

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 431 Denver, Colorado 80202 (720) 865-8301</p>	<p>FILED DISTRICT COURT DENVER, COLORADO DATE FILED: October 24, 2018 CASE NUMBER: 2018CV33011</p>
<p><b>Plaintiff:</b>  GERALD ROME, Securities Commissioner for the State of Colorado  v.  <b>Defendants:</b>  GARY DRAGUL, ET AL.</p>	<p>▲ COURT USE ONLY ▲  Case Number: 2018 CV 33011 Division: 424</p>
<p><i>Attorneys for MLMT 2005-LC1 Yale Retail, LLC</i> Patrick H. Pugh, #36774 Ballard Spahr LLP 1225 17th Street, Suite 2300 Denver, CO 80202 Phone: 303-292-2400 Facsimile: 303-296-3956 <a href="mailto:pughp@ballardspahr.com">pughp@ballardspahr.com</a></p>	
<p><b>MOTION FOR RELIEF FROM STIPULATED ORDER APPOINTING RECEIVER</b></p>	

MLMT 2005-LC1 YALE RETAIL, LLC (“Secured Lender”), through its undersigned counsel of record, respectfully moves for an order (i) affirmatively excluding certain real property and rents from the application of the Stipulated Order Appointing Receiver (“Dragul Receivership Order”) (ii) lifting any applicable stay imposed by the Dragul Receivership Order, (iii) allowing Secured Lender to commence, continue, and complete any foreclosure proceedings against the real property at issue, and (iv) deferring the oversight and control of the property at issue to a separate receiver appointed by Division 203 of the Denver County District Court in October 2013. In support of this Motion, the Secured Lender states as follows:

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

Undersigned counsel certifies that he has conferred with counsel for Harvey Sender, the receiver appointed in this case, about the relief requested. Mr. Sender's counsel has advised that the receiver opposes the Motion.

**SUMMARY OF LENDER'S POSITION**

On August 30, 2018, this Court appointed Harvey Sender (the "Dragul Receiver") to serve as receiver for certain assets of Gary J. Dragul, GDA Real Estate Services, and GDA Real Estate Management. Mr. Dragul, and by extension, the Dragul Receiver, holds only a 25% equity interest in a company known as YM Retail 07 A, LLC ("YM Retail"). YM Retail is a single asset entity serving as the record owner of two parcels of real property located at Yale and Monaco in Denver known as 6460 East Yale Avenue, Units E & G, Denver, Colorado (the "Property"). The two parcels are presently under the control and oversight of a different division of the Denver County District Court through a receiver appointed in October 2013. The Property and its rents are subject to a first priority Deed of Trust and an Assignment of Leases and Rents held by the Secured Lender to secure a \$4.4 million commercial loan. YM Retail defaulted on its loan and the Secured Lender successfully sought the appointment of a receiver.

First, the Court should defer to Division 203 of the Denver County District Court, which already has jurisdiction over the Property due to the appointment of a receiver for the Property. Because a receiver has already been appointed for and taken possession of the Property, Division 203 has exclusive jurisdiction to determine the title, possession, and control over the Property. Accordingly, the Court should defer to the jurisdiction of Division 203 and exclude the Property from the application of the Dragul Receivership Order.

Second, at the time the Dragul Receivership Order was entered, neither YM Retail nor Mr. Dragul had any right to possess or control the Property or to collect or use the rents from the Property. Mr. Dragul holds only a 25% equity interest in YM Retail. YM Retail affirmatively transferred its rights to the rents to the Secured Lender, and a receiver was appointed to manage the Property and collect the rents. Because the Dragul Receiver took only the same rights or interests that Mr. Dragul had as of the Dragul Receivership Order, subject to any liens, priorities, or prior court orders, the Property cannot be deemed to be part of the Receivership Estate.<sup>1</sup> The Court should enter an order confirming that the Property is not part of the Receivership Estate, and is not subject to the Dragul Receivership Order.

Lastly, the Court should grant the Secured Lender relief from the Dragul Receivership Order to permit Secured Lender to complete its foreclosure and to comply with orders from Division 203. The Property lacks any equity and is of no value to the Receivership Estate. As an under-secured creditor, Secured Lender is entitled to all proceeds to be derived from a liquidation or sale of the Property. There will be nothing remaining for YM Retail, a single asset entity, and, consequently nothing for the equity holders of YM Retail, including the 25% ostensibly owned by Mr. Dragul, and by extension, the Dragul Receiver. In addition, permitting the Secured Lender to foreclose and liquidate the Property will reduce claims against the Receivership Estate. Mr. Dragul personally guaranteed the loan, and the outstanding debt will be reduced following application of the foreclosure sale proceeds.

Because the Property at issue is not part of the Receivership Estate, and because there is no equity in the Property or value to the Dragul Receiver, the Court should confirm that the

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<sup>1</sup> Capitalized terms not defined in this Motion have the meanings set forth in the Dragul Receivership Order.

Property is not subject to the application of the Dragul Receivership Order or, at the very least, grant the Secured Lender relief from the Dragul Receivership Order.

### **STATEMENT OF MATERIAL FACTS**

#### **Loan Transaction with YM Retail 07 A, LLC**

1. YM Retail is the owner of certain real property located at 6460 East Yale Avenue, Units E & G, Denver, Colorado. The Property consists of two separate parcels within a retail shopping complex located at the intersection of Yale and Monaco Streets in Denver. YM Retail is a single asset entity with the Property as its only assets.
2. Mr. Dragul is the owner of approximately 25% of the equity interests in YM Retail.<sup>2</sup> See Ex. A (Operating Agreement) at Ex. A thereto.
3. YM Retail is indebted to Secured Lender pursuant to that certain Promissory Note, dated November 1, 2005, originally made by Yale and Monaco 02, LLC in the original principal amount of \$4.4 million (the "Note"). See Ex. B (Affidavit of Joe Polcari ("Polcari Aff.")), ¶¶ 4-5, 10-11; Ex. C (Note).
4. The Note is secured by the Property pursuant to the grant of a security interest in the Property through that certain Deed of Trust, Security Agreement, Assignment of Rents and Fixture Filing, dated November 2, 2005, which was recorded in the real property records of Denver County under Reception No. 2005191438 (the "Deed of Trust"). See Ex. B (Polcari Aff.), ¶ 6; Ex. D (Deed of Trust).

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<sup>2</sup> Upon information and belief, Mr. Dragul may also hold a direct or indirect interest in Safeway Marketplace Manager 07, Inc., which historically served as the manager for YM Retail. At all times since October 2013, Brian Baker, as receiver for the Property, has collected the rents and managed the Property.

5. To ensure repayment of the Note, the borrower also entered into that certain Assignment of Leases and Rents (“Assignment of Rents”), dated November 2, 2005, and recorded in the real property records of Denver County under Reception No. 2005191439. *See* Ex. B (Polcari Aff.), ¶ 7; Ex. E (Assignment of Rents). The documents evidencing the loan transaction are collectively referred to as the “Loan Documents.”

6. The Assignment of Rents transferred all rights to collect and all title to the rents from the Property to Secured Lender. More specifically, the Assignment of Rents provides,

This instrument is an absolute, unconditional and present assignment of the Leases and Rents and grant of the powers of [Secured Lender] . . . and not an assignment for security . . . [Borrower] is hereby granted a revocable license by [Secured Lender] to collect the Rents . . . subject to the terms of the Loan Documents. Upon the occurrence of an Event of Default, the License shall automatically be revoked without notice to [Borrower]. After such revocation . . . [Borrower] shall be the agent of [Secured Lender] for collection of Rents. Any Rents so collected shall be held in trust by Assignor for the sole and exclusive benefit of [Secured Lender] to be applied by [Secured Lender].

Ex. E (Assignment of Rents), ¶ 1.

7. The Assignment of Rents further provides that Secured Lender shall apply the rents to maintain the Property and to reduce the debt. Ex. E (Assignment of Rents), ¶ 3.

8. Mr. Dragul signed and affirmed an Indemnity and Guaranty Agreement through which Mr. Dragul, among other things, guaranteed payment of the Loan. *See* Ex. B (Polcari Aff.), ¶ 8; Ex. F (Guaranty).

9. The Loan Documents were assigned to and assumed by Safeway Marketplace 07 A, LLC, Safeway Marketplace 07 B, LLC and Safeway Marketplace 07 C, LLC, pursuant to that certain Note and Deed of Trust Assumption Agreement, dated September 28, 2007, and recorded in the real property records of Denver County under Reception No. 2007161090. *See* Ex. B (Polcari Aff.), ¶ 10; Ex. G (Sept. 2007 Assumption Agreement).

10. The Loan Documents were then assigned to and assumed by YM Retail pursuant to that certain Note and Deed of Trust Assumption Agreement, dated December 31, 2008, and recorded in the real property records of Denver County, Colorado under Reception No. 2008174051. *See* Ex. B (Polcari Aff.), ¶ 11; Ex. H (Dec. 2008 Assumption Agreement).

11. Through a chain of assignments and allonges, all of which are attached hereto, Secured Lender is the current holder of the Note and beneficiary of the Deed of Trust and the Assignment of Rents. *See* Ex. B (Polcari Aff.), ¶¶ 4-7.

12. The Note requires YM Retail to make monthly payments on the Loan and further requires YM Retail to pay all outstanding principal, accrued and unpaid interest, default interest, late charges, and any and all other amounts due under the Note on or before the maturity date of December 1, 2015. YM Retail failed to make the required monthly payments on the Loan, and has failed to pay the outstanding balance of the Loan on or before the maturity date. *See* Ex. B (Polcari Aff.), ¶ 13.

13. The total unpaid principal balance of the Loan is \$4,026,260.34. This does not include accrued Note rate interest, default interest, late fees, taxes, insurance, expenses or attorneys' fees. *See* Ex. B (Polcari Aff.), ¶ 14.

#### **Action Appointing Receiver for the Property**

14. On October 11, 2013, the Secured Lender initiated an action in the Denver County District Court as Case No. 2013 CV 34476 seeking the appointment of a receiver for the Property. *See* Ex. B (Polcari Aff.), ¶ 15.

15. On or about October 17, 2013, the Denver District Court entered an Order Granting Ex Parte Verified Motion for Appointment of Receiver ("Property Receivership Order"), which appointed Mr. Brian J. Baker, as the court-appointed receiver for the Property.

The Property Receivership Order governs the Property and the relative rights and obligations of the receiver for the Property, the Secured Lender, and YM Retail. Ex. I (Property Receivership Order).

**Environmental Action Asserted by the State**

16. In August 2013, the Colorado Department of Public Health and Environment (“CDPHE”) brought an environmental action against YM Retail, Gary Dragul, Aaron Metz, GDA Real Estate Services, and GDA Real Estate Management as Case No. 13 CV 33076 (the “Environmental Action”).

17. In the Environmental Action, CDPHE sought to enforce a Corrective Action Plan, which YM Retail, Mr. Dragul, and others entered into with CDPHE to conduct an environmental remediation on Unit G. Unit E is a separate parcel and is not part of the Environmental Action. *See* Ex. J (Release of Notice of Lis Pendens)

18. On January 20, 2015, the Denver County District Court entered a Stipulated Order Regarding Parties’ Settlement Agreement in the Environmental Action. *See* Ex. J (Stipulated Order). In the Stipulated Order, Mr. Baker, as the receiver for the Property, contributed \$150,000 into an escrow account to be used for the environmental remediation. The defendants in the Environmental Action contributed a total of \$100,000 to the escrow account to be used for the environmental remediation. The Stipulated Order expressly provides that, in event the environmental remediation costs in excess of the \$250,000 deposited into escrow, the defendants to the Environmental Action, including Mr. Dragul, “shall be solely responsible for any such excess.” Ex. K (Stipulated Order), ¶ 8(d).

19. The Loan Documents also include an Environmental Indemnity which makes clear that Mr. Dragul is individually responsible for any environmental contamination at the Property. *See* Ex. B (Polcari Aff.), ¶ 9; Ex. L (Environmental Indemnity).

**The Secured Lender's Foreclosure on the Property and Value of Parcels**

20. On or about May 4, 2018, the Secured Lender commenced a foreclosure on Unit E, through the Denver County Public Trustee. The original sale date was September 6, 2018. Secured Lender has voluntarily delayed the foreclosure sale. *See* Ex. B (Polcari Aff.), ¶ 17.

21. As of August 23, 2018, the appraised value of Unit E, the parcel that is not the subject of any environmental action, was \$3.1 million. *See* Ex. B (Polcari Aff.), ¶ 18; Ex. M (Unit E Appraisal). The value of Unit G, which is the subject of the Environmental Action is uncertain at this time due to the ongoing remediation.

**Entry of Receivership Order in this Case.**

22. On August 30, 2018, this Court entered the Dragul Receivership Order which applies to certain assets owned by Mr. Dragul, GDA Real Estate Service (“GDARES”), and GDA Real Estate Management (“GDAREM”).

23. The Dragul Receivership Order provides that the Receivership Property or Receivership Estate shall consist of the assets of Mr. Dragul, GDARES, and GDAREM, including interests in subsidiary companies, and any assets derived from investor funds from the solicitation or sale of securities as described in the Complaint. Dragul Receivership Order, ¶ 9.

24. The Dragul Receivership Order also states that all actions in equity or at law against the Receivership Estate are enjoined and stayed pending further action by this Court. Dragul Receivership Order, ¶ 26.



25. The Dragul Receivership Order further requires the Dragul Receiver to take appropriate action with respect to the January 20, 2015 “CDPHE Stipulation and Order” entered against Mr. Dragul, GDARES and GDAREM in the Environmental Action. Dragul Receivership Order, ¶ 31. However, the Dragul Receiver is expressly prohibited from taking possession or control over property that is subject to environmental contamination. *See* Dragul Receivership Order, ¶ 30.

26. The Dragul Receivership Order does not permit the Dragul Receiver to take possession of the Property owned by YM Retail and in the possession of Mr. Baker, as receiver for the Property. The Dragul Receivership Order also does not permit the Dragul Receiver to prime Secured Lender’s lien priority.

### ARGUMENT

**A. Denver County District Court, Division 203, has Jurisdiction over the Property.**

The Court should defer to Division 203 of the Denver County District Court, which has exclusive jurisdiction over the Property through its appointment of Brian Baker, as receiver for the Property. “When a controversy arises between two courts of concurrent jurisdiction as to the right or custody over a res [*i.e.*, the Property], as between the two courts of concurrent and coordinate jurisdiction . . . the court which first obtains jurisdiction is entitled to retain it without interference.” 2 CLARK ON RECEIVERS § 331 (3rd ed. 1959);<sup>3</sup> *see also Eller Indus. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995) (citing *Wabash R. Co. v. Adelbert College*, 208 U.S. 38, 53 (1908) (receivership court’s possession of the property gives such court

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<sup>3</sup> CLARK ON RECEIVERS has been cited with approval in numerous federal courts and by the Colorado Supreme Court. *See, e.g., Coit Independence J.V v. FSLIC*, 489 U.S. 561, 576 (1989); *George N. Sparling Coal Co. v. Colorado Pulp & Paper*, 299 P.41, 42 (Colo. 1931); *Eller Indus. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Colo. 1995).

exclusive jurisdiction to hear and determine questions affecting title, possession or control of the property); *Oppenheimer v. San Antonio Land & Irrigation Co.*, 246 F. 934, 935 (5th Cir. 1917) (effect of the receivership court's taking possession was a withdrawal of the property from the jurisdiction of all other courts). Another division of the Denver County District Court has already asserted jurisdiction and oversight over the Property (effectively withdrawing the Property from the jurisdiction of all other courts). Accordingly, this Court should defer to Division 203 for purposes of determining title, possession, and control of the Property, and exclude the Property from the application of the Dragul Receivership Order.

**B. The Property is Not Part of the Receivership Estate.**

Even if this Court assumes jurisdiction over the Property, the Court should enter an order excluding the Property from the application of the Dragul Receivership Order because the Property is not Receivership Property and is not part of the Receivership Estate. "Appointment of a receiver does not determine any rights nor destroy any liens." *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1195 (10th Cir. 2010); *SEC v. Madison Real Estate Grp., LLC* 647 F. Supp. 2d 1271, 1277 (D. Utah 2009) (quoting *Marshall v. NY*, 245 U.S. 380, 385 (1920). Rather, "a receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment." *In re Real Prop. Located at Jupiter Dr.*, No. 05-cv-01013-DB, 2007 WL 7652383 (D. Utah June 7, 2007); *see also Grubb v. FDIC*, 833 F.2d 222, 225 (10th Cir. 1987) (liens, equities or rights arising prior to the insolvency and not in contemplation thereof are not invalidated). In other words, the Dragul Receiver has only the rights and title to whatever assets as held by Mr. Dragul at the time the Dragul Receivership Order was entered.

The Dragul Receivership Order defines “Receivership Property” as the assets of Gary Dragul, GDARES, and GDAREM, including their interests in any subsidiaries or assets derived from the solicitation or sale of securities described in the Complaint. Dragul Receivership Order, ¶ 9. Neither GDARES nor GDAREM hold any interest in YM Retail, and YM Retail is not part of the securities claims against Mr. Dragul. Therefore, at best, the Receivership Estate includes only Mr. Dragul’s approximately 25% equity interest in YM Retail. The Dragul Receiver has no direct interest in the Property at issue; only a minor equity interest in the single asset entity that merely holds record title to the Property.

In fact, the Dragul Receiver is expressly prohibited from taking ownership, possession or control of Unit G, which is subject to the Environmental Action, due to the environmental contamination. Dragul Receivership Order, ¶ 30.

Neither YM Retail nor Mr. Dragul have any right to or title in the rents from the Property. First, the rents were expressly and irrevocably assigned and transferred to the Secured Lender to be applied to the debt. *See* Ex. E (Assignment of Rents), ¶ 1. Secured Lender then granted a revocable license to YM Retail subject to the terms of the Loan Documents so long as there was no default. *Id.* Once YM Retail defaulted on the Loan, the license to collect and use the rents was automatically revoked. *Id.* Under Colorado law, where an assignment of rents provides for a transfer of rents to be used to reduce the balance due on the debt, the lender has a direct interest in and may rightfully collect and apply the rents. *Wynn v. Adams County Bank*, 761 P.2d 234, 236 (Colo. App. 1988) (“upon default an assignee of rental may rightfully collect the assigned rent . . . without first commencing a foreclosure proceeding” or otherwise taking possession of the property). Thus, because YM Retail has defaulted on the Loan, YM Retail has

no right to collect or use the rents from the Property, and neither do any equity holders in YM Retail, such as Mr. Dragul or, by extension, the Dragul Receiver.

Second, even if the Assignment of Rents is deemed a security interest rather than a transfer, the Secured Lender has taken affirmative action to take possession of the Property and of the rents through the foreclosure action and the appointment of a receiver for the Property. *See Fisher v. Norman Apartments*, 72 P.2d 1092, 1096 (Colo. 1937) (“Where rents are assigned to the mortgagee, a receiver may be appointed to take possession for him and collect the rents for his benefit . . .”). Therefore, Secured Lender, through the Assignment of Rents, and the Property Receivership Order, has a right to and interest in the rents from the Property to the exclusion of YM Retail, and its members.

At the time the Dragul Receivership Order was entered in this case, neither YM Retail nor Mr. Dragul had any right to or possessory interest in the Property or the rents from the Property. Thus, the Dragul Receiver, taking only whatever right and title was held by Mr. Dragul at the time of the Dragul Receivership Order, also has no interest in the Property or in the rents from the Property. The Property is not part of the Receivership Estate, and the Court should enter an order to that effect.

**C. The Court Should Grant Relief From the Dragul Receivership Order.**

Even if, *arguendo*, the Property is indirectly part of the Receivership Estate through YM Retail (it is not), the Court should enter an order granting Secured Lender relief from the Dragul Receivership Order to allow it to complete its foreclosure and allow, the Property Receiver, Brian Baker, to continue to manage the Property under the Property Receivership Order in accordance with orders entered by Division 203.

Relief from the Dragul Receivership Order is warranted because the Property lacks any equity and is of no value to the Receivership Estate. Courts of equity have broad powers to fashion relief in accordance with general equitable principles. *See Yates v. Hartman*, 2018 COA 31 (Colo. App. March 8, 2018). “Generally speaking, the person who has a specific lien on property is entitled . . . to pay himself out of the property and if it be insufficient, then to prove his claim for the deficiency.” 3 CLARK ON RECEIVERS § 679 (3rd ed. 1959). “Secured creditors have recourse against specific collateral, and must be paid out of the proceeds of that collateral.” *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). Where there is no equity in the receivership estate or if the property is burdensome or of little value, the Court should authorize relief from the Dragul Receivership Order or abandonment of the Property. *See Quilling v. Trade Partners, Inc.*, Case No. 03-cv-0236, 2011 WL 4973870 (W.D. Mich. Sept. 30, 2011) (quoting *Helvey v. United States Bldg. & Loan Ass'n*, 184 P.2d 919, 922 (Cal. App. 1947)).

As of the date of this Motion, the unpaid principal balance of the Loan is \$4,026,260.34. This does not include accrued Note rate interest, default interest, late fees, taxes, insurance, expenses or attorneys’ fees. The appraised value for Unit E, the parcel that is not subject to the Environmental Action, is \$3.1 million, far less than even the unpaid principal balance of the Loan. Given the current environmental contamination and required remediation, the value of Unit G is negligible, and in any event, is much less than the approximately \$1 million needed just to exceed the unpaid principal balance of the Loan let alone the accrued interest, default interest, taxes, expenses, and attorneys’ fees. Thus, to the extent the Dragul Receiver could even claim an indirect interest in the Property, the Property lacks equity and has no value to the Receivership Estate.

All proceeds to be derived from a liquidation or sale of the Property will be paid solely to the Secured Lender. There will be nothing remaining for YM Retail, a single asset entity, and nothing for the equity holders of YM Retail, including Gary Dragul, and by extension, the Dragul Receiver. Consequently, there would be nothing of value for the Dragul Receiver to distribute to the investors or to pay claims against the Receivership Estate.

Granting the Secured Lender relief from the Dragul Receivership Order, and permitting the Secured Lender to foreclose as permitted by Division 203, would reduce claims against the Receivership Estate. Mr. Dragul has guaranteed the Loan. By foreclosing, the Secured Lender will be liquidating collateral and reducing the outstanding obligation to which Mr. Dragul would be individually liable. Any and all proceeds received by the Secured Lender will reduce potential claims against the Receivership Estate dollar-for-dollar.

The Court should grant the Secured Lender relief from the Dragul Receivership Order to allow it to proceed with the foreclosure and operate under the Property Receivership Order

### CONCLUSION

For the reasons set forth above, MLMT 2005-LC1 YALE RETAIL, LLC respectfully requests that the Court enter an Order ((i) affirmatively excluding certain real property and rents from the application of the Dragul Receivership Order (ii) lifting any applicable stay imposed by the Dragul Receivership Order, (iii) allowing Secured Lender to commence, continue, and complete any foreclosure proceedings against the real property at issue, and (iv) deferring the oversight and control of the property at issue to a separate receiver appointed by Division 203 of the Denver County District Court in October 2013, and for such other relief as the Court deems just and appropriate.

Respectfully submitted this 24<sup>th</sup> day of October 2018.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 24, 2018, true and correct copies of the foregoing MOTION FOR RELIEF FROM STIPULATED ORDER APPOINTING RECEIVER were served via email and U.S. Mail, first class postage prepaid, addressed to:

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*/s/ Lisa Ray* \_\_\_\_\_

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