

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
<p><b>CHRIS MYKLEBUST, Securities Commissioner for the State of Colorado,</b></p> <p><b>Plaintiff,</b></p> <p><b>v.</b></p> <p><b>GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC,</b></p> <p><b>Defendants.</b></p>	<p style="text-align: center;"><b>Δ COURT USE ONLY Δ</b></p>
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	Case Number: 2018CV33011  Courtroom: 424
<p><b>DEFENDANT GARY DRAGUL'S 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</b></p>	

COMES NOW, Defendant Gary Dragul, by and through his counsel of record Jeffrey A. Springer of Springer and Steinberg, P.C., and hereby submits the following Response to the Joint Motion of the Securities Commissioner and the Receiver for an Order Requiring Dragul to Turnover and Account for Property of the Estate. Dragul Responds to the requests/arguments in the order they were presented in the Motion:

**A. SSC '02, LLC is not property of the Receivership Estate.**

The Receiver claims that Dragul incorrectly represented his ownership of SSC '02 LLC as 1%. In fact the Receiver has provided this Court in Exhibit 1 an incomplete copy of the SSC '02 LLC Operating Agreement. The Receiver claims that he cannot find another copy. Attached is a complete copy of the Operating Agreement as Dragul's **Exhibit A**. In the Receiver's copy of the SSC '02 LLC Agreement, the Receiver did not include the last page of the addendum which is Exhibit A to the Agreement. This demonstrates Dragul's ownership at 1% and his three children at 33% each. The Receiver incorrectly represents to the Court that the Operating Agreement does not state ownership percentages and neglects to tell the Court that he was presented with a complete copy of the Operating Agreement in November 2018.

In point of fact, Mr. Sender approved a loan against one of the assets of SSC '02 LLC on December 12, 2018 after reviewing all of the current agreements with Mr. Dragul. It is beyond disingenuous that now after 6 months has passed, the Receiver is reversing his position.

SSC '02 LLC was formed and signed April 22, 2002 and has not changed since that time. Attached is the Certificate of Good Standing with the State of Colorado as Dragul's **Exhibit B**.

Incredibly, the Receiver attempts to make the case that since the 2016 Tax Return for SSC '02 LLC shows Dragul's "Tax Basis" as 71.58% that his "Ownership Basis" is somehow changed from 1% ownership and is therefore now part of the Receivership Estate. The Receiver is conflating "Tax Basis" with "Ownership Basis". The Operating Agreement governs these issues under Article 1, Section Q and W. Mr. Dragul's Tax Basis was increased because he signed on two loans for SSC '02 LLC that were recourse to him. These loans are attached as Dragul's **Exhibits G and H**. When and if the property is sold, the loans would be paid and Mr. Dragul's Tax Basis would go away and he would be entitled to 1% of the net proceeds from the sale. In

turn, his children will be entitled to 33% each of the net proceeds.<sup>1</sup> As such, it is more than possible, that the capital accounts, if adjusted for items that cannot have economic effect (such as nonrecourse deductions of the partnership), such as company liabilities, would show a significant increase to a single partner instead of all partners. In this case, Dragul personally guaranteed a company liability, increasing his capital account percentage in relation to the three other members of the Company.

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<sup>1</sup> Members Capital Accounts which are reflective of each Member's share of their Tax Basis (as opposed to GAAP basis) in the partnership, are as signified on Item L of the Schedule K-1 issued to each member. There are a number of non-equity items that have impact on the capital accounts, and is not simply limited to profits and losses. Per Article I, paragraph (h) of the operating agreement:

"Capital Account" means an account maintained for each Member in accordance with Regulation Sections 1.704-1(b) and 1.704-2 and to which the following provisions apply to the extent not inconsistent with such Regulations:

- (i) There shall be credited to each Member's Capital Account (A) such Member's Capital Contributions; (B) such Member's distributive share of Profits (C) any items of income of gain specially allocated to such Member under Section 50.3 of this Agreement; and (D) the amount of any Company liabilities (determined as provided in Code Section 752(c) and the Regulations thereunder) assumed by such Member or to which Property distributed to such Member is subject;
- (ii) There shall be debited to each Member's Capital Account (A) the amount of money and the Asset Value of any Property Distributed to such Member pursuant to this Agreement; (B) such Member's distributive share of Losses; (C) any items of expense or loss which are specially allocated to such Member under Section 5.03 of this Agreement, and (D) the amount of liabilities (determined as provided in Code Section 752(c) and the Regulations thereunder) of such Member assumed by the Company or to which Property contributed to the Company by such member is subject; and
- (iii) The Capital Account of any transferee Member shall include the appropriate portion of the Capital Account of the Member from whom the transferee Member's Interest was obtained.

Furthermore, IRS Regulation Section 1.704-1(b)(3) itself states:

- (i) In General. References in section 704(b) and this paragraph to a partner's interest in the partnership, or to the partners' interest in the partnership, signify the manner in which the partners have agreed to share the economic benefit or burden (if any) corresponding to the income, gain, loss, deduction, or credit (or item thereof) that is allocated. Except with respect to partnership items that cannot have economic effect (such as non-recourse deductions of the partnership), this sharing arrangement may or may not correspond to the overall economic arrangement of the partners. Thus, a partner who has a 50% overall interest in the partnership may have a 90 percent interest in a particular item of income or deduction. The (For example, in the case of an unexpected downward adjustment to the capital account of a partner who does not have a deficit make-up obligation that causes such partner to have a negative capital account, it may be necessary to allocate a disproportionate amount of gross income of the partnership to such partner for such year so as to bring that partner's capital account back up to zero.) The determination of a partner's interest in a partnership shall be made by taking into account all facts and circumstances relating to the economic arrangement of the partners.
- (ii) Factors considered. In determining a partner's interest in the partnership, the following factors are among those that will be considered:
  - (a) The partners' relative contributions to the partnership,
  - (b) The interests of the partners in economic profits and losses (if different than that in taxable income or loss),
  - (c) The interests of the partners in cash flow and other non-liquidating distributions, and
  - (d) The rights of the partners to distributions of capital upon liquidation.

In considering the factors for determining a partner's interest in the partnership, one must not only consider the capital accounts as mentioned above. Per Article I, Section Q and W of the Operating Agreement:

*(Q): "Interest" means the ownership interest of a Member in the Company at any particular time, including the right of such Member to any and all benefits to which such member may be entitled as provided in this Agreement or the Act, together with the obligations of such Member to comply with all the terms and provisions of this Agreement and the Act. Such Interest of each Member shall, except as specifically provided herein, be the ratio of the aggregate of such benefits or obligations specified in this Agreement as such Member's Percentage Interest.*

*(W): "Percentage Interest" with respect to each Member, means the percentages shown on Exhibit A hereof.*

Hence, it is clear that based on the definitions included in Article 1 and the regulations set out in IRS Section 1.704-1(b)(3) that the actual ownership of SSC '02 LLC is not that of the capital accounts but that of the percentage interest listed on Exhibit A.

The bank statements produced by the Receiver do not change this result. In an attempt to make the case that SSC '02 LLC was funded by investor funds, the Receiver provides two months of bank statements, April 2018 and June 2018. SSC '02 LLC has been in business for 17 years. Accordingly, there have been approximately 204 bank reporting months since the inception of SSC '02 LLC. The Receiver is pointing to less than 1% of those months as a basis to argue that SSC '02 LLC was "funded" by investor funds.

On the two statements provided by the Receiver, April 2018 and June 2018, April shows Mr. Dragul contributing \$100,000.00 from his personal money market account for SSC '02 LLC to responsibly pay off a loan from Sol Leftin. The Receiver does not provide any evidence that these funds were from any investor. The second and last months bank statement provided by the Receiver is June 2018 which has \$7,089.53 of deposited dollars and \$7,143.60 of dollars paid out. The Receiver has only provided one money market account with activity that is de minimus for any business. Attached hereto is **Exhibit C** which ties all transactions in the bank statements to complete explanations.<sup>2</sup>

### **1. Properties of SSC '02 LLC**

SSC '02 LLC's assets include three real property assets See **Exhibit D**:

1. 2624 So Oneida Street - Denver Colorado - Purchased on April 16th 2007;
2. 2432 So Newport Street- Denver Colorado - Purchased on December 20th 2006;
3. 7152 E. Blackhawk Unit D2 - Englewood Colorado - Purchased on December 1st 2004

At page 5 of the Receiver's Motion, the Receiver states that after the Receiver was appointed, Dragul apparently directed the tenants of Newport and Oneida to send their monthly rent to a non-Receiver's account. As set forth above, the SSC '02 LLC was not part of the Receivership Estate and Mr. Dragul could not have formulated that belief. Mr. Dragul was completely up front and transparent with the Receiver about this entity owned 99% by his Children. This is evidenced by the attached two emails as **Exhibits E and F**. Please see the email chain dated December 21, 2018 between Mr. Dragul and Mr. Sender. In this email exchange, Mr.

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<sup>2</sup> The Receiver comments that Dragul's children have not earned livings sufficient to support themselves. In 2002 when SSC '02 LLC was formed, Sam Dragul was 11 years old and in 5th grade, Spencer was 9 years old and in 3rd grade, and Charli was 7 years old and in 1st grade. So not surprisingly, the Dragul children were not working at that time and unable to support themselves. Currently, however, Sam Dragul is a CPA and in his 6th year with PricewaterhouseCoopers. Spencer is a recent Law School graduate, and Charli is finishing her first year with a Blackstone Company in real estate acquisitions. All are self-sufficient and productive members of society.

Sender states, " Given that the asset has been in your children's name for many years, without any transfers, I do not consider the asset, the storage unit, to be part of the estate." Also, Mr. Sender confirms his stance concerning SSC '02 LLC in an email with Tyler Dickey on February 5,2019. See **Exhibit F**. In this email chain Mr. Sender confirms his prior position on the Storage Unit and a pending sale. Mr. Sender was provided all of the Organizational documents by Susan Markusch. Mr. Dragul was advised by Mr. Sender that SSC was not part of the receivership estate. The Receiver confirms he is aware that these assets are not under his control when he agrees to allow an encumbrance of the Blackhawk property.<sup>3</sup>

**2. Dragul did not misrepresent SSC '02 LLC's ownership in order to encumber the Blackhawk Storage Unit.**

As set forth above, Mr. Dragul's representations were entirely accurate concerning ownership of SSC '02 LLC. Therefore, the Receiver is without authority to sell the Blackhawk Storage Unit and should have no authority to change locks or to "preclude Dragul and his agents from accessing the storage unit". In that regard, the proceeds of the loan would not be part of the Receiver's Estate and the Receiver has no basis upon which to request a Court Order compelling Dragul to turnover those proceeds.

**B. VRBO Rental and Management for X12 Housing**

Based upon the receivership order of August 30, 2018, the Receiver is charged with preserving the value of the assets and minimizing the loses for GDA RES, GDA REM, and Gary Dragul. Mr. Sender retained the GDA Staff and Mr. Dragul who worked tirelessly (and for free), with total integrity and focus on maintaining the value or bettering the value of the assets starting

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<sup>3</sup> The Receiver posits the question about why there was no objection to the Motion to sell the Newport and Oneida houses by Mr. Dragul or his children. While the Draguls reserve the right to object, there was no apparent equity in these homes. See **Exhibit D**.

on 9/1/18. Mr. Dragul worked without pay 7 days a week for 8 months. Even after the receiver fired all the GDA employees in March 2019, Mr. Dragul continued to help Mr. Sender with anything he needed daily. When the Receiver hired the GDA employees in September 2018, he made it clear that all operations should stay the same with no reason to change procedure. In fact, the GDA policy was to allow employees the use the units if they were not rented. GDA expected the employees to pay the cleaning fees associated with the units. Mr. Dragul's stays were with the knowledge of Mr. Sender and with only 4 nights at Beaver Creek from September 1, 2018 to March 15, 2019. When managing property in the Mountains it is not unreasonable to have an owner or representative visit, inspect and/or stay at the property for a limited amount of time.

The VRBO reports attached as Receiver's Exhibit 5 refute the allegation that Mr. Dragul had concealed \$74,240.00 from the Receiver. These were provided to the Receiver on February 7, 2019.

Dragul's **Exhibit I** sets forth Dragul's understanding of what took place regarding the nightly stays at the Bever Creek House and Timberfalls Condominium in Vail. The actual number of nights stayed is 26 and not 51. 10 of these nights were for prospective purchasers of the properties.

Dragul's **Exhibit J** is a reconciliation of the income and expenses for the VRBO rentals for August 1, 2018 through June 7, 2019. The net income amount is \$32,079.95.

### **C. Dragul Automobiles**

The first table on page 10 of the Joint Motion lists cars in Mr. Dragul's name and Mrs. Dragul's name. Mrs. Dragul's assets are not a part of the Receivership Estate and the other motor vehicles have values less than the loan amounts. See **Exhibit K**. Demanding turnover of Mr. and

Mrs. Dragul's motor vehicles seems like nothing more than a means of attempting to punish Mr. Dragul, since the expense to do so exceeds any equity which could be recovered.

The second table on page 10 of the Joint Motion refers to vehicles that are no longer owned at this time or vehicles that are not part of the Receivership Estate. See **Exhibit L** which sets forth the details relating to these motor vehicles.

#### **D. Personal Residence<sup>4</sup>**

The Dragul residence has been sold in foreclosure. There is/was no equity or excess proceeds. A receiver has been appointed by the creditor. The Receiver in this case has been coordinating with the creditor's receiver and presumably can obtain whatever inventory this Receiver deems appropriate. Dragul specifically denies that the personal property within the home including couches and beds and the like are part of the Receivership Estate. First, the Receivership Estate does not include the residence and presumably the contents of the residence. Secondly, these assets are joint assets of Mr. and Mrs. Dragul which therefore would not be subject to the Receivership Estate.

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<sup>4</sup> 10 Cherry Lane Drive- Receiver attached Exhibit 7 from the Receiver titled "Summary Chart-Dragul Payments for Residential Mortgage with GDA Funds. All checks listed on Exhibit 7 are not from GDA Real Estate LLC but rather Mr. Dragul's personal account ending in 1885.

All checks described in Exhibit 7 from the Receiver are checks from Gary Dragul's Chase account to JP Morgan Chase, the first deed of trust holder on his personal residence. No checks came from GDA as described on Exhibit 7 of the Receiver. The Receiver provided Exhibit 8 titled GDA Funds Used For Improvements of the Dragul Residence.

1. The receiver has included some business payments on this list like Oz Architecture who was the Architect on The High Street Condo Project. Also, Affair With Flair has nothing to do with the Dragul Residence.

2. All payments on Exhibit 8 from the Receiver came from Gary Dragul's chase account ending in 1885. While the Receiver is making the assumption that all of these payments came from GDA, they did not.

3. FLOODS AT THE DRAGUL RESIDENCE- In 2010 there was severe water damage in the kitchen and the main floor bathroom of the house. As a result Mr. Dragul would advance dollars against the insurance claim with Chubb. These repair expenses were reimbursed by

Chubb Insurance. In 2015 the entire HVAC system failed and flooded the Dragul Residence. The Draguls had to move out of the house for a year while the house was repaired. All of the repairs were reimbursed by Chubb Insurance at a total amount of \$1,912,065.11. See **Exhibit M**.



**Conclusion**

WHEREFORE, Dragul requests that the Court deny the Joint Motion of the Securities Commissioner and the Receiver for an Order Requiring Dragul to Turnover and Account for Property of the Estate for the reasons set forth in this Response.

Respectfully submitted this 20<sup>th</sup> 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 20<sup>th</sup> day of June, 2019, the above and foregoing **DEFENDANT GARY DRAGUL'S 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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*/s/ Michaela Lloyd*  
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