DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: June 22, 2021 5:29 PM FILING ID: 4C35E79350986 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; 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 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	Case No. 2020CV30255 Courtroom: 414

DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF RENEWED MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR ORAL ARGUMENT

In his Response,[1] the Receiver advances four arguments why he believes the Court should not reconsider the previously-presiding Judge's stamped denial of Mr. Dragul's Motion to Dismiss the Receiver's First Amended Complaint ("Motion to Dismiss"): (1) that the only

[1] Receiver's Response to Dragul's Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint ("Response"), filed June 15, 2021.

manifest error Mr. Dragul identifies is that Judge McGahey did not enter detailed findings in his October 28, 2020 Order ("Order") denying the Motion to Dismiss (Resp. 2, 6); (2) the case has been pending a long time (Resp. 2, 3, 5); (3) that some claims are asserted on behalf of SPEs and not investor-creditors so some claims will remain even if some are dismissed (Resp. 3-4); and (4) that Mr. Dragul rehashes arguments he made previously (Resp. 5-7). Each of these arguments is either factually false, legally incorrect, or of no legal relevance, as addressed below. Worse, none of the Receiver's arguments substantively address the manifest legal errors justifying reconsideration identified in the Renewed Motion. The Court should correct those errors now because the Receiver cannot assert his claims and the Court lacks jurisdiction to hear them.

ARGUMENT

I. Manifest Legal Errors Justify Reconsideration and Dismissal

The Receiver's first argues that the only manifest error of law Mr. Dragul identifies is that Judge McGahey did not enter detailed findings in denying the Motion to Dismiss. Actually, Mr. Dragul argued that the lack of a written order here presented due process concerns resulting in *manifest injustice* justifying reconsideration, not that it reflected a manifest error of law. (Renewed Mot. 9-10.) As the Receiver concedes (Resp. 5), manifest injustice is one of four grounds justifying reconsideration and is separate and apart from manifest error of law.

Mr. Dragul identified six manifest errors of law. The October 28, 2020 Order necessarily held that: (1) the Receiver has standing to assert his claims; (2) the Receiver could sue Mr. Dragul even though Mr. Dragul is in the Receivership; (3) contrary to the Receivership Order, the Receiver could pursue his claims for damages even though his counsel are on contingency; (4) the Receiver's Colorado Securities Act claims are timely; (5) the Receiver's Fraudulent Transfer (CUFTA) claim is timely; and (6) the Receiver's Unjust Enrichment claim is both

timely and cognizable. Each of these reflects a manifest error of law, yet the Receiver fails to address any of them in his Response.

A. The Receiver Lacks Standing to Assert Third Party Investor Claims

As Mr. Dragul demonstrated with ample caselaw in the Renewed Motion (Renewed Mot. 6-7), and in his Motion to Dismiss (Mot. to Dismiss 5-12),[2] the Receiver may assert claims belonging to the people or entities in receivership, but lacks standing to assert third-party creditors' claims. Those claims belong to the creditors. In his Original Motion for Reconsideration, and in the Renewed Motion, Mr. Dragul noted that, while myriad cases hold receivers lack standing to assert third-party creditors' claims, he is not aware of any contrary authority from any jurisdiction anywhere in the U.S. (Original Mot. for Reconsideration 6; Renewed Mot. 7.) He also noted that, since the Receiver never identified any contrary caselaw in his "Omnibus Response" to the motions to dismiss,[3] his response to the Original Motion for Reconsideration ("Original Response"), his response to the Certification Motions, or any other pleadings, the Receiver must not be aware of any contrary authority either. (*Id*.) Though he was given another opportunity to finally identify such caselaw in his Response to this Motion, he still has not cited any authority to show he has standing here. (*See generally* Resp.) If the Order is

[2] Mr. Dragul incorporates by reference his (1) Motion to Dismiss, (2) Defendant Gary Dragul's Motion in the Alternative for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint, filed November 12, 2020 ("Original Motion for Reconsideration"), (3) 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, and (4) 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 (the latter two "Certification Motions"). Mr. Dragul also incorporates his replies in support of those motions.

[3] Receiver's Omnibus Response to Defendants' Motions to Dismiss, filed August 17, 2020 ("Omnibus Response").

not reconsidered, that would appear to make this Court the first in the nation to break from uniform precedent and rule that a receiver has standing to assert third-party creditors' claims.

In his Response, the Receiver's only argument related to standing is that "regardless of whether some of the Receiver's twelve claims could be construed to assert, in part, claims for harm only to individual investors, others indubitably assert damages suffered by the SPE entities that are part of the Receivership Estate caused by the fraudulent transfer of assets from the SPEs to the defendants" and that the FAC contains allegations of harm to the Estate. (Resp. 3-4.) Thus, the Receiver argues, "[r]egardless of whether some claims may ultimately be construed to assert 'investor claims,' others will remain and must be tried." (Resp. 4.) The Receiver does not identify which claims allege harm to SPEs or the Estate, or whether they do so sufficiently. Mr. Dragul demonstrated why *all* the claims asserted in the FAC are third-party investor-creditors' claims, not claims belonging to a person or entity in the Receivership (Mot. to Dismiss 5-8).

Finally, the Receiver's argument appears to be that if only some of the alleged claims would be knocked out on a motion to dismiss, the motion to dismiss should be denied in its entirety. But parties file, and courts grant, partial motions to dismiss routinely. Even if some claims might remain, that is no reason not to dismiss the defective claims, especially those over which the Court lacks subject matter jurisdiction.

B. The Receiver May Not Sue Mr. Dragul

In the Renewed Motion, Mr. Dragul demonstrated five reasons, supported with authority, why the Receiver may not sue Mr. Dragul since Mr. Dragul is in the Receivership. (Renewed Mot. 7-8.) For example, since the Receiver stands in Mr. Dragul's shoes, that would mean Mr. Dragul is suing himself. (Renewed Mot. 7-8.) In his Response, the Receiver does not address this argument, the four other reasons, or Mr. Dragul's supporting authority. He simply refers to

his prior pleadings. (Resp. 6-7; Resp. Exs. 1-4.) But the Receiver either did not substantively address this argument and the five reasons in his prior pleadings, or Mr. Dragul on reply demonstrated the Receiver's responses were specious.[4] If the Receiver had a strong position, he ought to welcome reconsideration. It would allow the Court an opportunity to consider not only Mr. Dragul's substantive arguments, but also the Receiver's responses, and to issue a reasoned order that is less susceptible to reversal on appeal.

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[4] For example, in his response to Mr. Dragul's Original Motion to Reconsider ("Original Response"), which he incorporates by reference into his Response here (the Receiver attached his Original Response as Ex. 3 to the Response), the Receiver argued that even though Mr. Dragul already turned his assets over to the Receiver, there would not be a double-recovery if the Receiver prevailed on his claims here because: (1) any judgment can be satisfied with assets Mr. Dragul acquired after the Receiver was appointed; (2) Mr. Dragul may be a necessary party; and (3) other defendants may try to apportion fault to Mr. Dragul. (Orig. Resp. 9-10.) But as Mr. Dragul demonstrated in his Dec. 24, 2020 reply in support of the Original Motion for Reconsideration ("Original Reply" 3-4), even if Mr. Dragul could acquire more assets with the cases against him pending, the Receiver's ability to recover against after-acquired assets has no bearing on the fact that the Receiver would still have an unlawful double-recovery up to the value of the assets Mr. Dragul already turned over. Had the Receiver not already seized those assets, Mr. Dragul would have them to satisfy a judgment. The Receiver also never articulated why Mr. Dragul would be a necessary party or why it would matter if he was. And he never explains why other defendants trying to apportion fault to Mr. Dragul would have any bearing on whether there is an unlawful double-recovery. The Receiver also argued Mr. Dragul has not proven the Receiver is using or will use Mr. Dragul's attorney-client privileged information against Mr. Dragul. (Orig. Resp. 9.) But he does not deny that he *has* such attorney-client privileged information, which is enough reason to preclude him from suing Mr. Dragul. (Orig. Reply 4.) It is also hard to escape the conclusion he is using it since the Receiver sued Mr. Dragul *and* Mr. Dragul's former attorney, Benjamin Kahn/Conundrum Group LLC, here. (*Id*.) The Receiver's argument (Orig. Resp. 9-10) that Mr. Dragul may only raise privilege issues with the court that appointed the Receiver ("Receivership Court") is legally baseless—it denies Mr. Dragul his universally-recognized right to protect his attorney-client privileged communications in the very forum where that right is being violated. 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 prejudice in *this* proceeding. (Orig. Reply 4.)

C. The Receiver Cannot Sue for Damages on Contingency

The Receivership Order does not authorize the Receiver to pursue claims for damages on contingency. (Renewed Mot. 9; Original Mot. for Reconsideration 7; Mot. to Dismiss 17-18.) The Receiver never addresses this argument in his Response. He obfuscated in his Omnibus Response to the motions to dismiss by arguing that the Receivership Order permits him to assert fraudulent transfer claims on contingency, ignoring the difference between fraudulent transfer claims and claims for damages. (Omnibus Resp. 21-22). In his response to the Original Motion for Reconsideration, he merely points to another part of the Receivership Order that purports to authorize him to assert creditors' claims, without addressing whether he can assert claims for damages *on contingency*. (Orig. Resp. 10.)

D. The Receiver's CSA, CUFTA, and Unjust Enrichment Claims are Time-barred and/or Not Cognizable

Based on the Receiver's own allegations, which Mr. Dragul accepted as true for the Motion to Dismiss, the Receiver's Colorado Securities Act ("CSA") claims, fraudulent transfer ("CUFTA") claims, and unjust enrichment claim are time-barred. (Renewed Mot. 9; Original Mot. for Reconsideration 8; Mot. to Dismiss 18-25.) And the unjust enrichment claim is not cognizable when plead with a fraudulent transfer claim. (Renewed Mot. 9; Original Mot. for Reconsideration 8; Mot. to Dismiss 24-25.) The Receiver does not respond to these points other than to incorporate his prior pleadings, without even identifying relevant pages in those pleadings. (Resp. 6-7.) Nowhere in those prior pleadings does the Receiver adequately address these legal defects. In his Omnibus Response, he argues that fact issues preclude ruling on statute of limitation grounds, ignoring both that the timeliness of a CSA claim is a substantive element the plaintiff must allege and prove, and that Mr. Dragul's arguments are based on the facts as the Receiver alleged them and in the exhibits the Receiver attached to his FAC.

(Omnibus Resp. section II(D); Mot. to Dismiss 18-25.) Both in his Response to the Original Motion for Reconsideration and his Omnibus Response, the Receiver also failed to address that the date of discovery on fraudulent transfer and unjust enrichment claims is the date of appointment of the receiver as a matter of law. (Mot. to Dismiss 23; Dragul's Reply in Support of Mot. to Dismiss 14-15); *Lewis v. Taylor*, 375 P.3d 1205, 1207 (Colo. 2016). And the Receiver never responded to Mr. Dragul's argument that an unjust enrichment claim is not cognizable when pled with a fraudulent transfer claim. (Mot. to Dismiss 24-25; Omnibus Response, *generally* (not addressing this point); Renewed Mot. 9; Resp., *generally* (not addressing this point).

II. The Circumstances Surrounding the Order Also Justify Reconsideration

The Order consists of a stamp "DENIED BY COURT." Though it ruled on complicated issues presented in 170 pages of briefing on the motions to dismiss, which involved the Court's subject matter jurisdiction, the Order contains no explanation or reasoning.[5] It was issued three days before the prior Judge's retirement as part of a mass issuance of non-reasoned stamped orders in multiple cases. These circumstances raise the question of whether the prior Court properly considered the motions to dismiss and related briefing, resulting in manifest injustice.

The Receiver argues the Court should deny the Renewed Motion because Mr. Dragul merely "rehashes the same arguments he made in his motion to dismiss the FAC[.]" (Resp. 6.)[6] But of the four grounds for reconsideration the Receiver identifies—(1) changed conditions, (2)

[5] Compare, for example, the case the Receiver cites, *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988), (Resp. 5), in which the U.S. District Court *did* issue a reasoned decision.

[6] This is ironic because in his Response, the Receiver provided no explanation, analysis, application, or cites. He merely incorporates four of his prior pleadings (with no page cites), and says he "will not reiterate these arguments here, and instead attaches and hereby incorporates those responses by reference." (Resp. 7.)

to correct a manifest legal or factual error in the previous ruling, (3) intervening change in law, or (4) manifest injustice from the previous ruling (Resp. 5)—only the first and third reasons turn on something different than what was already raised in the original motion briefing. Reasons (2) and (4)—the only reasons expressly identified in C.R.C.P. 121 § 1-15(11)—necessarily rely on what was already argued. They involve a manifest error in fact or law, or manifest injustice, made in ruling on those already-filed briefs.

III. The Length of Time the Case Has Been Pending is of No Import

The Receiver's argument that the Court should deny Mr. Dragul's Renewed Motion because the case has been pending a long time (Resp. 2, 3, 5), fails for several reasons. First, the length of time a case has been pending has no bearing on whether a party has standing to assert his claims, whether he has sued the proper defendant, whether his claims are time-barred, or whether they are cognizable. The passage of time does not create standing where none otherwise exists. Second, the Receiver was appointed in August of 2018, but did not file his original complaint against Mr. Dragul until January 21, 2020. If the Receiver were concerned about delay, he would not have waited nearly a year and half to bring suit. Third, if the Receiver wanted to avoid time-consuming fights about standing, whether he can sue Mr. Dragul, and other issues, he could have asserted only claims that do not suffer from these defects, especially in the FAC after the defendants identified those defects in their motions to dismiss the original complaint. Fourth, the Receiver has sought and received multiple extensions in this case, including for 75 days to file the FAC after the defendants filed their original motions to dismiss, and most recently for an additional 14 days to respond to the Certification Motions and Mr. Dragul's Original Motion for Reconsideration. Mr. Dragul does not begrudge the Receiver these extensions. Mr. Dragul did not oppose, and given the impact of COVID, understands such

extensions are sometimes necessary and has needed some himself. But that means Mr. Dragul is not solely to blame for delays—so is the Receiver.

Finally, if the Receiver successfully prosecutes the FAC through judgment, Mr. Dragul will appeal. If Mr. Dragul prevails on appeal, the parties would have wasted tremendous time (and money) litigating claims ultimately wiped away, meaning it will *save* the Receiver and the investor-creditors time if the Court addresses the issues now and dismisses the defective claims.[7]

CONCLUSION

Mr. Dragul does not dispute that motions for reconsideration are generally disfavored. But here, it is not clear the previously-presiding Judge considered the issues presented in the Motion to Dismiss. In denying that motion, the previous Court erred as a matter of law, including by effectively ruling it has subject matter jurisdiction contrary to all other authority from all other jurisdictions in the nation. If not corrected, the error in denying the Motion to Dismiss could easily lead to the parties litigating this case through trial only to have the Court of Appeals determine this Court lacked subject matter jurisdiction to hear it in the first place. Reconsideration is justified.

Because the history of this case and the legal issues at play are both weighty and complicated, Mr. Dragul respectfully requests a hearing to address the matters at issue and assist the Court in any way the Court may find helpful.

[7] The Receiver would also bill the Receivership Estate for his fees and costs (including for experts) to litigate those ultimately doomed claims. So too for his counsel's fees, whether on contingency since their fee jumps from 38% to 45% if there is an appeal (Ex. 2 at ¶ 5, attached hereto), or hourly. Since the investor-creditors' recovery comes out of the Estate, they will benefit if the Court dismisses the claims that are not viable.

Dated this 22nd day of June, 2021.

JONES & KELLER, P.C.

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

ATTORNEYS FOR DEFENDANT GARY J. DRAGUL

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 RENEWED MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT AND REQUEST FOR ORAL ARGUMENT** was filed and served via the Colorado Court E-filing system to the following:

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DATE FILED: June 22, 2021 5:29 PM
FILING ID: 4C35E79350986
CASE NUMBER: 2020CV30255

EXHIBIT 2

District Court, Denver County, State of Colorado Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433	DATE FILED: May 11, 2020 9:57 AM FILING ID: 5A003475E0835 CASE NUMBER: 2018CV33011
Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado v. **Defendants:** Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC	▲COURT USE ONLY▲
Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 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 mgilbert@allen-vellone.com rsternlieb@allen-vellone.com	Case Number: 2018CV33011 Division/Courtroom: 424

RECEIVER'S NOTICE CONCERNING REVISED COMPENSATION OF ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

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 hereby gives notice of a change in the terms of compensation to be paid to the law firm of Allen Vellone Wolf Helfrich & Factor P.C. ("Allen Vellone").

1. On August 15, 2018, Gerald Rome, Securities Commissioner for the State of Colorado (the "Commissioner), filed his Complaint for Injunctive and Other Relief

and on August 30, 2018, the Court entered its Order Appointing Receiver ("Receivership Order") which appointed Harvey Sender receiver for Dragul and the DGA Entities, as well as for their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate" or the "Estate"). Receivership Order at p. 2, ¶ 5.

2. The Receivership Order gives the Receiver the authority 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 . . . other third parties to assist the Receiver in the performance of its duties hereunder, all within the Receiver's discretion[.]" Receivership Order at p. 9, ¶ 13(l).

3. On September 7, 2018, the Receiver provided notice that he had retained Allen Vellone as his counsel to assist in him in administering the Receivership Estate. To date, Allen Vellone has been compensated on an hourly basis.

4. The Receiver has filed the following two cases that remain pending:

(a) ***Sender v. Dragul, et al.***, 2019CV33373, Denver District Court. In this case, the Receiver seeks 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 is set for trial beginning in December 2020 (the "**Dragul Family Case**").

(b) ***Sender v. Dragul, et. al.,*** 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 seeks to recover approximately $30 million.

5. The Receiver and Allen Vellone have agreed to modify their existing fee agreement, effective as of November 1, 2019, for work performed in the Insider and Dragul Family Cases so that Allen Vellone will be compensated on a contingent fee basis for work performed in those cases as follows: 25% of any recovery obtained in either case on or before September 5, 2020; 38% recovered after September 5, 2020, through the filing of any appeal, and 45% of the amount recovered after any appeal is filed. The Receivership Estate will pay the expenses incurred in both cases. The Commissioner has approved this agreement.

Dated: May 11, 2020.

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 May 11, 2020, I served a true and correct copy of the foregoing **RECEIVER'S NOTICE CONCERNING REVISED COMPENSATION OF ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.** via CCE 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