

<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 17, 2021 6:42 PM FILING ID: 43CE06C25B6C3 CASE NUMBER: 2021CA483</p>		
<p>Petition for Interlocutory Appeal From: DENVER DISTRICT COURT Honorable Ross B.H. Buchanan District Court Case Number: 2020CV30255</p>			
<p>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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: right;">Court of Appeals Case No. 2021CA483</p>		
<p>Attorneys for Defendants-Appellants:</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>Christopher S. Mills, #42042 Paul L. Vorndran, #22098 JONES & KELLER, P.C. 1675 Broadway, 26th Fl. Denver, CO 80202 Phone: (303) 573-1600 Fax: (303) 573-8133 cmills@joneskeller.com pvorndran@joneskeller.com <i>Counsel for Gary J. Dragul</i></p> </td> <td style="width: 50%; vertical-align: top;"> <p>Thomas E. Goodreid, #25281 Paul M. Grant, #26517 Goodreid & Grant LLC 7761 Shaffer Parkway, Suite 105 Littleton, Colorado 80127 Phone: 303-296-2048 (Goodreid) Phone: 720-810-4235 (Grant) t.goodreid@comcast.net pgrant@goodreidgrant.com <i>Counsel for Marlin S. Hershey, Performance Holdings, Inc.</i></p> </td> </tr> </table>		<p>Christopher S. Mills, #42042 Paul L. Vorndran, #22098 JONES & KELLER, P.C. 1675 Broadway, 26th Fl. Denver, CO 80202 Phone: (303) 573-1600 Fax: (303) 573-8133 cmills@joneskeller.com pvorndran@joneskeller.com <i>Counsel for Gary J. Dragul</i></p>	<p>Thomas E. Goodreid, #25281 Paul M. Grant, #26517 Goodreid & Grant LLC 7761 Shaffer Parkway, Suite 105 Littleton, Colorado 80127 Phone: 303-296-2048 (Goodreid) Phone: 720-810-4235 (Grant) t.goodreid@comcast.net pgrant@goodreidgrant.com <i>Counsel for Marlin S. Hershey, Performance Holdings, Inc.</i></p>
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<p style="text-align: center;">GARY DRAGUL’S, MARLIN HERSHEY’S, AND PERFORMANCE HOLDINGS, INC.’S REPLY IN SUPPORT OF PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO C.A.R. 4.2</p>			

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply complies with the requirements of C.A.R. 4.2, C.A.R. 28, and C.A.R. 32, to the extent applicable, including applicable formatting requirements set forth in these rules. Moreover, it complies with this Court's April 13, 2021 Order. Specifically, the undersigned certifies that:

The Reply complies with the word limit set forth in this Court's April 13, 2021 Order. It contains 1,989 words. This Reply is also limited to whether the Petition meets the requirements of C.A.R. 4.2(b), and does not address the merits of the underlying questions of law, as directed in the April 13, 2021 Order.

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

INTRODUCTION

The Receiver's Response to Petition for Interlocutory Appeal ("Response") primarily rests on his assertion that even if this Court determined (1) receivers lack standing to assert third-party creditors' claims, and (2) receivers cannot sue people or entities over whom they serve as receiver, claims asserted on behalf of the GDA Entities¹ would remain, meaning immediate review would not promote a more orderly or final disposition. But none of the Receiver's claims are properly alleged on behalf of the GDA Entities. Even if some were, this Court's immediate review will lead to a more orderly disposition because it would eliminate many of the claims and the main defendant, and dramatically reduce the scope of discovery.

ARGUMENT

I. Appellants' Petition Satisfies C.A.R. 4.2(b) and Is Appropriate for Immediate Review

A. Immediate Review of Both Questions of Law Will Promote a Final and More Orderly Disposition

Addressing the Receiver's standing to assert third-party creditors' claims will promote a final disposition because, while the District Court can determine on remand which claims belong to third-party creditors, most if not all the claims do.

¹ Capitalized words are defined in Gary Dragul's, Marlin Hershey's, and Performance Holdings, Inc.'s Petition for Interlocutory Appeal Pursuant to C.A.R. 4.2 ("Petition").

(Pet. 20-23.) The Receiver does not dispute that his first three claims are expressly alleged exclusively on behalf of third-party investors/creditors. (*See* Pet. 20-21). He argues receivers can assert CUFTA and unjust enrichment like in his eleventh and twelfth claims (Resp. 8-10), but all the cases he cites address when the *entity in receivership's* funds are fraudulently transferred away or unjust enrichment came at *its* expense, and hold a receiver *cannot* assert third-party creditors' claims (*id.*). Only creditors may assert CUFTA claims, C.R.S. §§ 38-8-105, 108, and the Receiver never alleged the GDA Entities were creditors. He also alleged no facts to show the alleged enrichment came at the GDA Entities' expense.

The Receiver argues he alleged the Civil Theft, COCCA, and aiding and abetting COCCA claims on behalf of the GDA Entities. (Resp. 11.) But none of the FAC paragraphs he cites support that. (*Id.*; Pet. Ex. 2 ¶¶372 (for Civil Theft, asserting Receiver has standing but alleging theft from and damages to only third-party investors, not GDA Entities (¶373-377); ¶¶379-81 (asserting standing for COCCA claim, but alleging injury only to third-party investors (¶¶383, 387, 389), except for one fact-free assertion of damage to the GDA Entities (¶391); ¶¶393-95 (asserting standing for COCCA aiding and abetting, but alleging no damage to the GDA Entities (¶¶402, 407)). He asserts the breach of fiduciary duty claim is on behalf of the GDA Entities, but failed to allege what duty was owed to the GDA

Entities, how it was breached, or what injury the GDA Entities suffered, alleging these only for investors. (*Id.* ¶¶410, 412-415.) It appears all the claims would be subject to final disposition.

However, final disposition is not required. C.A.R. 4.2(b) permits interlocutory review when it “*may*” promote final disposition—the mere possibility is facially sufficient. Rule 4.2(b) also permits immediate review when it *may* promote a more *orderly* disposition, even if not final. Reviewing the Receiver’s standing to assert third-party creditors’ claims would promote a more orderly disposition because it will resolve at least three, and perhaps all, of the Receiver’s claims.²

But even if *all* the claims were asserted on behalf of the GDA Entities (they are not), review would still promote a more orderly disposition because the scope of discovery would be dramatically reduced. If only GDA Entity claims are involved, Appellants would need discovery of only the GDA Entities’ damages. But if the Receiver pursues creditors’ claims, the Parties would need discovery

² That distinguishes this case from *Tomar Development, Inc. v. Bent Tree, LLC*, 264 P.3d 651 (Colo. App. 2011). (Resp. 12.) In *Tomar*, the court declined review of an issue because it might resolve no more than one of many claims, the plaintiffs could reallege that same claim under a different theory, and they could achieve the same relief under a different claim. 264 P.3d at 653-654.

against each creditor to determine what damages each creditor sustained.³

Approximately 261 creditors filed claims in the equitable claims pool. (*See* Ex. 17 at 13, attached hereto.) Avoiding discovery against that many third parties will promote a much more orderly disposition.

Determining whether a receiver may sue a party in the receivership will also establish a final disposition because if the answer is no, that ends the litigation as to Mr. Dragul. The Receiver argues this is not a final disposition because claims against other defendants would remain. (Resp. 19.) As addressed above, that is incorrect. The Receiver also cites no authority that ending the entire case as to one party is insufficient, and the District Court held otherwise. (Pet. Ex. 16 at 2.)

Resolving this question would also promote a more orderly disposition because it would eliminate the remaining claim alleged solely against Mr. Dragul, and carve out Mr. Dragul from the seven other claims alleged against defendants including Mr. Dragul. (*See* Pet. Ex. 2 generally). Furthermore, it would eliminate a party for motions practice and significant discovery.

³ The District Court noted that if the Receiver lacks standing to assert third-party creditors' claims, "[t]he damages would be confined to those of the GDA entities, as distinct from those of the defrauded investors." (Pet. Ex. 15 at 5.)

B. Both Questions of Law Are Controlling

In determining if an issue is controlling, courts consider whether it is one of widespread public interest, whether it would avoid the risk of inconsistent results in different proceedings, whether the issue is case dispositive, and whether the case involves extraordinary facts. *Affiniti Colorado, LLC v. Kissinger & Fellman, P.C.*, 461 P.3d 606, 612 (Colo. App. 2019). In *Affiniti*, the court determined the issue was controlling based only on the case-dispositive and public-interest factors, never analyzing the other two. *Affiniti*, 461 P.3d at 612-13. Thus, while all four factors demonstrate the issues here are controlling, fewer would still be sufficient.

1. Both Questions of Law Are of Widespread Public Interest

The Receiver argues the public interest weighs against hearing this appeal because it will delay the case. (Resp. 14-15.) But the test is not whether *hearing the interlocutory appeal is in the public interest*. Rather, it is “whether the issue is one of widespread public interest[.]” *Affiniti*, 461 P.3d at 612—i.e., whether the public is interested in a receiver’s standing to assert third-party creditors’ claims and ability to sue a person in the receivership.

The Receiver’s standing is of widespread public interest for the reasons set forth in the Petition (Pet. 15-17), to which the Receiver does not respond. As the District Court noted, addressing a receiver’s standing will impact not only this

case, but future ones.⁴ (Pet. Ex. 15 at 6.) Whether a receiver may sue a party in the receivership is also of widespread public interest as stated in the Petition (Pet. 24-25), to which the Receiver does not respond.

Finally, immediate review will benefit creditors, not prejudice them as the Receiver contends. (Resp. 14-15, 20.) If there is no interlocutory review and the Receiver prevails, Appellants will appeal after judgment. If Appellants prevail on appeal, the Parties would have wasted tremendous time and money litigating claims ultimately wiped away, meaning it would take far longer and require far more money than if this Court addresses the issues now. And the Receiver would bill the Estate for litigating those doomed claims, depleting the funds available for creditors.

2. Answering Both Questions of Law Would Avoid Inconsistent Results

Answering whether the Receiver has standing to assert third-party creditors' claims would avoid inconsistent results in different proceedings because, as the Receiver acknowledges (Resp. 16), creditors are free to file claims after the receivership terminates. That they are currently "nonexistent, hypothetical claims"

⁴ The Receiver argues that considering future cases means Appellants seek an advisory opinion. (Resp. 15.) An advisory opinion is one that cannot affect the matter at issue. *Tippett v. Johnson*, 742 P.2d 314, 315 (Colo. 1987). Here, the Receiver's standing to assert third-party creditors' claims and to sue Mr. Dragul are live issues that affect the matter and could be dispositive.

(*id.*) does not change the potential for inconsistent outcomes. The test is “whether the issue would avoid the *risk* of inconsistent results in different proceedings[,]” *Affiniti*, 461 P.3d at 612 (emphasis added), not whether it would resolve current inconsistencies. The Receiver argues such future creditors’ claims would be “subject to issue and/or claim preclusion” and thus not inconsistent. (Resp. 16 n.12.) But that presupposes this Court has already answered the standing question in the Receiver’s favor. Otherwise, future courts considering creditors’ claims will have to determine whether the Receiver had standing in this proceeding, meaning there could be preclusive effect, or did not, meaning no preclusion. Those courts could reach inconsistent results.

Moreover, this is not the only receivership pending in Colorado, and certainly will not be the last. There is risk of inconsistent results with those other proceedings.

Answering whether a receiver may sue a party in the receivership would avoid inconsistent results for the same reasons. (*See* Pet. 25.)

3. Both Questions of Law Could be Case Dispositive

Both the Receiver’s standing to assert third-party creditors’ claims and ability to sue a party in the receivership are likely case-dispositive for the same reasons above regarding final resolution.

4. This Case Involves Extraordinary Facts

The District Court held the case involves extraordinary facts primarily from the Receiver's allegations that the Defendants used the GDA Entities as instrumentalities in their allegedly unlawful activity. (Pet. Ex. 15 at 8.) The Receiver contends the "scheme is no different than other cases in which receivers are appointed[.]" (Resp. 16-17.) But the extraordinary facts here are that the Receiver expressly and as a matter of law alleged claims belonging to third-party creditors, which has not yet been addressed in Colorado. And the Receiver sued a person over whom he serves as Receiver. It is unclear if any receiver in any jurisdiction has attempted this before.

C. Both Questions of Law Are Unresolved

As the District Court held (Pet. Exs. 15 at 5; 16 at 2), and Appellants demonstrated (Pet. 12-14; 23-24), both questions of law are unresolved. The Receiver does not dispute this.

The Receiver instead argues the standing question is a mixed question of fact and law inappropriate for interlocutory appeal because this Court must factually determine whether each of the Receiver's claims is a third-party creditor claim for which the Receiver lacks standing. (Resp. 17-19.) The District Court rejected that argument. (Pet. Ex. 15 at 8.) In *Rich v. Ball Ranch P'ship*, 345 P.3d

980, 982 (Colo. App. 2015), the court declined to review a contractual interpretation issue because it involved “mere application of settled legal principles to the facts”. A pure question of law can be decided “without having to study the record[.]” *Id.* at 983 (internal quotation and citation omitted). Here, the District Court certified: “whether a receiver may pursue claims which belong to the creditors of the receivership estate.” (Pet. Ex. 15 at 2.) There are no settled legal principles to apply to the facts here. And this Court need not study the record since it can answer whether a receiver has standing to assert third-party creditors’ claims, then remand to the District Court to apply to the facts.⁵

CONCLUSION

The District Court and Parties would greatly benefit from this Court’s review. So would the creditors, and anyone who is or may be involved in or affected by a receivership. The Court should grant the Petition.

⁵ The Receiver points to particular pages of the Petition addressing whether the Receiver’s claims are third-party creditors’ claims. (Resp. 18 (citing Pet. 8-11, 20-22).) But those pages address whether interlocutory review is appropriate, not whether a receiver has standing to assert third-party creditors’ claims. Those are different issues, and reference to the record is not required for the latter.

Respectfully submitted this 17th of May, 2021,

JONES & KELLER, P.C.

GOODREID & GRANT, LLC

s/ Christopher S. Mills

s/ Thomas E. Goodreid

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 2021, a true and correct copy of this **GARY DRAGUL'S, MARLIN HERSHEY'S, AND PERFORMANCE HOLDINGS, INC.'S REPLY IN SUPPORT OF 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:

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District Court, Denver County, State of Colorado Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433	DATE FILED: May 17, 2021 6:42 PM FILING ID: 43CE06C25B6C3 CASE NUMBER: 2021CA483
<p>Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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RECEIVER’S FIFTH REPORT	

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC (“GDA RES”), GDA Real Estate Management, LLC (“GDA REM”), and related entities (collectively, “Dragul and the GDA Entities”), submits his fifth report concerning the status and condition of the Receivership Estate.

I. Procedural History

1. On April 12, 2018, Dragul was indicted by a Colorado State Grand Jury on nine counts of securities fraud.

2. On August 15, 2018, Gerald Rome, the then Securities Commissioner for the State of Colorado (the “Commissioner”), filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities.

3. On August 29, 2018, the Commissioner and Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver, consenting to the appointment of a receiver over Dragul and the GDA Entities pursuant to Colo. Rev. Stat. § 11-51-602(1) and C.R.C.P. 66.

4. On August 30, 2018, the Court entered a Stipulated Order Appointing Receiver (the “Receivership Order”) appointing Harvey Sender as receiver for Dragul and the GDA Entities, and their assets, interests, and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Receivership Order at 2, ¶ 5.

5. On March 1, 2019, Dragul was indicted by a Colorado State Grand Jury on five additional counts of securities fraud.

6. On April 27, 2020, Tung Chang was substituted as the Securities Commissioner.

7. As required by paragraph 14 of the Receivership Order, the Receiver previously submitted his preliminary report concerning the status of the Estate on November 28, 2018, and his Second, Third, and Fourth Reports on May 15, 2019, November 14, 2019, and May 11, 2020, respectively. A summary of Dragul’s investment scheme is set forth in the Receiver’s Third Report, which is available along with all material pleadings in this case (including all Receiver Reports) at <http://dragulreceivership.com>

II. Status of Estate Properties

8. As of February 19, 2021, the effective date of this Report, there are no remaining real properties or membership interests in other SPEs in the Estate. They have been disposed of as provided below.

A. Commercial Property

9. The following chart details the commercial properties that were part of the Estate and their disposition and/or current status. The Estate has received \$2,643,599.26 from disposing of these assets:

	Property Name	Description	Status	Estate Proceeds
1.	Happy Canyon Shoppes	Retail shopping center, Denver, CO	Sold April 15, 2019	\$600,494.52
2.	AV Pad (aka Village Inn Pad)	Unoccupied former Village Inn restaurant	Sold May 13, 2019	\$200,000.00
3.	Summit Marketplace	Retail Shopping Center, Lafayette, CO	Sold Oct. 1, 2019	\$194,606.25
4.	Hickory Corners	Main retail shopping center, Hickory NC	Sold Nov. 1, 2019	\$393,298.53
5.	Hickory Corners Box	Outparcel at Hickory Corners, Hickory NC	Sold Nov. 1, 2019	\$195,199.96
6.	Rose, LLC	Leasehold interest at Treasure Island Casino leased to Senor Frogs Restaurant	Pre-Receivership appeal terminating lease interest decided against Rose, LLC	\$350,000 of \$850,000 appeal bond paid to Estate on October 4, 2019, per Settlement Agreement approved by Receivership Court on July 23, 2019

ESTATE INTEREST IN HAGSHAMA PROPERTIES SOLD TO ISABEL MARINA APRIL 2019 FOR \$710,000				
1.	Cassinelli Square	Retail shopping center Cincinnati, OH	Estate's interest SPEs that owned properties sold to Isabel Marina in April 2019.	\$710,000.00
2.	Marketplace at Delta	Retail shopping center Lansing, MI		
3.	DU Student Housing	3 single-family homesites, Denver, CO		
4.	Happy Canyon Market (aka Happy Canyon Box)	Former Safeway store 4950 East Hampton Avenue		
5.	Windsor Square	Retail shopping center Knoxville, TN		
NET PROCEEDS RECEIVED		\$2,643,599.26		

COMMERCIAL INTERESTS ABANDONED				
1.	YM Retail	Retail shopping center with two separate parcels, Denver, CO	Abandoned per court order December 13, 2018	
2.	Clearwater Collection	Retail shopping center, Clearwater Florida	Abandoned per court order March 3, 2020	
3.	Prospect Square	Retail shopping center, Cincinnati, OH	Receiver terminated as manager by majority owner on March 29, 2019	Property controlled by receiver appointed by lender; sale to lender for credit bid was approved by Ohio state court; Estate retains 6.387% equity interest, which appears to have no value
4.	Ash and Bellaire	6 single-family homes located at Ash & Bellaire Streets, Denver ¹	Abandoned per court order March 3, 2020	

B. Residential Property

10. The Receiver sold the following residential properties:

	Property	Status	Estate Proceeds
1.	4450 Timber Falls Court, #1702, Vail, CO	Sold July 24, 2019	\$100,001.00
2.	5722 S. Lansing, Ct, Englewood, CO	Sold Sept. 19, 2019	\$34,497.65
3.	41 S. Fairway, Beaver Creek, CO 81620	Sold Oct. 16, 2019	\$25,000.00
4.	3142 S Leyden Street, Denver, CO	Sold Oct. 31, 2019	\$29,545.25
5.	2432 S Newport Street, Denver, CO	Sold Nov. 19, 2019	\$30,000.00 ²
6.	3555 S Holly Street, Denver, CO	Sold Dec. 4, 2019	\$12,280.28
7.	2624 S Oneida Street, Denver, CO	Sold Dec. 4, 2019	\$30,000.00
8.	3675 S. Hibiscus Way, Denver, CO	Sold Jan. 3, 2020	\$18,933.00
9.	7152 S. Blackhawk St. Unit D2	Sold Feb. 21, 2020	18,377.83
Net Sales Proceeds			\$298,635.01

11. The Receiver abandoned the following residential properties pursuant to the Receivership Court's November 4, 2019, Order because they were of no or

¹ 2166 South Ash Street, 2175 South Ash Street, 2175 South Bellaire Street, 2186 South Ash Street, 2195 South Bellaire Street, and 2196 South Ash Street.

² Both the Oneida and Newport properties were significantly underwater. The Receiver was able to negotiate an agreement with First Community Bank, the holder of second deeds of trust on the properties, that allowed the Estate to receive \$30,000 from each sale.

inconsequential value to the Estate due in part to the amount of the outstanding debt on the properties and the fact that the loans were in default and accruing default interest at high rates:

RESIDENTIAL ESTATE PROPERTIES ABANDONED PER NOVEMBER 4, 2019, COURT ORDER	
1.	3593 S Hudson Street, Denver, CO
2.	1777 Larimer Street #703, Denver, CO
3.	1777 Larimer Street, #901, Denver, CO
4.	891 14th Street, #2417, Denver, CO
5.	5455 Landmark Pl, #509, Greenwood Village, CO
6.	5788 S Lansing Way, Englewood, CO
7.	6316 E Fair Avenue, Centennial, CO
8.	7373 E Fremont, Centennial, CO
9.	7517 E Davies Place, Centennial, CO
10.	7842 E Briarwood Boulevard, Centennial, CO
11.	1660 N. LaSalle Drive #3909, Chicago, Il
12.	1660 N. LaSalle Drive, #4205, Chicago, Il
13.	6937 E 6th Street, #1002, Scottsdale, AZ
14.	6937 E 6th Street, #1004, Scottsdale, AZ
15.	6937 E 6th Street, #1005, Scottsdale, AZ

12. A final residential property formerly held by the Estate was located at 11188 Campsie Fells Court, Las Vegas, NV. As set forth in the Receiver’s Second Report, Dragul entered into a contract to sell that property just before the Receiver was appointed. The Receiver filed a motion seeking Court approval of that contract on October 19, 2018, which the Court approved on October 31, 2018. The buyers subsequently terminated the contract. Despite having notice of the Receivership and of the Court’s stay of all actions concerning Estate property – without providing notice to the Receiver or obtaining relief from this Court – the first mortgage lender foreclosed the Campsie Fells property on February 22, 2019.

13. The Estate obtained \$298,635.01 from selling residential properties. As set forth in the Receiver’s Second Report, on April 29, 2019, the Receiver entered into an agreement with Chad Hurst pursuant to which Hurst agreed to purchase the Estate’s interest in 22 of the Estate’s residential properties for \$575,000. The Court approved that agreement on June 19, 2019. After Mr. Hurst failed to close, the Receiver retained Mr. Hurst’s non-refundable \$100,000 earnest money deposit per

the agreement. The Estate has therefore received \$398,635.01 from liquidating the Estate’s residential properties.

III. Other Estate Assets and Income

14. In addition to the proceeds received from the disposition of the above assets, the Estate received \$1,884,759.04 in rental income, and from August 30, 2018, through January 31, 2020, \$248,231 from ACF Property Management, Inc. (“ACF”) attributable to Estate investments in properties owned and managed by ACF, which is owned and operated by Alan C. Fox (jointly, “Fox”).

15. Fox, like Dragul, solicited investments in special purpose entities (“SPEs”) that purchased and operate retail shopping centers. As he did with GDA-owned and operated commercial properties, Dragul solicited funds from investors to purchase membership interests in Dragul-created SPEs that in turn invested in ACF properties/entities. The table below lists the Estate’s interest in the Fox properties and the distributions the Estate has received from them during the Receivership:

	ACF Entity	Investor	Projected			Total Distributions Owed
			Distributions Received 8/30/18 - 1/31/20	Distributions Missing 8/30/18 - 12/31/19	Distributions Missing 1/1/20 - 2/28/20	
1	10 Quivera Plaza 14 A, LLC	Gary Dragul	\$969	\$1,456	\$82	\$1,538
2	Shoppes at Bedford 15 A, LLC	Gary Dragul	\$0	\$0	\$0	\$0
3	Kenwood Pavilion 14 A, LLC	SSC 02, LLC	\$0	\$7,412	\$872	\$8,284
4	Fenton Commons	SSC 02, LLC	\$0	\$1,581	\$186	\$1,767
5	College Marketplace	SSC 02, LLC	\$0	\$1,037	\$122	\$1,159
6	ACF Lakewood 11, LLC	GDA Village Crossroads, LLC	\$109,120	\$26,836	\$13,566	\$40,402
7	Tower Plaza 12, LLC	GDA Market at Southpark, LLC	\$0	\$0	\$0	\$0
8	Arapahoe Village	P.R. Investments	\$0	\$0	\$0	\$0
9	Greentree Plaza	P.R. Investments	\$0	\$0	\$0	\$0
10	Paradise Valley Festival	P.R. Investments	\$0	\$2,499	\$294	\$2,793
11	Scottsdale Crossing	P.R. Investments	\$0	\$74,167	\$1,102	\$75,269
12	Crystal Falls Town Center, LLC	Fort Collins WF, LLC	\$5,860	\$5,274	\$3,516	\$8,790
13	Meadows Shopping Center 05 A, LLC	Fort Collins WF, LLC	\$75,208	\$16,111	\$10,744	\$26,855
14	Southwest Commons 05 A, LLC	Fort Collins WF, LLC	\$825	\$825	\$550	\$1,375
15	Trophy Club 12, LLC	Fort Collins WF, LLC	\$41,249	\$9,843	\$6,562	\$16,405
16	Laveen Ranch Marketplace 12, LLC	Fort Collins WF, LLC	\$15,000	\$0	\$0	\$0
	Total		\$248,231	\$147,041	\$37,596	\$184,637

16. Without advance notice to the Receiver, in October 2019, Fox began to withhold distributions from these investments. On March 13, 2020, the Receiver filed a turnover motion to obtain the withheld distributions. On July 30, 2020, the Court

held an in-person hearing on the ACF turnover motion, and on August 10, 2020, entered an order requiring ACF to pay the Estate \$184,637.00 for the withheld distributions and to produce documents requested by the Receiver; the payment was timely made. Pursuant to a settlement agreement between the Receiver and Fox (approved by the Court on December 15, 2020), which resolved the Receiver's claims against Fox in the Insider Case (discussed below in paragraphs 24-25), the Receiver also assigned the Estate's interests in the Fort Collins WF 02, LLC, PR Investments, Inc, GDA Village Crossroads LLC, and GDA Market at Southpark LLC entities to Fox effective December 15, 2019.

IV. Personal Assets and Turnover Motion

17. As set forth in the Second Report, Dragul turned over a RV to the Estate. The value of the RV was less than the purchase money lien encumbering it and it has been turned over to the lender.

18. Dragul's personal residence located at 10 Cherry Lane Drive, Englewood CO, was foreclosed by Xin Nick Liu, the second lienholder, at a foreclosure sale on June 5, 2019. Mr. Liu bid \$1,250,000 leaving a deficiency of \$863,594.13 on his note. Mr. Liu took the property subject to a first mortgage lien of approximately \$4.1 million held by JP Morgan Chase Bank.

19. On June 4, 2019, the Receiver and the Securities Commissioner filed a Joint Motion for an Order Requiring Dragul to Turnover and Account for Property of the Estate ("Motion"). That motion was resolved in a settlement agreement in which Dragul agreed to turnover various assets to the Estate. The settlement agreement was approved by the Court on December 17, 2019. In addition to the Blackhawk Storage Unit referred to above, the Receiver liquidated the following assets:

PROCEEDS FROM DRAGUL TURNOVER ASSETS			
ITEM	AMOUNT	COMMISSION, LIEN PAYMENT	NET
A. Vehicles Sold through Dickensheet			
2016 Land Rover and Honda ATV - total	\$163,300.00	-(\$4,230.00)	\$38,070.00
Payoff to Bank of America on 2016 Land Rover			-(\$27,620.00)
Relocation costs (ATV to Auction Site from Arapahoe & Holly)			-(\$85.00)
Dickensheet Advertising & Promotion Costs			-(\$561.40)

PROCEEDS FROM DRAGUL TURNOVER ASSETS			
ITEM	AMOUNT	COMMISSION, LIEN PAYMENT	NET
Total Auction Net			\$9,803.60
B. Jewelry, Sports Memorabilia, Liquor Sold through Dickensheet			
Jewelry, Sports Memorabilia, Liquor - total	\$13,108.00	-\$1,310.80)	\$11,797.20
Dickensheet Advertising & Promotion Costs			-\$435.40)
Total Auction Net			\$11,361.80
DICKENSHEET AUCTION TOTAL	\$176,408.00	-\$5,540.80)	\$21,165.40
C. 7152 S Blackhawk Storage Unit (owned by SSC 02, LLC)			
Sale of Blackhawk Storage Condo	\$121,000.00	-\$102,620.00)	\$12,380.00
TURNOVER GRAND TOTALS	\$297,408.00	-\$108,160.80)	\$33,545.40

V. Operations and Management

20. **Property Management.** On March 15, 2019, management of the Receivership properties was turned over to Revesco Property Services, LLC. Revesco's services were terminated effective February 29, 2020.

21. **Taxes.** As discussed in the Receiver's Third Report, due to Dragul's scheme which involved transferring and comingling funds between and among multiple SPE accounts, GDA RES accounts, and his personal accounts, and his disregard of legal formalities, the Receiver has determined the most equitable solution is to collapse the SPEs into GDA RES. In September 2019, the Receiver's accountants prepared final tax returns for the SPEs and issued final K1's to the investors for the 2018 tax year. Tax returns were also filed for various entities for which GDA RES had a management obligation, and the underlying assets were held through joint tenancy. Investors should not expect to receive additional K-1s. Rather, in the year of distribution, the investors will receive the appropriate form 1099.

VI. Assets and Liabilities

A. Litigation claims by the Receiver

22. In August 2019, the Receiver sent demand letters and tolling agreements to a number of potential litigation targets who received payments from

the Dragul entities that exceeded their investments, *i.e.*, “false profits,” or other fraudulent transfers.

23. On August 30, 2019, the Receiver filed several complaints in Denver District Court seeking to recover assets of the Estate under fraudulent transfer and other theories.

a. ***Sender v. Dragul, et al.***, 2019CV33373, Denver District Court (the “**Family Case**”). In this case, the Receiver sought to recover fraudulent transfers Dragul made to his wife Shelly (\$36,579,428.58), and his children Charli (\$314,158.74), Samuel (\$712,946.55), and Spencer (\$543,083.86), a total of \$38,149,617.73. The case was set for trial beginning December 14, 2020. On November 30, 2020, the parties participated in mediation and agreed to a settlement pursuant to which Dragul’s children paid the Estate \$125,000, and Shelly Dragul agreed to file for protection under the Bankruptcy Code. She filed a Petition under chapter 7 on February 23, 2021, Case No. 21-10851-KHT, Bankruptcy Court in and for the District of Colorado. The settlement reflects that in the four years before the complaint in the Family Case was filed, the net transfers to the Dragul children were: Charli (\$54,489.97), Samuel (\$92,257.55), and Spencer (\$80,862.97), a total of \$227,610.49. The settlement also reflects the Receiver’s investigation of the defendants’ ability to satisfy any judgment that might have entered against them.

b. ***Sender v. Becker, et al.***, 2019CV33374, Denver District Court. In this case, the Receiver sought to recover fraudulent transfers Dragul made to three investors, Russell Becker (\$86,941.67), Joseph Peirce (\$29,988.98), and Ken Stoltzfus (\$108,632.17), a total of \$225,562.82. Settlements have been reached with all defendants as shown below.

c. ***Sender v. Bank of America, et al.***, 1:19-cv-02875-WJM, United States District Court, D. Colo. This case was filed in Denver District Court and removed to the United States District Court on October 8, 2019. Settlements have been reached with all defendants as shown below.

24. **The Insider Case.** On January 21, 2020, the Receiver filed a lawsuit against Dragul, Fox, Susan Markusch, Benjamin Kahn, The Conundrum Group, LLP, Marlin Hershey, and Performance Holdings, Inc., in Denver district court, Case No. 2020CV30255 (the “**Insider Case**”). Defendants in the Insider Case were Dragul insiders and co-conspirators and were involved in furthering Dragul’s Ponzi scheme and profited from it. Among other things, the Complaint identified the following

commissions paid to the Insider Defendants, which the Receiver seeks to recover under several legal theories:

Defendant	Total Commissions Received
Gary Dragul	\$19,148,047.10
Susan Markusch	\$310,196.67
Kahn Defendants	\$1,701,441.92
Fox Defendants	\$10,200,305.00
Hershey Defendants	\$3,175,655.54

25. Defendants in the Insider Case have vigorously defended. Initially all defendants except for the Ben Kahn and his law firm, the Conundrum Group, filed motions to dismiss the Complaint. On June 1, 2020, in response to those motions, the Receiver filed a 126-page First Amended Complaint, which named an additional defendant, Juniper Consulting Group, LLC, which the Receiver alleged received \$104,000 in payments the Receiver contended were fraudulent transfers. The same defendants again moved to dismiss. The court in the Insider Case denied all motions to dismiss on October 28, 2020. The moving defendants have asked the court in the Insider Case to certify its dismissal orders for immediate interlocutory appeal to the Colorado Court of Appeals, and in Dragul’s case, to reconsider its denial of his motion to dismiss. Those motions are pending and the Insider Case is not yet at issue.

26. In addition, as set forth in previous reports, the Receiver had identified potential claims against Audrey Ahrendt, Dragul’s mother-in-law, who appears to have received fraudulent transfers of approximately \$156,000. During the four years prior to her execution of a tolling agreement with the Receiver, she received approximately \$80,000 in transfers. On December 11, 2020, the Court approved a settlement agreement between the Receiver and Ms. Ahrendt under which Ms. Ahrendt paid the Estate \$25,000.

27. Pursuant to settlement agreements approved by the Receivership Court, the Estate has received the following settlement payments concerning the Estate’s litigation claims:

RESOLVED LITIGATION CLAIMS			
	Defendant	Claim Amount	Settlement Amt
1.	Mike Powers	\$36,000	\$18,000

RESOLVED LITIGATION CLAIMS			
	Defendant	Claim Amount	Settlement Amt
2.	Jim Bauer	\$142,100	\$71,050
3.	John Blackerby	\$33,500	\$16,750
4.	Jim Gruenewald	\$39,450	\$19,725
5.	Steve Kris	\$59,138	\$30,000
6.	Cristiano Luchetta	\$22,777	\$15,000
7.	Richard Meer	\$7,532	\$3,766
8.	Chase/First USA	\$36,386	\$22,750 ³
9.	Discover	\$10,598	\$8,478
10.	American Express	See note ⁴	\$80,769
11.	Bank of America	\$66,560	\$40,000
12.	Joseph Peirce	\$8,203	\$3,500
13.	Russell Becker	\$86,942	\$15,000
14.	Juniper Consulting Group, LLC	\$104,000	\$10,000
15.	Audrey Ahrendt	\$158,000	\$25,000
16.	ACF/Fox	\$10,200,305	\$650,000
17.	Dragul Family Settlement	\$227,610.49	\$125,000
TOTAL		\$10,807,704.49	\$1,666,955

28. 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 Receiver is unable to predict the outcome of the remaining claims in the Insider Case or when they will be finally resolved.

29. The Receiver hired Allen Vellone Wolf Helfrich & Factor P.C. (“Allen & Vellone”) as counsel in the main Receivership case and all related matters to provide legal services on an hourly fee for services basis, and notice thereof was provided on September 7, 2018. Due to the expense and uncertainty with respect to remaining litigation claims, effective November 1, 2019, the Receiver and Allen & Vellone agreed to modify its existing fee agreement so that Allen & Vellone would be compensated on a contingent fee basis for work performed in the Insider Case, the Family Case,

³ This includes \$6,500 to settle potential Estate claims against Chase with respect to transactions in accounts Chase held for GDA RES and a Dragul special purpose entity, Rose, LLC, relating to what appeared to be a potentially improper \$275,000 set-off.

⁴ Although the original complaint against American Express sought \$8,308,946.42, informal discovery revealed the Estate’s maximum claim was \$80,769.

and ancillary litigation on the following terms: 25% of the amount of any recovery obtained before September 5, 2020; 38% of the amount recovered after September 5, 2020, through the filing of any appeal; and 45% of the amount recovered after any appeal; the Receivership Estate to pay the expenses incurred in litigation matters subject to the contingent fee agreement. The Commissioner approved this agreement, notice of which was provided to the Court and all parties-in-interest on May 11, 2020.

30. **The Brownstein Litigation.** On September 3, 2020, Dragul filed a motion in the Receivership Action seeking a determination that claims Dragul and the GDA Entities purport to hold against certain accountants, attorneys, and consultants, including Brownstein Hyatt Farber Schreck, LLP (“Brownstein”) had been abandoned by the Receiver, such that Dragul and the GDA Entities could pursue them on their own behalf. On October 1, 2020, the Receivership Court denied that motion.

31. Notwithstanding that denial, on October 7, 2020, without notice to the Receiver or the permission of the Receivership Court, Dragul, GDA RES, GDA REM, and Rose, LLC filed a lawsuit in the Eighth Judicial District Court in Clark County, Nevada against Brownstein and 41 of its current and former attorneys and paralegals (Case No. A-20-822625-C) (the “Nevada Action”). The complaint filed in the Nevada Action asserts causes of action for malpractice, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and breach of fiduciary duty.

32. On October 26, 2020, Dragul filed a second motion in the Receivership Case seeking a determination that the claims asserted in the Nevada Action have been abandoned by the Receiver, such that Dragul can pursue them for his own benefit. The Receiver opposed that motion. On or about November 13, 2020, the Receiver and Brownstein entered into a settlement agreement pursuant to which Brownstein agreed to pay the Estate \$250,000 in exchange for a release of the Estate’s potential claims against Brownstein.

33. On November 16, 2020, the Receiver filed a motion with the Receivership Court seeking Court approval of the Brownstein settlement agreement. Dragul filed the only objection to the motion. The Court thereafter set a hearing on the motion. Dragul then filed a motion to conduct discovery, which the Court denied. The Receivership Court held a two-day evidentiary hearing on the motion, and on

February 26, 2021, entered an order approving the Brownstein settlement and denying Dragul's motion to deem the claims asserted in the Nevada Action abandoned.

B. Creditor Claims against the Estate.

34. The deadline for submitting claims against the Estate was March 18, 2019. Approximately 261 investors filed claims totaling approximately \$58 million. Claims submitted by investors (including Hagshama) relating to the five commercial properties transferred to Isabel Marina have been resolved. Based on the Receiver's present analysis, it appears allowable investor claims are not likely to exceed \$32 million. In addition, Hagshama filed claims for over \$100 million, third-party vendors filed claims of approximately \$4.8 million, and secured lenders filed claims for approximately \$105 million. Again, based on the Receiver's present analysis, Hagshama's allowable claim appears not exceed \$25 million. Also, the vast majority of claims from secured lenders have been either satisfied or greatly reduced by the Estate's sales of the commercial and residential properties discussed above.

35. A number of claims have been filed after the bar date. Some claimants have represented they did not receive notice of the Receivership or the claims bar date. During the Receiver's claims review, he will consider allowing late-filed claims on an individual basis. A complete claims analysis has not yet been completed; the Receiver will thoroughly review claims when the Estate has sufficient assets to consider making distributions.

C. Administrative Expenses

36. Effective as of March 31, 2020, the Estate had paid the following professional fees and expenses as detailed in the Receiver's first four fee applications: **First Application:** submitted December 6, 2018, for the period August 30, 2018, through November 30, 2018; **Second Application:** submitted April 19, 2019, for the period December 1, 2018, through March 31, 2019; **Third Application:** submitted November 14, 2019, for the period April 1, 2019, through October 31, 2019; and **Fourth Application,** submitted May 11, 2019, for the period November 1, 2019, through March 31, 2020.⁵

⁵ Dragul objected to the Receiver's Fourth Fee Application and the Receiver's contingent fee agreement with Allen & Vellone. After substantial briefing, the

PROFESSIONAL FEES AND EXPENSES PAID		
AUGUST 30, 2018 – MARCH 31, 2020		
Provider	Description	Amount Paid
Harvey Sender	Receiver	\$476,768.36
Allen Vellone Wolf Helfrich & Factor P.C.	Counsel for the Receiver	\$1,276,448.22
RubinBrown LLP	Accountants (forensic accounting, expert witness, and tax preparation)	\$737,358.26
Waldrep LLP	North Carolina local counsel for the Receiver	\$10,518.85
Frost Brown Todd, LLC	Ohio local counsel for the Receiver	\$71,190.56
Revesco Property Services	Property manager (commercial and residential)	\$325,355.32
Kelly Reinhart	Accountant (former GDA accountant; tax preparation)	\$41,200.00
Total Professional Fees and Expenses		\$2,938,839.57

37. The Receiver hired Allen Vellone Wolf Helfrich & Factor P.C. (“Allen & Vellone”) as counsel in this and all related matters to provide legal services on an hourly fee-for-services basis, and notice thereof was provided on September 7, 2018.

38. Effective November 1, 2019, the Receiver and Allen & Vellone agreed to modify its existing fee agreement so that Allen & Vellone would thereafter be compensated on a contingent fee basis for work performed in the Insider Case, the Family Case, and ancillary litigation, on the following terms: 25% of any recovery obtained before September 5, 2020; 38% of amounts recovered after September 5, 2020, through the filing of any appeal; and 45% of amounts recovered after any appeal; the Receivership Estate to pay the expenses incurred in litigation matters subject to the contingent fee agreement. The Commissioner approved the agreement, notice of which was provided to the Court and all parties-in-interest on May 11, 2020. The Receiver is submitting his Fifth Fee application contemporaneously with this report and is seeking approval of the following fees and expenses from April 1, 2020, through February 28, 2021:

Court denied Dragul’s objection and entered an order approving the Fourth Fee Application on December 9, 2020.

PROFESSIONAL FEES AND EXPENSES INCURRED		
APRIL 1, 2020 – FEBRUARY 28, 2021		
PROVIDER	DESCRIPTION	AMT. SOUGHT
Harvey Sender	Receiver	\$45,440.00
Allen & Vellone	Counsel for the Receiver	
	Hourly Fees - Main Receivership Case	\$94,421.60
	Contingent Fees	\$393,000.00
	Costs	\$9,349.65
RubinBrown LLP		\$138,682.10
Total		\$681,193.35

39. As of March 8, 2021, the balance in the Receivership account was \$1,706,932.55, which does not reflect the \$250,000 settlement payment received on March 8, 2021, from the Brownstein settlement. Once that payment is deposited, the balance in the Estate’s account will increase to \$1,956,932.55. A detailed list of all Estate receipts and disbursements and its balance sheet as of March 8, 2021, is attached as **Exhibit 1**.

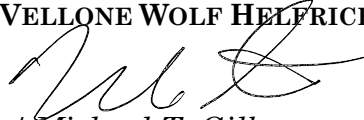
VII. Conclusion

40. The Estate’s sales activities are complete, and all property management services have been terminated. The Receiver will continue to pursue the claims against the remaining defendants in the Insider Case and anticipates the Estate will remain open until that case is resolved and does not plan on making distributions until that occurs.

41. The Receiver will file additional periodic reports as appropriate. Information and substantive filings concerning the Estate are publicly available on the Receivership website: <http://dragulreceivership.com>.

Dated: March 9, 2021.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



By: /s/ Michael T. Gilbert

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2021, a true and correct copy of the foregoing **Receiver's Fifth Report** was filed and served via the Colorado Courts E-Filing system on all counsel of record and to the following:

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CERTIFICATION OF E-SERVICE ON KNOWN CREDITORS

In accordance with this Court's February 1, 2019, Order clarifying notice procedures for this case, I also certify that a copy of the foregoing is being served by electronic mail on all currently known creditors of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.

By: /s/Salowa Khan
Allen Vellone Wolf Helfrich & Factor, P.C