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:

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Division/Courtroom: 424

RECEIVER'S MOTION FOR ORDER APPROVING AGREEMENT WITH HAGSHAMA CONCERNING SALE OF CLEARWATER COLLECTION AND HICKORY CORNERS

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"), asks the Court to enter

an order approving the "Agreement" submitted with this Motion as **Exhibit 1**¹ thereby authorizing the agreement reached between the Receiver and Hagshama about the sale of, and distribution of proceeds from, Clearwater Collection and Hickory Corners.

I. Background

- 1. On August 15, 2018, Gerald Rome, the former 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 and 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 under 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, their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate" or the "Estate"). Receivership Order at 2, ¶ 5.
- 4. The Receivership Order grants the Receiver the authority to sell or otherwise dispose of Estate property and obtain Court approval for any sale for

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To the extent any terms of this Motion are inconsistent with the Agreement, the Agreement controls.

greater than \$10,000 (Receivership Order at 12, ¶ 13(t)). The Receivership Order provides that "Court approval of any motion filed by the Receiver shall be given as a matter of course, unless any party objects . . . within ten (10) days after service by the Receiver or written notice of such request." Receivership Order at 21, ¶ 34.

5. The Receiver asks the Court to approve the Agreement it has reached with Hagshama, which resolves the parties' disputes over the sales of Clearwater Collection and Hickory Corners. Upon Court approval, Hagshama will withdraw its objections to both the Clearwater Collection and Hickory Corners sale motions, which will resolve the only objection filed to the Clearwater sale, and remove the major impediment to the Hickory sale.²

II. Clearwater Collection and Hickory Corners

6. Clearwater Collection and Hickory Corners are retail shopping centers owned as tenants-in-common by at least one Hagshama entity and at least one entity in which Dragul owns an interest.³ Equity in some of the Dragul entities that own

One other creditor, National Commercial Builders, Inc., has objected to the Receiver's motion to sell Hickory Corners. NCB's objection is addressed in the Receiver's Response to: (1) National Commercial Builders, Inc.'s Objection to Receiver's Motion for Order Authorizing Sale of Hickory Corners; and (2) its Motion for Relief from Stay (filed March 18, 2019). As set forth in that Response, NCB does object to the Hickory Corners sale itself, but rather to distributed the sales proceeds without paying its mechanics' lien on the Hickory Corners property.

Hagshama is an Israeli private investment firm that solicits investments from individuals. Those investor funds are then pooled and invested in real estate ventures throughout the world, including the United States. Hagshama is

interests in the Hagshama Projects is also held by other investors. The following table shows the respective ownership percentages in Clearwater Collection and Hickory Corners:

Receivership property	Hagshama equity %	Other investment equity	Dragul equity percentage ⁴
Clearwater Collection	Approx.	Approx.	6.76%
(Clearwater, FL)	54%	46%	
Hickory Corners	64.59%	35.41%	25.875%
(Hickory, NC)			

- 7. Mortgages on both Clearwater Collection and Hickory Corners are in default and lenders on both properties have commenced foreclosures. Before the Receiver was appointed, the Clearwater Collection lender declared loan defaults and began to sweep the rental income from the property and to apply it to its loan.
- 8. **Hickory Corners**. On February 8, 2019, the Receiver filed a motion seeking Court approval to sell Hickory Corners to Nova Capital Partners, LLC for \$13,600,000. Hagshama objected on February 19, 2019, arguing that applicable operating agreements, the tenant-in-common common agreement, and State law all require its consent to the sale, and it did not consent.

responsible for the investments of about 28,000 investors. Globally, it has invested over \$5 billion in various projects, including those with the Receivership Estate.

In some cases, the companies' records do not appear consistent with respect to these equity percentages. The above estimates are based on the best estimates presently available. The Receiver and Hagshama have agreed to agree to the accurate ownership percentages before distributing Clearwater Collection and Hickory Corners sales proceeds.

- 9. On March 8, 2019, the Receiver filed a reply in support of the sale motion, and on March 14, 2019, Hagshama filed a sur-reply. A hearing on the Hickory Corners sale motion is set for March 21, 2019, at 3:00 pm MDT.
- 10. **Clearwater Collection**. On February 21, 2019, the Receiver filed his motion seeking Court approval to sell Clearwater Collection to Fortune Capital Partners, Inc. for \$17,100,000.
- 11. On March 1, 2019, Hagshama objected to the sale raising arguments similar to those it made to the Hickory Corners sale. On March 14, 2019, the Receiver filed a reply in support of his Clearwater Corners sale motion.

III. The proposed Agreement is in the best interests of the Estate and its creditors.

12. There exists little Colorado authority regarding factors the Court should consider whether to approve a Receiver's proposed sale. In analogous bankruptcy contexts, approval of a sale of property under Section 363 of the Bankruptcy Code is warranted where there exists a "sound business reason." Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983). "In evaluating whether a sound business purpose justifies the use, sale or lease of property under Section 363(b), courts consider a variety of factors, which essentially represent a 'business judgment test." Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999).

- 13. Factors bearing on whether a sound business reason or purpose supports a proposed sale of estate property in the bankruptcy context include (where applicable): (1) the proportionate value of the asset to the estate as a whole; (2) the amount of elapsed time since the filing; (3) the likelihood that a plan of reorganization will be proposed and confirmed soon; (4) the effect of the proposed disposition on the future plans of reorganization; (5) the proceeds to be obtained from the disposition vis-à-vis any appraisals of the property; (6) which alternative of use, sale or lease the proposal envisions; and (7) most important perhaps, whether the asset is increasing or decreasing in value. In re Medical Software Solutions, 286 B.R. 431, 441 (Bankr. D. Utah 2002) (quoting *Lionel*, 722 F.2d at 1071) (emphasis omitted). Bankruptcy courts are granted considerable discretion in evaluating proposed sales. *Montgomery* Ward, 242 B.R. at 153; see Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (B.A.P. 9th Cir. 2001) (recognizing that "[r]ulings on motions to sell property of the estate other than in the ordinary course of business pursuant to section 363 are reviewed for abuse of discretion").
- 14. In the Receiver's judgment, the proposed Agreement is in the best interest of the Estate and its creditors. Hagshama contends the Clearwater Collection and Hickory Corners governing documents require its consent to the pending sale motions, and has indicated it will not consent to the Receiver selling the properties now. Litigating these control and liquidation issues will be expensive and time-consuming for the Estate, during which time the properties may be lost to foreclosure

or otherwise depreciate. The Agreement resolves these issues without litigation with

its attendant costs and uncertainties.

Upon approval of the Agreement, Hagshama will withdraw its 15.

objections to the Clearwater Collection and Hickory Corners sales motions, which will

allow the properties to be sold without further delay, expense, or uncertainty. The

potential economic benefits to the Estate include avoiding potential costly litigation

with Hagshama and the payment of much needed cash to the Estate.

16. In addition, the Agreement resolves potential future disputes about

distribution to the equity shareholders of the entities that own Clearwater Collection

and Hickory Corners. By agreeing in advance on how the net sales proceeds from

these sales will be distributed, the Parties will each avoid significant potential

attorneys' fees and costs.

17. Finally, avoiding a time-consuming dispute is critical because

foreclosure proceedings have been commenced against both Clearwater Collection

and Hickory Corners. Absent timely sales, the properties may be lost to foreclosure

and the Estate may receive nothing.

WHEREFORE, the Receiver asks the Court to approve the Agreement

submitted as Exhibit 1 and authorize the Receiver to take all actions and execute all

further documents necessary to consummate the transaction.

Dated: March 18, 2019.

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ALLEN VELLONE WOLF HELFRICH & FACTOR P.O.

By: <u>/s/ Michael T. Gilbert</u>

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ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I certify that on March 18, 2019, I served a true and correct copy of the foregoing RECEIVER'S MOTION FOR ORDER APPROVING AGREEMENT WITH HAGSHAMA CONCERNING SALE OF CLEARWATER COLLECTION AND HICKORY CORNERS via CCE to the following:

Robert W. Finke Sueanna P. Johnson Matthew J. Bouillon Mascareñas Ralph L. Carr Judicial Building 1300 Broadway, 8th Floor Denver, Colorado 80203

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Kenneth Rossman, Esq. Lewis Roca Rothgerber Christie, LLP 1200 17th Street, Suite 3000 Denver, CO 80202 krossman@lrrc.com

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Counsel for Dynasty, LLC

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Counsel for Defendants, Gary Dragul, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC

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Counsel for National Commercial Builders, Inc.

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Counsel for Fortune Capital Partners, Inc.

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.

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

Agreement

This Agreement (the "Agreement") is entered into as of March 18, 2019, by Hagshama Hickory NC, LLC, CoFund 6, LLC, Hagshama Florida 13 Clearwater, LLC, and Cofund 5, LLC (collectively, "Hagshama"), and Harvey Sender, as Receiver ("Receiver"). Hagshama and the Receiver are the "Parties," and each individually a "Party."

Recitals

WHEREAS, the Denver District Court has appointed Harvey Sender as Receiver for Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, Inc. and all their respective properties and assets, interests, and management rights in related affiliated and subsidiary businesses (the "Receivership Estate"). See August 30, 2018 Stipulated Order Appointing Receiver, Romev. Dragul, et al., Denver District Court (the "Receivership Court"), Case No 2018 CV33011 (the "Receivership Action").

WHEREAS, Hagshama invested in certain properties managed by entities that are now part of the Receivership Estate: Clearwater Collection and Hickory Corners (jointly the "Properties").

WHEREAS, the Receiver has moved to sell the Properties and Hagshama has opposed those motions (the "Disputed Sales"). The Parties want to resolve all issues concerning the Disputed Sales efficiently and without incurring the costs and delays associated with continued litigation.

WHEREAS, neither Party concedes any legal or factual positions raised in the Disputed Sales.

Covenants

- 1. The Parties agree to ask the Receivership Court to continue the March 21, 2019, hearing on the Disputed Sales. Upon approval of this Agreement by the Receivership Court, Hagshama will promptly withdraw its objections to the Disputed Sales and agree to cooperate with the Receiver to takes all actions necessary to consummate the sale of both Properties and to effect the terms of this Agreement.
- 2. The Parties agree that the sales proceeds from the Properties shall be paid as follows:
 - a. First to pay commissions and uncontested secured interests;
 - Second, \$75,000 from each sale shall be paid to the Receivership Estate to reimburse it in part for the operating expenses and other costs the Estate has paid and incurred related to the Properties;
 - c. Third, amounts shall be held in escrow for the amounts of any contested interests (loans and liens);

- d. Fourth, from the Clearwater sale, the Receiver shall hold an amount between \$707,776 and \$574,869 in escrow; from the Hickory Corners sale the Receiver shall hold an amount between \$438,523 and \$488,836 in escrow (jointly, the "Distribution Escrows"). These are the amounts of previous distributions paid to Hagshama relating to its investment in these Properties. The Parties agree to coordinate during the pendency of the motion seeking approval of this Agreement to determine the proper amounts for the Distribution Escrows. The Receiver and Hagshama reserve all rights with respect to the Distribution Escrows, which shall not be released into the Estate's general claims process until the Parties have determined the appropriate amount of distributions Hagshama should have received from the Properties, if any.
- e. Fifth, the remaining sales proceeds shall be paid to Hagshama and the Estate according to their respective equity positions in the Properties. For Clearwater: approximately Hagshama 54%, and the Estate 46% (the Parties agree to coordinate during the pendency of the motion seeking approval of this deal to determine the exact percentage). For Hickory: Hagshama 64.59% and the Estate 35.41%. The Receiver will provide a closing statement and distribution calculation to Hagshama for review and agreement prior to any distribution of equity shares.
- f. Sixth, the Parties agree to negotiate in good faith and to exchange financial information and facts regarding the appropriate distributions, if any, Hagshama was entitled to have received from both Clearwater and Hickory Corners. Upon determination by agreement of the Parties or a ruling by the Receivership Court, that amount shall be released from escrow and paid to Hagshama. The remaining Distribution Escrows shall be released from escrow and paid to Hagshama and the Estate in accordance with their respective equity positions in the Properties.
- 3. This Agreement or its terms may not be used by either Party with respect to any disputes concerning other Receivership Estate properties.
- 4. By entering into this Agreement, neither Party is releasing any claim it may have against the other for losses or damages suffered before the Receiver was appointed, other than claims concerning the distributions of sales proceeds from the Properties, which are intended to be fully and finally resolved pursuant to the terms of this Agreement.
- 5. The Receiver agrees not to close the sale of the Properties before this Agreement is approved by the Receivership Court.
- 6. Upon the execution of this Agreement, the Parties agree to promptly submit it to the Receivership Court for approval, and to take all actions necessary to obtain Court approval.
 - 7. Miscellaneous.

- a. This Agreement shall be governed by and construed and enforced under the laws of the State of Colorado, without giving effect to conflict of law principles. Any dispute arising from this Agreement will be submitted to the Receivership Court, which the Parties agree shall have exclusive jurisdiction over any dispute related to or arising from this Agreement.
- b. If any provision of this Agreement is held to be invalid, illegal, or unenforceable under any law, the validity, legality, and enforceability of the remaining provisions shall remain effective and binding and shall not be affected or impaired.
- c. This Agreement may be executed in counterparts, each of which shall be deemed an original and which together constitute the same instrument. Electronic signatures shall be as effective as original signatures.
- d. Time is of the essence regarding the performance under this Agreement.
- e. This Agreement may only be amended by written instrument signed by the Parties.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement as of the date indicated above, to be effective upon approval by the Receivership Court.

HARVEY SENDER, Receiver

HARVEY SENDER, Receiver

CoFund 5, LLC

By:Cofund Management LTD Manager

By: Hanania Shemesh Manager

Dated: March 18, 2019

CoFund 6, LLC

By: Cofund Management Ltd Manager

By: Hanania Shemesh Manager

Dated: March 18, 2019

Hagshama Florida-13 Clearwater, LLC By: Hanania Shemesh Manager Dated: March 18, 2019

Hagshama Hickory NC, LLC By: Hagshama Livestments LLC Manager By: Hanania Shemesh Manager Dated: March 18, 2019