it. Notably, the form provision does not contain the word "assign" or any derivation thereof and does not even address claims that creditors may have against individuals or entities other than those individuals and entities that comprise the receivership estate. Thus, it is clear that, by filing a claim in the Receivership Case, creditors of the receivership estate did not assign to the Receiver their claims against Hershey and other individuals or entities that are not in receivership. *See Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 845 (Colo. App. 2007) (although no particular formalities

are necessary for a valid assignment, the "intent to make the assignment must be apparent").

2. The Receiver's Claims Against Hershey Are Creditors' Claims

The Receiver generally asserts that he "seeks to recover for harm caused both to creditors and to the GDA Entities in Receivership." However, this statement simply is not true with respect to the Receiver's claims against Hershey as all such claims are creditors' claims. The Receiver asserts two (2) claims against Hershey for violation of the Colorado Securities Act based on the sale of securities to investors – violations of C.R.S. §§ 11-51-401 and 11-51-501(1). (Complaint at ¶¶ 321, 345-348). With respect to each violation, only the buyer of a security, *i.e.*, the investor, can bring a claim. C.R.S. §§ 11-51-604(2)(a), 11-51-604(5)(c). Similarly, only investors can bring claims for negligence or negligent misrepresentation against Hershey because both claims are premised on Hershey's alleged breach of his duty to investors. (Complaint at ¶¶ 357, 362-370).

With respect to his claims for civil theft, violations of the Colorado Organized Crime Control Act ("COCCA"), aiding and abetting violations of COCCA, fraudulent transfer, and unjust enrichment, the Receiver distinctly pleads each claim on behalf of creditors/investors of the receivership estate, not on behalf of the GDA Entities, as, in support of such claims, he alleges conduct directed at and damages incurred by such creditors/investors. (Complaint at ¶¶ 373-377, 383, 387(a)-(c), 389, 391, 395-396, 402, 406, 443-444, 448). Accordingly, all of the Receiver's claims alleged against Hershey are claims of creditors/investors, not the GDA Entities. Therefore, the Receiver's argument that he has standing to pursue the claims alleged in the Complaint because they allege harm to the entities in Receivership is inapplicable to Hershey.

3. The Receiver Does Not Have Standing to Pursue Creditors' Claims

The only authority that the Receiver has to pursue claims of creditors/investors of the receivership estate is Paragraph 13(s) of the Receivership Order. The Receiver does not provide any authority to counter settled law that, regardless of Paragraph 13(s), (i) he may not assert any

rights greater than the those of the entity whose property he was appointed to preserve, (ii) a court cannot exceed its power by conferring standing on a receiver that is prohibited by law, and (iii) the grant of authority in the Receivership Order to pursue claims on behalf of creditors of the receivership estate is prohibited by law. *Good Shepherd Health Facilities of Colorado, Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); *see also Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) ("Since 1935 it has been well settled that 'the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have.'"); *Scholes v. Schroeder*, 744 F.Supp. 1419, 1422 (N.D. Ill. 1990) (a receiver cannot pursue claims that belong not to the receivership estate but rather to those who may have an interest in the estate). Instead, the Receiver merely argues that he has standing to pursue his fraudulent transfer and unjust enrichment claims even if those claims are brought on behalf of creditors because the GDA Entities were damaged as a result of the transfers. Thereby, the Receiver appears to confess that he lacks standing to pursue six (6) of his eight (8) claims against Hershey – violations of the Colorado Securities Act, negligence, negligent misrepresentation, civil theft, and violations of COCCA – as such claims are creditors' claims that, notwithstanding the improvident and incorrect grant of authority in paragraph 13(s) of the Receivership Order, the Receiver is not authorized to pursue.

Even if the Receiver has standing to pursue his fraudulent transfer and unjust enrichment claims[2] pursuant to the reasoning in *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), he only may do so with respect to the entities in receivership through which Dragul allegedly operated his fraudulent scheme. *See Scholes*, 56 F.3d at 754 (receiver had standing to pursue fraudulent transfers made by three corporations in receivership when transfers injured corporations and creditors of the corporations). Thus, to the extent that the Receiver's fraudulent transfer and

[2] The Receiver's fraudulent transfer and unjust enrichment claims are nearly identical as both seek to recover payments made to Hershey. The unjust enrichment claim simply is the equitable equivalent of the statutory fraudulent transfer claim.

unjust enrichment claims are premised on payments from entities other than those that comprise the receivership estate, neither the reasoning in *Scholes* nor its progeny provide the Receiver with any authority to recover payments made by such entities.[3] The Receiver lacks standing to pursue claims based on payments from entities that are not part of the receivership estate, and, therefore, his fraudulent transfer and unjust enrichment claims based on such payments must be dismissed.

B. The Receiver Acknowledges That He Does Not Have a Claim for Civil Theft

The Receiver does not substantively address Hershey's argument that he has not alleged a claim for civil theft against Hershey because he does not, and cannot, state that any particular set or sets of funds are directly traceable from the investors to Dragul and then to Hershey. *See Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 608 (Colo. 2016) (an allegation of civil theft fails if "it does not allege an intent to deprive [plaintiff] . . . of specific funds."). Rather, the Receiver simply reiterates the allegations in the Complaint that Hershey received approximately $2,891,155.54 in commissions paid by Dragul. However, as Exhibit 7 to the Complaint makes clear, the payments to which the Receiver refers were not from investors but rather were from various entities associated with Dragul. The Receiver alleges that Hershey stole funds from investors, not from any of the entities identified on Exhibit 7. (Complaint at ¶¶ 373-377). In order to state a claim for civil theft, the Receiver had to identify the specific investor funds allegedly stolen by Hershey. Because the Receiver did not, and cannot, do so, such claim must be dismissed pursuant to C.R.C.P. 12(b)(5).

C. The Receiver Fails to Allege His Fraud-Based Claims With Particularity

As Hershey stated in the Motion, the Receiver does not, and presumably cannot, identify the creditors on whose behalf he allegedly asserts claims. Thus, the Receiver's fraud-based claims against Hershey are based on the Receiver's speculation that fraud occurred but are

[3] Exhibit 7 to the Complaint lists all of the payments to Hershey that the Receiver seeks to recover as fraudulent transfers or pursuant to his unjust enrichment claim. A substantial number of these payments were not paid by any of the entities that comprise the receivership estate.

unsupported by any specific facts establishing when, how, and to what extent the alleged fraud occurred. General and collective factual allegations simply do not support the Receiver's fraud-based claims against Hershey as they fail to provide Hershey with adequate notice of the basis of the claims against him. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (dismissing § 1983 claims alleged against multiple defendants because complaint's collective allegations against "defendants" with no "distinction as to what acts are attributable to whom" made it "impossible for any of these individuals [defendants] to ascertain what particular unconstitutional acts they are alleged to have committed."); *Lane v. Capital Acquisitions and Management Co.*, 2006 WL 4590705, *5 (S.D. Fla. 2006) (complaint for violations of Civil Rights Act and FLSA failed to satisfy minimum pleading standard of F.R.C.P. 8 "[b]y lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct…"); *Medina v. Bauer*, 2004 WL 136636, *6 (S.D. NY 2004) (complaint for violations of Copyright Act, RICO, and various state laws failed to satisfy minimum pleading standard of F.R.C.P. 8 by lumping defendants and failing to distinguish their conduct). This is especially true with respect to the Receiver's fraud-based claims which must be pled with particularity. Colo.R.Civ.P. 9(b) (2020).

The Receiver argues that, in the Complaint, "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," citing six (6) exhibits in support. However, such exhibits are merely lists of investors in various projects, four (4) of which concern Hershey – Plaza Mall of Georgia North (Ex. 33), Fort Collins WF 02, LLC (Ex. 35), High Street (Ex. 25), and Prospect Square (Ex. 42). The exhibits do not specify which, if any, of the listed investors allege fraud, when Hershey communicated with any investor who alleges fraud, what Hershey communicated to any investor who alleges fraud, whether any such investor relied on Hershey's communication, or whether the investor suffered some damage as a result of any such reliance.

Accordingly, the Receiver has failed to meet the pleading requirements of C.R.C.P. 9(b), and, therefore, the Receiver's claims for violations of the Colorado Securities Act, negligent misrepresentation, and violations of COCCA must be dismissed.[4]

D. Certain of the Receiver's Claims Are Time-Barred

The Receiver does not contest that, to the extent that he can allege claims on behalf of creditors of the receivership estate, he stands in the shoes of such creditors and, therefore, is subject to any defenses to which the creditors are subject, including the statute of limitations. Thus, because the Receiver purports to supplant the creditors, he may initiate an action so long as the creditors are not barred from doing so by the applicable statute of limitations. *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1249 (Colo. 1994).

Here, the Receiver concedes that his claim against Hershey for violation of C.R.S. § 11-51-401(1) is time-barred under C.R.S. § 11-51-604(8). (Response at p. 46, fn. 22). Additionally, the Receiver acknowledges that his claim against Hershey for violation of C.R.S. § 11-51-501(1) also is time-barred under C.R.S. § 11-51-604(8) except with respect to four (4) discrete transactions that occurred after August 29, 2014. (Response at p. 46, fn. 22).[5]

The Receiver does not address Hershey's argument that, as pled, the Receiver's negligence and negligent misrepresentation claims are time-barred because the Receiver acknowledges that creditors knew or should have known of such claims no later than 2012. Accordingly, except possibly with respect to a claim for negligence or negligent misrepresentation based on the four (4) discrete transactions made in connection with the Plaza

[4] The Receiver argues that his negligent misrepresentation claim is not subject to the heightened pleading requirement of C.R.C.P. 9(b). However, because such claim is grounded in fraud (Complaint at ¶¶ 362-363, 365), it is subject to C.R.C.P. 9(b). *See Martin v. Chinese Children Adoption Int.*, 2020 WL 1703793, *6 (D. Colo. April 8, 2020) (holding that F.R.C.P. 9(b) applies to negligent misrepresentation claim grounded in fraud).

[5] Subsequently in the Response, the Receiver states that "[t]he 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." (Response at p. 51). However, there are no such allegations in the Complaint.

Mall of Georgia North in 2015 and 2016, the Receiver appears to confess that his negligence and negligent misrepresentation claims are time-barred.

Finally, the Receiver contends that he has alleged a predicate act against Hershey within the applicable limitations periods and, therefore, that he has alleged viable COCCA claims against Hershey. However, the only conduct alleged against Hershey within the applicable five-year limitation period is that he was involved in certain "rollover" transactions with respect to the Plaza Mall of Georgia North. With respect to these transactions, there are no allegations about how Hershey was involved and, thus, whether his alleged involvement constituted a predicate act for purposes of a COCCA claim. Without the occurrence of a predicate act within the five-year limitations period, the Receiver does not have a COCCA claim against Hershey. C.R.S. § 13-80-103.8 (2020).

E. Adoption of Other Defendants' Arguments in Support of Their Motions to Dismiss

To the extent that Defendants Dragul, Alan Fox/ACF Property Management, Inc., and Susan Markusch/Olson Real Estate Services, LLC make arguments that also are applicable to the Receiver's claims alleged against Hershey, Hershey adopts such arguments and incorporates them herein by reference.

Respectfully submitted this 8th day of September 2020.

By: /s/Paul M. Grant
Paul M. Grant

Attorneys for Performance Holdings, Inc. and Marlin Hershey

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Colorado Courts E-Filing on this 8th day of September 2020:

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

Moye White
Eric Brian Liebman
Joyce Carmel Williams
Lucas Trask Ritchie

Gordon and Rees LLP
John M. Palmeri
Margaret Louise Boehmer

Jones & Keller PC
Christopher Stephen Mills
Paul Leo Vorndran

Susan Markusch (by first-class, U.S. mail)

/s/Paul M. Grant
Paul M. Grant

DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** Denver District Court 1437 Bannock St. Denver, CO 80202	DENIED BY COURT 10/28/2020 DATE FILED: October 28, 2020 3:27 PM CASE NUMBER: 2020CV30255 ROBERT LEWIS MCGAHEY JR District Court Judge
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 ▲
	Case No. 2020CV30255 Courtroom: 414

[PROPOSED] ORDER RE DEFENDANT GARY J. DRAGUL'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

THIS MATTER, having come before the Court on Defendant Gary Dragul's Motion to Dismiss the Receiver's First Amended Complaint, and good cause having been shown therefore, the Motion is GRANTED and Plaintiff's claims against Mr. Dragul are dismissed WITH PREJUDICE.

SO ORDERED this ____ day of _____, 2020.

_____
District Court Judge

EXHIBIT A

EXHIBIT 7

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO

Court Address:
1437 Bannock Street
Denver, CO 80202

Plaintiffs: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC

vs.

Defendants: GARY DRAGUL; BENJAMIN KAHN; THE CONUNDRUM GROUP, LLP; SUSAN MARKUSCH; ALAN C. FOX; ACF PROPERTY MANAGEMENT, INC.; MARLIN S. HERSHEY; PERFORMANCE HOLDINGS, INC.; OLSON REAL ESTATE SERVICES, LLC; JUNIPER CONSULTING GROUP, LLC; JOHN AND JANE DOES 1-10; and XYZ CORPORATIONS 1-10

DENIED BY COURT
10/28/2020

DATE FILED: October 28, 2020 3:26 PM
CASE NUMBER: 2020CV30255

ROBERT LEWIS MCGAHEY JR
District Court Judge

▲COURT USE ONLY ▲

Case Number: 20CV30255

Courtroom: 414

ORDER GRANTING DEFENDANTS MARLIN S. HERSHEY'S AND PERFORMANCE HOLDINGS, INC.'S MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(1) and (5)

EXHIBIT A

EXHIBIT 8

THIS MATTER comes before the Court on Defendant Marlin S. Hershey's and Performance Holdings, Inc.'s Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and (5) (the "Motion") pursuant to which Defendants Marlin S. Hershey and Performance Holdings, Inc. seek to dismiss the Receiver's claims against them for violations of the Colorado Securities Act, negligence, negligent misrepresentation, civil theft, violations of the Colorado Organized Crime Control Act, aiding and abetting violations of the COCCA, fraudulent transfer, and unjust enrichment. The Court having reviewed the Motion and the Court being advised in the premises does hereby

ORDER that the Motion is granted on the basis that the Receiver does not have standing to pursue claims of creditors of the receivership estate, and all of the claims that the Receiver alleges against Marlin S. Hershey and Performance Holdings, Inc. are such claims; and

FURTHER that, pursuant to C.R.S. § 13-17-201, Marlin S. Hershey and Performance Holdings, Inc. shall be awarded the attorney's fees and costs that they incurred in moving to dismiss the Receiver's claims alleged against them. The fees and costs shall be submitted to the Court in accordance with C.R.C.P. 121, § 1-22.

SO ORDERED this _____ day of August, 2020.

BY THE COURT:

_____
Denver District Court Judge

EXHIBIT A

DATE FILED: November 12, 2020 4:07 PM
FILING ID: 49A513F3B6CFC
CASE NUMBER: 2020CV30255

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202 Telephone: 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, BENJAMIN KAHN, THE CONUNDRUM GROUP, LLP, SUSAN MARKUSCH, ALAN 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 ▲
Attorneys for ACF Defendants: Lucas T. Ritchie, Atty. Reg. No. 35805 Eric B. Liebman, Atty. Reg. No. 27051 Joyce C. Williams, Atty. Reg. No. 52930 MOYE WHITE LLP 16 Market Square 6th Floor 1400 16th Street Denver, CO 80202 Telephone: 303-292-2900 Email: Luke.Ritchie@moyewhite.com Eric.Liebman@moyewhite.com Joyce.Williams@moyewhite.com and Gary S. Lincenberg *(admitted pro hac vice)* Sharon Ben-Shahar Mayer *(admitted pro hac vice)* James S. Threatt *(admitted pro hac vice)* BIRD, MARELLA, BOXER, WOLPERT, NESSIM, DROOKS, LINCENBERG & RHOW, P.C. 1875 Century Park East, Twenty-Third Floor Los Angeles, CA 90067 Telephone: 310-201-2100 Email: glincenberg@birdmarella.com smayer@birdmarella.com jthreatt@birdmarella.com	Case Number: 2020CV30255 Courtroom 414

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)

EXHIBIT A

Defendants Gary Dragul ("Dragul"), ACF Property Management, Inc. ("ACF"), Alan C. Fox ("Fox"), Marlin S. Hershey ("Hershey") and Performance Holdings, Inc. ("PH") (collectively, "Moving Defendants"), through counsel, hereby submit their joint Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) Pursuant to C.R.S. 13-4-102.1, and in support thereof state as follows:

C.R.C.P. 121, § 1-15, ¶ 8 AND C.A.R. 4.2(c) CERTIFICATIONS

Prior to filing this motion, counsel for Moving Defendants have met and conferred with counsel for plaintiff Harvey Sender as receiver ("Receiver") for Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC (collectively, "GDA"), and, based thereon, advise the Court that the Receiver opposes the requested relief. The requested certification of interlocutory appeal is not being sought for purposes of delay.

I. INTRODUCTION

Moving Defendants move to certify for interlocutory appeal a single issue in the Court's October 28, 2020 orders ("Orders") denying their respective motions to dismiss the Receiver's First Amended Complaint ("FAC"). Specifically, the issue Moving Defendants seek to certify is whether the Receiver has standing to bring his claims against them.

The Receiver asserts each of his claims on behalf of investors in the GDA Entities,[1] who are creditors of the Receivership Estate. While no Colorado appellate court has ever ruled on this issue, federal and state courts across the nation have repeatedly held that a receiver does not have standing to bring claims on behalf of creditors of the receivership estate and have dismissed such

[1] The term "GDA Entities" is defined in the FAC as referring to GDA and "a number of related entities and single purpose entities." FAC ¶ 10.

claims for lack of subject matter jurisdiction. Moving Defendants moved to dismiss the FAC on the ground, among others, that the Receiver lacks standing to assert his claims. On October 28, 2020, the Court denied all motions to dismiss by stamping Moving Defendants' respective proposed orders "Denied by the Court." The Court provided no reasoning or explanation for its Orders, but its rulings necessarily mean that the standing argument, and consequently the challenge to subject matter jurisdiction, was denied.

C.R.S. 13-4-102.1 and C.A.R. 4.2(a) allow this Court to certify an order for interlocutory appeal if immediate review "may promote a more orderly disposition or establish a final disposition of the litigation" and "[t]he order involves a controlling and unresolved question of law." C.R.S. 13-4-102.1; C.A.R. 4.2(a). The Court's Orders meet this standard. Resolution of the standing issue implicates the subject matter jurisdiction of this Court and controls the outcome of this case. It is a matter of first impression in Colorado, presenting important facts, invoking public interest concerns, and involving an unresolved and important question of law. Resolving this issue now will also obviate the risk of inconsistent rulings that may result if individual investors bring separate claims directly against Moving Defendants. If Moving Defendants are forced to wait until the proceedings are concluded to file their appeal and the Court of Appeals disagrees with this Court and determines the Receiver lacks standing to bring his claims, that decision will require a reversal and would result in an enormous waste of judicial and party resources. Immediate appellate review, on the other hand, may resolve this case or at least narrow the issues before the Court, and streamline further proceedings. Moving Defendants, therefore, ask the Court to certify for interlocutory appeal the question whether the Receiver has standing to assert the claims brought against them in this action.

II. THIS COURT SHOULD CERTIFY THE DECISION ON STANDING FOR INTERLOCUTORY APPEAL

1. Legal Standard for Certification of an Order for Interlocutory Appeal.

A trial court may certify an order as "immediately appealable" if:

> (1) "immediate review may provide a more orderly disposition or establish a final disposition of the litigation"; and
>
> (2) "the order involves a controlling and unresolved question of law."

C.R.S. 13-4-102.1. These requirements are reiterated in C.A.R. 4.2. In turn, Colorado courts have confirmed that an order may be certified for interlocutory appeal when: "(1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order from which an appeal is sought involves a controlling question of law; and (3) the order from which an appeal is sought involves an unresolved question of law." *Indep. Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015), *aff'd*, 372 P.3d 1047 (Colo. 2016); *Wahrman v. Golden W. Realty, Inc.*, 313 P.3d 687, 688 (Colo. App. 2011); *Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011). The Orders denying the Moving Defendants' standing argument meet each of these three criteria.

2. The Receiver's Standing to Pursue His Claims Presents an Unresolved Question of Law.

Taking the criteria enumerated in *Pandy* in reverse order, 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). The question must be one of "law," as opposed to a mixed question that involves the application of well-established legal

principles to the unique facts at hand. *See Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 611 (Colo. App. 2019), *reh'g denied* (Oct. 10, 2019), *cert. denied*, No. 19SC864, 2020 WL 1887932 (Colo. Apr. 13, 2020); *see also Clyncke v. Waneka,* 157 P.3d 1072, 1076 (Colo. 2007) (issues of statutory interpretation are questions of law). The Receiver's standing to bring claims on behalf of creditors is a pure question of law, and no Colorado appellate court has ever decided it, let alone resolved it in favor of standing.

Both federal and state courts in other jurisdictions have repeatedly held that a receiver lacks standing to sue on behalf of creditors of the receivership estate. For example, the Sixth Circuit held that a receiver "stand[s] in the shoes of the entity in receivership" and therefore "lack[s] standing to bring suit unless the receivership entity could have brought the same action." *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009) (citations omitted). In *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003), the court explained "although the stated objective of a receivership may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors." *Id*., at 627 (citations omitted).

Other federal appellate courts, including the Tenth Circuit, have similarly held that a receiver has standing to bring only those claims that can be asserted by the individual or entities in receivership. *See Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008) ("A receiver may commence lawsuits, but stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted.") (citations and quotation marks omitted); *Fleming v. Lind–Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (equity receiver did not have standing to bring claims on behalf of investors); *Commodity Futures Trading Comm'n. v. Chilcott Portfolio*

Mgmt., Inc., 713 F.2d 1477, 1481 (10th Cir. 1983) (receiver can assert claims only for the corporate fund in receivership and cannot seek "damages on the claims for the investors").

State courts in other jurisdictions have reached a similar conclusion. *See e.g., Forex Capital Markets, LLC v. Crawford*, No. 05-14-00341-CV, 2014 WL 7498051, at *3 (Tex. App. Dec. 31, 2014) ("As a general rule, a receiver may sue only for claims of the entities in receivership, and may not assert claims for injuries directly suffered by the investors."); *GTR Source, LLC v. FutureNet Grp., Inc.*, 62 Misc. 3d 794, 807–09, 89 N.Y.S.3d 528, 539–40 (N.Y. Sup. Ct. 2018) (same).

No Colorado appellate court has ever decided this issue. In *Sender v. Kidder Peabody*, 952 P.2d 779 (Colo. App. 1997), the Colorado Court of Appeals considered a similar challenge to the standing of a *bankruptcy trustee* to assert claims on behalf of creditors of the bankruptcy estate. The court held that a bankruptcy trustee had no standing to do so. *Id.* at 781. Although the Colorado Court of Appeals' rationale in *Sender v. Kidder* supports a reversal here, that case did not directly resolve the standing question in the context of a receivership.[2]

The Receiver has argued that Section 13(s) of the Receivership Order authorizes him to sue on behalf of creditors. While this too is a matter of first impression in Colorado, courts in other jurisdictions have rejected similar arguments and have held that a receivership order cannot bestow standing where none exists under the United States Constitution. In *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421 (N.D. Ill. 1990), for example, the court explained that "the appointment of a receiver is inherently limited by the jurisdictional constraints." Granting a receiver authority

[2] Underscoring that the issue at bar is one of first impression in Colorado is the fact that the Receiver argued in his Omnibus Response to Defendants' Motion to Dismiss that the *Sender* case is factually inapposite because, *inter alia*, it involved a bankruptcy trustee rather than a receiver.

to bring claims held by others would violate those limitations, because "the ability to confer substantive legal rights that may create standing [under] Article III is vested in [the legislature] and not the judiciary." *Id.* at 1421 n.6;[3] *see also Liberte Capital*, 248 F. App'x at 657–59 (receiver lacked standing despite receivership order's language purporting to authorize such claims); *Fleming*, 922 F.2d at 24–25 (although the district court empowered the receiver "to prevent irreparable loss, damage and injury to commodity customers and clients," the receiver lacked standing to sue for claims belonging to investors); *Marwil v. Farah*, No. 1:03–CV–0482–DFH, 2003 WL 23095657, at *7 (S.D. Ind. Dec. 11, 2003) (receiver lacked standing to represent the investors notwithstanding the language of the receivership court order that purported to enable him to do so because the court lacked the authority to transfer property—including causes of action—from the investors to the receiver). Indeed, if "a district court could confer individual creditors' standing on a receiver simply by ordering it so, such an exception would completely swallow the general rule that receivers may only sue on behalf of the entity they are appointed to represent, not on behalf of creditors . . . directly." *Liberte Capital*, 248 F. App'x at 664.

So, while federal and state courts in other jurisdictions have held that an order appointing a receiver cannot confer standing to sue on behalf of creditors, no Colorado appellate court has addressed this question. The Receiver's standing to sue thus is an unresolved question of law under C.R.S. 13-4-102.1 and C.A.R. 4.2.

[3] *See Wimberly v. Ettenberg*, 194 Colo. 163, 167 (Colo. 1977) (same considerations applicable to Article III standing also guide Colorado courts).

3. The Receiver's Standing to Pursue His Claims Presents a Controlling Question of Law.

Criterion (2) from the *Pandy* test is whether the question is "controlling." In making this determination, a court should consider the following factors: "(1) whether the issue is one of widespread public interest; (2) whether the issue would avoid the risk of inconsistent results in different proceedings; (3) whether the issue is "case dispositive"; and (4) whether the case involves "extraordinary facts." *Affiniti*, 461 P.3d at 612. "There is no doubt[, however,] that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment, either for further proceedings or for a dismissal that might have been ordered without the ensuing district court proceedings." *Triple Crown at Observatory Vill. Ass'n, Inc. v. Vill. Homes of Colorado, Inc.*, 389 P.3d 888, 893 (Colo. App. 2013).

Here, these factors favor certifying the standing issue for interlocutory appeal. First, a receiver's standing to bring claims on behalf of creditors is one of widespread public interest because the public has a strong interest in ensuring that receivers act within the scope of their powers and within the constitutional constraints. *See Cargill, Inc. v. HF Chlor-Alkali, LLC*, No. 16-2506, 2016 U.S. Dist. LEXIS 123785, at *12 (D. Minn. Sept. 12, 2016) (declining to appoint receiver where party seeking same did not make adequate showing that appointing receiver would be in the public interest). Moreover, because receivers are officers of the court, *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2981 (3d ed. 1975), when they purport to bring claims for which they lack standing, they undermine the public's confidence not only in the institute of a receivership but also in the court. *Id.*

Analogy to federal law further demonstrates Congress's recognition that the conduct of a receiver is a matter of public interest that may warrant immediate review. Under Section

1292(a)(2) of Title 28 of the United States Code, the federal courts of appeal have jurisdiction to review "interlocutory orders… to take steps to accomplish the purposes [of the receivership], such as directing sales or other disposals of property." The interlocutory orders to which this statute refers have been defined as "orders in the nature of 'executions before judgment,' and in effect either ousting parties from the possession of property or injuriously controlling the management and disposition of property." *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2986 (3d ed. 1975); *see also S.E.C. v. Bartlett*, 422 F.2d 475, 477 (8th Cir. 1970) (holding that where a trial court denied a motion to vacate a receivership, such interlocutory ruling was appealable under 28 U.S.C. § 1292). The Receiver's assertion of claims on behalf of creditors is akin to an attempt to dispose of property that does not belong to the Estate. Such an order would be immediately appealable under federal law.[4]

Second, resolution of the standing issue would also avoid the risk of inconsistent results in different proceedings because the creditors on whose behalf the Receiver purports to sue are fully capable of filing lawsuits on their own behalf. While the Receivership Order requires creditors to refrain from independently prosecuting claims against Dragul and GDA as a condition to submitting a claim (see FAC, Ex. 1 at ¶ 16), it requires nothing of the sort as to prosecution of claims against third parties to the Receivership Order like Fox, ACF, Hershey and PH. The

[4] *See Adams v. Corr. Co. of Am.*, 264 P.3d 640, 643 (Colo. App. 2011) ("Some of the language in [C.R.S. § 13-4-102.1] is similar to the federal interlocutory appeal statute, 28 U.S.C. § 1292(b). When a federal law is similar to a Colorado statute, federal cases may be useful, although not determinative, in analyzing comparable language in the Colorado provision.").

appellate court's immediate resolution of the standing issue would thus prevent inconsistent rulings and duplicative litigation and liability for these parties.[5]

Third, the standing issue is case dispositive because, as more fully discussed in Section II.4 below, it underlies each of the claims asserted by the Receiver against Moving Defendants. If the Moving Defendants are required to wait until the proceedings are concluded to file their appeal and the appellate court determines the Receiver lacked standing to bring his claims, that decision will require a complete reversal, and would result in an enormous waste of judicial and party resources. *See Independent Bank v. Pandy,* 383 P.3d at 66 (statute of limitations issue was "controlling" because if it bars the Bank's complaint, then any disposition rendered by the district court would be vacated).

Triple Crown, 389 P.3d 888 is instructive. There, the court concluded that the question whether claims were properly sent to arbitration was "controlling" because "a decision that the order was incorrect would require a reversal of a final judgment." *Id.* at 893. The order therefore "could cause the needless expense and delay of litigating an entire case in a forum that had no power to decide it." *Id.* Like in *Triple Crown*, here too, if the case proceeds and the Court of Appeals ultimately determines that the Receiver had no standing to bring his claim, then everything the Court will have done in this case will be nullified, as all actions undertaken without standing necessarily lack subject matter jurisdiction and would consequently be void. *Cunningham v. BHP Petroleum Gr. Brit. PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005).

[5] This is not a merely theoretical concern. For example, the Receiver has asserted allegations in the FAC concerning matters that were actively litigated by Dragul's creditors in the Denver District Court in the case captioned *GDA DU Student Housing A LLC v. Alan C. Fox*, Case No. 2019CV32374. *See e.g.*, FAC ¶¶ 67-71.

4. Immediate Review May Establish a Final Disposition of the Litigation and at Least Will Promote a More Orderly Disposition of the Case.

Criterion (1) from *Pandy* is satisfied when the order being appealed is potentially case dispositive. *Independent Bank v. Pandy*, 383 P.3d at 66 (certification for interlocutory appeal granted where statute of limitations issue was potentially case dispositive). But even if an issue is not case dispositive, it may be certified for immediate review if its early resolution would promote the "orderly disposition" of the case. *See Affiniti*, 461 P.3d at 612 (review of the attorney-client privilege issue was certified for interlocutory appeal because, while not resolving the entire litigation, it played a central role in the court's resolution of a key immunity issue).

Here, the standing issue is case dispositive because the Receiver has purported to bring each of his claims against Moving Defendants on behalf of creditors of the Estate. And although the Receiver has argued that he brought at least some of the claims also on behalf of the "GDA Entities," as more fully discussed below, none of his claims *can* be asserted by those entities. Without standing, subject matter jurisdiction is lacking, rendering actions taken by the Receiver, as an officer of the Court, void. *Cunningham*, 427 F.3d at 1245.

First through third claims for relief: By his own allegations, the Receiver purports to bring the first through third claims solely on behalf of Dragul's investors and/or SPEs, all of which are described as "creditors of the Receivership Estate." FAC ¶¶ 315, 356, 361. The tolling allegations and prayers for relief further confirm this. *See* FAC ¶¶ 319–20, 325–26, 336, 338.

Nor *could* the Receiver bring these claims on behalf of the GDA Entities. The first claim for relief for violations of the Colorado Securities Act can be asserted only by a purchaser or seller of a security – here, the GDA investors. C.R.S. §§ 11-51-501(1), 11-51-604(1)–(3). Although the allegations in the FAC do not reflect that, the Receiver has argued in his Omnibus Response to

Defendants' Motions to Dismiss filed August 17, 2020 ("Response") that he has brought the first claim for relief on behalf of the "GDA Entities" as purchasers of securities. But the allegations reflect that neither fraud nor injury can be asserted by these entities. Detrimentally to the Receiver's argument, the GDA Entities are not alleged to have been misled by any misrepresentation. FAC ¶ 327–28, 331, 337. Instead, the Receiver alleges that the GDA Entities knew the true facts, were "in" on the alleged fraud, and were the ***recipients*** of many of the allegedly illicit commissions. *E.g., id.,* FAC ¶¶ 98, 111, 136, 153, 249, 299, 331.

The Receiver has conceded, as he must, that he brought the second and third claims solely on behalf of the GDA investors. Resp. at 14.[6]

Fourth claim for relief: Civil theft can be asserted only by the injured party, which the FAC alleges were only the "GDA Entity investors." FAC ¶ 377. In his Response, the Receiver has argued that the GDA Entities were injured as well because they were allegedly deprived of fees paid to the Moving Defendants. Resp. at 11. But according to the Receiver's own theory, if those fees instead had been retained by the GDA Entities, they "ultimately [would have been] distributed to investors." *Id.* at 15. Either way, the GDA Entities would not have retained those fees and thus cannot claim to have been directly harmed.

Fifth and Sixth Claims for Relief: Violations of COCCA and aiding and abetting can be asserted only by those injured by one or more predicate acts. C.R.S. § 18–17–106(7). Again, the FAC alleges that only Dragul's investors sustained such injury. FAC ¶ 379, 393. The Receiver's

[6] Claims for negligence and negligent misrepresentation are premised on a duty of care that the Receiver claims Moving Defendants owed "to investors and prospective investors." FAC ¶¶ 357 & 360. Therefore, the Receiver could not bring those claims on behalf of Dragul and GDA even if he wanted to do so.

argument that the GDA Entities were harmed because they were deprived of the fees paid to the Moving Defendants is refuted by the Receiver's own allegations, as addressed above.

Seventh claim for relief: The Receiver alleges under the seventh claim for breach of fiduciary duty against Dragul that Mr. Dragul owed a fiduciary duty to "the GDA Entities and their member investors". FAC ¶ 409. But he alleges no facts to demonstrate what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered. The only facts he actually articulates in the FAC are to allege a duty owed to investors and how investors were purportedly injured. *Id.* ¶ 410, 412-415. Thus, the only plausibly-pled fiduciary duty claim is brought on behalf of third-party investor-creditors, not the GDA Entities.

Eleventh and twelfth claims for relief: The Receiver fails to allege a basis for his purported standing to assert his fraudulent transfer and unjust enrichment claims, but neither of them can be asserted on behalf of the parties in receivership. The relief afforded by the Colorado Uniform Fraudulent Transfer Act ("CUFTA") is expressly available only to creditors of the Estate. C.R.S. § 38-8-108(1) ("In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in section 38-8-109, may obtain" relief). And federal courts have repeatedly held that receivers lack standing to bring such claims. *See Eberhard*, 530 F.3d at 132 (receiver lacked standing to assert fraudulent conveyance claim because he did not represent any creditor); *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274 (7th Cir. 1997) (receiver appointed for trader who allegedly defrauded investors lacked standing to sue the defendant because the trader had no possible claim and the receiver had no standing to act on investors' behalf); *see also 2 Clark on Receivers* § 364 (3d ed. 1959) (a receiver "acquires no right ... to the

property fraudulently transferred for the reason that the transfer is valid against the debtor and cannot be set aside by the receiver as the debtor's successor").

The Receiver has cited cases in which receivers were allowed to pursue fraudulent transfer claims, but has ignored a crucial distinction—a fraudulent transfer claim may be brought by a receiver ***only if it asserts a distinct harm that is clearly traceable to the entities in receivership***. *Scholes v. Lehmann*, 56 F.3d 750, 753–54 (7th Cir. 1995) (receiver could bring fraudulent transfer claims but only because entity in receivership was distinct from wrongdoer and suffered distinct injury); *Marion v. TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010) ("heart of the standing issue" is whether the receivership entity suffered a "distinct injury" from creditors); *Buckley v. Deloitte & Touche USA LLP*, 888 F. Supp. 2d 404, 411–12 (S.D.N.Y. 2012) (receiver had standing because he alleged separate "harms to [the entity in receivership]"); *Stern v. Legent Clearing LLC*, No. 09-CV-794, 2009 WL 2244616, at *3 (N.D. Ill. July 28, 2009) (receiver had standing because he seeks "to redress a distinct harm to [the entity in receivership], not just to its customers.").

The receivers in those cases therefore had standing to bring fraudulent transfer claims because the entities in receivership suffered injury distinct from the injury to the creditors. In contrast, here, the alleged injury to the GDA Entities—the fees paid to the Moving Defendants—is the *same injury* allegedly caused to Dragul's investors. In the absence of distinct injury to the entities in receivership, the Receiver has no standing to bring the eleventh and twelfth claims against the Moving Defendants.[7]

[7] The rationale underlying *Scholes* and *Knauer* with respect to fraudulent transfer claims equally applies to unjust enrichment. Because the fees paid to ACF did not harm the GDA Entities but only allegedly the investors, the Receiver also has no standing to bring his twelfth claim for unjust enrichment.

A nearly identical fact pattern was addressed in *Knauer v. Johnathon Roberts Financial Group*, 348 F.3d 230 (7th Cir. 2003). As that court explained, Ponzi schemes have two distinct phases: (1) solicitation and (2) embezzlement. Entities utilized to execute the Ponzi scheme are not harmed during solicitation, even when, as alleged here, fees are taken from investors' funds. This is because the sales of securities ultimately "fatten[] . . . the companies' coffers." *Id.* at 234. During embezzlement, the Ponzi scheme operator then diverts for his own use the proceeds deposited with the corporation, and it is only this process that harms the corporation. A receiver thus has standing to pursue, on behalf of the corporation, claims predicated on the embezzlement phase but not the solicitation phase. *Id.* at 233–34. Courts across the nation have adopted the framework articulated in *Knauer*. *See, e.g.*, *Liberte*, 248 F. App'x at 662–63 (receivers only have standing to pursue claims on behalf of companies for funds taken during embezzlement stage); *Moecker v. Bank of America, N.A.*, No.13-CV-01095-SCB-EAJ, 2013 WL 12159056, at *4 (M.D. Fla. Oct. 21, 2013) ("a corporation has standing to assert claim[s] arising from the embezzlement phase . . . but not those arising from the sales phase").

Knauer is precisely on point. According to the Receiver's theory, the alleged harm to the GDA entities – the fees paid to the Moving Defendants – was caused during solicitation, which ultimately "fattened [GDA's] coffers." Because the GDA Entities benefitted from the solicitation activity, this alleged injury cannot support a fraudulent transfer and unjust enrichment claims by the GDA Entities.

The foregoing analysis confirms the Receiver's standing to sue on behalf of creditors is potentially case dispositive because none of the Receiver's claims against Moving Defendants can be asserted on behalf of Dragul or GDA – the only parties on whose behalf he has standing to sue.

This standing issue controls the outcome of the case and is not a matter that can be cured by further amendment of the FAC.

But even if the Court of Appeals concludes that some of the claims can be asserted on behalf of Dragul or GDA, that determination likely would still eliminate most of the claims, significantly narrow the scope of the case, and make for a more manageable, focused, and streamlined litigation. Resolution of the standing issue therefore would at least promote the orderly disposition of the litigation, if it does not dispose of it completely as to the Moving Defendants.

III. CONCLUSION

For the foregoing reasons, Moving Defendants respectfully request the Court to certify for interlocutory appeal under C.R.S. 13-4-102.1 and C.A.R. 4.2 the question whether the Receiver has standing to bring his claims. Allowing the court of appeals to take a close look at this issue will streamline and potentially dispose of this litigation, to the benefit of the parties, the Court, and the public at large. A proposed order granting the requested relief is submitted herewith.

Dated: November 12, 2020

Respectfully submitted,
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DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: November 12, 2020 10:27 PM FILING ID: F6291E0565259 CASE NUMBER: 2020CV30255
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 Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2020CV30255 Courtroom: 414

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)

Defendant Gary Dragul, along with defendants ACF Property Management, Inc., Alan Fox, Marlin Hershey, and Performance Holdings, Inc., have jointly concurrently moved for certification of interlocutory appeal of whether the Receiver has standing to assert his claims in

EXHIBIT A

this case as raised in those defendants' motions to dismiss the Receiver's First Amended Complaint. ("Standing Certification Motion"). However, Mr. Dragul argued in his motion to dismiss the First Amended Complaint an issue unique to him: that the Receiver cannot sue Mr. Dragul as a matter of law because Mr. Dragul is himself in the Receivership. Mr. Dragul hereby moves for certification of interlocutory appeal of that issue in addition to the standing issue.

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Mr. Dragul conferred with counsel for the Receiver, and the Receiver opposes the relief sought in this Motion.

INTRODUCTION

Mr. Dragul, ACF Property Management, Inc., Alan Fox, Marlin Hershey, and Performance Holdings, Inc., set forth the background of this case and the law applicable to motions to certify for interlocutory appeal at length in the Standing Certification Motion, and Mr. Dragul does not repeat it here. Rather, Mr. Dragul adopts and incorporates by reference that background, legal standard, and analysis.

The Standing Certification Motion does not, however, raise for certification for interlocutory appeal the issue of whether the Receiver may sue Mr. Dragul when Mr. Dragul is himself in the Receivership because that issue is unique to Mr. Dragul. This Motion advances the certification request on this issue.

The three part test articulated by *Indep. Bank v. Pandy*, 383 P.3d 64, 66 (Colo. App. 2015), *aff'd*, 372 P.3d 1047 (Colo. 2016) to determine whether an order may be certified for interlocutory appeal is met. The Court's October 28, 2020 Order ("Order") denying Mr. Dragul's Motion to Dismiss the FAC, with a "DENIED BY COURT" stamp, at least as to the denial of Mr. Dragul's motion refuting the Receiver's ability to sue him, should be certified.

ARGUMENT

Orders may be certified for immediate appeal "when (1) immediate review may promote a more orderly disposition or establish a final disposition of the litigation; (2) the order from which an appeal is sought involves a controlling question of law; and (3) the order from which an appeal is sought involves an unresolved question of law." *Indep. Bank v. Pandy*, 383 P.3d 64, 66, *aff'd,* 372 P.3d 1047. Here, the Order effectively determined that the Receiver could sue Mr. Dragul, a party in the receivership. A review now of that Order meets the *Pandy* test.

I. Immediate Review of Whether the Receiver May Sue Mr. Dragul Will Provide a More Orderly Disposition.

The first factor of *Pandy* is satisfied here because the resolution of the issue whether the Receiver can sue Mr. Dragul is dispositive of the litigation as to Mr. Dragul. If the Receiver cannot sue Mr. Dragul, a party in the Receivership, as a matter of law none of the claims against Mr. Dragul can proceed. As argued fully in Mr. Dragul's Motion to Dismiss First Amened Complaint (filed July 6, 2020) (hereafter, "Dragul Motion to Dismiss"), a Receiver may not sue a party in receivership. Thus, a determination by the Court of Appeals that the Receiver has no authority to sue Mr. Dragul would dispose of the litigation against him. Alternatively, a determination by the Court of Appeals that the Receiver may maintain such an action will enable a more orderly resolution of the litigation because the parties will know that this fundamental issue, representing an all or nothing outcome, will not remain outstanding to frustrate resolution or settlement.

II. Immediate Review of Whether the Receiver May Sue Mr. Dragul Involves a Controlling Issue of Law

The second factor of *Pandy* is whether the Order involves a controlling issue of law. In making this determination, Courts should consider: "(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.'" *Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 612, *reh'g denied* (Oct. 10, 2019), *cert. denied*, 2020 WL 1887932 (Colo. Apr. 13, 2020) (citations omitted).

The *Affiniti* factors support certification. There is public interest support for a determination whether a Receiver can sue the very party in receivership, and public interest is advanced by the lawful exercise of authority by a receiver, an officer of the court. The resolution the question whether the Receiver can sue Mr. Dragul by asserting investor claims avoids inconsistent outcomes where such investors might also assert such claims. Certainly, the resolution of whether the Receiver can sue Mr. Dragul is potentially dispositive of the Receiver's case against Mr. Dragul. Certification of the Order is supported by the second *Pandy* factor.

III. Whether the Receiver May Sue Mr. Dragul is an Unresolved Question of Law

The third factor of *Pandy* concerns whether the issue is an unresolved question of law. Under *Pandy,* such a question must be one of law and not mixed with fact, and one that has not been resolved by either the Colorado Supreme Court or the United States Supreme Court. As argued fully in the Dragul Motion to Dismiss, no decision has been made by the Colorado Supreme Court or the United States Supreme Court concerning whether a receiver can sue a party in the receivership. Accordingly, this third factor is established.

CONCLUSION

The three part test in *Pandy* is met. This Court should grant the motion to certify the question pursuant to C.A.R. 4.2(a) and C.R.S. § 13-4-102.1(1) because the receiver cannot sue Mr. Dragul as a matter of law because Mr. Dragul is himself in the receivership.

Dated this 12th day of November, 2020.

JONES & KELLER, P.C.

s/ Paul L. Vorndran
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ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2020, a true and correct copy of the foregoing **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)** was filed and served via the Colorado Court E-filing system to the following:

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EXHIBIT A

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DISTRICT COURT, DENVER COUNTY
STATE OF COLORADO
Denver District Court
1437 Bannock St.
Denver, CO 80202

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.

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Case No.: 2020CV30255

Division/Courtroom: 414

RECEIVER'S RESPONSE TO DEFENDANTS' MOTIONS FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. §13-4-102.1(1)

EXHIBIT A

Plaintiff, Harvey Sender (the "**Receiver**"), hereby responds to: (1) the Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) pursuant to C.R.S. §13-4-102.1(1) (the "**Standing Motion**") filed by Dragul, the Fox Defendants,[1] and the Hershey Defendants[2] (the "**Movants**"); and (2) Dragul's separate Motion for Certification of Interlocutory Appeal of Unique Issue under C.A.R. 4.2(a) pursuant to C.R.S. § 13-4-102.1(1) filed by Dragul (the "**Dragul Motion**")[3] (jointly, the "**Certification Motions**").

I. Introduction

Through their Certification Motions, Movants ask the Court to allow them to take a premature piecemeal appeal that will delay resolution of this case to the detriment of Dragul's defrauded investors. The Motions are contrary to Colorado's long-standing and strong policy against piecemeal appeals. *See, e.g.*, *Allison v. Engel*, 2017 COA 43, ¶ 31 (2017).

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1 On December 15th, the Receivership Court entered an order approving the Receiver's Settlement Agreement with the Fox Defendants which resolves all claims asserted in this case against them. To the extent the Motion presents arguments unique to the Fox Defendants, they are moot.

2 Capitalized terms not defined here are defined in the First Amended Complaint and the Receiver's Omnibus Response to Defendants' Motions to Dismiss.

3 Dragul also filed an alternative Motion for Reconsideration concerning the same issue of whether the Receiver may sue him while he is subject to the Receivership as the one raised in his Certification Motion. The Receiver therefore incorporates the arguments set forth in his Response to Dragul's Motion for Reconsideration being filed contemporaneously herewith as if fully set forth herein. And, because Dragul's Certification Motion merely incorporates by reference all arguments advanced in his Motion to Dismiss on the issue, in the interest of efficiency, the Receiver hereby incorporates by reference Section II(B) of his Omnibus Response as is fully stated herein in response thereto.

Movants rely on C.R.S. § 13-4-102.1 and C.A.R. 4.2 for their extraordinary request. Under C.R.S. § 13-4-102.1, the court of appeals may permit an interlocutory appeal of "a certified question of law" only if (a) "immediate review may promote a more orderly disposition or establish a final disposition of the litigation;" and (b) the issue to be certified "involves a controlling and unresolved question of law." Pursuant to C.A.R. 4.2, this Court must first certify the issue to the court of appeals for review.

The circumstances in which an interlocutory appeal is available is purposefully limited. *Wilson v. Kennedy*, 2020 COA 122, ¶ 29 (2020). "Those limitations reflect careful consideration by the General Assembly (for instance, in its enactment of section 13-4-102.1(1), which prompted the adoption of C.A.R. 4.2) and the Colorado Supreme Court Civil and Appellate Rules Committees to balance the interests of allowing interlocutory appeals in limited circumstances with the interests of maximizing judicial efficiency and minimizing piecemeal appeals." *Id.* To permit piecemeal interlocutory appeals in cases where the articulated requirements are lacking, would both defeat this carefully crafted balance and frustrate the intent of both the legislature and the rule committees. *Id.* at ¶ 31. It would also be inappropriate considering the limited statutory jurisdiction of Colorado appellate courts. *Id.*

The issue Movants seek to certify is "whether the Receiver has standing to bring his claims against them" in this case. Standing Mot. at 2. Certification of that issue is appropriate only if "(1) immediate review may promote a more orderly

disposition or establish a final disposition of the litigation; (2) the order from which an appeal is sought involves a controlling question of law; and (3) the order from which an appeal is sought involves an unresolved question of law. *Indep. Bank v. Pandy,* 2015 COA 3, ¶ 8 (2015). Because these requirements are not met here, the Certification Motions should be denied.

II. Background

On August 30, 2018, the Court in *Rome v. Dragul, et al.* Case No. 2018CV33011, District Court, Denver, Colorado (the "**Receivership Court**") entered a Stipulated Order Appointing Receiver (the "**Receivership Order**") appointing Harvey Sender receiver for Gary Dragul and the GDA Entities, and their assets, interests, and management rights in related affiliated and subsidiary businesses (the "**Receivership Estate**" or the "**Estate**"). *See* Receivership Order, previously attached to original Complaint as Exhibit 1.

The Receivership Order grants the Receiver the authority to recover possession of Receivership Property from any persons who may wrongfully possess it and to prosecute claims premised on fraudulent transfer and similar theories. *See* Compl. Ex. 1, at ¶ 13(o). It also grants the Receiver the authority to prosecute claims and causes of action against third parties held by creditors of Dragul and the GDA Entitles, and any subsidiary entities for the benefit of creditors of the Estate, "in order to assure the equal treatment of all similarly situated creditors." *See* Compl. Ex. 1, at ¶ 13(s).

Pursuant to the foregoing authority, the Receiver filed his Complaint in this case on January 21, 2020 (the "**Complaint**"), asserting claims against Dragul and several co-conspirators stemming from a complex Ponzi scheme orchestrated by Dragul through which defrauded investors lost over $70 million. The Markusch, Fox, Hershey, and Kahn Defendants (the "**Non-Dragul Defendants**") all played roles in the fraud. Movants (excluding the Kahn Defendants), initially moved to dismiss the Receiver's Complaint. The Kahn Defendants, who are not part of the Movant group here, did not move to dismiss, and filed their Answer on March 17, 2020.

The Receiver filed his First Amended Complaint on June 1, 2020 (the "**Amended Complaint**"). Movants filed motions to dismiss the Amended Complaint on July 6, 2020.[4] The Receiver filed an Omnibus Response to the motions to dismiss on August 17, 2020 (the "**Omnibus Response**"). Dragul and the Fox and Hershey Defendants replied on September 8, 2020. On October 28, 2020, the Court entered four separate orders denying the motions to dismiss.[5]

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[4] The Markusch Defendants' Motion to Dismiss was not filed until July 31, 2020.

[5] The Kahn Defendants are the sole Defendants herein that have filed an Answer to the Amended Complaint, and as such, the case it not yet at issue so proceedings against these Defendants have been stalled while the issues as to the remaining defendants are pending. Additionally, the Receiver and the Fox Defendants have entered into a Settlement Agreement and a motion seeking Receivership Approval thereof was filed in the Receivership Court on December 3rd. If approved, the Fox Settlement will resolve all claims asserted by the Receiver against the Fox Defendants herein.

III. Certification is not appropriate.

In an effort to further delay this case with a detour to the court of appeals, Movants mischaracterize or ignore the Receiver's actual claims. Immediate review here will not promote judicial efficiency and will not, contrary to Movants' argument, finally resolve the claims in the case. And importantly, Movants themselves recognize that the standing issue involves not only legal questions – which may be appropriate for certification – but factual issues, which are not. *See* Standing Mot. at 3 (the standing issue "present[s] important facts).

A. The standing issue is not a pure question of law.

Initially, certification is only appropriate for issues (1) of first impression in Colorado,[6] and (2) which involve purely legal issues, not mixed questions of law and fact. *See Rich v. Ball Ranch P'ship*, 2015 COA 6, ¶¶10-12 (2015). The lynchpin to the Certification Motions is Movants' contention that all of the Receiver's claims in this case are owned by creditors of the Estate, and the Receiver therefore lacks standing to bring them. Standing Mot. at 2, 5.

Movants continue to make this argument notwithstanding the allegations in the Amended Complaint that the Receiver brings his claims not only on behalf of defrauded investors, but also on behalf of the GDA Entities (or SPEs) themselves,

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[6] In their Certification Motions, Movants argue the standing issue is unresolved in Colorado. But in their motions to dismiss, they argued that the issue *had been resolved* previously in *Sender v. Kidder Peabody,* 952 P. 2d 779 (Colo. App. 1997). *See* Dragul Mot. to Dismiss at §§ I(B) and II(A). Both the Fox and Hershey Defendants joined Dragul's argument.

which the Receiver indisputably has standing to pursue. As representative, the Receiver succeeds to the rights of the creditors for whose benefit he was appointed. 2 R. CLARK, Treatise on the Law and Practice of Receivers, §§ 594 (receiver for corporation), 595 (power to avoid fraudulent contracts and conveyances), and 599 (receiver for bank), at pp. 991-992, and 994 (3rd ed. 1992); *see also Good Shepherd Health Facilities of Colo, Inc. v. Dept, of Health,* 789 P.2d 423, 425 (Colo. App. 1989); *see also* Omnibus Resp. at § § II(A)(6). Who owns the claims, and therefore the standing issue, thus involves both questions law and of fact, making it inappropriate to certify. *See Rich*, 2015 COA 6, ¶ 8. Indeed, Movants admit that the standing issue "present[s] important facts," and "involves the application of well-established legal principles to the unique facts at hand." Standing Mot. at 2, 4-5. Thus, the issue Movants seek to certify is not a pure issue of law as is required, and involves factual questions inappropriate for certification.

B. Immediate review will not resolve this case, it will only delay it.

Under *Pandy*, the Court must determine whether certification of its orders denying Movants' motions to dismiss would promote a more orderly disposition or establish a final disposition of the litigation.[7] It will not.

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[7] It is axiomatic that an order denying a motion to dismiss does not end litigation on its merits and is not a final appealable order. *E.g.*, *In re Tri-Valley Distrib., Inc.*, 533 F.3d 1209, 1216 (10th Cir. 2008) (As a general rule, the "denial of a motion to dismiss, *even when the motion is based upon jurisdictional grounds,* is not immediately reviewable." (citing *In re Magic Circle,* 889 F.2d at 954) (emphasis in original).

First, because the Receiver asserts claims of both the investors and on behalf of the defrauded Receivership entities, even if the Receiver were found to lack standing to pursue *investor* claims, his claims to recover for harm to the SPEs in the Estate will remain before this Court. And this Court, not the court of appeals, is in the best position to determine the nature and ownership of the Receiver's claims.

Second, resolving the standing issue for some claims will not resolve all of the twelve claims the Receiver asserts in the Amended Complaint. For example, the Receiver's eleventh claim for relief asserts a claim under CUFTA to recover fraudulent transfers Defendants received *from the GDA Entities* (not from investors) in the Estate. *See* Amd. Compl. at ¶¶ 442-46; *see also* Omnibus Resp. at § II(A)(6)(vi). It is well-established the Receiver has standing to recover fraudulent transfers that deplete the assets of the Estate. *See* Omnibus Resp. at § II(A)(6)(vi), citing *Scholes v. Lehmann*, 56 F.3d 750, 753-4 (7th Cir. 1995); *Lewis v. Taylor*, 2018 CO 76, ¶ 23; *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).

The same is true for the Receiver's twelfth claim for unjust enrichment, which the Receiver plainly has standing to pursue. *See* Omnibus Resp. at § II(A)(6)(vii), citing *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). So even if the Court were to certify the question of the Receiver's standing to pursue investor claims, the claims being asserted on behalf of the GDA Entities, including the claims for fraudulent transfer and unjust enrichment, will remain for adjudication by this Court.

Certification will also delay resolution of the Receiver's claims against other defendants in this case. The Kahn Defendants filed their answer nine months ago and the Markusch Defendants have not sought certification. Regardless of any appellate court advisory opinion regarding receiver standing, the Receiver's claims against the Kahn Defendants and the Markusch Defendants will remain, further undermining the availability and efficacy of an interlocutory appeal. *See Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651, 653 (Colo. App. 2011) (denying certification even when for an issue of first impression because the case involved "numerous claims, counterclaims, cross-claims, and third-party claims, including claims for damages

and claims that do not appear to involve the [issue to be certified]."). The case is still not "at issue" after nearly a year. Certification and acceptance by the court of appeals would stay the case indefinitely. *See* C.A.R. 4.2(e)(2). And, it will prejudice the Receiver's ability to administer the Receivership Estate, and cause undue harm to his creditor constituents.

C. The standing issue is not "controlling."

Certification is appropriate only for "controlling" legal issues. No Colorado court has developed a single definition of "controlling" for purposes of either C.A.R. 4.2 petition or C.R.S. § 13-4-102.1. This is largely because "whether an issue is 'controlling' depends on the nature and circumstances of the order being appealed." *Pandy,* 2015 COA 3, at ¶ 9. Courts consider the following factors to determine whether an issue is controlling: (1) whether the issue is one of widespread public interest; (2) whether the issue would avoid the risk of inconsistent results in different proceedings; (3) whether the issue is "case dispositive;" and (4) whether the case involves "extraordinary facts." *Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.,* 2019 COA 147, ¶ 17 (2019), *reh'g denied* (Oct. 10, 2019), *cert. denied*, 19SC864, 2020 WL 1887932 (Colo. Apr. 13, 2020) (citations omitted). Here, the public interest is best served by allowing this case to proceed without the delay that will be created by an unnecessary appeal so that the Receiver can proceed to administer the Estate. There is no risk of inconsistent results because this case is the only remaining case the

Receiver is pursuing that has not been settled. And as discussed, the issue is not case dispositive.

D. The absence of findings of fact and conclusions is not grounds to certify.

Finally, Movants argue certification is proper because when denying their motions to dismiss the Court did not make specific findings of fact or conclusions of law, instead simply stating their motions were "Denied by the Court." *See* Standing Mot. at 3. Movants cite no authority in support of this agreement, nor is the Receiver aware of any. The Court got it right; both issues of fact and law preclude dismissal of the Receiver's claims and it would be inappropriate to authorize a piecemeal appeal of those issues.

Finally, Movants spend half a dozen pages re-arguing that the Receiver has not stated valid claims against them, and those claims should have been dismissed pursuant to C.R.C.P. 12(b)(5). *See* Standing Mot. at 11-16. But whether the Receiver's Amended Complaint states viable claims for relief is **not** a pure legal issue appropriate for certification.

IV. Conclusion

Certification here is inappropriate here for several reasons. The issue Movants seek to certify is not purely a legal issue, certification will not resolve all of the claim or issues in the case, nor will it promote an orderly disposition of the remainder of the case. Certification will only further delay the case, which is not at issue after nearly a year. The Receiver therefore asks the Court to deny the Certification Motions

and order Movants to answer the Amended Complaint within 10 days so the parties can proceed with disclosures and discovery.

Dated: December 17, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

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EXHIBIT A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 17, 2020, a true and correct copy of the **RECEIVER'S RESPONSE TO DEFENDANTS' MOTIONS FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. §13-4-102.1(1)** 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.

EXHIBIT A

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	DATE FILED: December 31, 2020 1:45 PM FILING ID: 4AE0806B2EF6D CASE NUMBER: 2020CV30255
Plaintiffs: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC vs. Defendants: GARY DRAGUL; BENJAMIN KAHN; THE CONUNDRUM GROUP, LLP; SUSAN MARKUSCH; MARLIN S. HERSHEY; PERFORMANCE HOLDINGS, INC.; OLSON REAL ESTATE SERVICES, LLC; JOHN AND JANE DOES 1-10; and XYZ CORPORATIONS 1-10	**▲COURT USE ONLY ▲** Case Number: 20CV30255 Courtroom: 414
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DEFENDANTS MARLIN S. HERSHEY'S, PERFORMANCE HOLDINGS, INC.'S, AND GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL UNDER C.A.R. 4.2(a) PURSUANT TO C.R.S. § 13-4-102.1(1)

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

I. INTRODUCTION

In his Response to the Moving Defendants' Motion for Certification of Interlocutory Appeal Under C.A.R. 4.2(a) Pursuant to C.R.S. § 13-4-102.1(1) (the "Motion"), the Receiver misstates the discrete issue on which the Moving Defendants seek certification of an interlocutory appeal. The Receiver frames the issue on which the Moving Defendants seek certification as "whether the Receiver has standing to bring his claims against the [Moving Defendants]." However, as clearly stated multiple times in the Motion, the much narrower issue on which the Moving Defendants seek certification for an interlocutory appeal is whether the Receiver has standing to assert claims *on behalf of creditors of the Receivership Estate*. (*See, e.g.*, Motion at pp. 2-3, 5, 8).

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

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

II. ARGUMENT

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

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

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

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

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

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

As set forth in the Motion, whether the question of law for which a movant seeks certification is "controlling" is determined by considering four factors: "(1) whether the issue is one of widespread public interest; (2) whether the issue would avoid the risk of inconsistent results in different proceedings; (3) whether the issue is 'case dispositive'; and (4) whether the

case involves 'extraordinary facts.'" *Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 611 (Colo. App. 2019), *reh'g denied* (Oct. 10, 2019), *cert. denied*, No. 19SC864, 2020 WL 1887932 (Colo. April 13, 2020). The Receiver argues that the public interest "is best served by allowing this case to proceed without the delay that will be created by an unnecessary appeal so that the Receiver can proceed to administer the Estate." (Response at p. 10). The Receiver's argument misses the point as the "public interest" considered in determining whether an issue of law is "controlling" is the public interest in resolving and establishing certainty regarding the issue of law, not the Receiver's interest in how and when this case is litigated. The Receiver similarly misses the point with respect to the avoidance of inconsistent results. The concern is not avoiding inconsistent results in this case or in other cases filed by the Receiver but rather avoiding inconsistent results between this case and lawsuits that have been or could be filed by creditors of the Receivership Estate directly against the Moving Defendants. As noted in the Motion, this is not merely a theoretical concern as at least one lawsuit involving matters alleged in this case has been filed against previous Defendant Alan C. Fox. (Motion at p. 10, fn. 5).

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

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

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

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

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

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

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

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

Respectfully submitted this 31st day of December 2020.

By: /s/Paul M. Grant
Paul M. Grant

Attorneys for Performance Holdings, Inc. and Marlin Hershey

By:/s/Christopher S. Mills
Christopher S. Mills

Attorneys for Gary Dragul

CERTIFICATE OF SERVICE

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

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Michael Thomas Gilbert
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Rachel A. Sternlieb

Gordon and Rees LLP
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Jones & Keller PC
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/s/Paul M. Grant
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DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: December 31, 2020 1:28 PM FILING ID: 80B06E0262AC5 CASE NUMBER: 2020CV30255
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; MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; OLSON REAL ESTATE SERVICES, LLC, a Colorado Limited Liability Company; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10.	▲ 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. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2020CV30255 Courtroom: 414

DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF UNIQUE ISSUE UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. § 13-4-102.1(1)

While Defendant Gary Dragul and several other defendants jointly moved for certification for interlocutory appeal of whether the Receiver has standing to assert third-party creditors' claims ("Standing Certification Motion"), in his separate Motion for Certification of Interlocutory Appeal of Unique Issue Under C.A.R. 4.2(A) Pursuant to C.R.S. § 13-4-102.1(1) ("Motion"), Mr. Dragul sought to certify for appeal an issue unique to him: that the Receiver

EXHIBIT A

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

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

Moreover, Mr. Dragul's unique issue meets the test for certification for interlocutory appeal. Mr. Dragul does not repeat here what the Court already read in his Motion, but to summarize[1]:

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

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

- The Receiver stands in Mr. Dragul's shoes, which means Mr. Dragul would be suing himself;
- The Receiver lacks standing under the doctrine of *in pari delicto* to sue the people or entities in Receivership;
- The order appointing the Receiver enjoined all actions against the people and entities in Receivership, including against Mr. Dragul;
- Mr. Dragul already turned over all his assets related to or derived from investor funds, meaning any recovery the Receiver might obtain from this action would be an unlawful double-recovery;
- When the Receiver was appointed, Mr. Dragul turned over all his information including his attorney-client privileged information, which the Receiver is now using against Mr. Dragul.

- This issue meets the test for certification for interlocutory appeal because:
  - This issue is case-dispositive as to Mr. Dragul—if, as Mr. Dragul demonstrates, the Receiver may not sue Mr. Dragul, all of the claims against Mr. Dragul will be dismissed;
  - Immediate appellate review of this issue will provide a more orderly disposition of the case because otherwise, this case might proceed to judgment then be reversed on appeal only to start all over again with the prospect that the other defendants might be similarly impacted, and this uncertainty will frustrate potential resolution;
  - This issue involves a controlling issue of law because: (1) the scope of a receiver's authority is a matter of public interest since it affects not only the

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

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

CONCLUSION

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

Dated this 31st day of December, 2020.

JONES & KELLER, P.C.

s/ Christopher S. Mills
Paul L. Vorndran, #22098
Christopher S. Mills, #42042

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2020, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL OF UNIQUE ISSUE UNDER C.A.R. 4.2(A) PURSUANT TO C.R.S. § 13-4-102.1(1)** was filed and served via the Colorado Court E-filing system to the following:

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EXHIBIT A

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: March 18, 2021 3:56 PM 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;
>
> * * * *
>
> (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.

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[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:
>
> (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.

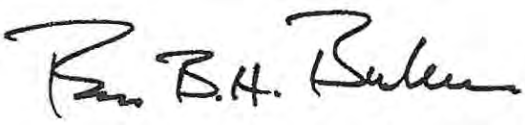
Here, the court's orders denying Defendants' motions to dismiss necessarily imply the court's rejection of their principal arguments that the Receiver lacks standing to pursue the claims against them because those claims properly belong to the creditors, including the investors, and not the Receivership 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

EXHIBIT A

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO Court Address: 1437 Bannock St., Denver, CO 80202	DATE FILED: March 18, 2021 3:58 PM 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: 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)

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.

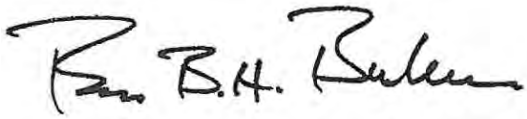
Accordingly, for all these reasons, as well as all those set forth in the Order on the Defendants' Collective Motion, the court finds that it is appropriate to certify the unique issue presented by Defendant Dragul.

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

Your filing has been successfully submitted to the court. Your filing is not considered final until the court accepts it.

Filing Information:

Filing ID: 8D136AFCEF466
Court Location: Court of Appeals
Case Number: Pending Court Assignment
Authorized Date: 04/01/2021 6:06 PM
Submitted By: Renae Mesch

Filing Party(ies):

Party	Type	Status	Attorney
Gary J Dragul	Petitioner	Active	Christopher Stephen Mills (Jones & Keller PC)
Marlin S Hershey	Petitioner	Active	Christopher Stephen Mills (Jones & Keller PC)
Performance Holdings Inc	Petitioner	Active	Christopher Stephen Mills (Jones & Keller PC)

Documents:

Document ID	Document	Title	Statutory Fee	Security
A2B5FDE219CC1	Notice of Appeal	Petition for Interlocutory Appeal Pursuant to CAR 4 2	$223.00	Public
2880D23D1190E	Exhibits	Exhibit Index	$0.00	Public
2DD586BAB74E5	Exhibits	Exhibit 1 - Order 8 13 2018	$0.00	Public
A3E1FE22BC23A	Exhibits	Exhibit 2 - Amended Complaint 6 1 2020	$0.00	Public
8BE0F665BFA0A	Exhibits	Exhibit 3 - Dragul Mtn to Dismiss 7 6 2020	$0.00	Public
45D8647F10AD3	Exhibits	Exhibit 4 - 7 6 2020 Def Mtn to Dismiss	$0.00	Public
7E20E6E6515AE	Exhibits	Exhibit 5 - 8.17.2020 Receiver's Omnibus Response	$0.00	Public
480710BE8F561	Exhibits	Exhibit 6 - 9 8 2020 Dragul Reply	$0.00	Public
B5EE874FBE326	Exhibits	Exhibit 7 - Defs Reply	$0.00	Public
77CC304F81E42	Exhibits	Exhibit 8 - 10 28 2020 Dragul Mtn to Dismiss	$0.00	Public
DE9CE9C4C6403	Exhibits	Exhibit 9 - 10 28 2020 Order	$0.00	Public
37927C5ADC830	Exhibits	Exhibit 10 - 11 12 2020 Dragul et al Mtn for Cert	$0.00	Public

EXHIBIT A

Document ID	Document	Title	Statutory Fee	Security
93EF713758F27	Exhibits	Exhibit 11 - 11 12 2020 Dragul Mtn for Cert	$0.00	Public
FF1A3DF1D3572	Exhibits	Exhibit 12 - 12 17 2020 Receiver Response	$0.00	Public
40784E6155D66	Exhibits	Exhibit 13 - 12 31 20 Defs Reply re Mtn for Cert	$0.00	Public
14E198452A258	Exhibits	Exhibit 14 - 12 31 20 Dragul Reply	$0.00	Public
D7DEEA7461CA9	Exhibits	Exhibit 15 - 3 18 2021 Order	$0.00	Public
59E2541FF92B1	Exhibits	Exhibit 16 - 3 18 2021	$0.00	Public

Courtesy Copy(ies):

Party	Type	Attorney	Organization	Method
No results were found.				

Submission Options:

Note To Clerk: N/A
Authorizer: Christopher Stephen Mills
Submit Options: Submit to the court.

Billing Information:

Statutory Filing Fees: $223.00
E-Filing Fees: $12.00
Courtesy Copy Fees: $0.00
Total Fees: $235.00
Billing Reference: 16488.001

EXHIBIT A