

<small>DATE FILED: November 28, 2018 12:11 PM  FILED: FD176081CF290  CASE NUMBER: 2018CV33011</small>	
<b>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO</b> Denver District Court 1437 Bannock St. Denver, CO 80202	
<b>Plaintiff:</b> Gerald Rome, Securities Commissioner for the State of Colorado  v.  <b>Defendants:</b> Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	
<b>▲ COURT USE ONLY ▲</b>	
Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Phone Number: (303) 534-4499 pvellone@allen-vellone.com mgilbert@allen-vellone.com rsternlieb@allen-vellone.com	Case Number: 2018CV33011  Division/Courtroom: 424
<b>RECEIVER’S MOTION TO ABANDON PROPERTY (YM RETAIL 07 A, LLC AND SAFEWAY MARKETPLACE MANAGER 07, INC.)</b>	

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities (collectively, “Dragul and the GDA Entities”), hereby requests Court approval to abandon the Estate’s interest in a Dragul-related special purpose entity,

YM Retail 07 A, LLC (“YM Retail”), and a wholly-owned Dragul entity, Safeway Marketplace Manager 07, Inc. (“Safeway Manager”).

## **I. Conferral**

The Receiver consulted with the parties likely to be most interested in this motion, the Colorado Department of Health and Environment (“CDPHE”), and MLMT 2005-LC1 Yale Retail, LLC (“Lender”), and neither opposes the requested relief.

## **II. Background**

### **A. YM Retail is Part of the Receivership Estate.**

1. On August 15, 2018, Gerald Rome, Securities Commissioner for the State of Colorado (the “Commissioner”), filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities.

2. On August 29, 2018, the Commissioner, Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver, consenting to the appointment of a receiver over Dragul and the GDA Entities pursuant to COLO. REV. STAT. § 11-51-602(1), C.R.C.P. 66.

3. On August 30, 2018, the Court entered a Stipulated Order Appointing Receiver (the “Receivership Order”), appointing Harvey Sender of Sender & Smiley, LLC as receiver for Dragul and the GDA Entities

and all of their assets, including, but not limited to, all real and personal property, including tangible and intangible assets, their interests in any subsidiaries or related companies, management and control rights, claims, and

causes of action, wherever located, including without limitation the “LLC Entities” identified in the Commissioner’s Motion and Complaint for Injunctive and Other Relief, or assets (including those of Dragul) of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the Complaint, or derived indirectly [sic, read “directly”] or indirectly from investors funds (the Receivership Property,” and altogether the “Receivership Estate”).

*Receivership Order* at 3, ¶ 9.

4. YM Retail is part of the Receivership Estate: Gary Dragul owns 17.86% of YM Retail; 31 other investors Dragul solicited own the remaining 82.14%. YM Retail’s manager is Safeway Marketplace Manager 07, Inc., which upon information and belief is wholly-owned by Dragul, and whose only purpose is to manage YM Retail.

**B. The North Portion of the YM Property (Parcel G) is Contaminated.**

5. YM Retail is a special purpose entity (“SPE”) whose only asset is real property located at 6460 East Yale Avenue, Units E & G, Denver, Colorado (the “YM Property”). The YM Property consists of two separate parcels within a retail shopping center complex at the intersection of Yale and Monaco Streets. Parcel G (a/k/a Parcel 1 or the “Contaminated Parcel”) is on the north portion of the property. It is a strip mall with six units and is physically attached to a Safeway store. Parcel E (a/k/a Parcel 2 or the “Clean Parcel”) is on the south portion of the property. It is a standalone strip mall with 9 units.

6. In 2005, Lender extended a \$4.4 million commercial loan (the “MLMT Loan”) to YM Retail’s predecessor, secured by the YM Property. The balance due on the MLMT Loan is approximately \$4 million. On October 17, 2013, the Lender had a Receiver (Brian J. Baker, the “YM Receiver”) appointed for the YM Property in Case No. 2013 CV 34476, Denver District Court. Since then, the YM Receiver has assumed all control and management of the YM Property and Safeway Manager has neither controlled nor managed the Property. Since Mr. Baker’s appointment, all rents from the YM Property have been paid to the YM Receiver. Upon information and belief, excess rents after paying the necessary expenses of the YM Receiver and the YM Property have been paid to the Lender. Since 2013, YM Retail has not received any rental income from the YM Property.

7. When Mr. Baker was appointed, the YM Property was subject to an environmental enforcement lawsuit commenced by the CDPHE, *CDPHE v. YM Retail 07 A, LLC, et al.*, Case No. 2013CV33076, Denver District Court (the “Environmental Action”). The Environmental Action related to tetrachloroethylene (“PCE”) contamination caused by a dry-cleaning tenant on Parcel 1 sometime from the mid-1980s to 1993. The contamination occurred long before YM Retail acquired the YM Property. The contamination occurred in a building that was torn down and upon which the current strip mall on Parcel 1 was constructed. PCE was a widely-used chemical solvent in dry cleaning. Although PCE has been found at the YM Property, it does not appear to pose an imminent threat to human health or safety.

**C. The CDPHE Stipulation and Remediation Cost Estimate.**

8. On January 20, 2015, the Court in the CDPHE case approved a stipulation among, on one hand, YM Retail, GDA Real Estate Management, Inc., GDA Real Estate Services, LLC, Gary Dragul,<sup>1</sup> and Aaron Metz (the “Defendants”), and, on the other hand, CDPHE (the “CDPHE Stipulation”). The YM Receiver was a signatory to the Stipulation.

9. The CDPHE Stipulation and the Court’s Order approving it provided for cleanup of the Contaminated Parcel. The Stipulation estimated cleanup costs would be between \$126,540 and \$252,000; it required Defendants to make eight monthly deposits of \$12,500 (total of \$100,000) into an escrow account to fund the cleanup. The CDPHE Stipulation also required the YM Receiver to deposit \$150,000 into the cleanup escrow account. If cleanup costs exceeded \$250,000, Defendants agreed to be solely responsible for the excess. Upon information and belief, the required deposits were made.

10. Notwithstanding the CDPHE Stipulation, it does not appear that any remediation of the site has occurred. The escrow deposits were apparently used to fund site studies to determine the extent of contamination and develop a remediation plan.

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<sup>1</sup> As noted above, Mr. Sender was appointed Receiver for GDA Real Estate Management, Inc., GDA Real Estate Services, LLC, and Gary Dragul.

11. On July 16, 2018 – three-and-a-half years after the Stipulation was approved – CDPHE approved a Corrective Action Plan Modification for the cleanup. On November 13, 2018, the remedial contractor, Terracon, submitted a cost estimate for the Contaminated Parcel to where it could be occupied (two units in the south property have been unoccupied because of the contamination) with use restrictions, and an estimate to clean up the site to where there would be no use restrictions. With use restrictions, the estimated costs ranged from \$640,000 to \$840,000, and for complete groundwater remediation and unrestricted use an additional \$1.6 to \$2.4 million might be required. A copy of the Terracon estimate is submitted as **Exhibit 1**.

**D. The Lender has Filed a Motion for Relief from this Court’s Stay to Foreclose the Clean Parcel of the YM Property.**

12. The Receivership Order enjoins all actions in equity or at law against the Receiver, Dragul, the GDA Entities, or the Receivership Estate, absent an order from this Court. *Receivership Order* at 18, ¶ 26.

13. Starting in 2013, the Lender commenced (and thereafter repeatedly continued) foreclosure actions on both the Clean and the Contaminated Parcels of the YM Property.

14. On May 9, 2018, Lender commenced a new foreclosure seeking to foreclose only the Clean Parcel. On October 24, 2018, Lender filed its Motion for Relief from Stipulated Order Appointing Receiver in this case in which it asked this Court to lift the litigation stay imposed by the Receivership Order so that it can foreclose

the Clean Parcel, while apparently intending to leave the Contaminated Parcel under the control of Mr. Baker.

**III. The Court Should Authorize the Receiver to Abandon the Estate's Interest in YM Retail and Safeway Manager Because they are of Inconsequential Value to the Estate.**

15. The Receivership Order authorizes the Receiver to sell or otherwise dispose of the assets of the Estate, including the personal property of the Receivership Estate. *Receivership Order* ¶ 13(t), at 12. Upon obtaining a court order, a receiver may generally abandon property that is of inconsequential value to an estate. *E.g.* 65 AM. JUR. 2D RECEIVERS § 156. Under the Bankruptcy Code, property may be abandoned that is burdensome or of inconsequential value or benefit to a bankruptcy estate. 11 U.S.C. § 554(a).

16. The Receivership Estate includes Gary Dragul's 17.85% interest in YM Retail and his management rights in Safeway Manager. Before the Receiver here was appointed, however, the YM Receiver had assumed management and control over the YM Property. There is no value to the Estate in Safeway Manager.

17. Nor is there any equity or value in the Estate's interest in YM Retail, or in the YM Property. The Receiver has engaged Marcus & Millichap, a nationally-recognized real estate broker with extensive experience in the commercial retail market, to provide a market analysis of the YM Property. It has valued the YM Property at between \$3.5 million and a proposed listing price of \$4.7 million. *See* Excerpts of Marcus & Millichap Valuation Proposal, attached as **Exhibit 2**. The

outstanding debt on the Property exceeds \$4 million. Pursuant to the recently obtained Terracon report, remediation costs for the Contaminated Parcel could range from \$640,000 to \$3.2 million (or potentially more). *See Ex. 1.*

18. Although title to the YM Property is held by YM Retail, the YM Property itself is not part of this Estate because the Lender obtained control of the Property in 2013 when the YM Receiver was appointed. Since 2013, the Lender has controlled all rental income from the Property. The Lender's pending foreclosure action will, at minimum, result in the Lender obtaining title to the Clean Parcel. The YM Receiver would still retain control over the Contaminated Parcel for the Lender's benefit.<sup>2</sup>

19. Even if there were equity in the Contaminated Parcel (there is not), the Receivership Order expressly prohibits the Receiver from taking any action regarding ownership, operation, control, generation, or storage of any hazardous substance, pollutant, or contaminant without an order from this Court. *Receivership Order* ¶ 30, at 20. Absent such an order, the Receiver has no ownership, control, authority, or power over contaminated property, nor any obligation to exercise ownership or control over the disposal of any hazardous substance. *Id.*

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<sup>2</sup> Whether the Lender can foreclose only the Clean Parcel and not pay to remediate the Contaminated Parcel is an issue that needs to be addressed in the pending environmental action.

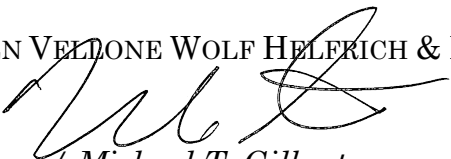


#### IV. Conclusion

20. Because the Estate's interests in YM Retail and Safeway Manager are of no conceivable benefit to the Estate, the Receiver asks this Court to enter an order authorizing him to abandon any such interests the Estate may have in those entities.

Dated: November 28, 2018.

ALLEN VELLONE WOLF HELERICH & FACTOR P.C.



By: s/ Michael T. Gilbert

Patrick D. Vellone, #15284

Michael T. Gilbert, #15009

Rachel A. Sternlieb, #51404

ATTORNEYS FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

I hereby certify that on the November 28, 2018, a true and correct copy of **RECEIVER'S MOTION TO ABANDON ESTATE'S INTEREST IN PROPERTY (YM Retail 07 A, LLC AND SAFEWAY MARKETPLACE MANAGER 07, INC.)** was filed and served via the Colorado Courts E-Filing system to the following:

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**CERTIFICATE OF SERVICE ON KNOWN CREDITORS**

The undersigned certifies that, a copy of the foregoing will also be served by electronic mail and/or U.S. Mail first-class, postage-prepaid to all known creditors and parties in interest of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.

*s/ Terri M. Novoa* 

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

*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.*