

<p>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 720.865.8612</p>	<p>DATE FILED: October 18, 2019 10:35 AM FILING ID: 40A0A3C1B5A9F CASE NUMBER: 2018CV33011</p>
<p><b>Plaintiff:</b> David S. Cheval, Acting Securities Commissioner for the State of Colorado</p> <p>v.</p> <p><b>Defendants:</b> Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Receiver: Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Rachel A. Sternlieb, #51404 ALLEN VELLONE WOLF HELFRICH &amp; 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 Division/Courtroom: 424</p>
<p align="center"><b>RECEIVER’S MOTION TO APPROVE AGREEMENT WITH FIRST CITIZENS BANK &amp; TRUST COMPANY</b></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 an agreement he has reached with First Citizens Bank & Trust Company (“FCB”). A copy of the “Agreement” is submitted as **Exhibit 1**.

## **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 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.

## **II. FCB holds liens on two Estate residential properties.**

4. Properties of the Receivership Estate include two single-family homes located at 2432 South Newport Street, Denver, CO 80224 (the “Newport Property”), and 2624 S. Oneida Street, Denver, CO 80224 (the “Oneida Property”) (jointly, the “Properties”).

5. FCB holds a second deed of trust on each of the Properties. These deeds of trust were granted by Dragul to secure a home equity line of credit in the original

principal amount of \$1,330,000.00 (the “Dragul Loan”), as subsequently increased to \$1,391,076.59 pursuant to a June 2, 2009, Change in Terms Agreement, Loan No. 2653699. The “Newport Deed of Trust” was recorded June 25, 2009, at Reception No. 2009080534. The “Oneida Deed of Trust” was recorded June 25, 2009, at Reception No. 2009080533.

6. The principal amount of the Dragul Loan was reduced to \$769,000 pursuant to a July 10, 2013, Amended and Restated Settlement Agreement. As of August 30, 2019, FCB represented the payoff amount for the Dragul Loan was \$554,562.16.

7. The Newport Property is encumbered by a first mortgage payable to Nationstar Mortgage, LLC d/b/a Mr. Cooper. As of September 30, 2019, the payoff amount for this loan was \$195,404.10.

8. The Oneida Property is encumbered by a first mortgage payable to Chase Bank. As of October 4, 2019, according to what appears to be Chase’s special servicer, Select Portfolio Servicing, Inc., the payoff amount for this loan was \$171,601.41.

9. The Receiver has listed the Oneida Property for \$460,000 and anticipates listing the Newport Property for \$400,000. If the Properties were to be sold for at or about these amounts, there would be no equity in the Properties to provide any return to the Receivership Estate.

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

10. There exists little Colorado authority with respect to factors the Court should consider in determining whether to approve a Receiver's agreement with an opposing party. In analogous bankruptcy contexts courts consider whether "the agreement 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).

11. Considering these factors, the Court should approve the Agreement with FCB. Under the Agreement, the Receiver will market and attempt to sell the Properties and if he is able to do so at agreed upon minimum prices, the Estate will receive the first \$30,000 of the net sales proceeds after paying the first mortgages on the Properties and all reasonable and customary costs of sale, including commissions not to exceed six percent (6%). The remainder will be paid to FCB at closing. Under the Agreement, FCB has agreed to accept substantially less than it is owed but will nevertheless release its deeds of trust on the Properties at closing to facilitate the

sales. If the Receiver is unable to sell the Properties at the minimum prices set by the Agreement, any reduction in the sale prices shall reduce dollar-for-dollar the \$30,000 to be paid to the Estate. Under the Agreement, the Receiver retains the right to abandon either of the Properties if in his sole discretion he determines doing so would be in the best interest of the Estate.

12. The Settlement Agreement is in the best interest of the Estate and its creditors. It may allow the Estate to receive \$60,000 from Properties that are otherwise of no value to the Estate. The Agreement benefits FCB because the Estate may be able to liquidate the Properties without the need for FCB to appoint its own receiver and foreclose.

13. 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 FCB Agreement.

Dated: October 18, 2019.

ALLEN VELLONE WOLF HELFRICH & FACTOR  
P.C.



By: /s/ Michael T. Gilbert

Patrick D. Vellone

Michael T. Gilbert

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ATTORNEYS FOR THE RECEIVER

**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2019, I served a true and correct copy of the foregoing **RECEIVER'S MOTION TO APPROVE AGREEMENT WITH FIRST CITIZENS BANK & TRUST COMPANY** via CCE to the following:

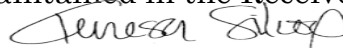
Robert W. Finke  
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State of Colorado*

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

A copy of the Motion was also served by electronic mail and/or U.S. Mail first-class, postage-prepaid 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/Teresa Silcox

## AGREEMENT

This Agreement (“Agreement”) is entered as of October 17, 2019, between Harvey Sender (the “Receiver”) in his capacity as receiver for the assets of Gary J. Dragul (“Dragul”), GDA Real Estate Management, LLC (“GDA REM”), GDA Real Estate Services, LLC (“GDA RES”), and related entities, and First Citizens Bank & Trust Company (“FCB”). Each is individually a “Party,” and collectively are the “Parties.”

### I. Recitals

A. 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 in the District Court in and for Denver County, Colorado, Case No. 2018CV33011 (the “Receivership Court”).

B. On August 29, 2018, the Commissioner, Dragul and the GDA Entities filed a Stipulated Motion for Appointment of Receiver, seeking appointment of a receiver over Dragul and the GDA Entities pursuant to § 11-51-602(1), C.R.S, and C.R.C.P. 66.

C. On August 30, 2018, the Court entered the Stipulated Order Appointing Receiver (the “Receivership Order”), which appointed Receiver (Harvey Sender) receiver for Dragul and the GDA Entities, and their respective properties and assets, and interests and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Receivership Order ¶ 5.

D. Properties of the Receivership Estate include two single-family homes located at 2432 South Newport Street, Denver, CO 80224 (the “Newport Property”), and 2624 S. Oneida Street, Denver, CO 80224 (the “Oneida Property”) (jointly, the “Properties”).

E. FCB holds second deeds of trust on each of the Properties. These deeds of trust were granted by Dragul to secure a home equity line of credit in the original principal amount of \$1,330,000.00 (the “Dragul Loan”), as subsequently increased to \$1,391,076.59 pursuant to a June 2, 2009, Change in Terms Agreement, Loan No. 2653699. The “Newport Deed of Trust” was recorded June 25, 2009, at Reception No. 2009080534. The “Oneida Deed of Trust” was recorded June 25, 2009, at Reception No. 2009080533.



F. The principal amount of the Dragul Loan was reduced to \$769,000 pursuant to a July 10, 2013, Amended and Restated Settlement Agreement. As of August 30, 2019, FCB represented the payoff amount for the Dragul Loan was \$554,562.16.

G. The Newport Property is encumbered by a first mortgage payable to Nationstar Mortgage, LLC d/b/a Mr. Cooper. As of September 30, 2019, the payoff amount for this loan was \$195,404.10.

H. The Oneida Property is encumbered by a first mortgage payable to Chase Bank. As of October 4, 2019, according to what appears to be Chase's special servicer, Select Portfolio Servicing, Inc., the payoff amount for this loan was \$171,601.41.

I. The Receiver has listed the Oneida Property for \$460,000, and anticipates listing the Newport Property for \$400,000. If the Properties were to be sold for at or about these amounts, there would be no equity in the Properties to provide any return to the Receivership Estate.

J. The Parties enter into this Agreement to incentivize and facilitate the Receiver's marketing and sale of the Properties, and to avoid the costs and delays FCB would incur if it were to initiate foreclosure proceedings on the Properties.

## II. Agreements

**NOW, THEREFORE**, in consideration of the foregoing Recitals, the mutual promises set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Court Approval. This Agreement is subject to approval by the Receivership Court. Following the execution of this Agreement by all Parties, the Receiver shall promptly seek Court approval and the Parties shall cooperate to obtain that approval. The Agreement shall be null and void if not approved by the Receivership Court.

2. Effective Date. The Effective Date of this Agreement shall be the day it is approved by the Receivership Court.

3. Sale of Newport. The Receiver shall market and attempt to sell the Newport Property. The Receiver anticipates listing the Property for approximately \$400,000. If the Receiver is able to sell Newport for at least \$360,000, after paying

the first mortgage on the Property and all reasonable and customary costs of sale, including commissions not to exceed six percent (6%), the Receivership Estate shall receive the first \$30,000 in net sales proceeds, and the remainder will be paid to FCB at closing. In exchange, FCB shall release its Newport Deed of Trust at closing to facilitate the Newport sale. If the Receiver consummates any sale of the Newport Property for less than \$360,000, absent further agreement with FCB, any reduction in the sale price shall reduce dollar-for-dollar the \$30,000 to be paid to the Estate at closing pursuant to this paragraph.

4. Sale of Oneida. The Receiver shall continue to market and attempt to sell the Oneida Property. The Property has been listed for \$460,000, and the Receiver has received an offer to purchase it for \$400,000. If the Receiver is able to sell Oneida for at least \$410,000, after paying the first mortgage on the Property and all reasonable and customary costs of sale, including commissions not to exceed six percent (6%), the Receivership Estate shall receive the first \$30,000 in net sales proceeds, the remainder to be paid to FCB at closing. In exchange, FCB shall release its Oneida Deed of Trust at closing to facilitate the sale. If the Receiver consummates any sale of Oneida for less than \$410,000, absent further agreement with FCB, any reduction in the sale price shall reduce dollar-for-dollar the \$30,000 to be paid to the Estate at closing pursuant to this paragraph.

5. Abandonment. Nothing in this Agreement shall preclude the Receiver from abandoning either of the Properties if in his sole discretion he determines doing so would be in the best interest of the Estate. The Receiver shall give written notice of his intent to abandon either of the Properties to FCB.

6. Specific Performance. The Receivership Court shall be the exclusive forum for any disputes arising under this Agreement, and upon application by either Party, the Receivership Court may require specific performance by either Party of its obligations hereunder. Each Party hereby consents to the exclusive jurisdiction and venue of the Receivership Court for any disputes relating to or arising under this Agreement.

7. Authorization. The Parties represent and warrant that no promise or inducement has been offered except as expressly set forth herein; that the person signing this Agreement on behalf of each Party is both authorized and legally competent to execute this Agreement and accepts full responsibility therefor; and, that it has not assigned, transferred, or hypothecated any claim or interest identified herein.

8. Successors. This Agreement shall be binding upon, and shall inure to the benefit of the Parties, their respective estates, and their legal representatives, successors, and assigns, whether by operation of law or otherwise.

9. Controlling Law. This Agreement shall be deemed made and entered into in the State of Colorado, and shall in all respects be interpreted, enforced, and governed by and under the laws of the State of Colorado, without reference to Colorado's law on conflicts of law.

10. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be illegal, invalid or unenforceable under present or future laws effective during the term of this Agreement, such provision shall be fully severable.

11. Fair Interpretation. This Agreement is the product of negotiations among the Parties and shall be given fair interpretation. Each of the Parties expressly acknowledges that this Agreement shall be deemed to have been mutually prepared so that the rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

12. Parties Advised by Counsel. The Parties acknowledge that they have been represented by counsel with respect to this Agreement and all matters covered by and relating to it.

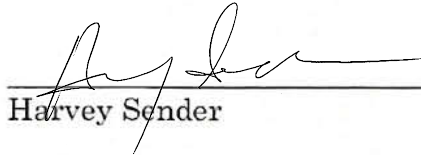
13. No Waiver of Breaches of Agreement. The failure by a Party to insist upon strict compliance with any of the covenants or restrictions contained in this Agreement shall not be construed as a waiver, nor shall any course of action deprive a Party of the right to require strict compliance with this Agreement.

14. Entire Agreement. This Agreement constitutes the entire agreement among the Parties regarding the subject matter hereof and supersedes all prior and contemporaneous representations, contracts, or agreements of any nature. Any modification of any provision of this Agreement shall not be valid unless in writing and executed by the Parties.

15. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument. Signatures delivered by facsimile and email as electronic files shall be deemed effective as originals.

16. Headings and Titles. The headings and titles in this Agreement are for convenience only and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision herein.

**Receiver**

  
\_\_\_\_\_  
Harvey Sender

10/17/2019  
\_\_\_\_\_  
Date

**First Citizens Bank & Trust  
Company**

  
\_\_\_\_\_  
Name: MICHAEL O'HARE  
Title: VICE-PRESIDENT

10/17/2019  
\_\_\_\_\_  
Date