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 pvellone@allen-vellone.com mgilbert@allen-vellone.com rsternlieb@allen-vellone.com	Case No.: 2018CV33011 Division/Courtroom: 424

RECEIVER'S REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SALE OF ESTATE'S INTEREST IN 22 RESIDENTIAL PROPERTIES

Harvey Sender, the duly-appointed receiver ("Receiver") for Gary J. 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 May 10 Motion for Order Authorizing Sale of Estate's Interest in

22 Residential Properties ("Motion"), and responds to Secured Creditors' Opposition to that Motion.

I. Introduction

Under the Receiver's May 10 Motion, the Receiver seeks Court approval to sell the Estate's interest in 22 Residential Properties for $575,000. On May 20, 2019, Secured Creditors filed their Opposition to the Receiver's Motion for Order Authorizing Sale of Estate's Interest in 22 Residential Properties ("Objection"). Secured Creditors hold first mortgage liens on 11 of the 22 Properties (the "11 Properties").[1] Secured Creditors also have liens on four additional Estate properties not being sold pursuant to the Motion.[2]

Secured Creditors argue the Motion should be denied because: (1) "it ignores Secured Creditor's [sic] first lien position"; (2) it "prefers some creditors over others"; (3) "it violates the terms of the loan documents"; and (4) it "is a below market value sale to an insider." Obj. at 2. No other creditor has objected. Instead of selling the Estate's interest in the 22 Residential Properties for $575,000, Secured Creditors argue the Estate should sell the underlying properties individually and apply the net

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1 On pages 3-4 of their Objection, Secured Creditors list their properties subject to the Motion in 12 separate subparagraphs, (a) – (l). There are, however, only 11 Properties: the 1660 North Lasalle #3909 property is listed twice in subparagraphs (b) & (k).

2 As discussed below, Secured Creditors' four additional mortgage liens are on individual houses located at Ash & Bellaire streets in Denver. These houses were part of a six-home proposed commercial redevelopment project. The Receiver is negotiating a separate contract with Hurst to buy the Estate's interest in the entities that own those properties.

proceeds first to repay all of their 15 loans. Secured Creditors suggest the Receiver should disregard the six junior liens on the 11 Properties, notwithstanding that these junior liens have been acknowledged by the Court and the Receiver. Instead of paying the junior liens, Secured Creditors would have all proceeds paid only to them. *See* Obj. at 2.

Secured Creditors' Objection misstates the facts and ignores legal and economic reality. For example, Secured Creditors articulate no basis for the Receiver to refuse to pay junior liens, and don't explain how the Receiver could convey marketable title without paying them. There are numerous other problems with Secured Creditors' Objection. Adopting Secured Creditors' position would leave the Estate with nothing and benefit only Secured Creditors.

Secured Creditors essentially suggest the Receiver be treated as if he had been appointed under their loan documents for the sole purpose of protecting their interests. But the Receiver is not their appointee. He was appointed at the behest of the Securities Commissioner of the State of Colorado to protect the rights of *all* creditors of the Estate, not just Secured Creditors'. The Receiver has considered and analyzed the proposed sale carefully and believes it is in the best interest of the Estate and *all* its creditors. And the proposed sale will not disadvantage Secured Creditors, it will actually put them in a better position than they occupy now. The Court should deny the Objection and grant the Motion.

A. Secured Creditors' first lien position will not be affected by the proposed sale.

The Objection makes a number of factual misstatements and unsupported accusations. For example, Secured Creditors incorrectly state the Motion "does not reveal the name of the proposed purchaser." Obj. at 5. They suggest the Receiver concealed Buyer's identity to obtain approval of "a highly structured transaction . . . to an insider at a discount to fair market value." *Id.* at 7. Secured Creditors apparently failed to read the entire Motion, for its very first sentence identifies Chad Hurst as the Buyer, and the Contract identifying him is attached as an exhibit.[3] The Motion also discloses that WBF/CT, LLC, of which Hurst is a principal, holds second deeds of trust on six of the 22 Properties.

Secured Creditors incorrectly argue the proposed sale ignores their first lien position on the 11 Properties, and the sale is "intentionally structured to avoid paying" their liens. *Id.* at 2. Secured Creditors don't explain how this is so (and it is not). As described in the Motion, the Receiver seeks to sell the Estate's interest in the single-purpose entities that own the underlying real estate. Buyer will purchase those interests and assume control of the Properties subject to all valid liens and encumbrances, including Secured Creditors'.

Secured Creditors argue, however, they will be harmed because Buyer "will have no contractual obligation with respect to the properties, such as paying rents"

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[3] It was not filed under seal.

to Secured Creditors. Obj. at 7. This ignores Secured Creditors' deeds of trust, which include an assignment of leases and rents. *See* Obj. Ex. 2. Nothing in the proposed sale would eliminate or affect Secured Creditors' remedies under their deeds of trust.

Approval of the sale will actually put Secured Creditors in a better position than they occupy now. Presently they are barred by the stay imposed by this Court's Receivership Order from foreclosing any of their 11 Properties or exercising other remedies under their deeds of trust. Once the Estate's interests in the entities that own the 22 Residential Properties are transferred to Buyer, the stay will no longer apply, and Secured Creditors will be free to exercise all remedies under their deeds of trust, including having their own receiver appointed. As to Secured Creditors' claim that the six junior liens on the 11 Properties were prohibited by Secured Creditors' deeds of trust, Secured Creditors remain free to challenge those liens.

B. The proposed sale is not preferential.

Although Secured Creditors toss out in passing that the proposed sale prefers some creditors over others, they don't identify what creditor is preferred or how. The Receiver can only surmise Secured Creditors suggest that selling the Estate's interest to one of the principals in WBF/CT, LLC, which holds second deeds of trust cross-collateralized with six of the 11 Properties to secure a $1.2 million loan, is somehow preferential.

This is not the case. Hurst is going to pay the Estate $575,000 to purchase Dragul's equity interests in the entities that own the 22 Residential Properties. Buyer

will take control of the Properties subject to all liens and encumbrances, including Secured Creditors' deeds of trust. The net sales proceeds from the proposed sale will be paid to the Estate to satisfy creditor claims. The proposed sale is not preferential.

C. The proposed sale is not prohibited by Secured Creditors' loan documents, and all of their loans are already in default.

Secured Creditors also object to the sale arguing generally that "it violates the terms of the loan documents." Obj. at 2. Secured Creditors cite various provisions of the loan documents purportedly violated by the sale. *Id.* at 5. Then they conclude – without analysis – that the "loan documents prohibit sales of interests in the beneficial owners of the properties and require proceeds of property sales to be applied to the loans held by Secured Creditor [sic]." *Id.* at 8.

The Receiver is selling the Estate's beneficial interest in the special purpose entities that own the 22 Residential Properties, not the Properties themselves. Extant liens will remain in place and Secured Creditors' remedies under their loan documents remain unaffected. The only provision in the loan documents Secured Creditors cite that relates to selling the Estate's equity interests is paragraph 20.1 of

the deeds of trust.[4] For good reason they don't quote the specific language of that paragraph because it does not prohibit the proposed sale.

Paragraph 20.1 of the deed of trust submitted with Secured Creditors' Objection is entitled "Acceleration on Transfer or Encumbrance." It provides in relevant part:

> If Borrower sells . . . twenty five percent (25%) or more of the beneficial ownership interests of Borrower outstanding at the date of this Deed of Trust without prior Lender approval . . . then Lender, at Lender's option, may, without prior notice, declare all sums secured by this Deed of Trust . . . immediately due and payable and exercise all rights and remedies in this Deed of Trust, including those in paragraph 21 [acceleration and foreclosure].

Obj., Ex. 2, at 29-20, ¶ 20.1. This provision does not prohibit the equity sale, it simply allows Lender to accelerate its loans and exercise its remedies under its deeds of trust upon such sale. Given Secured Creditors' acknowledgement that "[a]ll but two of the loans are matured," and the other two mature July 1, 2019, Obj. at 4, acceleration is a non-issue; consummating the proposed sale will remove the Properties from the scope of the Receivership stay and allow Secured Creditors to exercise remedies under

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[4] Secured Creditors represent the deed of trust attached to their Objection is representative of all 11 deeds of trust on all 11 Properties. Their deeds of trust are not, however, identical. For example, there is no cross-collateralization provision in the deed of trust on the 1660 North LaSalle property in Chicago. That provision is, however, contained in the deeds of trust encumbering three condominiums located in Scottsdale, Arizona. Secured Creditors do not, however, argue those condominiums are cross-collateralized, nor do they explain how deeds of trust recorded solely in Arizona and Illinois encumber property in Colorado.

their loan documents. Again, this will put Secured Creditors in a better position than they occupy now.

Secured Creditors also argue they have 15 outstanding loans, four in addition to those on the 11 Properties. Those four additional loans and deeds of trust are on individual houses located at Ash & Bellaire streets in Denver, which were to be part of a six-home proposed commercial redevelopment. The six homes were to be razed and 27 townhomes built on their site. Secured Creditors argue each of their 15 separate deeds of trust cross-collateralize all 12 of the Colorado properties on which they hold deeds of trust. Obj. at 5.[5]

The language Secured Creditors rely on is nothing more than vague, nebulous boilerplate. Secured Creditors did not record deeds of trust that secure their entire loan portfolio with each of the 15 properties. Rather, they recorded a single deed of trust against each of the 15 individual properties to secure only the loan used to purchase that particular property. The deeds of trust do not refer to any other property purporting to secure that particular loan. And when searching title records, only the individual deed of trust recorded to secure the one loan used to acquire that particular property shows up. No purchaser would be on notice that Secured Creditors claim each of their singular deeds of trust are intended to encumber 14 additional properties.

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[5] As discussed in footnote 3, not all of the deeds of trust are the same.

But this cross-collateralization issue is in any event a red-herring. Selling the Estate's equity interests in the 22 special purpose entities that own the 22 Residential Properties will not, and does not purport to, affect Secured Creditors' liens, whether cross-collateralized or not. After the sale, Secured Creditors can exercise whatever remedies they have under their loan documents or otherwise.

D. The proposed sale is not to an insider or for below market value.

Secured Creditors incorrectly assert – without support, citation, or analysis – that the proposed sale is to an insider. Obj. at 7. As the Receiver has disclosed, Hurst and his company WBF/CT had previous business dealings with Dragul and lent him money, in part secured by liens on six of the 22 Residential Properties. That does not make Hurst an "insider," as defined in COLO. REV. STAT. § 38-8-102(8). Secured Creditors don't cite the statute, or any other definition of insider, nor demonstrate how Hurst meets any such definition.

Secured Creditors argue finally that the proposed sale is for below fair market value and the Receiver would do better selling the 11 Properties individually. The table below reflects the Receiver's equity analysis for the 11 Properties, and includes Secured Creditors' fair market value estimates.

#	PROPERTY	Rcvr FMV	Toorak Value	Value Diff.	1st DOT	2nd DOT	RE Comm'n (6.0%)	Closing Costs (2.0%)	Est. Equity Based on Rcrv FMV
1	41 S Fairway, Beaver Creek, CO	2,145,000	2,235,000	90,000	1,829,320	400,000	128,700	42,900	-251,597
2	1777 Larimer St, #703, Denver, CO	460,000	438,000	-22,000	402,169		27,600	9,200	22,980
3	5788 S Lansing Wy, Englewood, CO	470,000	465,900	-4,100	410,850		28,200	9,400	23,511

#	PROPERTY	Rcvr FMV	Toorak Value	Value Diff.	1st DOT	2nd DOT	RE Comm'n (6.0%)	Closing Costs (2.0%)	Est. Equity Based on Rcrv FMV
4	1660 N. LaSalle Dr, #3909, Chicago, Il	298,898	360,000	61,102	277,026		17,934	5,978	1,119
5	6937 E 6th St, #1005, Scottsdale, AZ	450,000	440,500	-9,500	351,793	42,164	27,000	9,000	18,070
6	7517 E Davies Pl, Centennial, CO	450,000	420,000	-30,000	327,950	50,610	27,000	9,000	21,690
7	3593 S Hudson St, Denver, CO	520,000	558,000	38,000	476,479	7,723	31,200	10,400	3,310
8	6937 E 6th St, #1002, Scottsdale, AZ	450,000	525,000	75,000	378,581	23,511	27,000	9,000	10,076
9	6937 E 6th St, #1004, Scottsdale, AZ	450,000	525,000	75,000	374,996	26,042	27,000	9,000	11,161
10	5455 Landmark Pl, #509, Grnwd Vill, CO	727,400	660,000	-67,400	585,548		43,644	14,548	67,678
11	891 14th St, #2417, Denver, CO	572,000	685,000	113,000	586,575		34,320	11,440	-68,690
	Total	**6,993,298**	**7,312,400**	**319,102**	**6,001,287**	**550,050**	**419,598**	**139,866**	**-117,502**

Secured Creditors' value estimates are not consistent with the Receiver's. Although Secured Creditors assert their estimates are based on "third party valuations obtained from a nationally recognized appraisal management company," Obj at 7, no appraisal was attached to their Objection and none has been provided to the Receiver. The Receiver does not believe Secured Creditors' estimates are correct. For example, the Receiver has engaged a local broker to market the Beaver Creek property. That broker confirmed the highest sustainable *listing price* for the property would be $2.1 million. Secured Creditors $2.35 million value is unsubstantiated.

Even if Secured Creditors' values were correct, their "equity analysis" is wrong. Instead of the proposed equity sale, Secured Creditors would have the Estate hold and liquidate their collateral at the Estate's sole expense and pay 100% of the net sales proceeds to them, without paying junior liens. Secured Creditors even go so far

as to argue that if Court authorizes the proposed sale, instead of the $575,000 being paid to the Estate, it should instead be paid to them. Secured Creditors articulate no basis whatsoever for this request.

And significantly, Secured Creditors nowhere state what the Estate's net return would be if the Receiver were to sell the 22 Residential Properties individually. Previously, however, Secured Creditors provided their Exhibit 3 "equity analysis" to the Receiver and argued the Estate would net $812,618 from selling just the 11 Properties individually. This is unfounded and disingenuous. As noted, this has the Receiver disregarding the second liens on six of the 11 Properties. This Court's November 1, 2018, Order approving the Estate's settlement with WBF/CT, however, expressly recognizes the validity of these junior liens. That settlement entitles the Estate to 30% of the payoff amounts of these junior liens. WBF/CT's 70% is listed in the above table as the amount to be paid on the second deeds of trust. Secured Creditors' $812,000 figure ignores these junior liens and assumes the Estate could convey marketable title without paying them, which of course it couldn't.

Moreover, Secured Creditors' "equity analysis," admittedly fails to account for "additional interest accruals" on their notes, or on the WBF/CT notes secured by second deeds of trust on six of the 11 Properties. All but two of Secured Creditors' loans have matured; all are in default and accruing default interest at 18% or 24%.[6]

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[6] The default rate on 10 of the Secured Creditors' loans is 18%; it is 24% on the 1660 North LaSalle property.

At 18%, that is over $1 million a year and over $90,000 per month. The first lien numbers in the table above (which differ slightly from those in the table on page 8 of the Motion) are taken directly from the accounting Secured Creditors provided to the Receiver of their loan balances as of December 2018. Through May 31, 2019, according to Secured Creditors, an additional $450,000 in interest would have accrued. Even adopting Secured Creditors' inflated market values, this puts the 11 Properties underwater and, under Secured Creditors' proposed liquidation, would yield nothing for the Estate.

Additional analysis further undermines Secured Creditors' "equity analysis," which fails to account for their remaining four loans on the Ash & Bellaire properties. As discussed, Secured Creditors claim these loans too are cross-collateralized by the 11 Properties. The principal balance on those four loans is approximately $1.7 million, which Secured Creditors demand be paid before the Estate obtains anything. Even using Secured Creditors inflated values and its $812,000 figure, this would leave nothing for the Estate or its other creditors.

Secured Creditors' "equity analysis" also ignores unpaid real estate taxes and liability for security deposits on some of the Residential Properties. All of the 22 Residential Properties have unpaid 2017 and 2018 taxes. Dragul stole a number of security deposits on the 22 Residential Properties. Buyer under the proposed sale is liable for unpaid taxes and existing leases, and therefore for the purloined security deposits.

Finally, Secured Creditors' misrepresent that under the proposed sale the Estate must pay real estate commissions of $117,675, or 20% of the sales price. Here again Secured Creditors apparently failed to read the controlling document. Under the proposed contract, *Buyer* is to pay those commissions. This couldn't be clearer: as the title to contract Exhibit D states, "Properties Subject to Broker Listing Agreement for which Commission is to be paid by ***Buyer***." *See* Motion, Ex. 1, Ex. D (emphasis added).

II. Conclusion

Secured Creditors filed the sole objection to the Motion. As Secured Creditors recognize, the Receiver is charged to act in the best interests of *all* creditors, not just theirs. Secured Creditors would have the Receiver hold and liquidate their collateral at the Estate's expense for Secured Creditors' sole benefit, meanwhile returning nothing to the Estate and its other creditors.

As opposed to this, the proposed sale will net the Estate approximately $575,000, which is clearly in its best interest, and the best interest of its many other creditors. Approving the sale will not affect Secured Creditors' rights, which they will be free to enforce after the sale. The Receiver asks the Court to forthwith grant the Motion and approve the proposed sale.

Dated: May 28, 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 May 28, 2019, I served a true and correct copy of the foregoing **RECEIVER'S REPLY IN SUPPORT OF MOTION FOR ORDER AUTHORIZING SALE OF ESTATE'S INTEREST IN 22 RESIDENTIAL PROPERTIES** via CCE to the following:

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CERTIFICATION OF E-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/ Terri M. Novoa
Allen Vellone Wolf Helfrich & Factor, P.C.