

DISTRICT COURT, DENVER COUNTY  
STATE OF COLORADO  
Denver District Court  
1437 Bannock St.  
Denver, CO 80202  
(303) 606-2429

DATE FILED: June 16, 2022 3:42 PM  
FILING ID: 7D16037518F26  
CASE NUMBER: 2020CV30255

**Plaintiff:** HARVEY SENDER, AS RECEIVER FOR  
GARY DRAGUL; GDA REAL ESTATE SERVICES,  
LLC; AND GDA REAL ESTATE MANAGEMENT, LLC

v.

**Defendants:** GARY J. DRAGUL, an individual;  
BENJAMIN KAHN, an individual; THE CONUNDRUM  
GROUP, LLP, a Colorado Limited Liability Company;  
SUSAN MARKUSCH, an individual; MARLIN S.  
HERSHEY, an individual; and PERFORMANCE  
HOLDINGS, INC., a Florida Corporation; OLSON  
REAL ESTATE SERVICES, LLC, a Colorado Limited  
Liability Company; JOHN AND JANE DOES 1 – 10;  
and XYZ CORPORATIONS 1 – 10.

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Case Number:  
2020CV30255

Division/Courtroom:  
414

**RECEIVER'S RESPONSE TO DRAGUL'S ALTERNATIVE MOTION TO  
STAY**

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC, GDA Real Estate Management, Inc., and related entities (collectively, “Dragul and the GDA Entities”), responds to Defendant Gary Dragul’s Alternative Motion to Stay (“Stay Motion”).

## I. Introduction

This case has been pending since January 2020. Since then, Dragul has done everything he can to delay it, including an unsuccessful detour to the Court of Appeals under C.A.R. 4.2. At the status conference on April 22, 2022, the Court advised the parties it was finalizing an order denying Dragul’s renewed motion to dismiss and ordered this case to proceed. In his Stay Motion, Dragul once again seeks to suspend this case, now indefinitely until all criminal proceedings against him have finally been resolved, which may be years.

As Dragul acknowledges, he was first indicted in April 2018, and again in March 2019. More than four years later, he has not been tried on either indictment. Dragul obtained at least ten continuances of his arraignment date; he finally pleaded not guilty on June 22, 2021. Since then, Dragul has obtained four continuances of trial dates on his first indictment, which had been set for November 30, 2020, March 22, 2021, June 28, 2021, and June 6, 2022. The remaining charge in the first indictment is now set for trial November 7-17, 2022,<sup>1</sup> but, considering the past delays,

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<sup>1</sup> Apparently 8 counts of the first indictment have been dismissed on limitations grounds. Stay Motion at 2 n.1.

there is no assurance Dragul's first criminal trial will proceed as scheduled, and no trial date has been set on his second indictment.

Dragul has known about his criminal proceedings since this case was filed two-and-a-half years ago. More than a year ago, he indicated he intended to move to stay before answering the Receiver's First Amended Complaint, on the very same grounds he advances now.<sup>2</sup> Yet it is only now – after failing to get the case dismissed despite multiple attempts, and the Court's recent statement that it was going to deny Dragul's renewed motion for reconsideration of his motion to dismiss – does he ask the Court to stay this case indefinitely. The Court should reject Dragul's latest effort to stall this proceeding. This case is the last material asset to be administered in the Receivership case, which was commenced in August 2018. Nearly four years later, with many of Dragul's defrauded investors' funds hanging in the balance, the Receiver, and no doubt the Receivership Court are eager to close the Receivership as expeditiously as possible and distribute its assets. This Court too has an interest in resolving this case and getting it off its docket. Granting Dragul's Stay Motion will frustrate these public interest and delay these processes indefinitely.

## **II. The Court should exercise its discretion and deny the Stay Motion.**

Nothing in the Constitution requires a civil case be stayed pending the outcome of related criminal proceedings. *E.g.*, *S.E.C. v. Bongiorno*, Case No. 1:20-cv-00469,

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<sup>2</sup> See Dragul's Motion to Toll Deadline to Respond to First Amended Complaint at 2, ¶ 4 (attached as **Exhibit 1**).

2022 WL 891811, at \*2 (N.D. Ohio Mar. 28, 2022); *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). Indeed, it “is the rule, rather than the exception that civil and criminal cases proceed together.” *Alcala v. Texas Webb Cnty.*, 625 F. Supp. 2d 391, 397 (S.D. Tex. 2009). A stay pending resolution of criminal proceedings is an extraordinary remedy entirely within the Court’s discretion. *People v. Shifrin*, 2014 COA 14, ¶ 25 (quoting *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98–100 (2d Cir.2012) (defendants face a heavy burden “in overcoming a district court’s decision to refrain from entering a stay.”)). The party seeking a stay must show there is a pressing need for the requested delay and “that neither the other party nor the public will suffer harm from” a stay. *Bongiorno*, 2022 WL 891811, at \*2. Here the Receiver, the Estate’s defrauded creditors, and the public will be harmed if Dragul is granted his requested blanket, indefinite stay.

Dragul is correct that courts generally examine six non-exclusive factors in deciding whether to enter a stay in these circumstances: (1) the extent to which the issues in the criminal case overlap with those in the civil case; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the private interests of plaintiffs in proceeding expeditiously weighed against the prejudice they would suffer from delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *See* Stay Motion at 4 (citing *Shifrin*, 2014 COA 14, ¶ 26). However, “[b]ecause these factors ‘do no more than act as a rough guide for the [trial] court as it exercises its discretion,’ the ultimate

decision ‘requires and must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case.’” *Shifrin*, 2014 COA 14, ¶ 26 (quoting *Louis Vuitton*, 676 F.3d at 99). The most important factor is the balance of hardships, but courts should also consider whether granting a stay will further judicial economy. *Bongiorno*, 2022 WL 891811, at \*2. Here, the balance of interests support denying the Stay Motion.

**A. The balance of interests does not support a stay.**

The Receiver does not dispute that there is some overlap of the issues between Dragul’s criminal case and those here, but the issues are far from “virtually identical” as Dragul contends.<sup>3</sup> See Stay Motion at 6. The two indictments combined contain 14 counts of securities fraud all under C.R.S. § 11-51-501(1)(b) and 603(1). In this case, the Receiver also alleges violations of C.R.S. § 11-51-604, 11-51-301, and asserts claims for negligence, negligent misrepresentation, civil theft, violations of the Colorado Organized Crime Control Act, breach of fiduciary duty, fraudulent transfer, and unjust enrichment. While there is some overlap, it is not clear – and Dragul does not specify – how his anticipated testimony in his criminal cases and this case might coincide, or to what questions he might invoke the Fifth Amendment. Instead, he

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<sup>3</sup> The overlap of issues and the existence of an indictment are best considered in the context of weighing the interests of the parties, the Court, third parties, and the public rather than as standalone elements. *Alcala*, 625 F. Supp. 2d at 399-400.

alludes vaguely to prejudice in his criminal case if he were to testify here.<sup>4</sup> But a party invoking the Fifth Amendment must invoke it in response to specific questions. *E.g.*, *People in Int. of K.S-E*, 2021 COA 93, ¶ 33.<sup>5</sup> Requesting “a complete stay is tantamount to a defendant’s ‘blanket assertion’ of the Fifth Amendment, which is itself improper.” *Alcala*, 625 F. Supp. 2d at 397; *K.S-E*, 2021 COA 93, ¶ 33 (“It is well established that the privilege against self-incrimination ‘is an option of a refusal, not a prohibition of inquiry,’ and thus it ‘may not be asserted as a blanket claim in advance of the questions actually propounded.’”) (quoting *People v. Ruch*, 2016 CO 35, ¶ 23)). And a blanket stay is unnecessary to protect Dragul from discovery in this case from being used against him in his criminal cases, particularly since alternatives such as a protective order can mitigate any potential harm. *See, e.g., In re CFS-Related Secs. Fraud Litig.*, 256 F. Supp. 2d 1227, 1236 (N.D. Okla. 2003) (canvassing cases and denying stay of deposition despite complete overlap of issues in civil and criminal cases and defendant’s indictment; any prejudice ameliorated by sealing deposition transcript).

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<sup>4</sup> Dragul also argues that the interests of the other defendants in this case also warrant a stay. Stay Motion at 11 n.5. None of the other defendants have moved to stay or joined Dragul’s Stay Motion, and Dragul lacks standing to assert their interests.

<sup>5</sup> Indeed, at the April 22nd Status Conference and the May 27th Case Management Conference, counsel indicated Dragul would invoke the Fifth Amendment in response to specific questions asked during a deposition or in written discovery.

In the nearly four years since the Receiver was appointed, Dragul has steadfastly denied any wrongdoing and explained to the Receiver that his indictments arise from mere accounting misunderstandings and belated account reconciliations. Dragul doesn't explain why, if this is so, his testimony in this case to that effect could undermine his defense in his criminal case. Nor does he address why he could not establish his defense in this civil case through the testimony of other parties, such as Susan Markusch (his CFO/controller, longtime friend, and co-defendant in this case), his attorney Benjamin Kahn (also a co-defendant), both of whom are intimately familiar with GDA's historical operations, or with the experts he has engaged in his criminal case (who are likely to be experts in this case as well). *See, e.g., Pellegrino v. Wengert*, 147 F. Supp. 3d 1379, 1382 (S.D. Fla. 2015) (denying stay in part because defendant failed to show he could not support defenses through other witnesses).

There is no reason this case cannot proceed through discovery and trial. Dragul's first criminal trial is scheduled to begin in November 2022; trial in this case is not scheduled to begin until May 2023, so Dragul's criminal defense strategy will likely be disclosed well before trial occurs here. Moreover, if after his first criminal trial, Dragul elects to testify at trial here, he could still invoke the Fifth Amendment in response to specific questions. He does not have an "absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege." *Creative Consumer Concepts, Inc.*, 563 F.3d at 1080 (quoting *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995)).

While Dragul seeks to delay this case indefinitely, the Receiver, this Court, third parties, and the public have a compelling interest in resolving it as expeditiously as possible. The Receiver is an officer of the Receivership Court. He was appointed to marshal Dragul's assets for the benefit of Dragul's defrauded investors and creditors, who have been waiting several years for resolution.<sup>6</sup> Until this case resolved, the Receivership Estate cannot be closed or distributions made to creditors. The interests of the Receiver, third parties, and the public strongly mitigate against a stay. And this Court too has a strong interest in moving the case to resolution. The case has been pending for two-and-a-half years. It may be years until Dragul's criminal proceedings are finally resolved.

Dragul argues the Receiver will not be materially prejudiced and must not be interested in promptly resolving this case because the Receiver waited more than a year after he was appointed to file the case and has obtained extensions of time to respond to Dragul's many motions. Stay Motion at 8-9. Dragul doesn't inform this Court about the mess he left the Receiver. Before the Receiver was appointed, every commercial loan against Receivership properties scattered across the country was in default, and foreclosure actions were pending. The Receiver was inundated responding to issues in lawsuits against Dragul and the GDA Entities, and in managing, stabilizing, and attempting to sell at least 10 shopping centers throughout

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<sup>6</sup> The Receiver and counsel regularly receive inquiries from investors as to the progress of this case and when Receivership assets may be distributed.



the United States and multiple residential properties. Simultaneously, the Receiver was investigating and pursuing multiple fraudulent transfer cases and other litigation. The investigation required to bring this case was extensive, and the case was filed promptly.

Dragul is the progenitor of delay here. He has filed at least three motions to dismiss, two motions for reconsideration when those motions were denied, and he sought interlocutory appellate review of the denials as well. Now he wants an *indefinite* stay until all of his criminal proceedings are finally resolved. Given his history of delay, there is no assurance the currently scheduled criminal trial on Dragul's first indictment will proceed in November 2022, and no trial date has yet been set on his second indictment. If Dragul is convicted, he will likely appeal, and there is no telling when all appeals might be exhausted. In effect, Dragul is asking this Court to stay this case for years after it has already languished for more than two. But this Court, the Receivership Court, the Receiver, and Dragul's third-party creditors all have a strong interest in concluding this case.<sup>7</sup>

**B. The stay of the Commissioner's civil enforcement action does not justify a stay here.**

Dragul next argues that, because the Commissioner's civil enforcement action against him has been stayed for almost four years, "[t]here is no discernable reason

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<sup>7</sup> *In re CFS-Related Secs. Fraud Litig.*, 256 F. Supp. 2d at 1241 ("The Court has a strong interest in keeping litigation moving to conclusion without unnecessary delay.").

why” this case should not be as well. Stay Motion at 12. Dragul moved to stay the Commissioner’s case on October 26, 2018, without serving the Receiver. *See Exhibit 2*. That motion asserted the public interest would not be undermined because Dragul’s criminal case would be resolved *without delay*. *Id.* at 4. The Commissioner consented to a stay, but was careful to exclude “actions conducted by or on behalf of the receiver.” Stay Motion at Ex. 7. On June 14, 2022, the Commissioner filed her *twelfth* request to extend that stay, observing the Receivership remains open, and again specifically excluding from the stay any actions by the Receiver. **Exhibit 3**.

Four years on, the notion that a stay would not delay the Commissioner’s case has been proven wrong. While the Commissioner remains willing to delay her civil enforcement action, there is no justification for making the Receivership’s creditors wait indefinitely for Dragul’s criminal proceedings to be resolved, the Receivership to be wound up, and its assets distributed.

**C. The Receivership Order does not enjoin this action.**

Retreading an argument the Court has already rejected, Dragul once again argues the Receivership Order enjoins the Receiver’s claims here. Stay Motion at 13; Dragul’s Motion to Dismiss First Amended Compl. at 14 (filed July 6, 2020); Dragul’s Motion to Dismiss at 12 (filed Mar. 17, 2020). He argues paragraph 26 of the Receivership Order<sup>8</sup> precludes the Receiver’s claims. Paragraph 26 stays actions by third-parties against the Receiver, Dragul, or the GDA Entities. It does not stay the

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<sup>8</sup> Stay Motion at Ex. 2.

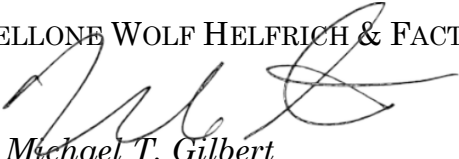
Receiver from commencing actions specifically authorized by other provisions of the Receivership Order. Paragraph 13(n) of the Receivership Order authorizes the Receiver to “institute such legal actions as the Receiver deems reasonably necessary, including actions [...] against third parties.” The use of “including” is an example of the Receiver’s authority, not a limitation on it. *See, e.g., Arnold v. Colorado Dep’t of Corrections*, 978 P.2d 149, 152 (Colo. App. 1999). Indeed, the Commissioner’s requests to stay her enforcement action and the Receivership Court’s orders extending that stay, all exclude actions brought by the Receiver. Although the Receivership Court has extended the Commissioner stay six times since this case was filed, it has never stayed this case, nor has Dragul asked the Receivership Court to do so. If Dragul believes the Receivership Order bars this action, his relief must come from the Receivership Court.

### **III. Conclusion**

The Receiver, the Receivership creditors, the public, and this Court all have a compelling interest in resolving this case without further delay. Dragul’s blanket request for an indefinite stay should be denied.

Respectfully submitted this 16<sup>th</sup> day of June, 2022.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By:   
s/ Michael T. Gilbert

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 16, 2022, a true and correct copy of the foregoing, **RECEIVER'S RESPONSE TO DRAGUL'S ALTERNATIVE MOTION TO STAY** was filed and served via the Colorado Courts E-Filing system to the following:

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*In accordance with C.R.C.P. 121 § 1-26(7), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*

<p>DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202</p>	<p>DATE FILED: May 12, 2021 3:42 PM FILING ID: 7886937418350 CASE NUMBER: 2020CV30255</p>
<p><b>Plaintiff:</b> HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p><b>Defendants:</b> GARY J. DRAGUL, an individual; BENJAMIN KAHN, an individual; THE CONUNDRUM GROUP, LLP, a Colorado Limited Liability Company; SUSAN MARKUSCH, an individual; MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; OLSON REAL ESTATE SERVICES, LLC, a Colorado Limited Liability Company; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10.</p>	<p>▲ 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 &amp; Keller, P.C. 1675 Broadway, 26<sup>th</sup> Floor Denver, CO 80202 Phone: 303-573-1600 Email: cmills@joneskeller.com pvorndran@joneskeller.com</p>	<p>Case No. 2020CV30255  Courtroom: 414</p>
<p><b>DEFENDANT GARY DRAGUL’S MOTION TO TOLL DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT</b></p>	

Defendant Gary Dragul seeks to toll the deadline to respond to the Receiver’s First Amended Complaint until fourteen days following the Court’s ruling on Mr. Dragul’s concurrently filed Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint (“Renewed Motion”). In support thereof, Mr. Dragul states as follows:

### Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Mr. Dragul conferred with counsel for the Receiver and the Receiver opposes the relief sought in this Motion.

1. Concurrent with the filing of this Motion to Toll Deadline to Respond to First Amended Complaint (“Motion”), Mr. Dragul is filing his Renewed Motion which asks the Court to revisit Mr. Dragul’s Motion to Dismiss the Receiver’s First Amended Complaint (“FAC”).

2. Mr. Dragul’s Renewed Motion (and underlying Motion to Dismiss) include two case-dispositive issues implicating the Court’s subject matter jurisdiction: (1) whether the Receiver has standing to assert third-party creditors’ claims; and (2) whether the Receiver may sue Mr. Dragul even if Mr. Dragul is in the Receivership.

3. If the Court grants the Renewed Motion, reconsiders the Motion to Dismiss, and dismisses the Receiver’s claims, there will be no need to answer the FAC.

4. Additionally, should the deadline to answer the FAC approach, Mr. Dragul intends to move to stay the case. Mr. Dragul is defending against two criminal indictments involving substantially the same facts as the Receiver alleges in the FAC. The first indictment is currently scheduled to go to trial at the end of June. No criminal defense attorney would allow his or her client to testify in a civil proceeding about facts related to a pending criminal case. The criminal attorney would instead instruct the client to invoke his Fifth Amendment rights.

5. Doing so in this civil case will preclude Mr. Dragul from defending himself. It will also preclude other defendants from defending themselves in this civil action, as they assuredly need testimony from Mr. Dragul for their defense. For that reason, courts may and often do stay such civil cases when parallel criminal cases are pending. *See, e.g., United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970) (collecting cases); *People v. Shifrin*, 342 P.3d 506, 513

(Colo. App. 2014); *Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995).

6. However, there is no need to stay the case if it is instead dismissed for lack of subject matter jurisdiction or other reasons. Indeed, if the Court lacks subject matter jurisdiction, it is unclear it would even have jurisdiction to stay the case (or allow it to proceed).

7. No party will be prejudiced by tolling the complaint response deadline. The case is not yet at issue and no other dates exist that could be impacted. The requested tolling until 14 days after the Court rules on the Renewed Motion does not represent a significant delay in the overall timeline of a case. That is particularly so since Mr. Dragul intends to move to stay the case if it is not dismissed, meaning it might not move forward anyway. And tolling the deadline would prevent the parties from having to expend time and resources drafting and addressing pleadings that may be wholly unnecessary.

### CONCLUSION

For those reasons, Mr. Dragul requests the Court toll the deadline for Mr. Dragul to respond to the FAC until fourteen (14) days following the Court's ruling on Mr. Dragul's Renewed Motion. Should the Court grant the Renewed Motion and dismiss the case, there will be no need for Mr. Dragul to respond to the FAC or file the motion to stay. Should the Court deny the Renewed Motion, tolling the deadline will allow Mr. Dragul to draft and file his motion to stay. A proposed order is submitted herewith.

Dated this 27th day of May, 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 27<sup>th</sup> day of May, 2021, a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S 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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Christopher S. Mills

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	DATE FILED: May 27, 2021 4:17 PM FILING ID: BB593A41E3500 CASE NUMBER: 2020CV30255
<p><b>Plaintiff:</b> HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p><b>Defendants:</b> GARY J. DRAGUL, an individual; BENJAMIN KAHN, an individual; THE CONUNDRUM GROUP, LLP, a Colorado Limited Liability Company; SUSAN MARKUSCH, an individual; MARLIN S. HERSHEY, an individual; and PERFORMANCE HOLDINGS, INC., a Florida Corporation; OLSON REAL ESTATE SERVICES, LLC, a Colorado Limited Liability Company; JOHN AND JANE DOES 1 – 10; and XYZ CORPORATIONS 1 – 10.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
	Case No. 2020CV30255  Courtroom: 414
<b>[PROPOSED] ORDER GRANTING DEFENDANT GARY DRAGUL’S MOTION TO TOLL DEADLINE TO RESPOND TO FIRST AMENDED COMPLAINT</b>	

THIS MATTER, having come before the Court on Defendant Gary Dragul’s Motion to Toll Deadline to Respond to First Amended Complaint (“Motion to Toll”), and good cause having been shown, the Court hereby GRANTS the Motion to Toll.

Mr. Dragul shall have up to and including fourteen (14) days following the Court’s ruling on Mr. Dragul’s Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint to either respond to the Receiver’s First Amended Complaint or to file a motion to stay the case.

SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 2021.

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District Court Judge

**INTERNAL SSC MEMORANDUM**

<p><b>Scanned/Save</b></p> <ul style="list-style-type: none"> <li>) Save/scanned to e-file</li> <li>) Save Signature to pleading</li> <li>) Save to Index</li> </ul>	
<p><b>Sent to Client &amp; Attorneys on:</b></p> <p><b>Sent to Attorneys Only:</b></p> <p><b>By:</b></p>	<p align="right">Matrix?</p>
<p><b>Calendared:</b></p> <p><b>By:</b></p>	<p align="center">OR</p>
<p><b>Notes:</b></p>	

DISTRICT COURT, COUNTY OF DENVER STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202 Phone Number: 720.865.7800	DATE FILED: Dec 26, 2018 13:42 PM FILING NO: 19C8D16085308F26 CASE NUMBER: 2018CV33011
<p><b>GERALD ROME, Securities Commissioner for the State of Colorado,</b></p> <p><b>Plaintiff,</b></p> <p><b>v.</b></p> <p><b>GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC,</b>  <b>and GDA REAL ESTATE MANAGEMENT, LLC,</b></p> <p><b>Defendants.</b></p>	<p><b>Δ COURT USE ONLY Δ</b></p> <hr/> <p>Case Number: 2018CV33011</p> <p>Courtroom: 424</p>
SPRINGER AND STEINBERG, P.C. Jeffrey A. Springer, Esq. (Bar No. 6793) 1600 Broadway, Suite 1200 Denver, Colorado 80202 Tel: 303.861.2800 Fax: 303.832.7116 Email: jspringer@springersteinberg.com ATTORNEYS FOR DEFENDANTS	
<p><b>MOTION TO STAY</b></p>	

COME NOW, Defendants Gary Dragul, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC, by and through their counsel of record Jeffrey A. Springer of Springer and Steinberg, P.C., and hereby move that the Court stay proceedings in this matter until the case *The People of the State of Colorado v. Gary Dragul*, 18CR001092, which is pending in Arapahoe County District Court, is resolved.

**CERTIFICATE OF CONFERRAL PURSUANT TO C.R.C.P. 121, § 1-15(8)**

On October 26, 2018 undersigned counsel conferred with Attorney General Sueanna Johnson regarding the relief requested herein and she advised that the Plaintiff does take any position on the Motion.

**GROUND FOR THE MOTION:**

**BACKGROUND**

The Complaint<sup>1</sup> in this matter alleges that from January 2008 through December 2015 the Defendants committed multiple acts of securities fraud. As alleged, the Defendants persuaded investors to purchase membership interests in various limited liability companies (“companies”) without disclosing material information to them. The companies were engaged in the practice of purchasing and selling commercial property. The Complaint also alleges that when the Defendants sold various parcels of commercial property, they did not repay all investors or even inform them that the property had been sold. It is also alleged that the Defendants comingled the assets of the companies.

In addition to this matter, Mr. Dragul has been indicted by a Colorado grand jury in Arapahoe County District Court case 18CR00192 (“Criminal Case”). The indictment<sup>2</sup> in the Criminal Case charges that in 2012 and 2013, as part of the conduct described in the Complaint, Mr. Dragul committed multiple acts of securities fraud against the investors who purchased membership interests in the companies.

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<sup>1</sup> A true and correct copy of the Complaint is attached as Exhibit 1 and is incorporated herein by reference.

<sup>2</sup> A true and correct copy of the Indictment is attached as Exhibit 2 and is incorporated herein by reference.

## ARGUMENT

This Court should stay this case until the Criminal Case has been resolved. A defendant in a civil case who is also defending criminal charges based on the same or similar allegations giving rise to the civil case must often choose between testifying in the civil case and asserting his Fifth-amendment privilege against self-incrimination. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). In a criminal case, a fact finder cannot draw an adverse inference from the defendant's decision to invoke his Fifth-amendment privilege against self-incrimination, but in a civil case, the fact finder can. *Griffin v. Cal.*, 380 U.S. 609, 613-15 (1965); *People v. Ortega*, 597 P.2d 1034, 1036-37 (Colo. 1979); *McGillis Inv. Co. v. First Interstate Fin. Utah LLC*, 2015 COA 116, ¶27, 370 P.3d 295; *People v. Williams*, 100 P.3d 565, 566-67 (Colo. App. 2004). To prevent a defendant's assertion of his privilege against self-incrimination from prejudicing his civil case, a court may stay civil proceedings until the criminal case is resolved. *People v. Shirfrin*, 2014 COA 14, ¶26, 342 P.3d 506. Courts consider six factors when determining whether to stay civil proceedings pending the resolution of a criminal case:

- 1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
- 2) the status of the case, including whether the defendants have been indicted;
- 3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay;
- 4) the private interests of and burden on the defendants;
- 5) the interests of the courts; and
- 6) the public interest.

*Id.*

Analyzing these factors, first, both the Criminal Case and this case allege that Mr. Dragul committed securities fraud in connection with selling membership interests in the companies. In fact, the allegations in the Criminal Case are completely subsumed in this case. Where this case alleges that the Defendants committed securities fraud from 2008 through 2015, the Criminal Case focuses on certain instances of alleged securities fraud that occurred during 2012 and 2013. Thus,

there is substantial legal and factual overlap between this case and the Criminal Case. Second, the Criminal Case commenced in April 2018 when a Colorado grand jury indicted Mr. Dragul. Since that time, the case has been progressing toward resolution without significant delays. These first two factors strongly weigh in favor of staying this case. *See id.* at ¶¶29-31.

The remaining factors also weigh in favor of staying this case. As to the third factor, the Plaintiff in this case will not suffer prejudice. Although the plaintiffs are nominally different in each case—Gerald Rome, Securities Commissioner for the State of Colorado in this case and the People of the State of Colorado in the Criminal Case—they are actually the same because Mr. Rome is acting in his official capacity for the State of Colorado. Both plaintiffs are also being represented by the State Attorney General’s Office. Given the overlap between the two cases, the plaintiffs’ shared identity, and the plaintiffs’ shared counsel, prosecuting the Criminal Case will also move the civil case forward. Indeed, resolution of the Criminal Case may also resolve issues involved in this case. As to the fourth factor, Mr. Dragul’s private interest is substantial. Staying the civil case will allow him to exercise his Fifth Amendment rights, if necessary, without an adverse inference being drawn in the civil case. Moreover, granting a stay will ease the financial burdens on Mr. Dragul by preventing duplicative hearings in both cases and by allowing his attorneys to focus their efforts on the Criminal Case and this case in succession, if necessary. As to the fifth factor, staying this case is also in the courts’ best interest. It will avoid duplicative litigation, thus conserving the courts’ resources. And finally, the public interest will still be served because the allegations against Mr. Dragul in the Criminal Case will still be resolved without delay, and again, the outcome of the Criminal Case may resolve issues pending in this case. Further a receiver has been appointed in this case so that actions to preserve the Estate and possibly to provide restitution to investors can still proceed. Moreover, the Defendants have been restrained



in this case and Mr. Dragul is subject to restrictions in the Criminal Case attendant to his posting of bond. Hence, the public interest is certainly not compromised in anyway by staying this action and as set forth above, is likely enhanced.

### CONCLUSION

This Court should stay this case to protect Mr. Dragul's Fifth-amendment rights. He should not be forced to decide whether to testify in this case or to assert his Fifth-amendment rights. Indeed, the factors governing whether or not to grant a stay, especially the first and second factors, all weigh in favor of granting a stay.

**WHEREFORE**, the Defendants respectfully request that this Court stay this case until *The People of the State of Colorado v. Gary Dragul*, 18CR001092, which is pending in Arapahoe County District Court, is resolved.

Respectfully submitted this 26<sup>th</sup> day of October, 2018,

SPRINGER AND STEINBERG, P.C.

By:           /s/ Jeffrey A. Springer            
Jeffrey A. Springer, #6793  
ATTORNEYS FOR DEFENDANTS  
*Original signature on file at the  
Springer and Steinberg, P.C.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this 26<sup>th</sup> day of October, 2018, the above and foregoing **MOTION TO STAY** was filed with the Court and a true and accurate copy of the same was served via ICCES to:

Robert Finke  
Sueanna Johnson  
Matthew Bouillon Mascarenas  
Assistant Attorney Generals  
1300 Broadway, 8<sup>th</sup> Floor  
Denver, Colorado 80203

*/s/ Michaela Lloyd*

Michaela Lloyd

*Original signature on file at the  
Springer and Steinberg, P.C.*

<p><b>DISTRICT COURT, DENVER COUNTY, COLORADO</b> 1437 Bannock Street Denver, CO 80202</p> <hr/> <p><b>TUNG CHAN, Securities Commissioner for the State of Colorado,</b></p> <p>Plaintiff,</p> <p>v.</p> <p><b>GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC,</b></p> <p>Defendants.</p>	<p>DATE FILED: June 16, 2022 3:52 PM FILING ID: 5B06034308E262 CASE NUMBER: 2018CV33011</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General ROBERT W. FINKE, 40756* First Assistant Attorney General JANNA K. FISCHER, 44952* Assistant Attorney General Ralph L. Carr Judicial Building 1300 Broadway, 8<sup>th</sup> Floor Denver, CO 80203 Tel: (720) 508-6376 (Finke)       (720) 508-6374 (Fischer) Fax: (720) 508-6037 <a href="mailto:robert.finke@coag.gov">robert.finke@coag.gov</a> <a href="mailto:janna.fischer@coag.gov">janna.fischer@coag.gov</a> *Counsel of Record <i>Attorneys for Plaintiff, Tung Chan, Securities Commissioner for the State of Colorado</i></p>	<p>Case No.: <b>2018CV33011</b></p> <p>Courtroom: <b>424</b></p>
<p><b>TWELFTH STATUS REPORT WITH REQUEST FOR EXTENSION OF STAY</b></p>	

Plaintiff Tung Chan, Securities Commissioner for the State of Colorado  
("Securities Commissioner"), by and through the Colorado Attorney General and

undersigned counsel, hereby submits this Twelfth Status Report with Request for Extension of Stay (“Status Report”) and states as follows:

1. Undersigned counsel certifies that she conferred with counsel for Defendant Gary Dragul (“Defendant”), and counsel for Defendant does not oppose this motion.

2. On March 7, 2022, the Parties filed their Eleventh Status Report with Request for Extension of Stay for 120 days.

3. On April 22, 2022, based upon motions filed by Defendant to vacate, continue, and reschedule his jury trials, the Court ordered trials to be reset in Arapahoe County District Court criminal cases 2018CR1092 and 2019CR610.

4. On April 22, 2022, the Court reset an eight-day trial to commence November 7, 2022, in 2018CR1092. Case number 2019CR610 is set for a status conference on the same date and has no separate trial date set.

5. Due to Defendant’s pending criminal trial, and because the work of the Receivership is still outstanding, the Securities Commissioner requests an additional stay of 120 days from approval of this Status Report with the same terms and conditions as previously permitted so that said stay will not bar any action taken by or on behalf of the Receiver.

Respectfully submitted this 14<sup>th</sup> day of June 2022.

PHILIP J. WEISER  
Attorney General

*/s/ Janna K. Fischer*

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JANNA K. FISCHER, 44952\*  
First Assistant Attorney General  
Financial and Health Services Unit  
*Attorney for Plaintiff Tung Chan, Securities  
Commissioner*  
\*Counsel of Record

**CERTIFICATE OF SERVICE**

I certify that I have duly served the foregoing **ELEVENTH STATUS REPORT WITH REQUEST FOR EXTENSION OF STAY** upon all parties herein through the Colorado Courts E-Filing system this 14<sup>th</sup> day of June 2022, addressed as follows:

Patrick D. Vellone, Esq.  
Michael T. Gilbert, Esq.  
Rachel A. Sternlieb, Esq.  
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1675 Broadway, 26th Floor  
Denver, CO 80202  
*Counsel for Defendant Gary Dragul*

*/s/ Shannon Kealiher*

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The Office of The Attorney General