DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	
Plaintiff: Chris Myklebust, Securities Commissioner for the State of Colorado v. **Defendant: Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC**	▲COURT USE ONLY▲
Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Phone Number: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com	Case Number: 2018CV33011 Division/Courtroom: 424

RECEIVER'S REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SALE OF CLEARWATER COLLECTION AND IN RESPONSE TO HAGSHAMA'S OBJECTION

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"), submits this reply in

support of his Motion for Order Authorizing Sale of Clearwater Collection ("Sale Motion," filed Feb. 21, 2019), and in response to Hagshama's Objection to the Sale Motion (filed March 1, 2019).

I. The Receiver incorporates his Hickory Corners Reply.

Hagshama makes the same objection to the Clearwater sale as it did to the Receiver's Hickory Corners Sale Motion, *i.e.*: (1) the Receiver lacks authority under the governing documents to sell the Clearwater Property (the "Property"); (2) Clearwater is not part of the Estate; and (3) the sale price is too low, which will cause Hagshama to lose some of its investment. These arguments, and the economic realities facing the Estate which Hagshama again fails to recognize, are addressed in the Receiver's Reply in Support of Hickory Corners Sale Motion and Response to Hagshama's Objection ("Hickory Reply"; filed March 8, 2019). While the properties and their investor structures differ, the legal arguments do not. The Receiver incorporates his Hickory Reply as supplemented herein. As will be seen, the facts surrounding Clearwater even more strongly support approving the Receiver's Sale Motion.

II. The Court should approve the proposed Clearwater sale.

A. Like Hickory Corners, Clearwater is distressed Property that will be lost to foreclosure absent a sale.

The Receiver asks the Court to approve the Clearwater sale to unrelated third-party Fortune Capital Partners, LLC ("FCP") for $17.1 million. The net proceeds from

the sale are estimated to be around $4 million, which will confer a substantial benefit on the Estate and its constituent creditors.

Clearwater Corners is a retail shopping center in Florida encumbered by a $13,350,000 million mortgage in favor of Rialto Mortgage Finance, LLC.[1] Contrary to Hagshama's assertion that Clearwater had no problems until the Receiver was appointed (Hag. Obj. at 2), in March 2018, Rialto declared its loan in default for nonpayment, began to sweep the rents from the Property, and has been accruing default interest ever since. Then in April 2018, Dragul who managed Clearwater, was indicted on nine counts of securities fraud. On or about July 26, 2018, Rialto accelerated its loan and demanded payment in full. On August 16, 2018, Rialto commenced a foreclosure action against Clearwater in Florida state court.[2] All of this occurred before the Receiver was appointed on August 30, 2018.

As with Hickory, Hagshama has not offered to contribute one cent to pay the necessary operating expenses, cure the loan defaults, stabilize the Property, or fund the proposed Forbearance Agreement. Hagshama has done nothing to stave off the pending foreclosure. It has not offered to reimburse the Estate for the substantial fees and expenses the Estate has incurred attempting to preserve the Property over the last six months. This notwithstanding that the tenancy-in-common agreement

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1 Capitalized terms not defined here are defined in the Sale Motion.

2 *Wilmington Trust, N.A. v. Clearwater Collection 15, LLC, et al.*, Case No. 18-005459-CI, Circuit Court, Sixth District, Pinellas County, Florida.

Hagshama relies on requires it to pay its pro rata share of the costs, expenses, taxes, insurance premiums, and debt service for the Property. See Hag. Obj., Ex. A, Art. 2.2. Hagshama has instead offered nothing, leaving the Estate to bear the burden of funding essential Property expenses which the Estate now lacks the funds to continue to pay.

Since February 2019, the Estate has been unable to pay critical expenses for the Property (*e.g.*, insurance and utilities), let alone pay off or reinstate the Rialto loan. Rialto has reluctantly agreed to pay only these critical expenses. Recently, Rialto presented a forbearance agreement to the Receiver that would require the Estate to pay between $400,000 and $600,000 to postpone Rialto's foreclosure for six months. The Estate does not have the funds to do so. Absent the proposed sale, Clearwater like Hickory will be lost to foreclosure and Hagshama and the other investors in the Property will be left with nothing.

B. The proposed sale is in the best interest of the Estate and its creditors.

Hagshama implies (but does not actually state) that the proposed sale may be at a depressed value because the Property is in Receivership. Hag. Obj. at 3. Hagshama argues it invested $3 million for a 53.78% interest in Clearwater, and that selling the Property now may cause it to lose some of that investment. Hag. Obj. at 2, 3. Hagshama is correct that it and the other defrauded Clearwater investors may lose a portion of their investment. But something is better than nothing, which is what the Estate will be left with if Hagshama is allowed to block the Clearwater sale.

As with Hickory, Hagshama fails to acknowledge the Property is in receivership, its mortgage in default, and foreclosure is imminent. Absent the proposed sale, Hagshama and the other individual investors in the Property may lose *their entire investments*, not just a portion. Hagshama and its individual investors are no different than other individual investors in that respect. Indeed, Hagshama appears to be in a substantially better position than Dragul's other defrauded investors: it has already received $574,869 in distributions from Dragul for Clearwater – almost 20% of its principal. It is unclear what, if anything, other Clearwater investors have received.

And Hagshama doesn't present any viable alternative to the proposed sale. As discussed in the Receiver's Hickory Corners Reply – despite months of trying – Hagshama has not produced anyone willing to buy the Estate's equity interest in Clearwater or any of the other Hagshama Projects and to infuse the capital needed to cure the loan defaults and stabilize the properties. Nor has Hagshama produced a buyer willing to purchase the Property for *any* amount, let alone for more than the $17.1 million on the table. Nowhere in its Objection does Hagshama state what it believes the fair market value of the Property is today, or what it believes a fair and acceptable sale price would be. The Receiver's nationally-recognized commercial brokers marketed the Property and negotiated the best terms possible. If Hagshama believes the Property is underpriced, it should tender a better offer, or purchase the Property itself. It has done neither.

But Hagshama does not want to step up and buy the Property. Instead, it wants to block any proposed sale of any of its Project properties, including Clearwater, until: (a) the loans on the properties can be paid current or renegotiated by the Receiver; (b) any outstanding liens or tenant improvement obligations are paid; and (c) the properties can be fully-leased. While this might allow Hagshama to realize the full economic potential of its Clearwater investment and perhaps the 12% internal rate of return it projected, the Estate lacks the funds to do any of this.

C. Clearwater is property of the Receivership Estate.

Hagshama next argues, incorrectly, that the Clearwater Property is not part of the Receivership Estate. As set forth in the Hickory Reply, the Estate includes all of the LLC entities specifically identified in the Commissioner's Complaint in this case,[3] any LLC assets related in any manner, or directly or indirectly derived from investor funds, and all management and control rights exercised by Dragul and related entities. *See* Hickory Reply at 8 (quoting Receivership Order at 3, ¶ 9).

The Clearwater Property is owned by two SPEs in which Dragul and individual investors he solicited own a substantial interest, Clearwater Collection 15, LLC ("Collection 15") and Clearwater Plainfield 15, LLC ("Plainfield 15"). The Court need go no further than the Commissioner's Complaint, which specifically identifies both of these SPEs as property of the Receivership Estate. *See* Comm'r Compl. at ¶ 21.

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[3] August 15, 2018, Complaint for Injunctive and Other Relief.

Moreover, 34.83% of the membership interests in Collection 15 purport to be owned by Dragul and 15 other investors he solicited. And 100% of the membership interests in Plainfield 15 purport to be owned by Dragul and 33 other investors he solicited. So, there are at least 48 other investors Dragul solicited who own interests in Clearwater, and whose rights are at issue.

On March 1, 2019, Dragul was indicted on an additional five counts of securities fraud, four of which focus on his solicitation of investors in Plainfield 09A, LLC.[4] Plainfield 09A was another Dragul SPE formed to own the Plainfield Commons Shopping Center in Plainfield Indiana. The indictment avers Dragul sold over 194% of the membership interests in Plainfield 09A. In March 2015, Dragul sold the Plainfield shopping center for a net profit of approximately $1 million. **Ex. 1**, at ¶ 12. Instead of paying investors, Dragul pocketed the money and forced the Plainfield 09A investors to "roll" their investments into Plainfield 15 and thus the Clearwater Property. *Id. at* ¶ 13. This doubled down on Dragul's previous "rolling over" of other investors into Plainfield 09A from other prior Dragul investments. *Id.* at ¶¶ 16, 21, 27.[5]

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[4] A copy of this second indictment is submitted as **Exhibit 1**.

[5] In addition, the Receiver has recently learned that some of the non-Hagshama investors in Clearwater and other Hagshama Project properties previously loaned significant amounts of money either to Dragul or other non-Hagshama related entities in which Dragul was involved. When Dragul was unable to repay those loans, he converted the loans to equity interests in Hagshama Projects with no corresponding benefit being provided to the entity itself.

Finally, Clearwater is managed by GDA Clearwater Management, LLC (the "Manager"), a wholly-owned Dragul entity that is ultimately managed by GDA Real Estate Management, Inc., whose president and sole shareholder is also Dragul. Clearwater is indisputably property of the Receivership Estate.

D. The equities strongly favor approving the Clearwater sale.

As it did in its Hickory Objection, Hagshama argues the Receiver is prohibited from selling Clearwater by one of the numerous operating agreements relating to Clearwater's overly complex, multi-layered ownership structure.[6] In particular, the GDA Clearwater Investors, LLC Operating Agreement it attached to its Objection as Exhibit B. Hag. Obj. at 4. For good reason, Hagshama doesn't refer to the operating agreements Dragul put in place with respect to the 48 other non-Hagshama Clearwater investors. The GDA Clearwater 15, LLC Operating Agreement specifically grants the Manager the authority to "sell all or any of the assets of the Company without the consent of the Members." **Exhibit 2**, at 10, ¶ 6.14. Similarly, the Plainfield 15 Operating Agreement also explicitly allows the Manger to sell any or all assets of the Company without member consent. **Exhibit 3**, at 11, ¶ 6.14. So, as with Hickory, the documents that purport to govern Clearwater are inconsistent.

More importantly, as with Hickory, Dragul routinely comingled Clearwater assets with the assets of GDA Real Estate Services, which were then funneled to

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[6] The Clearwater ownership structure is overly complex and seems designed to, at minimum, obfuscate. The easiest way to follow this discussion is to refer to the diagram attached as Exhibit 2 to the Clearwater Sale Motion.

other, what Hagshama characterizes as "standalone" entities, and to Dragul for his and family's personal benefit. Clearwater cannot reasonably be treated as a legitimate "standalone" entity to be governed by fraudulently created and maintained agreements, which themselves conflict with respect to the Manager's authority to sell the Property. Indeed, given Dragul's overselling of the Clearwater membership interests and extensive comingling, it would be impossible to honor the operating agreements, which would require the Receiver to distribute almost twice the amount of available net sales proceeds to the 48 non-Hagshama Clearwater "investors."

III. Conclusion

The only solution to prevent Clearwater from being lost to foreclosure is to approve the proposed sale, absent which the Estate and its investors will receive nothing from Clearwater instead of approximately $4 million which the Estate will receive if the proposed sale is approved. And given Clearwater's fraudulent composition and management, the Court should authorize the Receiver to retain the net sales proceeds for distribution to all allowed claimants pursuant to the priority set forth in the Receivership Order and a plan of distribution to be proposed by the Receiver.

Dated: March 14, 2019.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

By: */s/ Michael T. Gilbert*

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I certify that on March 14, 2019, I served a true and correct copy of the foregoing **RECEIVER'S REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SALE OF CLEARWATER COLLECTION AND IN RESPONSE TO HAGSHAMA'S OBJECTION** via CCE to the following:

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CERTIFICATE OF SERVICE ON KNOWN CREDITORS

In accordance with this Court's February 1, 2019 Order clarifying notice procedures for this case, I also certify that a copy of the foregoing is being served by electronic mail on all currently known creditors of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.

By: /s/ Victoria Ray
Allen Vellone Wolf Helfrich & Factor P.C.