DISTRICT COURT, COUNTY OF DENVER STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202 Phone Number: 720.865.7800	DATE FILED: June 20, 2019 4:44 PM FILING ID: ED2B15A52ED79 CASE NUMBER: 2018CV33011
CHRIS MYKLEBUST, Securities Commissioner for the State of Colorado, **Plaintiff,** **v.** **GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC,** **Defendants.**	**Δ COURT USE ONLY Δ** Case Number: 2018CV33011 Courtroom: 424
SPRINGER AND STEINBERG, P.C. Jeffrey A. Springer, Esq. (Bar No. 6793) 1600 Broadway, Suite 1200 Denver, Colorado 80202 Tel: 303.861.2800 Fax: 303.832.7116 Email: jspringer@springersteinberg.com ATTORNEYS FOR DEFENDANTS	

DEFENDANTS GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC AND GDA REAL ESTATE MANAGEMENT, LLC'S MOTION TO VACATE ORDER AND REQUEST FOR LEAVE TO FILE RESPONSE TO JOINT MOTION OF THE SECURITIES COMMISSIONER AND THE RECEIVER FOR AN ORDER REQUIRING DRAGUL TO TURNOVER AND ACCOUNT FOR PROPERTY OF THE ESTATE

COME NOW, Defendants Gary Dragul, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC (collectively "Defendants"), by and through their counsel of record Jeffrey A. Springer of Springer and Steinberg, P.C., and hereby move to vacate the following order entered on June 19, 2019: Order: Joint Motion of the Securities Commissioner and the Receiver for an order requiring Dragul to Turnover and Account for Property of the Estate (also filed on

behalf of Plaintiff Chris Myklebust) w/attach. Further, Defendants request leave to file its Response to Joint Motion of the Securities Commissioner and the Receiver for an Order Requiring Dragul to Turnover and Account for Property of the Estate, which is attached hereto.

CERTIFICATE OF CONFERRAL PURSUANT TO C.R.C.P. 121, § 1-15(8)

Defendants' conferred with counsel for the Plaintiff and for the Receiver Harvey Sender regarding this motion, and both stated that they oppose the relief requested herein.

STATEMENT OF FACTS

On August 30, 2018, this Court appointed Harvey Sender of Sender & Smiley LLC ("Receiver") to serve as a receiver in this matter on stipulation of the parties.

1. In its order appointing the Receiver, this Court stated,

> Court approval of any motion filed by the Receiver shall be given as a matter of course, unless any party objects to the request for Court approval within ten (10) days after service by the Receiver or written notice of such request.

2. Defendants' counsel understood that the ten-day deadline imposed by the order appointing the Receiver applied only to motions filed by the Receiver and not to any motions filed jointly by the Receiver with any other party.

3. On June 4, 2019, the by Plaintiff and the Receiver filed their "Joint Motion of the Securities Commissioner and the Receiver for an Order Requiring Dragul to Turnover and Account for Property of the Estate" ("Joint Motion").

4. Defendants' counsel believed that he had twenty-one days to respond to Joint Motion under C.R.C.P. 121 § 1-15(1)(b), which is June 25, 2019, and planned on doing so.

5. However, before Defendants counsel responded to the Joint Motion, on June 19, 2019, the Court entered its Order: Joint Motion of the Securities Commissioner and the Receiver for an order requiring Dragul to Turnover and Account for Property of the Estate (also filed on behalf of Plaintiff Chris Myklebust) w/attach ("Order").

STANDARD OF REVIEW

This Court has discretion to vacate its interlocutory orders prior to the entry of a final order. *See* C.R.C.P. 54(b) & 121 § 1-15(11). Further, although they only apply to final orders and judgments, this Court may look to C.R.C.P. 59 and 60(b) to determine whether it should vacate its interlocutory orders. *See Spring Creek Exploration & Prod. Co. v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1023-24 (10th Cir. 2018) & *Forbes v. Goldenhersh*, 899 P.2d 246, 249 (Colo. App. 1994)(noting that when Colorado rules of procedure are similar or identical to federal rules of procedure, caselaw interpreting the federal rules provides guidance as to how to interpret and apply the Colorado rules). Thus, this Court may vacate its interlocutory orders that are based upon an error of law, mistake, inadvertence, surprise, or excusable neglect. *See* C.R.C.P. 59(d)(6) & 60(b)(1).

ARGUMENT

This Court should vacate the Order. It was an error of law to enter the Order without first giving Defendants until June 25, 2019 to respond to the Joint Motion. Alternatively, the Order should be vacated based on Defendants' counsel's good-faith, mistaken belief that C.R.C.P. 121 § 1-15(1)(b) governed the time to respond to the Joint Motion.

I. Defendants have until June 25, 2019 to respond to the Joint Motion.

The Court committed an error of law when it concluded that the order appointing the Receiver reduced Defendants' time to respond to the Joint Motion from twenty-one days to ten days. The meaning and effect of a court order is a question of law. *See Blecker v. Kofoed*, 672 P.2d 526, 528 (Colo. 1983)(noting that the same principles governing the interpretation of contracts govern the interpretation of court orders) & *FDIC v. Fisher*, 2013 CO 5, ¶9, 292 P.3d 934(noting

that the interpretation of contracts is a question of law). And an order's plain language controls its meaning. *See Broderick Inv. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601, (10th Cir. 1992)(citing *Chacon v. Am. Family Mut. Ins. Co.*, 788 P.2d 748 (Colo. 1990); *N. Ins. Co. v. Ekstrom*, 784 P.2d 320, 322 (Colo. 1989)) & *Blecker*, 672 P.2d at 528.

The plain language of the order appointing the Receiver does not alter the Defendants' time to respond to the Joint Motion. In that order, the Court stated that the parties have ten days to respond to motions filed by the Receiver. It does not say that the parties have ten days to respond to motions in which the Receiver joins. More importantly, it does not limit the time that the parties have to respond to motions filed by an opposing party.

Further, considering the law governing a receiver's duties and obligations, when it appointed the Receiver, the Court could not have anticipated that the Receiver would ever join in a motion with any party. When a court enters an order, the order "must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the [order], regardless of whether the [order] refers to the governing law." *Shaw v. Sargent Sch. Dist. No. RE-33-j*, 21 P.2d 446, 450 (Colo. App. 2001)(quoting 11 *Williston on Contracts* § 30:19 at 206, 211 (R. Lord 4th ed. 1999)) & *Blecker*, 672 P.2d at 528.

"[A] receiver is appointed to secure the rights of [the] parties to the underlying action." *Nationsbank of Ga., N.A. v. Conifer Asset Mgmt.*, 928 F.2d 760, 764 (Colo. App. 1996). As such, a receiver is "a fiduciary of the court and of the persons interested in the estate of which he is a receiver." *Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988). As a fiduciary, a receiver must "maintain and protect the property and the rights of the various parties." *Id*. Given a receiver's fiduciary duties, he must act in a neutral, unbiased manner and must not become a "partisan advocate". *See Rossi v. Colo. Pulp & Paper Co.*, 299 P. 19, 32 (Colo. 1931). But when a receiver

joins in a motion with one party against another party, he becomes a partisan advocate. Thus, any order appointing a receiver does not anticipate that the receiver will ever join one party in a motion against any other party.

In light of the Receiver's fiduciary duties, this Court simply could not have intended to limit Defendants' time to respond to a motion filed jointly by Plaintiff and the Receiver. Defendants have interests in the property involved in this case. As such, the Receiver owes them fiduciary duties and must maintain its neutrality. When it entered its order appointing the Receiver, this Court undoubtedly recognized this. It must have also recognized that if the Receiver were to join in a motion by one party against another party, he would not be acting in harmony with those duties and obligation. Because of this, this Court simply could not have anticipated that the Receiver would ever join with one party in a motion against another party. Thus, this Court could not have intended to limit the time to respond to the Receiver's motions if those motions were filed jointly with one party against another.

Based on its plain language, the Receiver's fiduciary duties to Defendants, and the Receiver's obligation to maintain neutrality in this matter, the order appointing the Receiver cannot limit Defendants' time to file the joint motion. Instead, the time to respond to the joint motion is governed by that C.R.C.P. 121 § 1-15(1)(b), and under this rule, Defendants have until June 25, 2019 to respond. Therefore, when it entered the Order before Defendants' time to respond expired, this Court made an error of law, and the Order must be vacated.

II. Alternatively, the Order should be set aside based on Defendants' counsel's good-faith, mistaken belief that the deadline to respond to the joint motion was June 25, 2019.

Alternatively, if the Court did intend to limit the parties' time to respond to a motion in which the Receiver joins with one party against the other, it should nevertheless vacate the Order. A party's mistake, inadvertence, or excusable neglect is grounds to set aside a court order. *See*

C.R.C.P. 60(b); *Spring Creek*, 887 F.3d at 1023-24. Further, disputes should be resolved on their merits, and when a party timely seeks relief from an order entered based on the party's inaction, such relief should be granted. *See Craig v. Rider*, 651 P.2d 397, 402-03 (Colo. 1982).

Defendants' counsel believed in good faith that the deadline to respond to the Joint Motion was June 25, 2019. Even though the Joint Motion should be resolved on its merits, the Order was entered without giving Defendants the opportunity to respond. As such, the Court did not have the benefit of Defendants' position before entering the Order, and the Order was entered on a technicality instead of its merits. Further, Defendants have not delayed in filing this motion. Indeed, the Order was just entered on June 19, 2019.

CONCLUSION

The Order must be vacated. Given its plain language, the Receiver's fiduciary duties to Defendants, and the Receiver's obligation to maintain neutrality, this Court's order appointing the Receiver did not limit the Defendants' time to respond to the Joint Motion to ten days. Alternatively, Defendants failure to respond to the Joint Motion within ten days was based on counsel's good-faith, mistaken belief that the deadline to respond was June 25, 2019, and this matter should be resolved on its merits, not on procedural technicalities.

WHEREFORE, Defendants respectfully request that this Court vacate its Order: Joint Motion of the Securities Commissioner and the Receiver for an order requiring Dragul to Turnover and Account for Property of the Estate (also filed on behalf of Plaintiff Chris Myklebust) w/attach and accept Defendants' Response to Joint Motion of the Securities Commissioner and the Receiver for an Order Requiring Dragul to Turnover and Account for Property of the Estate, which is attached.

Respectfully submitted this 20th day of June, 2019,

SPRINGER AND STEINBERG, P.C.

By: /s/*Jeffrey A. Springer*
Jeffrey A. Springer, #6793
ATTORNEYS FOR DEFENDANTS
Original signature on file at the Springer and Steinberg, P.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this 20th day of June, 2019, the above and foregoing **DEFENDANTS GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC AND GDA REAL ESTATE MANAGEMENT, LLC'S MOTION TO VACATE ORDER AND REQUEST FOR LEAVE TO FILE RESPONSE TO JOINT MOTION OF THE SECURITIES COMMISSIONER AND THE RECEIVER FOR AN ORDER REQUIRING DRAGUL TO TURNOVER AND ACCOUNT FOR PROPERTY OF THE ESTATE** was filed with the Court and a true and accurate copy of the same was served via ICCES to:

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