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<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, CO 80202</td><td rowspan="2">

▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiff: CHRIS MYKLEBUST SECURITIES COMMISSIONER FOR THE STATE OF COLORADO,
v.
Defendants: GARY DRAGUL, et al.</td></tr>
<tr><td>Attorney for Non-Party Hagshama:
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Courtroom: 424</td></tr>
<tr><td colspan="2">HAGSHAMA'S SURREPLY IN SUPPORT OF OBJECTION TO RECEIVER'S MOTION FOR ORDER AUTHORIZING SALE OF HICKORY CORNERS</td></tr>
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In the Receiver's Reply in Support of Hickory Corners Sale Motion and In Response to Hagshama's Objection ("Reply"), the Receiver argues for the first time that the proposed sale of Hickory Corners must be approved based on "economic realities" and vague notions of "fairness and equity." According to the Receiver, the Court should ignore the explicit language of the controlling documents, along with controlling law, to reach this result. To support this proposition, the Receiver cites decisions generated by various federal courts based on factual situations that have no bearing on the proposed sale of Hickory Corners. (Reply at 9-14.) None of these cases suggest a Receiver may confiscate property owned by third parties and convey it as if it were part of the receivership estate. The proposed transaction is contrary to established Colorado receivership law and North Carolina property law.

Further, the Tenancy-In-Common Agreement, which states North Carolina law governs, prohibits the proposed sale.[1] (*See* Hagshama's Objection to Receiver's Motion for Order Authorizing Sale of Hickory Corners, Ex. A, TIC §§ 1.1 and 7.1(a).) Section 4.1 requires unanimous consent of all tenants for any sale of the property.

ARGUMENT

Under Colorado law a receiver's rights in property cannot be summarily expanded.

In his Reply, the Receiver admits that "case law addressing the administration of equity in receiverships is sparse and typically limited to a case's particular facts." (Reply at 9.) The Receiver neglects, however, to note the controlling decision by the Colorado Supreme Court. *People v. District Court of First Judicial Dist.*, 218 P. 742 (Co. 1923), is directly on point. There, a receiver for the National Beet Harvester Company appointed by the district court filed a petition against an individual seeking possession of certain beet harvester equipment. The individual, who claimed titled to the equipment as a purchaser at a sheriff's sale, insisted "his rights to the property could not be thus summarily determined." A few months later, the receiver reported to the district court that the individual had not complies with its order and obtained an attachment, under which the individual was arrested. After posting bond, the individual filed a writ of prohibition with the Colorado Supreme Court. In granting the writ, the Court held the receiver had no rights in disputed property beyond that originally held by the subject corporation:

[1] The Receiver argues that there is a conflict in the controlling documents. (Reply at 12.) No such conflict exists. Hagshama's relationship with the other equity owners, is governed exclusively by the Tenancy-In-Common Agreement. Hagshama is not a party to the "B"-side operating agreement referred to in the Reply and cannot be bound by its terms.

> [The individual's] title to the harvesters, and of course his right to possession, depended upon the validity of the sale under which he claimed. That was a question to be judicially determined. The district court . . . assumed that it belonged to the receiver and ordered its delivery to him. Manifestly, the Court had no authority to make the order, and Pomeranz was under no obligation to obey it. **The receiver had no greater right with respect to the property of the Harvester Company than the company itself possessed, and in all matters of litigation he represents the corporation, and can exercise, as to property claimed by third persons, no powers which the corporation itself could not exercise.**

218 P. 742 at 743 (emphasis added). *See also, Seckler v. J.I. Case Co.*, 348 P.2d 368 (Co. 1960) (receiver stands in the shoes of entity over which he was appointed and can assert no greater rights).

Here, the Receiver's claimed authority to convey title to Hickory Corners goes far beyond the powers granted under the Tenancy-In-Common Agreement. There have been no evidentiary proceedings before this Court by which Hagshama's interests in Hickory Corners have been adjudicated. Regardless of the breadth of authority granted under the Receivership Order, Hagshama's proprietary rights and interests cannot be summarily denied without due process. In other words, as reflected in *People v. District Court*, a motion to sell is no substitute for an adjudication of title.

In the Reply, the Receiver suggests that Hagshama has somehow failed to perform its obligations under the Tenancy-In-Common Agreement. This is new. Up to this point, the Receiver has made no demand for performance upon Hagshama or accounted for "costs, expenses, taxes, insurance premiums, and debt service" allegedly advanced on Hagshama's behalf. (Reply at 5.) Hagshama cannot be in breach for the failure to pay amounts that have never been disclosed or requested.

Equity does not permit a result that is contrary to law.

The Receiver argues that Hagshama's rights under the Tenancy-In-Common Agreement and applicable state law can somehow be overcome by applying undefined principals of equity. This is a fallacy. The maxim that equity must follow the law dates to the earliest years of Colorado jurisprudence, *see Learned v. Tritch*, 6 Colo. 432 (1882), and is regularly and consistently applied in modern times, *see Preferred Professional Ins. Co. v. The Doctors Co.*, 419 P.3d 1020, 1027 (Colo. App. 2018) ("Absent a showing that a contractual provision violates public policy, equity should not be employed to defeat a party's bargained-for contractual rights."); *see also, Yates v. Hartman*, 2016 WL 1247615 (Colo. App. March 8, 2018); *Smith v. Hickenlooper*, 164 F.Supp.3d 1286, 1292 (D. Colo. 2016).

Hickory Corners is in North Carolina. Importantly, the Tenancy-In-Common Agreement specifies that North Carolina law applies. Under North Carolina law, property held in a tenancy in common cannot be conveyed without the consent of **all** co-tenants. It is long been the rule in North Carolina that a conveyance by a single tenant in common is of no effect. For instance, *Southern Inv. Co. v. Postal Telegraph-Cable Co.*, 72 S.E. 361 (N.C. 1911), involved a single cotenant's grant to a third party of the right to place telephone wires between poles owned by two corporations as tenants in common. The North Carolina Supreme Court found the transaction to be a nullity:

> The general rule seems to be well settled that one tenant in common cannot, as against his co-tenant, convey any part of the common property by metes and bounds, or even an undivided portion of such part. The reason is obvious. His title is to an undivided share of the whole, and he is not authorized to carve out his own part, nor to convey in such a manner as

> to compel his co-tenants to take their share in several distinct parcels, such as he may please.

72 S.E. 361 at 363 (citations omitted). *See also, LDDC, Inc. v. Pressley*, 322 S.E. 2d 416 (N.C. 1984).

As a single tenant in common, the Receiver has no authority to convey Hagshama's interest in Hickory Corners. The Tenancy-In-Common Agreement explicitly prohibits the very transaction that the Receiver proposes. Aside from the language of the Tenancy-In-Common Agreement, the Receiver has no authority to convey marketable title under North Carolina law without the consent of the other tenant in common. Even with this Court's approval, the proposed conveyance would not be enforceable under North Carolina law. *See Kirstein v. Kirstein*, 306 S.E.2d 552 (N.C. 1983). As a practical matter, the purchaser will only acquire a lawsuit over the legitimacy of the transaction.

CONCLUSION

The Receiver is attempting to run roughshod over the proprietary rights of Hagshama under the Tenancy-In-Common Agreement. This is in direct violation of Colorado and North Carolina law. Vague notions of equity cannot enlarge the Receiver's authority beyond the limits of the law. The Hickory Corners Sale Motion must be denied.

WHEREFORE, Hagshama respectfully requests that the Court enter its Order denying the Hickory Corners Sale Motion, and for such other and further relief as is appropriate.

Respectfully submitted this 14th day of March, 2019.

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Attorney for Hagshama

Certificate of Service

I certify that on March 14, 2019, the foregoing was served electronically by the Colorado Court's E-filing service, which caused electronic notice to be served on:

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