COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: May 4, 2021 3:34 PM FILING ID: CB046D9F951F3 CASE NUMBER: 2021CA483
Petition for Interlocutory Appeal from: Denver District Court Honorable Ross B.H. Buchanan Dist. Court Case No. 2020CV30255	
Plaintiff-Appellee: Harvey Sender as Receiver for Gary Dragul, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC **v.** **Defendants-Appellants:** Performance Holdings, Inc, Gary Dragul and Marlin Hershey	▲COURT USE ONLY▲
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RECEIVER'S RESPONSE TO
PETITION FOR INTERLOCUTORY APPEAL

Table of Contents

I. Introduction

The Petition[1] fails to meet the requirements of C.A.R. 4.2(b) and should be rejected. As to the first issue presented, an interlocutory appeal on the Receiver's standing to pursue claims of third-party creditors will not dispose of the litigation nor promote a more orderly disposition. *See* C.A.R. 4.2(b)(1). No matter the outcome on appeal, a trial on the merits will be required as to the claims asserted on behalf of the GDA Entities,[2] which are part of the Receivership Estate and not "third-party creditors."

Also, the relevant District Court order does not involve a *controlling* and unresolved *question of law*. *See* C.A.R. 4.2(b)(2). The question presented is not "controlling" primarily because it is not "case dispositive." *See Affiniti Colo., 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). The Petition does not present a

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1 Gary Dragul's, Marlin Hershey's, and Performance Holding, Inc.'s ("Movants") Petition for Interlocutory Appeal Pursuant to C.A.R. 4.2 (filed April 1, 2021) (the "Petition").

2 The "GDA Entities" refers to GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and a number of single purpose entities.

purely legal question; rather, it would require this Court to resolve a mixed question of fact and law, which is not this Court's role.

The second issue presented also fails to satisfy the requirements of C.A.R. 4.2(b). Whether the Receiver can sue Dragul is not case dispositive, will not streamline the litigation, and does not involve an unresolved question of law. The Court should therefore decline to grant interlocutory review on that issue.

II. Procedural and Factual Background

The Receiver was appointed to manage, stabilize, and administer the assets of Dragul and the GDA Entities primarily for the benefit of defrauded investors after Dragul was indicted on nine counts of securities fraud.[3] 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* Pet., Ex. 1, ¶ 13(o). It also grants the

[3] A subsequent indictment added five additional counts of securities fraud.

Receiver authority to prosecute claims of creditors "to assure the equal treatment of all similarly situated creditors." *Id.* ¶ 13(s).

The Receiver's Amended Complaint asserts claims against Dragul and his co-conspirators for, *inter alia,* securities fraud and fraudulent transfers arising from a Ponzi scheme Dragul orchestrated which defrauded investors of more than $50 million. Movants' Petition seeks interlocutory review of the District Court's orders denying their Rule 12(b) motions to dismiss the Amended Complaint.

On November 12, 2020, Movants filed motions pursuant to C.R.S. § 13-4-102.1(1) seeking certification for interlocutory review. On March 18, 2021, the District Court entered two orders certifying the following issues for appeal: (1) "whether the Receiver has standing to bring the claims against Defendants which he has asserted in the First Amended Complaint";[4] and (2) whether the Receiver may sue Dragul,

[4] Movants attempt to recast and narrow this issue as whether "a receiver [has] standing to assert claims belonging to third-party creditors of the receivership estate?" Pet. at 8. Relying on ample authority, the District Court correctly concluded the Receiver has standing to sue on behalf of investors and may sue Dragul individually.

whose pre-appointment assets are presently part of the Receivership Estate. Pet., Ex. 15, at 9 & Ex. 16, at 3.[5]

III. Argument

This Court need not defer to the District Court's findings as to the propriety of an interlocutory appeal. *Adams v. Corrections Corp. of Am.*, 264 P.3d 640, 643 (Colo. App. 2011). The Court has significant discretion when deciding whether to accept an interlocutory appeal. *Id.*; *see also* C.A.R. 4.2(a); *Tomar Dev., Inc. v. Bent Tree, LLC*, 264 P.3d 651 (Colo. App. 2011).

It is, however, well-settled that piecemeal appeals of non-final orders are greatly disfavored. *Allison v. Engel*, 395 P.3d 1217, 1224 (Colo. App. 2017); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1189 (10th Cir. 2006) ("Interlocutory appeals have long been disfavored in the law, and properly so. They disrupt and delay the proceedings below.");[6] *see also Par. Oil Co., Inc. v. Dillon Cos., Inc.*, 05-CV-00081 REBPAC, 2006 WL

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[5] Any judgment against Dragul would be recovered from his post-appointment assets.

[6] Colorado courts consider federal caselaw interpreting analogous federal interlocutory appeal statutes. *Adams*, 264 P.3d at 643.

2790429, at *2 (D. Colo. Sept. 27, 2006) (courts routinely reject interlocutory appeals that will delay instead of expedite the underlying case). Interlocutory appeals are purposefully limited, reflecting "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 allowing interlocutory appeals only in limited circumstances with the interests of maximizing judicial efficiency and minimizing piecemeal appeals." *Wilson v. Kennedy*, 2020 COA 11, ¶ 29.

An interlocutory appeal is only appropriate where (1) "immediate review may promote a more orderly disposition or establish a final disposition of the litigation"; *and* (2) the order below "involves a controlling and unresolved question of law." Movants must show "that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Judicial Watch, Inc. v. Nat'l Energy 122 Policy Dev. Group*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002); *see also Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1067 (D. Ariz. 2015).

A. Interlocutory review is not appropriate on whether the Receiver has standing to assert investor claims.

Whether the Receiver has standing to bring investor claims is not a controlling legal issue nor is it outcome determinative. This Court is being asked to render a purely advisory opinion: regardless of how this issue is resolved, a trial below will be required.

1. Immediate review will further delay this case not promote a more orderly or final disposition.

Interlocutory appeal of the standing issue will prolong, rather than simplify or streamline this case. No matter what this Court were to decide, a trial on the merits will still be necessary. *First*, the Receiver has asserted claims on behalf of both investors and the GDA Entities. Movants have not sought interlocutory review of whether the Receiver has standing to pursue claims on behalf of the GDA Entities, which he indisputably does.[7] Thus, even if this Court determined that the Receiver

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[7] *See, e.g.*, *Good Shepherd Health Facilities of Colo., Inc. v. Dept. of Health*, 789 P.2d 423, 425 (Colo. App. 1989); 2 R. CLARK, TREATISE ON THE LAW AND PRACTICE OF RECEIVERS, §§ 594 and 595 (3rd ed. 1992).

lacks standing to pursue *investor* claims, his claims on behalf of the *GDA Entities* will remain.[8]

Second, determining whether a Receiver can bring investor claims will not resolve all claims the Receiver has asserted below. For example, the Receiver's eleventh claim seeks to recover fraudulent transfers under CUFTA. *See* Am. Compl. ¶¶ 442-46 (Pet., Ex. 2). For at least 35 years, it has been almost universally recognized that receivers have standing to bring claims under the Uniform Fraudulent Transfer Act to recover Ponzi scheme transfers. *See*, *e.g.*, *Scholes v. Lehmann*, 56 F.3d 750, 754 (receivers have standing under UFTA to recover fraudulent transfers because they deplete the assets of the entity in receivership). The Colorado Supreme Court cited *Scholes* with approval in *Lewis v. Taylor*, 2018 CO 76, ¶ 23, and this rule has been adopted by many other courts.[9]

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[8] The Receiver's standing to pursue claims on behalf of the GDA Entities is both well-established and a separate legal question on which Movants have not sought review. *See* Pet. at 19.

[9] *See 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.

The District Court correctly followed the overwhelming weight of authority and held the Receiver has standing to pursue his fraudulent transfer claims. Accordingly, the Receiver's fraudulent transfer claim will remain for trial regardless of an interlocutory appeal.[10]

Movants' reliance on *Eberhard v. Marcu*, 530 F.3d 122 (2nd Cir. 2008), and *Troelstrup v. Index Futures Grp., Inc.*, 130 F.3d 1274 (7th Cir. 1997), for the proposition the Receiver lacks standing to assert fraudulent transfer claims is misplaced. In *Eberhard*, the court held that a receiver appointed for an individual lacked standing to bring fraudulent

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2008); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at * 2-3 (D. Utah May 14, 2009) (citing cases).

[10] The same is true for the Receiver's twelfth claim for unjust enrichment, which he plainly has standing to pursue. *See 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 Cap. of N.A., Inc.*, 288 F. Supp. 2d 844, 854 (N.D. Ohio 2003) (receiver properly asserted claim for unjust enrichment).

conveyance claims under New York law because a transferor cannot sue to avoid his own fraudulent conveyance. *Eberhard*, 530 F.3d at 134. That case is unique and distinguishable, however, because the receiver had been appointed only over an individual's assets, not the assets of the companies he ran. The 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 transfers 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.). In *Troelstrup* the receiver was likewise appointed over only the Ponzi scheme operator and not the corporate entities used to perpetrate the Ponzi scheme. *Troelstrup,* 130 F.3d 1276-77. There, the court 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 1274.

Third, immediate review of whether the Receiver can bring investor claims will not streamline the litigation or otherwise promote a more orderly disposition because the Receiver's claims on behalf of the investors are nearly identical to his claims on behalf of the GDA Entities. Movants incorrectly assert that the fourth (civil theft), fifth (COCCA violations) and sixth (aiding and abetting COCCA violations) claims are asserted *only* on behalf of investors. *See* Pet. at 20-21. Not so. These claims are asserted on behalf of the Estate, the defrauded investors, ***and*** the GDA Entities, and allege that the defendants' pilfering of the GDA Entities' accounts harmed the Entities themselves, and derivatively, the investors. *See* Pet., Ex. 2, ¶¶ 372, 379-381, 393-395. Movants also incorrectly contend that the Receiver's seventh claim for breach of fiduciary duty against Dragul is asserted only on behalf of investors. Pet. at 21-22. But that claim too is asserted on behalf of both investors ***and*** the GDA Entities. *See id*. at ¶¶ 409-420 (alleging Dragul owed duties to the "GDA Entities and their member investors," and that his breaches harmed both). Because the Receiver's claims on behalf of the GDA Entities are nearly coterminous with the investor claims, an

interlocutory appeal of whether the Receiver has standing to bring investor claims would not "promote an orderly disposition" of the litigation.

Tomar Development is instructive. There, this Court declined to exercise jurisdiction because regardless of interlocutory review, "the trial court will need to consider the myriad of other pending claims, counterclaims, cross-claims and third-party claims[,]" all of which would be unaffected by the outcome of any interlocutory appeal. 264 P.3d at 653. "As a result, we do not see why our accepting the proposed interlocutory appeal would promote a more orderly or final disposition of the litigation . . . ." *Id*. The same is true here. Even were this Court to grant interlocutory review and conclude the Receiver cannot pursue investor claims, the claims asserted on behalf of the GDA Entities would remain for trial. Interlocutory review will therefore only further delay this case, contrary to the mandate of C.A.R. 4.2.

2. The District Court's Order on standing does not involve a controlling question of law.

Because the first prong of C.A.R. 4.2(b) is not met, the Court need not consider the second. Indeed, whether the issue involves a controlling

question of law is closely tied to the requirement that resolution of the issue will promote a more orderly or final disposition. "[A] legal question cannot be termed 'controlling' if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal." *Bank of N.Y. v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1985).

The Petition nevertheless fails independently under the second prong, which itself consists of two sub-parts. First, the question must be "controlling." Second, it must involve a pure question of law. *See* C.A.R. 4.2; C.R.S. § 13-4-102.1. The Petition satisfies neither sub-part of C.A.R. 4.2(b)(2).

a. The standing issue is not "controlling."

No Colorado court has developed a single definition of "controlling" under C.A.R. 4.2 or C.R.S. § 13-4-102.1 because "whether an issue is 'controlling' depends on the nature and circumstances of the order being appealed." *Independent Bank v. Pandy*, 2015 COA 3, ¶ 9, *aff'd*, 2016 CO 49. To assist in this determination, Colorado courts 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 Colo., LLC,* 2019 COA 147, ¶ 17 (citations omitted). These factors militate against interlocutory review in this case.

First, the public interest strongly favors efficient resolution of this case, which is likely the last remaining Estate asset to be administered. This case has been pending for over 15 months and is not yet at issue. An interlocutory appeal will only further delay the adjudication of the GDA Entities' claims, at the very least, and any recovery on those claims will ultimately benefit investors. In Ponzi scheme receiverships such as this, the Receiver plays a critical role in protecting the interest of numerous defrauded investors who, individually, may lack the resources or capacity necessary to pursue recovery. *S.E.C. v. Vescor Cap. Corp.*, 599 F.3d 1189, 1197 (10th Cir. 2010) ("[T]he 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." (citation omitted)). The public's interest is to facilitate the Receiver's collection

and distribution of Estate assets, and closing the Receivership Estate. This will be undermined by an interlocutory appeal.

Disregarding the significant prejudice an appeal will cause to the Estate's creditors *in this case*, Movants argue an advisory opinion here may have potential value for *future* litigants. *See* Pet. at 1, 7, 17, 24. This underscores that Movants seek an advisory opinion on an issue that will not be outcome-determinative here. But this Court is not empowered to issue advisory opinions. *Bickel v. City of Boulder*, 885 P.2d 215, 234 (Colo. 1994); *Tippett v. Johnson*, 742 P.2d 314, 315 (Colo. 1987).

Movants also argue that 28 U.S.C. § 1292(a)(2) evidences Congress' recognition that the conduct of a receiver is a matter of public interest. *See* Pet. at 15-16. But Section 1292(a) has limited application,[11] not present here, and does not support Movants' position that the Receiver's ability to pursue creditor claims in this case involves a controlling question of law.

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[11] The statute authorizes interlocutory appeals only of (1) an order appointing a receiver, (2) the refusal to wind up the receivership, and (3) the refusal to take steps to accomplish the purposes of the receivership. *F.T.C. v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1235 (9th Cir. 1989).

Second, there is no risk of inconsistent results because this is the last remaining case being pursued by the Receiver. Because there are no parallel claims pending, Movants argue that creditors *could* assert their own claims at some future date. Pet. at 17. But nonexistent, hypothetical claims do not pose a legitimate risk. This is particularly true where, as here, creditors who filed claims in the Receivership are precluded from pursuing individual claims, and any other creditors would need to first seek and obtain relief from stay in the Receivership Court to bring individual claims. *See* Pet., Ex. 1, ¶¶ 16 & 26.[12] Thus, as a practical matter, there is no risk of inconsistent results.

Third, the issue is not case dispositive. Irrespective of this Court's ruling on the standing issue, the Receiver's claims on behalf of the GDA Entities will survive and have to be tried. *See* § III.A.1, *supra*.

Fourth, though this case involves egregious conduct, the overall scheme is no different than other cases in which receivers are appointed

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[12] Movants also suggest that investors could assert claims after the Receivership is closed. Pet. at 17. While possible, to the extent not barred by applicable limitations periods, those claims would likely be subject to issue and/or claim preclusion.

to administer the assets of Ponzi schemers for the benefit of defrauded investors.[13] Therefore, the Receiver's standing to pursue investor claims is not "controlling."

b. The standing issue is not a pure legal question.

Movants fare no better under the second fulcrum of C.A.R. 4.2(b)(2). Generally, a question is one of law where it is "'something the court of appeals [can] decide quickly and cleanly, without having to study the record.'" *Rich v. Ball Ranch P'ship*, 2015 COA 6, ¶ 12 (quoting *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000)). The issue must turn on a "pure question of law," not a mixed question of law and fact. *Id.* As one commentator explained, "to any extent the issue requires reference or resort to disputed facts or the record, it will likely doom the request for interlocutory appeal." Tory Weigand, *Discretionary*

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[13] *See Larsen v. Lauriel Inv., Inc.*, 161 F. Supp. 2d 1029, 1046 (D. Ariz. 2001); *A. Farber & Partners, Inc. v. Garber*, 305 F. App'x 489, 491 (9th Cir. 2008); *Dale v. ALA Acquisitions, Inc.*, 203 F. Supp. 2d 694, 703-04 (S.D. Miss. 2002); *Dale v. Frankel*, 131 F. Supp. 2d 852, 854 (S.D. Miss. 2001); *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 (5th Cir. 2012); *Grant Thornton, LLP v. F.D.I.C.,* 435 F. App'x 188, 200-01 (4th Cir. 2011).

Interlocutory Appeals under 28 U.S.C. § 1292(b): A First Circuit Survey and Review, 19 ROGER WILLIAMS U. L. REV. 183, 203–04 (2014).

The Court need look no further than the Petition to conclude that reference to the record is required to resolve the standing question. *See* Pet. at 8-11, 20-22. & Ex. 2 thereto. The crux of Movants' argument is that all claims asserted by the Receiver against them in the Amended Complaint are owned by the Estate's creditors and the Receiver lacks standing to pursue them. Pet. at 20-23. They make this argument notwithstanding that the Receiver's claims are asserted both on behalf of defrauded investors, *and on behalf of the GDA Entities*. And to determine whether the Receiver has standing to prosecute certain claims, this Court would have to carefully analyze the factual allegations in the 448 paragraph Amended Complaint and determine which claims and portions thereof are asserted solely on behalf of investors and which are asserted on behalf of the GDA Entities. This is precisely the type of in-depth analysis the *Rich* court, and countless others, have cautioned against. *Rich*, 2015 COA 6, ¶ 12; *see also Ahrenholz*, 219 F.3d at 676. Nothing about this process would be "quick" or "clean." *Rich*, 2015 COA

6, ¶ 12. Because the Receiver's standing to pursue claims on behalf of the creditors involves mixed questions of fact and law, interlocutory review is inappropriate.

B. Appellate review is not appropriate on the issue of whether the Receiver may sue Dragul.

Immediate review of the second issue raised by Dragul – whether the Receiver can sue him while both he and his assets are subject to the Receivership – is also not appropriate. As discussed above, immediate review would not "establish a final disposition of the litigation" because, at minimum, the Receiver's claims on behalf of the GDA Entities will remain. Dragul however argues that immediate review may lead to final disposition of the case *against* him. Pet. at 26. But that is not the standard. Instead, the touchstone is whether immediate review will "establish a final disposition of the litigation." C.A.R. 4.2(b)(1). Immediate review of the Receiver's ability to sue Dragul could not possibly dispose of the entire case.

Nor would dismissal of the claims against Dragul "promote a more orderly disposition." C.A.R. 4.2(b)(1). Only one of the Receiver's claims is asserted against only Dragul – the claim for Breach of Fiduciary Duty.

See Pet., Ex. A, ¶¶ 118-120. Each of the other claims asserted in the Amended Complaint is also asserted against at least one additional defendant. *See* Pet., Ex. A, at 85-126. Thus, dismissing Dragul would not materially streamline the litigation.

For the same reasons discussed above relative to the first issue presented, the Receiver's ability to sue a party in Receivership does not involve an unresolved "controlling" question of law. C.A.R. 4.2(b)(2). As to public interest, for the reasons discussed above, the public interest strongly favors uninterrupted administration of the Estate without further delay.

There is no risk of inconsistent results because, as discussed above, no investor has sued Dragul, and there is virtually no possibility that any such claim could be asserted. Finally, when considering whether an issue is controlling, "[t]he critical requirement is that the question be one having the potential for substantially accelerating disposition of the litigation. If the correct answer to the question will end the matter pending, the question is controlling." *In re Grand Jury Proceedings June 1991*, 767 F. Supp. 222, 225 (D. Colo. 1991) (citing 9 J. WM. MOORE ET AL.,

FEDERAL PRACTICE ¶ 110.22[2]). That is not the case here. Dismissing Dragul would resolve only one of the twelve pending claims for relief.

IV. Conclusion

Interlocutory appeal is disfavored and only appropriate in limited circumstances. *See Allison*, 395 P.3d at 1217. Those circumstances are not present here. Most significantly, immediate review of either or both of the issues presented will not finally dispose of the case, nor would it promote a more orderly disposition. And the District Court's orders denying Movants' Rule 12(b) motions do not involve controlling, purely legal questions. Thus, the Court should deny the Petition.

Dated: May 4, 2021

Respectfully Submitted,

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C.A.R. 32(h) CERTIFICATE OF COMPLIANCE

I hereby certify that this Response complies with all requirements of C.A.R. 4.2, C.A.R. 27 and C.A.R. 32, including all formatting requirements set forth in these Rules. Specifically, the undersigned certifies that:

This Response complies with the word limit set forth in the Court's April 13, 2021 Order: it contains 3,857 words.

The Response complies with the requirements set forth in C.A.R. 27(a)(3) and (d).

I acknowledge that my Response may be stricken if it fails to comply with any of the requirements in C.A.R. 32.

ORIGINAL SIGNATURE ON FILE WITH THE OFFICES OF
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: *s/ Michael T. Gilbert*
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2021 a true and correct copy of the foregoing was electronically filed via CCE and served on the following:

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