

<p>DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202</p>	<p>DATE FILED: June 22, 2021 5:34 PM FILING ID: 81866B48852F2 CASE NUMBER: 2020CV30255</p>
<p>Plaintiff: HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p>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; 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.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Defendant Gary J. Dragul Christopher S. Mills, Atty. Reg. No. 42042 Paul L. Vorndran, Atty. Reg. No. 22098 Jones & Keller, P.C. 1675 Broadway, 26th Floor Denver, CO 80202 Phone: 303-573-1600 Email: cmills@joneskeller.com pvorndran@joneskeller.com</p>	<p>Case No. 2020CV30255 Courtroom: 414</p>
<p style="text-align: center;">DEFENDANT GARY DRAGUL’S REPLY IN SUPPORT OF MOTION TO TOLL DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT</p>	

In his Response to Dragul’s Motion to Toll Deadline to Respond to First Amended Complaint (“Response”), the Receiver sets forth several arguments against Mr. Dragul’s Motion to Toll Deadline to Respond to First Amended Complaint (“Motion”). However, they all boil down to the same thing: the Receiver believes this will delay the case, and that the Court should deny the Motion to avoid that delay. That is both inaccurate and of no consequence.

As an initial matter, it is important to note what is before the Court. The Receiver devotes virtually all of his Response to pre-emptively attacking Mr. Dragul's motion to stay the case. But Mr. Dragul has not filed a motion to stay. The Motion at issue is simply to toll Mr. Dragul's deadline to respond to the First Amended Complaint ("FAC") for 14 days after the Court rules on Mr. Dragul's Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint ("Renewed Motion"). If the Court grants that Renewed Motion and dismisses the case, Mr. Dragul will never file a motion to stay.

Turning to the Receiver's specific arguments, he first asserts that no other party will benefit from additional delay, and the requested delay will prejudice the investor-creditors of the Receivership Estate. (Resp. ¶ 1.) However, Mr. Dragul's Motion seeks only to toll his deadline to respond to the FAC until two weeks after the Court rules on Mr. Dragul's Renewed Motion. In the context of the entire case, 14 days is of little significance. As the Receiver notes, the investor-creditors have asked when the Receivership will wrap up. (Resp. ¶ 1.) If the case proceeds, it will not wrap up for quite some time, making a 14-day extension immaterial.

Additionally, if the Motion is not granted, both Mr. Dragul and the Receiver could end up briefing a motion to stay the case, only to have the case dismissed based on Mr. Dragul's Renewed Motion. On the Receiver's side, the delay (and some cost) of that wasted briefing is borne by the Estate, meaning it comes at the investor-creditors' expense. The investor-creditors' interests are better protected by granting the Motion so Mr. Dragul and the Receiver can avoid the wasted briefing if the Renewed Motion is granted. Finally, Mr. Dragul is not solely responsible for any delay in this case. The Receiver is too. He waited nearly a year and a half after his appointment to file his original complaint against Mr. Dragul and the other defendants. He sought his own substantial extensions (which Mr. Dragul did not oppose) for a total of 75

days before he filed the FAC in response to the defendants' motions to dismiss the original complaint, and most recently he sought and received an extension to respond to the defendants' motions to certify for interlocutory appeal and Mr. Dragul's motion for reconsideration.

Second, the Receiver argues that a stay of the case would be prejudicial because Mr. Dragul's first criminal case was recently continued¹ and the other is not set for trial (Resp. ¶ 2), and the arraignments and trials have previously been continued (Resp. ¶ 4). Again, no motion for stay is presently before the Court. Also, a cursory review of the motion to continue the first criminal case, which the Receiver attaches as Exhibit 1 to his Response, demonstrates that *the prosecutor* reached out to Mr. Dragul's counsel to suggest a continuance, and Mr. Dragul filed the motion for that continuance "[a]s a courtesy to the Prosecution" (Resp. Ex. 1 at ¶ 1), after determining it also benefited Mr. Dragul. The Receiver also omits the context for the continuances. For the last year and a half, we have been in the midst of a world-wide pandemic. The prosecution did not object to any of the continuances. Numerous motions are pending against the criminal counts, including motions to dismiss based on the statutes of limitation. In fact, the prosecutor dismissed the first eight of nine counts in the first indictment in response to one such motion. The continuances in the criminal cases allow time for those pending motions to be ruled upon.

Third, the Receiver argues that even though the first criminal case has been pending since April 2018, "seemingly it is only now – after his efforts to dismiss and otherwise delay the case appear to have run their course – that it occurs to Dragul and his counsel that his Fifth Amendment rights may be implicated if he testifies in this case." (Resp. ¶ 3.) Not so. Mr. Dragul's counsel have known of the Fifth Amendment implications since they were retained.

¹ Today, it was reset for January 3, 2022.

The Receiver should have known longer than that, as both indictments issued long before the Receiver sued Mr. Dragul and the Fifth Amendment issues are obvious. But motions to dismiss, decided based on the Receiver's allegations as he pled them, involve no testimonial component and thus raise no Fifth Amendment concerns. Moreover, Mr. Dragul's Motion to Dismiss the FAC raises at least two jurisdictional issues: (1) whether the Receiver has standing to assert his claims; and (2) whether the Receiver may sue Mr. Dragul. If the Court lacks subject matter jurisdiction for either of these reasons or any others, "the court shall dismiss the action." C.R.C.P. 12(h)(3). Entering a stay is not an option because if the Court lacks subject matter jurisdiction to hear the case, it lacks subject matter jurisdiction to stay the case. Thus, it made sense to address whether the FAC passes muster under Rule 12 before seeking a stay. The investor-creditors also benefit from this approach, since if Mr. Dragul succeeds on his Renewed Motion and the case is dismissed, the Receivership can wrap up and the investor-creditors can get their money right away, unlike if a stay entered only to have the case dismissed after the stay ends.

CONCLUSION

The Receiver relies on the possibility of delay to avoid facing the difficult legal questions in this case. But it is much better not only for Mr. Dragul and the other defendants, but also for the investor-creditors, to address those legal issues now so a doomed case does not continue to draw time and resources (or at a minimum, so the case is postured correctly and streamlined going forward). The only people who benefit by diving into discovery without resolving these legal issues first is the Receiver and his counsel, since the Receiver can continue to bill the Estate for his fees, and his counsel's contingency jumps from 38% to 45% if the case is appealed. (*See* Ex. 2 to Mr. Dragul's concurrently-filed reply in support of the Renewed Motion at ¶ 5.)

Mr. Dragul's request to toll the deadline to respond to the FAC until 14 days following the Court's ruling on Mr. Dragul's Renewed Motion will not realistically prejudice anyone, and has the potential to save not only Mr. Dragul, but also the Receivership Estate, wasted work. For those reasons, Mr. Dragul respectfully requests the Court grant the Motion and toll the deadline for Mr. Dragul to move to stay or otherwise respond to the FAC.

Dated this 22nd day of June, 2021.

JONES & KELLER, P.C.

s/ Christopher S. Mills

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*ATTORNEYS FOR DEFENDANT GARY J.
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2021, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION TO TOLL DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT** was filed and served via the Colorado Court E-filing system to the following:

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