

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 720.865.8612</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: Chris Myklebust, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC.</p>	
<p>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 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com</p>	<p>Case Number: 2018CV33011</p> <p>Division/Courtroom: 424</p>
<p style="text-align: center;">RECEIVER’S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH TREASURE ISLAND, LLC</p>	

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 a settlement agreement he has reached with Treasure Island, LLC (“Treasure Island”). A copy of the “Settlement Agreement” is submitted with this motion as **Exhibit 1**. Approval of the Settlement Agreement will result in the immediate payment of \$350,000 to the Estate.

I. Background

1. On August 15, 2018, Gerald Rome, 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, 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 pursuant to 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 and their respective properties and assets, as well as their interests and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Receivership Order at 2, ¶ 5.

4. The Estate includes assets (including those of Dragul) of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from

investor funds from the solicitation or sale of securities as described in the Complaint filed by the Commissioner, or derived indirectly or indirectly from investor funds.

5. The Receivership Order grants the Receiver the authority to, among other things, settle claims relating to Estate property. Receivership Order at 12, ¶ 13(u).

6. Rose, LLC (“Rose”) is an entity Dragul formed and which was capitalized with funds solicited from over forty investors. Rose’s primary asset was a long-term lease it held with Treasure Island for space located in the ground floor of the Treasure Island Casino in Las Vegas, Nevada (the “Rose Lease”). The Rose Lease commenced in April 2011 and was renewed a number of times. Rose in turn subleased the space to Senor Frogs Las Vegas, LLC to operate a Mexican food restaurant.

7. In 2015, Treasure Island filed a lawsuit in the Eighth Judicial District in Clark County, Nevada (the “Nevada District Court”), Case No. (A-15-719105-B) (the “Litigation”), in which Treasure Island sought, *inter alia*, a declaratory judgment that in May 2015 Treasure Island had effectively terminated the Rose Lease. Rose filed a Counterclaim arguing, *inter alia*, that the Rose Lease had not been terminated in May 2015 and remained in effect. Trial was held on October 6 and 7, 2016.

8. After trial, the Nevada District Court ruled in Treasure Island's favor, determined the Rose Lease had been properly terminated in May 2015, and entered judgment to that effect (the "Judgment").

9. Rose appealed the Judgment to the Nevada Court of Appeals (the "Appellate Court") in *Rose, LLC v. Treasure Island, LLC*, Case No. 71941 (the "Appeal"). The Nevada District Court granted a stay in the enforcement of the Judgment and required Rose to post an \$850,000 bond to secure damages Treasure Island might incur between the date Judgment entered and final resolution of the Appeal if Treasure Island were to prevail.

10. On or about March 3, 2017, Rose posted \$850,000 in cash in lieu of a bond (receipt number 2017-20921-CCCLK) (the "\$850,000 Cash Bond").

11. The Appellate Court affirmed the Judgment on June 6, 2019. Treasure Island claims it is entitled to over \$1.1 million in attorneys' fees and other damages secured by the \$850,000 Cash Bond.

12. Under the proposed Settlement Agreement, Rose has agreed to forego pursuing further appellate relief, the Parties have agreed to execute mutual releases of all claims related to the Litigation, and Treasure Island has agreed the Estate shall receive \$350,000 from the \$850,000 Cash Bond.

II. The Settlement Agreement is in the Best Interests of the Estate and its Creditors.

13. There exists little Colorado authority with respect to factors the Court should consider in determining whether to approve a Receiver's settlement

agreement. In analogous bankruptcy contexts courts consider whether “the settlement is fair and equitable and in the best interests of the estate.” In considering whether to approve a settlement, bankruptcy courts consider four primary factors: “the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views.” *Kopp v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 105 B.R. 971, 977 (D. Colo. 1989). Courts also recognize that deference should be given to the business judgment of the Receiver. *See, e.g., In re OptInRealBig.com, LLC*, 345 B.R. 277, 291 (Bankr. D. Colo. 2006) (deferring to the business judgment of the bankruptcy trustee).

14. Considering these factors, the Court should approve the Settlement Agreement. The Rose Lease was a long-term agreement that had value to Rose because Rose was able to sublease the premises to Senor Frogs at a profit. As discussed, in May 2015, Treasure Island terminated the Rose Lease for non-payment. In the Litigation, Rose argued Treasure Island’s written termination was not effective due to technical defects as to whom the notice had been provided. It was undisputed, however, that Rose received notice of Treasure Island’s termination. Both the Nevada District Court and the Appellate Court held that notwithstanding

Rose's arguments concerning notice, Treasure Island had effectively terminated the Rose Lease in May 2015.

15. In addition to the May 2015 termination, Treasure Island sent another termination letter to Rose in August 2018 alleging Rose had failed to make requisite Lease payments. Treasure Island has also provided written notice of termination of the Rose Lease based on a provision in the Lease that makes it an event of default were Rose placed into Receivership.

16. The Receiver has consulted with local counsel who represented Rose in the Litigation concerning further appellate review of the Appellate Court's decision. In the Receiver's judgment, the probability of prevailing does not justify the costs of pursuing further appellate review. Moreover, even if Rose were to prevail on further appeal, the Rose Lease was likely terminated for other reasons in 2018.

17. The \$850,000 Bond secures both attorneys' fees and damages to Treasure Island, which Treasure Island claims exceed \$1.1 million. If Treasure Island prevails on further appeal, it may be entitled to the entire \$850,000 Cash Bond. To avoid the expense of further litigation, Treasure Island has agreed that the Estate will receive \$350,000 of the \$850,000 Cash Bond proceeds, and Treasure Island will receive the remaining \$500,000.

18. In the Receiver's informed business judgment, the Settlement Agreement is in the best interest of the Estate and its creditors. It will result in the

immediate payment of \$350,000 to the Estate and avoid additional legal fees pursuing an appeal that is not likely to succeed.

19. Pursuant to paragraph 10 of the Receivership Order, Court approval of any motion filed by the Receiver shall be given as a matter of course within 10 days after the motion is filed and served. As reflected by the certificate of service below, this Motion is being served on all parties who have appeared in this case and on all currently known creditors of the Estate.

WHEREFORE, the Receiver respectfully requests the entry of an Order approving the Settlement Agreement submitted as **Exhibit 1**.

Dated: July 8, 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 hereby certify that on July 8, 2019, a true and correct copy of the **RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH TREASURE ISLAND, LLC** was filed and served via the Colorado Courts E-Filing system to the following:

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Sueanna P. Johnson
Matthew J. Bouillon Mascareñas
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***Counsel for Defendants, Gary Dragul,
GDA Real Estate Services, LLC and
GDA Real Estate Management, LLC***

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.

s/ Salowa Khan
Allen Vellone Wolf Helfrich & Factor P.C.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (“Agreement”) is entered into as of the day last signed by a Party below, by and between on one hand Treasure Island, LLC (“Treasure”), and on the other hand Rose, LLC (“Rose”), by and through its duly-appointed Receiver, Harvey Sender (individually each is referred to as a “Party,” and collectively as the “Parties”).

Recitals

A. Treasure Island filed a lawsuit in the Eighth Judicial District in Clark County, Nevada (the “District Court”), Case No. (A-15-719105-B) (the “Litigation”), in which it sought, *inter alia*, a declaratory judgment that in May 2015 Treasure had effectively terminated a lease between it and Rose (the “Rose Lease”);

B. Rose filed a Counterclaim in the Litigation arguing, *inter alia*, that the Rose Lease had not been terminated in May 2015 and that the Lease remained in effect. Trial of the Litigation was held on October 6 and 7, 2016;

C. The District Court, the Honorable Judge Gonzales, ruled in Treasure’s favor in the Litigation and determined the Rose Lease had been properly terminated in May 2015, and entered judgment so providing in favor of Treasure and against Rose (the “Judgment”);

D. Rose appealed the Judgment to the Nevada Court of Appeals (the “Appellate Court”) in *Rose, LLC v. Treasure Island, LLC*, Case No. 71941 (the “Appeal”).

E. The District Court granted a stay in the enforcement of the Judgment and required Rose to post an \$850,000 bond to secure damages Treasure might incur between the date Judgment entered and final resolution of the Appeal if Treasure prevailed on the Appeal;

F. On or about March 3, 2017, Rose posted \$850,000 in cash in lieu of a bond (receipt number 2017-20921-CCCLK) (the “\$850,000 Cash Bond”);

G. On August 15, 2018, the Securities Commissioner for the State of Colorado commenced the civil case now captioned *Myklebust v. Gary Dragul, et al.*, Case No. 2018CV33011 (the “Receivership Action”), District Court, Denver, Colorado (the “Receivership Court”);

H. On August 30, 2018, the Court in the Receivership Action entered a Stipulated Order Appointing Receiver (the “Receivership Order”), appointing Harvey Sender receiver for Gary Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities, and their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Accordingly, as of August 30, 2018, Rose became part of the Receivership Estate;

I. The Appellate Court affirmed the Judgment on June 6, 2019;

J. The Parties enter into this Agreement to resolve all claims that were or could have been raised against each other in the Litigation, the Appeal, and to resolve any dispute about entitlement to the \$850,000 Cash Bond.

Covenants

For good and valuable consideration, the receipt of which the Parties expressly acknowledge, the Parties agree as follows:

1. Recitals Incorporated. The representations and recitals set forth above are true and accurate and are made a part of this Agreement.

2. Receivership Court Approval. This Agreement is conditioned upon, and requires the approval of, the Receivership Court, and shall be deemed null and void and of no effect if not so approved. As soon as practical after this Agreement is executed by both Parties (but in no event later than ten days after mutual execution), the Receiver shall, seek approval of this Agreement from the Receivership Court. The Receiver agrees to use all reasonable efforts to obtain Receivership Court approval of this Agreement in a timely manner.

3. Effective Date. The "Effective Date" of this Agreement is the date it is approved by the Receivership Court.

4. Settlement Payments. Upon the Effective Date, Treasure shall be entitled to receive \$500,000 of the \$850,000 Cash Bond as compensation for the attorneys' fees it incurred in the Litigation and the Appeal, rent Treasure claims Rose still owes under the Lease, and other damages Treasure claims to have suffered during the Appeal. Treasure asserts these fees and damages exceed \$1 million. The remaining \$350,000 of the \$850,000 Cash Bond shall be paid to Harvey Sender, as Receiver for Rose. The \$500,000 payment to Treasure and the \$350,000 payment to the Receiver are referred to as the "Settlement Payments." Following the Effective Date, the Parties shall file papers in the Nevada courts necessary to effect the distribution to the Parties of the Settlement Payments. If for any reason more or less than the entire \$850,000 Cash Bond is distributed, each Party shall proportionally share any under or excess payment.

5. Stay of Litigation and Appeal. The Parties agree to cooperate to obtain a stay of all deadlines in the Appeal until at least ten days after the Receivership Court issues an order on the Receiver's motion seeking approval of this Agreement. If the Receivership Court fails to approve this Agreement, any actions regarding the \$850,000 Cash Bond (including motions for attorneys' fees and other costs by Treasure) shall be stayed until a minimum of ten days after the Appellate Court has issued its mandate or such other deadline as the rules provide.

6. Mutual Releases. The mutual release in this paragraph shall be effective after the Effective Date and upon receipt the Settlement Payments, after which the Parties hereby release and discharge each other, their employees, officers, assigns, affiliates, attorneys, and agents from all claims, causes of action, suits, debts, sums of money, controversies, claims to property, damages, judgments, and demands whatsoever, in law or equity, known or unknown, asserted or unasserted, with respect to, related to, arising from, or in connection with the Litigation, the Appeal, or the \$850,000 Cash Bond, regardless of the legal or equitable theory upon which such claims may be based.

7. Dismissal of Litigation and Appeal. Upon receipt of the Settlement Payments, the Parties shall dismiss the Appeal and the Litigation with prejudice.

8. Further Cooperation. The Parties agree to cooperate and work in an expeditious manner to effect the terms of this Agreement, and to prepare and file any additional documents necessary to do so.

9. Successors and Assigns. This Agreement is binding on the Parties and their successors or assigns.

10. Construction. Each Party has participated in the drafting of this Agreement and acknowledge that the rule that any ambiguities shall be construed against the drafter shall not be applicable to this Agreement.

11. Severability. If any provision of this Agreement or the application thereof is held to be invalid or unenforceable, its invalidity or unenforceability shall not affect any other provision or application of this Agreement to the extent that such other provision or application can be given effect without the invalid or unenforceable provision or application. The provisions of this Agreement are declared to be severable.

12. Entire Agreement. This Agreement sets forth the entire agreement between the Parties and may be supplemented, altered, amended, modified, or revoked only by a writing signed by both Parties or their successors.

13. Authorization. Each Party executing this Agreement represents and warrants that he or she is duly authorized to execute and deliver this Agreement on behalf of such Party and that this Agreement is binding on such Party in accordance with its terms.

14. Voluntary and Knowingly. The Parties acknowledge they have read this Agreement, understand its terms, and that the Agreement is executed voluntarily, without duress, and with full knowledge of its legal significance. The Parties have been represented by legal counsel in connection with this Agreement, and they have not relied on each other in any way in making their independent decision to enter into this Agreement.

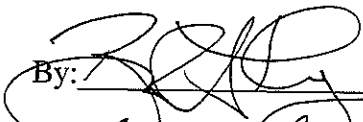
15. Counterparts/Facsimile Execution. This Agreement may be executed in counterparts and each such counterpart shall be an original Agreement, but all of which together shall constitute one and the same Agreement. Facsimile or electronic signatures shall be deemed original signatures.

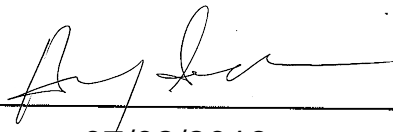
16. Costs and Attorneys' Fees. Each Party shall bear its own costs and attorneys' fees incurred prior to the Effective Date. In connection with any litigation, mediation, arbitration, special proceeding or other proceeding brought to enforce this Agreement, the prevailing Party shall be entitled to recover from the other Party its costs and reasonable attorneys' fees, through and including any appeal or post-judgment proceeding.

THE PARTIES CERTIFY THEY HAVE READ THIS ENTIRE AGREEMENT AND FULLY UNDERSTAND IT, AND IN WITNESS THEREOF, HAVE EXECUTED THIS AGREEMENT ON THE DATES SET FORTH BELOW.

TREASURE ISLAND, LLC

HARVEY SENDER, solely in his capacity as Receiver

By: 
Its: General Counsel
Dated: 1 July 2019


Dated: 07/02/2019