<table>
<tr><td>District Court, City and County of Denver, Colorado
City & County Building
1437 Bannock Street
Denver, CO 80202</td><td rowspan="2">DATE FILED: June 21, 2022
CASE NUMBER: 2020CV30255

▲ COURT USE ONLY ▲

Case Number: 2020CV30255

Courtroom: 414</td></tr>
<tr><td>Plaintiff:
HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; and GDA REAL ESTATE MANAGEMENT, LLC

v.

Defendants:
GARY DRAGUL; BENJAMINI KAHN; THE CONUNDRUM GROUP, LLP; SUSAN MARKUSCH; ALLEN C. FOX; ACF PROPERTY MANAGEMENT, INC.; MARLIN S. HERSHEY; PERFORMANCE HOLDINGS, LLC; OLSEN REAL ESTATE SERVICES, LLC; JUNIPER CONSULTING GROUP, LLC; JANE DOES 1-10; and XYZ CORPORATIONS 1-10</td></tr>
<tr><td colspan="2">ORDER RE: DEFENDANT GARY DRAGUL'S RENEWED MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS FIRST AMENDED COMPLAINT</td></tr>
</table>

THIS MATTER is before the court on Defendant Gary Dragul's ("Defendant Dragul's") Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint ("Renewed Motion"), filed May 27, 2021. The court, having reviewed the Motion, Receiver Harvey Sender's ("Plaintiff's" or "Receiver Sender's") Response in opposition thereto, filed June 15, 2021, the Reply, filed June 22, 2021, and the briefs incorporated by reference therein, the court file, and being otherwise fully advised in the premises HEREBY FINDS and ORDERS as follows:

FACTUAL & PROCEDURAL BACKGROUND

On August 15, 2018, the Securities Commissioner for the State of Colorado (the "Commissioner") brought an enforcement action[1] against Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC ("GDA entities") alleging a long-standing equity Ponzi scheme involving the solicitation of numerous investors into a large number of single purpose entities ("SPEs") established for the purpose of investing in commercial real estate. The

[1] *Chan v. Dragul, et al.*, Denver District Court Case No. 2018CV33011.

proceedings sought to enjoin[2] Defendant Dragul and the GDA entities from continuing the business of trading securities and to appoint a receiver to take control of the operations and assets of Defendant Dragul and the GDA Entities.

Pursuant to the parties' Stipulated Motion to Appoint Receiver, entered as an order of the court on August 30, 2018, Plaintiff Sender was appointed as the Receiver for Defendant Dragul, the GDA Entities and their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate"). 2018CV33011 Order of August 30, 2018 ("Appointment Order")

Receiver Sender initiated this action by filing his Complaint on January 21, 2020 and thereafter filing his First Amended Complaint ("FAC") on June 1, 2020. In response, Defendant Gary Dragul's Motion to Dismiss First Amended Complaint was filed on July 6, 2020. On October 28, 2020, Judge Robert McGahey summarily denied Defendant Dragul's Motion.[3] On November 12, 2020, Defendant Dragul moved for reconsideration of the denial of his Motion to Dismiss, filing Defendant Gary Dragul's Motion in the Alternative for Reconsideration, and contemporaneously therewith, Defendant Gary Dragul's Motion for Certification of Interlocutory Appeal of Unique Issues Under C.A.R. 4.2(A) Pursuant to C.R.S. 13-4-102.1(1). In both motions, Defendant Dragul primarily argued that Receiver Sender lacked standing to pursue claims on behalf of investors of the Receivership Property, and consequently, the court lacks subject matter jurisdiction, requiring the claims as asserted against Defendant Dragul to be dismissed in their entirety.

On March 18, 2021, this court granted Defendant Dragul's request for certification for interlocutory appeal, and accordingly denied his motion for reconsideration as moot. Defendant Dragul filed his petition in the court of appeals on April 1, 2021. On April 13, 2021, the court of appeals ordered Receiver Sender to respond to the petition, addressing only the issue of whether the petition met the requirements of C.A.R. 4.2(b). Receiver Sender filed his response on May 4, 2021, and the court of appeals subsequently denied Defendant Dragul's petition on May 25, 2021, stating only that "[u]pon review of the petition for interlocutory appeal, the Court DENIES the petition." Case No. 2021CA483, Ord. Re: Pet. for Interlocutory Appeal, May 25, 2021. After the deadline for requesting a rehearing had passed, the court of appeals issued its mandate and dismissed the appeal.

On May 27, 2021, Defendant Dragul filed his Renewed Motion and contemporaneously therewith, Defendant Gary Dragul's Motion to Toll Deadline to Respond to First Amended Complaint. The Renewed Motion incorporates by reference the briefs related to Defendant's original Motion to Dismiss filed on July 6, 2020. Receiver Sender's Response also incorporates the briefs he previously filed in response.[4]

---

[2] Prior to the Commissioner's initiation of the civil enforcement proceedings, a grand jury indicted Defendant Dragul on nine counts of securities fraud for soliciting funds from investors in GDA entities on April 12, 2018.
[3] The other named Defendants also previously filed motions to dismiss, which were also summarily denied by Judge McGahey on the same day. However, the other Defendants do not move the court to reconsider the court's denial of their respective motions.
[4] Receiver Sender's Response to Dragul's Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint, filed June 15, 2021, attaches and incorporates by single reference four pleadings previously filed in this court and the court of appeals. However, Plaintiff maintains that the arguments are repetitive as Defendant Dragul raises identical

STANDARD OF REVIEW

A motion to dismiss under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction concerns "the court's authority to deal with the class of cases in which it renders judgment." *Paine, Webber, Jackson & Curtis v. Adams*, 718 P.2d 508, 513 (Colo. 1986) (quoting *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981)). "Whether a court possesses such jurisdiction is generally only dependent on the nature of the claim and the relief sought." *Trans Shuttle, Inc. v. Public Utilities Comm.*, 58 P.3d 47, 50 (Colo. 2002). Under C.R.C.P. 12(h)(3), "[b]ecause a lack of subject matter jurisdiction means that a court has no power to hear a case or enter a judgment, it is an issue that may be raised at any time[.]" *Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009). See, C.R.C.P. 12(h)(3)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

In addressing a motion to dismiss under C.R.C.P. 12(b)(5), a court must view the allegations in the complaint in the light most favorable to the plaintiff, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992), and "accept all averments of material fact contained in the complaint as true." *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (*quoting Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992)); *Abu-Nantambu-El v. State*., 433 P.3d 101, 103 (Colo. App. 2018). Under this standard, in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 373 P.3d 588, 589 (Colo. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Finally, if, when considering a motion to dismiss under C.R.C.P. 12(b), "matters outside the pleading are presented to and not excluded," the court must treat the motion as one for summary judgment. C.R.C.P 12(b). The Colorado appellate courts have held, however, "that documents attached to or referred to in the complaint are not 'matters outside the pleading' for purposes of C.R.C.P. 12(b)." *Prospect Development Company, Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 149 (Colo. App. 2018) (citing *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005)).

LEGAL ANAYLSIS

I. Reconsideration of Denial of Defendant Dragul's Motion to Dismiss the FAC

The court initially addresses Plaintiff's opposition to the court's consideration of Defendants' Renewed Motion for Reconsideration. Plaintiff maintains that while Defendant Dragul plainly disagrees with the court's denial of his motion to dismiss, he has presented insufficient bases for reconsideration. On the other hand, Defendant Dragul contends that court's prior summary denial of his motion to dismiss without explanation for its ruling reflects a manifest error of law, clearly mandating a different result; therefore, reconsideration is proper.

---

issues. Accordingly, the court relied on Receiver Sender's Omnibus Response to Defendant's Motion to Dismiss, filed August 17, 2020.

Pursuant to C.R.C.P. 121 § 1-15(11), to demonstrate circumstances warranting reconsideration,

> [a] party must show more than a disagreement with the court's decision. Such a motion must allege a manifest error or fact or law that mandates a different result or other circumstance resulting in manifest injustice.

Although this judicial officer does not find that his predecessor's summary denial of Defendant Dragul's Motion to Dismiss necessarily warrants reconsideration under this standard, he nevertheless acknowledges that the law is also clear that when one judge denies a motion to dismiss, it does not offend the doctrine of law of the case or other similar notions short of finality, for a replacement judge to reconsider that denial. *Denver Elec. & Neon Sign Corp. v. Gerald H. Phipps, Inc.*, 354 P.2d 618, 621 (Colo. 1960); *see Broyles v. Fort Lyon Canal Co.,* 695 P.2d 1136, 1144 (Colo. 1985) (every ruling or order made in the progress of an on-going proceeding may be rescinded or modified during that proceeding upon proper grounds). Furthermore, because supervision and disposition of a receivership estate lie within the trial court's jurisdiction, this court has a duty to resolve disputed issues of law and fact pertaining to the receivership. *Midland Bank v. Galley Co.*, 971 P.2d 273, 277-78 (Colo. App. 1998). The court is also keenly aware of other policies that should make a judge new to a case reluctant to reconsider and change his or her predecessor's interlocutory rulings, including deference between judges at the same level, efficiency, predictability and continuity in litigation, and the deterrence of judge shopping.

The court finds that, although Defendant has failed to meet the relatively stringent standard of C.R.C.P. 121 §1-15 (11), nevertheless there are grounds for reconsidering the court's order denying Defendant's Motion to Dismiss. In granting certification for an interlocutory appeal, this judicial officer found that the issues raised by Defendant Dragul were unique to him, apparently unresolved under Colorado law, and potentially dispositive of the pending claims asserted against Defendant Dragul. Following the court of appeals declination to hear the interlocutory appeal, those issues remain in the case and implicate the court's subject matter jurisdiction, which may be raised at any time. C.R.C.P. 12(h)(3). Accordingly, under the somewhat unique procedural posture of this case, the court finds reconsideration appropriate.

II. Scope of Receivers' Authority

Defendant first asserts that Receiver Sender lacks standing to assert investor's claims because they are claims held by individuals or entities which are not parties to, but rather creditors of, the Receivership Estate. Defendant further argues that the Appointment Order authorizes Receiver Sender "to prosecute only claims 'to recover possession of the Receivership Property from any persons who may now or in the future be wrongfully possessing Receivership Property or any part thereof' on contingency (as opposed to hourly)," and that Receivership Property "only encompasses assets related to or derived from investor funds, not damages," and that, therefore, "[s]ince most of the Receivers claims seek to recover damages, he is not authorized to bring them on contingency under the plain language of the Receivership Order. Yet, that is what he does here." Renewed Mot., at 9. Plaintiff maintains that Receiver Sender has standing pursuant to the plain

language of the Appointment Order and the nature of the Receiver's authority under the Colorado Securities Act ("CSA").

Courts of equity have inherent power to appoint receivers. *See* C.R.C.P. 66 (a "receiver may be appointed by the court in which the action is pending at any time"). As pertinent here, the CSA also provides the Commissioner with statutory authority to seek injunctive relief for violations of the CSA and in connection therewith seek damages, restitution, disgorgement or "other equitable relief on behalf of some or all of the persons injured …" *See* § 11-51-602(1) & (2)(providing that the Commissioner may invoke such equitable remedies as necessary to enforce compliance with the CSA). The appointment of a receiver is an equitable remedy available when necessary to protect property or rights. *Eureka Coal Co. v. McGowan*, 212 P. 521 (Colo. 1922).

Additionally, courts have "broad powers and wide discretion to determine relief in an equity receivership," and, in Colorado, it is well-established that the measure of a receiver's power is derived from the scope of the court's order of appointment. *NationsBank of Ga. v. Conifer Asset Mgmt. Ltd.,* 928 P.2d 760, 764 (Colo. App. 1996); *SEC v. Vescor Capital Corp.,* 599 F.3d 1189, 1194 (10th Cir. 2010); *see also* C.R.S. § 7-114-303(3) (permitting the appointing court to set the parameters of a receivership by "describ[ing] the powers and duties of the receiver. . .in its appointing order"). When the court creates a receivership, its focus is "to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets as necessary." *Vescor,* 599 F.3d at 1194.

Upon appointment, a receiver serves neither the plaintiff nor the defendants, but is instead an officer of the court charged with the impartial exercise of the duties prescribed by the order appointing the receiver. *Hart v. Ed-Ley*, 482 P.2d 421 (Colo. App. 1971). "Even if his appointment resulted from the request of one of the parties, his responsibility is to the court to carry out the duties conferred on him by that court." *Id*. at 425 ("The receiver's function is to collect the assets, obey the court's order and in general to maintain and protect the property and the rights of the various parties"); *see also K-partners III, Ltd. v. WLM Hosp. Corp.*, 883 P.2d 604, 606 (Colo. App. 1994) (one appointed as a receiver serves as a fiduciary only of the court and those interested in the estate).

Here, the court's Appointment Order, stipulated to by the parties, provides, in relevant part, as follows:

> The Receiver shall have all the powers and authority usually held by equity receivers and reasonably necessary to accomplish the purposes stated herein, including but not limited to, the following powers which the Receiver may execute without further order of this Court, except as expressly provided herein:
>
> * * * * * *
>
> (n) …to institute such legal actions as the Receiver deems necessary, including actions necessary to enforce this Order to protect the

> Receivership Property, and to prosecute causes of action of Dragul, GDARES and GDAREM against third parties. . .;
>
> (o) …to recover possession of the Receivership Property from any persons who may now or in the future be wrongfully possessing Receivership Property or any part thereof, including claims premised on fraudulent transfer or similar theories. . .;
>
> *   *   *   *   *   *
>
> (s) To prosecute claims and causes of actions held by Creditors of Dragul, GDARES, and GDAREM, and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors;
>
> *   *   *   *   *   *
>
> (u) To establish a procedure for the assertion of claims against Dragul, GDARES and GDAREM or the Receivership Property, for the resolution of any disputes regarding such claims, and for the distribution of the proceeds of the Receivership Property;
>
> *   *   *   *   *   *
>
> (w) To do such other and further lawful acts as the Receiver reasonably deems necessary for the effective recovery of the Receivership Property and to perform such other functions and duties as may from time to time be required and authorized by this Court, by the laws of the State of Colorado, or the laws of the United States; and
>
> (x) To do any and all acts necessary, convenient or incidental to the foregoing provisions of this Order and this equity receivership.

Appointment Order, ¶ 13.

Perhaps most relevant to the current Motion, the Appointment Order expressly authorizes Receiver Sender "to institute such legal actions as the Receiver deems necessary to enforce this Order to protect the Receivership Property," including the power to "prosecute claims and causes of actions held by Creditors of Dragul, GDARES, and GDAREM, and any subsidiary entities for the benefit of Creditors, in order to assure the equal treatment of all similarly situated Creditors" and to "do such further lawful acts as the Receiver reasonably deems necessary for the effective recovery of Receivership Property." *Id.* at ¶ 13 (n), (s), (w).

While the court agrees with Defendant Dragul that the Appointment Order permits Receiver Sender to recover from third parties wrongfully transferred Receivership Property, the

court rejects Dragul's suggested interpretation that his authority is limited to *only* bringing such claims. Such an interpretation would ignore all other provisions describing the powers and authority bestowed upon Receiver Sender. Rather, the court finds that the plain language of the Appointment Order grants Receiver Sender broad authority, which certainly purports to include the power to bring the claims, including those seeking damages, asserted in the FAC, whether on behalf of the Receivership Property or its creditors.

Furthermore, as noted, the CSA expressly authorizes the Commissioner to include in *any* enforcement action, "a claim for damages . . . restitution, disgorgement, or other equitable relief *on behalf of some or all of the persons injured* by the act or practice constituting the subject matter of the action." C.R.S. 11-51-602(2) (emphasis supplied); *see also Schuette v. Winternitz,* 498 P.2d 1183, 1185 (Colo. App. 1972)(not published pursuant to C.A.R. 35(f))(where the defendant committed fraud to encourage the plaintiff to invest in the defendant's business, but the defendant never received any consideration from the plaintiff, the plaintiff's only remedy was an action for damages). Policy considerations underlying the CSA further support the court's granting broad authority to Receiver Sender because the CSA is intended to "protect investors and maintain public confidence in securities markets. . . ." C.R.S. § 11-51-101(2).

Despite the court's broad discretion in defining the powers and duties of a receiver, the express language of both the court's Appointment Order and the CSA, authorizing the Commissioner to bring claims on behalf of creditors in civil enforcement actions, Defendant Dragul argues that it was beyond the court's power to grant such authority. Rather he asserts that Receiver Sender may only assert claims on behalf of the individuals and entities in the receivership, and thus he lacks standing to assert claims on behalf of creditor-investors.

Because Defendant Dragul offers none, and the court is unaware of any, Colorado authority limiting the scope of the court's power to authorize a receiver to assert third-party creditor claims in its Appointment Order, the court acknowledges that its analysis could end here. Nonetheless, due to the absence of any controlling authority directly deciding whether claims may be asserted against an individual for which the receiver asserting the claims was appointed, the court addresses certain remaining issues raised by Defendant Dragul below.

III. Receiver Standing

Standing is a jurisdictional prerequisite that requires a named plaintiff to bring suit only to protect a cognizable interest. *First Horizon Merchant Servs., Inc. v. Wellspring Capital Mgmt., LLC.*, 166 P.3d 166, 179 (Colo. App. 1995). Standing requires that a "plaintiff must satisfy two criteria." *Id*. First, "the plaintiff must have suffered an injury-in-fact, and second, this harm must have been to a legally protected interest." *Id.* The Supreme Court of Colorado has "interpreted the first prong of Colorado's test for standing to require 'a concrete adverseness which sharpens the presentation of issues that parties argue to the courts.'" *Id*. at 856 (quoting *City of Greenwood Village v. Petitioners for Proposed City of Centennial,* 3 P.3d 427, 437 (Colo. 2000)). "A plaintiff satisfies the injury in fact requirement by demonstrating that the challenged activity has caused or threatened to cause injury to the plaintiff such that a court can say with fair assurance that there is an actual controversy proper for judicial resolution." *Wells v. Lodge Properties, Inc.*, 976 P.2d 321, 324 (Colo. App. 1998).

The "second prong of Colorado's standing test requires that the plaintiff have a legal interest protecting against the alleged injury." *Id.* (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)). "This is a question of whether the plaintiff has a claim for relief under the constitution, the common law, a statute, or a rule or regulation." *Id.* "A legally protected interest may be tangible or economic such as 'one of property, one arising out of contract, one protected against tortious invasions, or one founded on a statute which confers a privilege.'" *Id.* (quoting *Wimberly*, 570 P.2d at 537.) These "legally protected rights encompass all rights arising from constitutions, statutes, and case law." *Id.* "Although necessary, the test in Colorado has traditionally been relatively easy to satisfy." *Id.*

Whether the power is conferred by receivership order or statute, a receiver generally has the exclusive right to bring or defend suits for or against the corporations and individuals included in the receivership. *Francis v. Camel Point Ranch, Inc.*, 487 P.3d 1089, 1092-93 (Colo. App. 2019). Accordingly, receivers typically may only assert claims to redress injuries to the entities in receivership, and not directly on behalf of the entities' creditors. *See Good Shepherd Health Facilities of Colorado, Inc. v. Dep't of Health*, 789 P.2d 423, 425 (Colo. App. 1989) ("[G]enerally a receiver stands in the shoes of the entity in receivership and may assert no greater rights than the entity whose property the receiver was appointed to preserve.") However,

> If a cause of action alleges only indirect harm to a creditor (that is, an injury that derives from harm to the debtor [entity]), and the debtor [entity] could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the [receivership] estate.

First Horizon Merchant Servs., Inc. v. Wellspring Capital Mgmt., LLC., 166 P.3d 166, 180 (Colo. App. 1995); *See Sender v. Mann*, 423 F.Supp.2d 1155, 1172 (D. Colo. 2006) (finding that even sham corporations may have interests separate from their promoters and concluding that a sham corporation may suffer an injury cognizable for the purpose of standing).

Accordingly, the court finds that the key issue in the standing analysis is whether the Receiver Sender alleges distinct harm to the debtor entities, rather than solely harm to the entities' investor-creditors.

A. Applicability of the doctrine of *in pari delicto*

Defendant Dragul argues that Receiver Sender may not sue a person or entity in receivership for which he was appointed as he lacks standing under the doctrine of *in pari delicto*. Dragul further argues that because he has already turned over all assets he believed to be subject to the Appointment Order, which were "intended to *pay the very claims [Receiver Sender] brings here*," either Receiver Sender will receive a double recovery from Defendant Dragul for the same creditor injuries, or the judgment must be paid out of the Receivership Estate, making it pointless to sue Defendant Dragul. Mot. To Dismiss, 15. Plaintiff asserts that the doctrine of *in pari delicto* is inapplicable under the circumstances of this case.

The doctrine of *in pari delicto* is based on the principle that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that same conduct, the parties are deemed *in pari delicto,* and the law will aid neither, but rather, will leave them where it finds them. *Bushner v. Bushner*, 307 P.2d 204 (Colo. 1957); *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779 (Colo. App. 1997). Generally, the acts and knowledge of an agent are imputed to the principal; however, Colorado recognizes an exception to this rule when the agent "is acting in his own interests and against the interests of the principal." *Vail Nat. Bank v. Finkelman*, 800 P.2d 1342, 1345 (Colo. App. 1990). "This exception is based on the theory that the agent cannot be presumed to communicate his knowledge to the principal when the agent is acting in his own interests and against the interests of the principal." *Id.* at 1344–1345. Accordingly, in the context of a Ponzi scheme, direct participation in the scheme is imputed to the debtor and barred by *in pari delicto*, while defendants' misconduct that "did not benefit the debtor in any way, but only benefited the defendants and the debtors' principals" is not. *Id.* at 1345.

Although there is no authority in Colorado that has definitively resolved the issue of whether an equitable receiver in a securities enforcement action has standing to assert claims on behalf of creditors pursuant to the power granted in the order appointing him, numerous federal jurisdictions[5] have upheld receivers' ability to pursue fraudulent conveyance and other equitable claims against the beneficiaries of Ponzi schemes, under circumstances similar to those here. *See, e.g.*, *Donnell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008); *Marion v. TDI, Inc.*, 591 F.3d 137 (3d Cir. 2010); *Wing v. Dockstader*, 482 App'x 361, 362-63 (10th Cir. 2012); *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185 (5th Cir. 2013).

Defendant Dragul's argument relies on *Sender v. Kidder Peabody & Co.*, which applied the doctrine of *in pari delicto* to hold that a bankruptcy trustee does not have standing to pursue claims against a third party for injury to the debtor when the debtor has joined the third party in defrauding its creditors. 952 P.2d 779 (Colo. App. 1997). Defendant Dragul asserts, "[i]f a trustee, and by extension a receiver, cannot sue *third parties* who participated in the debtor's/person in receivership's scheme, it is untenable that the Receiver here could sue the actual person *in* receivership, Mr. Dragul, who the Receiver asserts not only participated in the scheme but was the central figure." Mot., p. 13.

The court agrees with Plaintiff that Defendant's reliance on *Kidder* is misplaced, as Colorado courts have consistently distinguished bankruptcy cases from equitable receiverships because the specific provisions of the bankruptcy code pertaining to trustees "function within the context of an intricate legislative system of laws designed carefully to meet the policy objectives of the Congress." *Johnson v. Studholme*, 619 F. Supp. 1397 (D. Colo. 1985); *see Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996)(reiterating the distinction between trustees and receivers, stating "this case does not implicate the law of receivership, and nothing we say herein should be construed as applicable to that area of law"). In fact, in *Kidder,* the court relied principally upon the Tenth Circuit's interpretation of a section of the Bankruptcy Code, 11 U.S.C. § 541, that "claims asserted by trustee must belong to the debtor entity itself, not debtor's creditors individually." 952 P. 2d at 781, citing *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996), as well as

[5] While this court is not bound by federal law, "insofar as the provisions and purposes of [the CSA] parallel those of the federal enactments, such authorities are highly persuasive." *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1204 (Colo. 1976).

several other federal and state appellate courts reaching similar conclusions regarding bankruptcy trustees.

The emerging trend in federal case law limits the applicability of the *in pari delicto* defense as to a receiver's standing, as the Seventh Circuit[6] explained at length in *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995). That case involved a similar Ponzi scheme masterminded by one Douglas and three corporations he created and, in turn, caused the corporations to create limited partnerships in which the corporations would be the general partners and would sell limited partnership interests to the investing public, ostensibly in a commodities trading business. *Id.*, at 752. In rejecting a challenge to the court-appointed receiver's standing to bring fraudulent conveyance claims under Illinois law on behalf of Douglas and his companies and against several insiders, Judge Posner wrote as follows:

> The argument that he did not [have standing] is that he was "really" suing on behalf not of Douglas or Douglas's corporations, the perpetrator and tools of the Ponzi scheme, respectively, but of the investors, the purchasers of limited-partners interests in the corporations; and a receiver does not have standing to sue on behalf of the creditors of the entity in receivership…How, the defendants ask rhetorically, could the allegedly fraudulent conveyances have hurt Douglas, who engineered them, or the corporations that he had created, that he totally controlled and probably (the record is unclear) owned all the common stock of, and that were merely the instruments through which he operated the Ponzi scheme?
>
> The answer—so far as the corporations are concerned, and we need go no further—turns out to be straightforward. The corporations, Douglas's robotic tools, were nevertheless in the eyes of the law separate legal entities with rights and duties. They received money from unsuspecting, if perhaps greedy and foolish, investors. That money should have been used for the stated purpose of the corporations' sale of interests in the limited partnerships, which was to trade commodities. Instead Douglas caused the corporations to pay out the money they received to himself, his ex-wife, his favorite charities, and an investor, Phillips, whom Douglas wanted to keep happy, no doubt in the hope that Phillips would invest more money in the Ponzi scheme or encourage others to do so. In the case of the ex-wife, the money went from the corporations first to Douglas and then from him to her, but we cannot see what difference that should make. If the money stopped with Douglas, a certain awkwardness

[6] In addition to the Seventh Circuit, the Second, Third, Fifth, Ninth, and Tenth Circuits have also endorsed the *Scholes* analysis. *See Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008); *Marion v. TDI Inc.*, 591 F.3d 137 (3d Cir. 2010); *Janvey v. Democratic Senatorial Campaign*, 712 F.3d 185 (5th Cir. 2013); *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008); *Wing v. Dockstader*, 482 F. App'x 361, 362-63 (10th Cir. 2012). The Tenth Circuit's characterization of *Scholes* takes the court's reasoning one step further, stating, "[i]n *Scholes,* a panel of the Seventh Circuit held a receiver of an entity which was used to perpetrate a Ponzi scheme has standing to recover fraudulent transfers as though the receiver were a creditor of the scheme." *Dockstader*, 482 Fed. Appx. at 363.

might arise from the fact that Scholes is the receiver both for Douglas and for the corporations which would be suing him for that money. But that is not our case and we need not consider it.

The three sets of transfers removed assets from the corporations for an unauthorized purpose and by doing so injured the corporations. As sole shareholder, Douglas could lawfully have ratified the diversion of corporate assets to noncorporate purposes—but only if creditors were not harmed. Creditors were harmed. The limited partners were tort creditors of the corporations from which they had been inveigled into buying limited-partner interests, and were, of course (other than Phillips), harmed. “It was not within the power of the shareholders to legalize this waste to the detriment of others.”

Though injured by Douglas, the corporations would not be heard to complain as long as they were controlled by him, not only because he would not permit them to complain but also because of their deep, their utter, complicity in Douglas's fraud. The rule is that the maker of the fraudulent conveyance and all those in privity with him—which certainly includes the corporations—are bound by it. But the reason, of course, as the cases just cited make clear, is that the wrongdoer must not be allowed to profit from his wrong by recovering property that he had parted with in order to thwart his creditors. That reason falls out now that Douglas has been ousted from control of and beneficial interest in the corporations. The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas's evil zombies. Freed from his spell they became entitled to the return of the moneys—for the benefit not of Douglas but of innocent investors—that Douglas had made the corporations divert to unauthorized purposes. That the return would benefit the limited partners is just to say that anything that helps a corporation helps those who have claims against its assets. The important thing is that the limited partners were not complicit in Douglas's fraud; they were its victims.

Put differently, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated. Now that the corporations created and initially controlled by Douglas are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's bringing suit to recover corporate assets unlawfully dissipated by Douglas. We cannot see any legal objection and we particularly cannot see any practical objection.

Scholes v. Lehmann, 56 F.3d 750, 754–55 (7th Cir. 1995) (internal citations omitted).

In *Scholes*, the court cautioned that if the receiver had been appointed to protect only Douglas's individual assets, the question of standing might have a different answer. *Id.* at 755. Two and a half years later, the Seventh Circuit was presented with that exact situation in *Troelstrup v. Index Future Group, Inc.*, where the receiver was appointed only for the assets of the Douglas figure, John Tobin. 130 F.3d 1274 (7th Cir. 1997). The court distinguished *Scholes*, holding that the receiver lacked standing to assert his claim. In considering *Scholes*, the *Troelstrup* Court held:

> We held that [Douglas's] receiver, *who had also been appointed the corporations' receiver,* had standing to sue on behalf of the corporations, because they were entitled to the return of the money that the defrauder had improperly diverted from them.... Troelstrup ... was just Tobin's receiver, and so he could not sue ... on behalf of [the investment entity], not having been appointed its receiver.

Id. at 1277 (emphasis in original). Tobin's receiver lacked standing because he was "suing a third party on behalf of Tobin's creditors to enforce a personal right of theirs, not a right of Tobin's in which they have an interest by virtue of being his creditors." *Id.* The essential issue is whether the debtor is complicit in the illegal conduct that is the basis for the claim. *Sender v. Simon*, 84 F.3d 1299 (10th Cir. 1996).

Although it is generally accepted that receivers typically cannot bring claims directly on behalf of third parties, such as investors, those parties may nonetheless indirectly benefit from a receiver's action as creditors of the receivership. This action arises from an alleged multi-million-dollar fraud and Ponzi scheme perpetrated by Defendant Dragul and his cohorts in violation of the CSA, and Receiver Sender was appointed as a Receiver not solely on behalf of Defendant Dragul but also on behalf of the GDA Entities as well. Accordingly, the court finds the doctrine of *in pari delicto* does not bar Receiver Sender from asserting claims against Defendant Dragul.

With the above principles in mind, the court addresses each of the claims challenged by Defendant Dragul below.

B. Claims Asserted Against Defendant Dragul

1. First Claim for Relief: Violations of the Colorado Securities Act

Defendant Dragul first argues that because the provisions of the CSA that he is alleged to have violated create a private right of action only for "a person buying a security," Receiver Sender improperly asserts that he has standing to prosecute the first claim for relief, on behalf of the SPEs and investors "all of whom are creditors of the Receivership Estate," because as a matter of law, only creditors, not the receiver, can bring such a claim. FAC ¶ 316; Mot. p. 5. Receiver Sender counters that he has standing because the claims stem from the GDA-managed properties and sale of promissory notes and are asserted on behalf of individual investors, claims which the Appointment Order expressly vests him with the authority to pursue.

The basic rules of statutory construction require the court to construe the language of the provisions at issue by giving the words their ordinary and common sense meaning. *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008). "Our primary task in interpreting statutes is to give effect to the intent of the drafters, which we do by looking to the plain language." *Waste Mgmt. of Colo., Inc. v. City of Commerce City,* 250 P.3d 722, 725 (Colo. App. 2010). "If the language of the provision at issue is clear and the intent of the legislative body that enacted it may be discerned with certainty, we need not resort to other rules of statutory interpretation." *Id*. When construing a statute, courts must "give effect to every word and, if possible, harmonize potentially conflicting provisions." *Enclave*, 185 P.3d at 178.

C.R.S. § 11-51-602 provides, in relevant part, as follows:

> (1) Whenever it appears to the securities commissioner upon sufficient evidence . . . that any person has engaged in or is about to engage in any act or practice constituting a violation of any provision of this article or of any rule or order under this article, the securities commissioner may apply to the district court of the city and county of Denver to temporarily restrain or preliminarily or permanently enjoin the act or practice in question and to enforce compliance with this article or any rule or order under this article….
>
> (2) The securities commissioner may include in any action authorized by subsection (1) of this section, relating to any violation of section 11-51-301, 11-51-401, or 11-51-501, a claim for damages under section 11-51-604 or restitution, disgorgement, or other equitable relief on behalf of some or all of the persons injured by the act or practice constituting the subject matter of the action….

Once again, the court is not persuaded by Defendant Dragul's suggested narrow interpretation of the provisions of the CSA. While various provisions of the CSA create a separate and distinct cause of action on behalf of "a person buying a security," those rights do not in any way detract from the Commissioner's separate and broad authority to enforce compliance with the provisions of CSA. Under the circumstances alleged in this case, it is clear that it is within the Commissioner's power to assert claims and seek the appointment of a receiver to assert claims for the securities violations alleged in the FAC.

2. Second & Third Claims for Relief: Negligence & Negligent Misrepresentation

Defendant Dragul argues that Receiver Sender lacks standing to assert claims of negligence and negligent misrepresentation as the claims are based on Defendant Dragul's alleged breach of the duty of care owed "to investors and prospective investors," not the Estate, and similarly, the claim of negligent misrepresentation alleges that Defendant Dragul "negligently induced . . . investors to invest and/or to continue to invest" and that only investors sustained damages or

losses. Plaintiff asserts that members and managers of the GDA Entities owed fiduciary duties to each other, and as such, Defendant Dragul owed the SPEs and the GDA Entity investors the duties of loyalty, good faith and fair dealing, and due care.

Managers of limited liability companies and others acting as an agent of the company owe certain duties to the LLC, including, but not limited to, a duty to use reasonable care in the performance of the agency relationship, to provide timely and accurate information to the LLC, to act competently in relation to the LLC's business, and to act diligently in relation to the LLC's business. Further, pursuant to C.R.S. § 7-80-404, each manager owes the following duties to the LLC: (1) to exercise any rights consistently with the contractual obligation of good faith and fair dealing; (2) to account to the LLC and hold as a trustee for the LLC any property, profit, or benefit derived from the use of the LLC's property by each member or manager, including the appropriation of an opportunity of the LLC; (3) refrain from dealing with the LLC in the conduct of the LLC as or on behalf of a party having interest adverse to the LLC; (3) a duty of care in the conduct of the LLC, limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law.

The court finds that Defendant Dragul's position that claims of negligence and negligent misrepresentation belong exclusively to the investors of the Receivership Property overlooks the derivative nature of the allegations. Defendant Dragul, as a controlling member and manager of GDA Entities, owed fiduciary duties to the GDA Entities. The FAC asserts, among other things, that Defendant Dragul's commingling and theft of investor funds while acting as an agent of the GDA Entities constituted of breach of the fiduciary duties he owed those entities. The court finds that the allegations in the FAC plausibly assert harm to the GDA Entities, giving rise to a cause of action for negligence and negligent misrepresentation on behalf of the entities themselves. Accordingly, the court finds that Receiver Sender has standing to assert the second and third claims for relief.

3. Fourth Claim for Relief: Civil Theft

Defendant Dragul argues that Receiver Sender improperly asserts that he has standing to prosecute the claim for civil theft on behalf of the Estate, SPEs, and investors, because the FAC alleges no facts to support that the Estate was injured by civil theft. Rather, Defendant Dragul argues that the claims belong to investor-creditors as Defendant Dragul is alleged to have "exercised control over GDA Entity investors' funds," and without "investors' knowledge or authorization" controlled those investors funds, with the intent to "permanently deprive investors of their investments," and that "investors have been damaged," FAC, ¶ ¶ 372-377, and thus, Receiver Sender lacks standing to assert a claim of civil theft.

> To state a claim for civil theft, a plaintiff must allege the elements of criminal theft: that the defendant knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception, and acts intentionally or knowingly in ways that deprive the other person of the property permanently.

Van Rees v. Unleaded Software, Inc., 373 P.3d 603, 608 (Colo. 2016).

> Fraud on *investors* that damages those *investors* is for those *investors* to pursue—not the receiver. By contrast, fraud on the *receivership entity* that operates to *its* damage is for the *receiver* to pursue (and to the extent that investors as the holders of equity interests in the entity may ultimately benefit from such pursuit, that does not alter the proposition that the receiver is the proper party to enforce the claim).

Scholes v. Schroeder, 744 F. Supp. 1419, 1422 (N.D. Ill. 1990)(emphasis original).

The FAC asserts that Defendant Dragul diverted more than $20 million in investor funds from the SPEs, that more than $34 million were paid in illegal commissions harming the GDA Entities, and that Defendant Dragul pilfered the SPEs assets causing damage to the GDA Entities and the Estate. FAC, ¶¶ 293-94, 297, 391, 406. Here, the court agrees with Plaintiff's contention that Defendant Dragul's argument simply ignores numerous allegations in the FAC that he diverted Estate assets causing harm to the GDA Entities themselves, e.g., Defendant Dragul received undisclosed and illegal commissions in connection with the purchase and sale of various SPE properties—funds which should have been retained by the SPEs, used in operations, and ultimately distributed to investors. Accordingly, the court finds that Receiver Sender has plausibly pled a claim for civil theft on behalf of the GDA Entities, for harm to the GDA entities caused by misconduct orchestrated by Defendant Dragul, acting as an agent of the GDA Entities.

4. Fifth Claim for Relief: Violations of the Colorado Organized Crime Control Act ("COCCA")

Defendant Dragul argues that the FAC alleges no facts to support the speculative assertion that the Estate was injured, rather the allegations of securities violations based on misrepresentations to investors, wire fraud, and civil theft implicate fraud on investors and bankruptcy fraud, which involves defrauding creditors. Defendant Dragul further argues that the Receiver could not have been injured by any COCCA violation because he was not appointed until August 30, 2018 and the FAC alleges that the purported scheme undertaken by the COCCA enterprise extended only through August 2018. Plaintiff counters that the FAC alleges that the GDA Entities were harmed by the COCCA conspiracy by depriving them of funds earmarked for their use, but which Defendants diverted to their own use.

C.R.S. § 18-17-104(3), provides that "[i]t is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt." "Pattern of racketeering activity" means "engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise." C.R.S. § 18-17-103(3).

The court first rejects Defendant Dragul's argument that Receiver Sender lacks standing to pursue the COCCA claim because he was appointed after the alleged COCCA enterprise ceased

operations. Receiver Sender does not assert this claim as a remedy for an injury he personally suffered, rather the claims are asserted on behalf of the Receivership Estate.

Second, as noted, Plaintiff alleges that Defendant Dragul formed or caused to be formed SPEs, which created an enterprise for the purpose of defrauding investors and utilized the enterprise for the sole benefit of himself and his cohorts to the detriment of the GDA Entities. Theft is one of the "predicate acts" enumerated in COCCA, of which the commission, attempted commission, conspiracy to commit, and/or solicitation to commit amount to "racketeering activity" and a "pattern of racketeering activity" giving rise to civil liability. C.R.S. §§ 18-17-103(3) and -103(5)(b)(II). Plaintiff also alleges that Defendants engaged in computer crime, money laundering, wire fraud, all of which also constitute "racketeering activity," and two or more amount to a "pattern of racketeering activity." C.R.S. §§ 18-17-103(3) and -103(5)(a) and (5)(b)(III) and (IV). The court finds that Plaintiffs have adequately identified the persons and enterprises involved and therefore have stated a plausible claim for relief under COCCA within the meaning of *Warne.* The court further finds that Receiver Sender has standing to assert his COCCA claim against Defendant Dragul on behalf of the GDA Entities.

5. Seventh Claim for Relief: Breach of Fiduciary Duty

Defendant Dragul contends that the FAC alleges that Defendant Dragul owed a fiduciary duty to "the GDA Entities and their member investors" and simply asserts the duty to the GDA Entities was breached when those entities were injured, but alleges no facts to demonstrate what duty was owed to the GDA Entities, how it was breached, or what injury the GDA Entities suffered.

As stated above, as a controlling member and manager of the GDA Entities, Defendant Dragul owed fiduciary duties to the GDA Entities. The allegations in the FAC purport to show that Mr. Dragul, as manager of the GDA Entities, "owed a fiduciary duty to the GDA Entities and their member investors, which required him to use reasonable care and skill in managing the properties and associated SPEs." FAC, ¶ 409. Plaintiffs allege that Mr. Dragul breached fiduciary duties owed to the GDA Entities by "failing to provide honest and accurate material information to the investors prior to and during ownership of the associated properties;" "[f]ailing to disclose that he and the Non-Dragul Defendants received illegal and unauthorized Commissions from escrow of the sale of SPE properties and from the SPE accounts;" "[r]eceiving undisclosed and unearned commissions and/or payments from escrow of closing on the sale of certain SPE properties and from the SPE accounts;" and "[p]lacing his own and the Non-Dragul Defendants' financial interests above those of the GDA Entities…" *Id.*, ¶¶ 412-16.

Here, the court finds that the above acts or omissions alleged in the FAC plausibly state a claim against Defendant Dragul for breach of the fiduciary duties he owed the GDA Entities as his conduct was "intentionally designed to enrich himself to the detriment of the GDA Entities and their member investors and were intentionally designed to conceal material information from the GDA Entity investors, all to their detriment." *Id.*, ¶¶ 418-19. As a result of the alleged breaches of fiduciary duties, "the Estate suffered damages and losses." *Id.* ¶ 420. Accordingly, because the FAC plausibly alleges that the GDA Entities were harmed by Defendant Dragul's conduct and that he benefited from such conduct to the detriment of the GDA Entities, Receiver Sender has standing to pursue the seventh claim for relief on behalf of the GDA Entities.

6. Eleventh Claim for Relief: Fraudulent Transfer

Defendant Dragul concedes that claims under the Colorado Uniform Fraudulent Transfers Act ("CUFTA") are commonly asserted by receivers when the entity in the receivership is the creditor who was injured by a fraudulent transfer to a third party; however, he argues that the FAC alleges that third-party investor-creditors were defrauded, not that Defendant Dragul or the GDA Entities were defrauded. Thus, because the fraudulent transfer claim is an investor-creditor claim, Receiver Sender lacks standing to assert it. Plaintiff asserts that the allegations in the FAC assert that fraudulent transfers completed by Defendant Dragul harmed the GDA Entities when Defendants paid themselves illegal and undisclosed commissions and otherwise fraudulently depleted the assets of the SPEs.

The CUFTA provides that a transfer is fraudulent as to a creditor if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. *See* C.R.S. § 38-8-105(1)(A). As relevant here, "a business entity abused by a Ponzi scheme qualifies as a defrauded creditor." *Klein v. Cornelius*, 786 F.3d 1310, 1316 (10th Cir. 2015). When a Ponzi scheme has been established, all transfers from entities involved in the scheme are presumed to be intentionally fraudulent. *Lewis v. Taylor*, 375 P.3d 1205 (Colo. 2016) (citing *Klein*, *supra*).

Plaintiffs fraudulent transfer claim is based on "transfers made in furtherance of Dragul's Ponzi Scheme with the actual intent to hinder, delay, and defraud creditors." FAC, ¶ 444. Plaintiffs further allege that "from 2003 through August 2018, Dragul, in active concert with the other Defendants, stole over $20.2 million from investors which was used, inter alia, to pay almost $9 million in gambling debts, to pay millions to his family and the Non-Dragul Defendants, and to fund the extravagant lifestyles of Dragul, his family, coworkers, and those designated as 'friends of the house.'" FAC, ¶ 293. Accordingly, the court finds that Plaintiff has standing under CUFTA because it is alleged that the GDA Entities and SPEs were abused by an elaborate Ponzi scheme orchestrated by Defendant Dragul and as such, the entities qualify as "defrauded creditors."

7. Twelfth Claim for Relief: Unjust Enrichment

Defendant Dragul argues that Receiver Sender's allegation that he received benefits "at the Estate's expense and at the expense of other creditors" is insufficient to state a claim for relief as it alleges no facts to show what benefits Defendant Dragul received or how they came at the Estate's expense. Defendant also argues that the claims should be barred as duplicative because the fraudulent transfer claim provides an adequate remedy at law.

Unjust enrichment is a form of contract, or quasi-contract, implied by law that does not rely upon a promise between parties. The elements of unjust enrichment are: (1) at the expense of a plaintiff; (2) a defendant received a benefit; (3) under circumstances making it unjust for the defendant to retain the benefit without paying for it. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1007 (Colo. 2008). Unjust enrichment may be appropriate when "[t]he defendant's wrongful act may be a common-law tort, such as conversion of personal property or trespass to land, or it may be an equitable wrong such as breach of trust or other fiduciary obligation. *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1205 (Colo. App. 2009).

The FAC alleges that Defendant Dragul, acting as an agent of the GDA Entities, stole millions of dollars from GDA Entity investors that were intended for business operations and used those funds for his own personal benefit to the detriment of the GDA Entities. Accordingly, the court finds that the allegations in the FAC plead a plausible claim for unjust enrichment. *See Brooks v. Bank of Boulder*, 891 F. Supp. 1469 (D. Colo. 1995) (permitting claims for unjust enrichment asserted by defrauded creditors against a bank, its officers and employees purportedly involved in the Ponzi scheme). Furthermore, the court declines to dismiss the unjust enrichment claim as duplicative at this stage in the proceedings. *See Beals v. Tri-B Assocs.*, 644 P.2d 78 (Colo. App. 1982) (parties may plead alternative remedies and should be allowed to recover the most favorable relief to which he is entitled by law).

IV. Timeliness of Claims

Defendant Dragul further argues that the Receiver's first claim for relief for violations of the CSA are time-barred as the FAC alleges that the Commissioner and Attorney General began to investigate Defendant Dragul and the GDA Entities in 2014 after receiving complaints from investors, indicating that investors discovered facts giving rise to the claims at least as early as 2014. Defendant Dragul also asserts that the CUFTA claim is time-barred because C.R.S. § 38-8-10(1)(a) bars any claim for fraudulent transfer not filed within one year of Receiver Sender's appointment.

As a general rule, affirmative defenses, such as the statute of limitations, must be raised in an answer to the complaint and not in a 12(b) motion to dismiss. However, if "the bare allegations of the complaint" establish that the affirmative defense is applicable, the defense may be raised in a 12(b)(5) motion to dismiss. *Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 433 P.3d 146, 149-50 (Colo. App. 2018). "Whether a particular claim is time barred presents a question of fact and may only be decided as a matter of law when 'the undisputed facts clearly show that the plaintiff had, or should have had the requisite information as of a particular date.'" *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007) (quoting *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 899 (Colo. App. 2003)).

Here, the FAC details on numerous occasions why the claims asserted therein could not have been discovered prior to August 30, 2018. For example, Plaintiff alleges that

> [n]either the Receiver nor the GDA Entity Investors could have discovered these material misstatements and omissions made in connection with the sale of securities prior to August 30, 2018, at the earliest, through reasonable diligence because (a) the Receiver did not have access to the GDA books and records before that date as Dragul and GDA were not yet subject to a receivership, (b) Dragul and the Fox Defendants refused to produce the SPE books to the GDA Entity Investors on numerous occasions; and (c) the manner in which Dragul conducted GDA's business was designed to conceal or hide the facts of his fraud, theft, and material misrepresentations and omissions. Moreover, upon information and

> belief, Dragul destroyed or deleted data, information, documents, and other electronically stored information prior to the Receiver's appointment.

FAC, ¶¶ 353, 259-292.

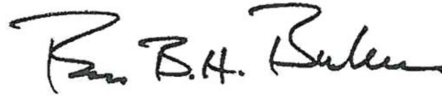
Accordingly, the court finds that Defendant Dragul has failed to demonstrate that the undisputed facts clearly show that Plaintiff has or should have had knowledge of the claims in 2014 or that the claims could have reasonably been discovered within one year of Receiver Sender's appointment. Therefore, dismissal of the claims asserted in violation of the CSA and CUFTA is improper.

CONCLUSION

For the reasons set forth above, Defendant Dragul's Renewed Motion for Reconsideration of Order Denying Motion to Dismiss First Amended Complaint is HEREBY DENIED, and Defendant Dragul's Motion to Dismiss First Amended Complaint is HEREBY DENIED IN ITS ENTIRETY. Defendant shall have through and including, July 5, 2022 within which to file an answer to Receiver Sender's First Amended Complaint. There shall be no further motions to dismiss.

DATED this 21st day of June, 2022.

BY THE COURT:



Ross B. H. Buchanan
Denver District Court Judge