

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202</p>	
<p>Case No. 2013-CV-33076; Division 203 Plaintiff: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT v. Defendant: YM RETAIL 07 A, LLC; GDA REAL ESTATE MANAGEMENT, INC; GDA REAL ESTATE SERVICES, LLC d/b/a THE GDA COMPANIES; GARY DRAGUL; AND AARON METZ</p>	
<p>Case No. 2018-CV-33011; Division 424 Plaintiff: DAVID S. CHEVAL, ACTING SECURITIES COMMISSIONER FOR THE STATE OF COLORADO, v. Defendants: GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT LLC</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr style="width: 20%; margin: auto;"/> <p style="text-align: center;">Case Nos.</p>
<p>Laura A. Menninger, #34444 Brian R. Leedy #35940 Jeffrey S. Pagliuca, #12462 HADDON, MORGAN AND FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 Tel: 303.831.7364 Fax: 303.832.2628 lmessenger@hmflaw.com bleedy@hmflaw.com jpagliariuca@hmflaw.com <i>Attorneys for Aaron Metz</i></p>	<p>2013CV33076 / Div. 203 2018CV33011 / Div. 424</p>
<p>AARON METZ'S MOTION TO CONSOLIDATE</p>	

Aaron Metz, through his attorneys Haddon, Morgan & Foreman, P.C., hereby moves pursuant to C.R.C.P. 42(a) for consolidation of two present cases pending in two different

Denver District Court divisions: *Colorado Department of Public Health & Environment v. YM Retail, et al.*, Case No. 13-CV-33011 (“Environmental Action”) pending in Division 203 before Judge Whitney, and *David S. Cheval, Acting Securities Commissioner for the State of Colorado v. Gary Dragul, et al.*, Case No. 18-CV-33011 (“Civil Fraud Action”), pending in Division 424 before Judge Egelhoff.

C.R.C.P. 121 1-15(8) CONFERRAL

Counsel for the Colorado Securities Commissioner, for Receiver Harvey Sender and for YM Retail oppose the relief requested herein. Counsel for Gary Dragul, for GDA REM and GDA RES, and for CDPHE has not responded to a request to confer.

BACKGROUND

Environmental Action¹

Mr. Metz along with YM Retail 07 A, Gary Dragul and the GDA Entities are co-defendants in the Environmental Action, currently pending before Judge Whitney, Denver District Court Division 203. The Environmental Action pertains to remediation of environmental contamination that occurred in the 1980s at 6460 East Yale Avenue, Denver, Colorado (the “Property”). A settlement agreement was reached in the Environmental Action on January 19, 2015. The agreement provided for joint and several liability of Dragul, the GDA Entities, YM Retail, and Mr. Metz, and it became an order of the Court on January 20, 2015 (hereafter “Remediation Order”).

¹ The facts concerning the Environmental Action are summarized in pertinent parts here, but are more fully described with supporting exhibits in Defendant Aaron Metz’s Motion for Relief from Judgment, Request for Stay, and for Declaratory Judgment filed in *CDPHE v. YM Retail, et al.*, 2013CV33076 (Feb. 27, 2019).

On January 23, 2019, CDPHE filed a Motion for Order to Show Cause and Contempt Citation Against Defendant Aaron Metz, scheduled for hearing on February 11, 2020 in Division 203. CDPHE moved only to hold Mr. Metz in contempt for “not funding the Remediation Work.” According to the motion, CDPHE did not likewise move with respect to Dragul or the Dragul entities due to the stay issued in the Civil Fraud Action. *Id.* at 5. CDPHE contends that Mr. Metz, a former employee of Dragul and GDA RES, should be held solely responsible for the cost of remediation of the Property, with the right to seek joint and several liability later from his co-defendants, Dragul, the GDA Entities and YM Retail.

Mr. Metz filed, on February 27, 2019, a Motion for Relief from Judgment, Request for Stay and for Declaratory Judgment to, *inter alia*, relieve him of his obligations under the Remediation Order pursuant to C.R.C.P. 60(b). That Motion is scheduled for hearing before Judge Whitney on February 10, 2020, one day prior to CDPHE’s contempt hearing.²

Civil Fraud Action

On August 15, 2018, the Securities Commissioner for the State of Colorado, filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities (“Civil Fraud Action”). On August 30, 2018, the court appointed Harvey Sender as receiver over Dragul, the GDA Entities, their respective properties and assets, and their interests and management rights in related affiliated and subsidiary businesses pursuant to C.R.S. § 11-51-602(1), C.R.C.P. 66 (“Receivership Order”) at 2, ¶ 5.

The Receivership Order also provided:

It is further Ordered that all actions in equity or at law against the Receiver, Dragul, GDARES and GDAREM, or the Receivership Estate are hereby enjoined (and any

² Judge Whitney has ruled that the Rule 60(b) Motion should be heard first, and then, if necessary, he will proceed to the Order to Show Cause proceedings against Mr. Metz.

actions already pending are hereby stayed), pending further action by this Court. The Receiver is instructed to file a request for an Order to Show Cause if any business, entity, or person commences or continues the prosecution of any action in any other court seeking relief in equity or at law against the Receiver, Dragul, GDARES and GDAREM or the Receivership Estate *without first seeking relief from this stay of proceedings.*

Id. at 18, ¶ 26 (emphasis added).

Shortly after the Receivership Order entered, the Receiver directed counsel for Dragul and the GDA Entities (who then also represented Mr. Metz and YM Retail) to file in the Environmental Action a “Notice of Receivership and Stay,” noting that the assets of the defendants to that action “are part of the Receivership Estate and this action may therefore affect the Receivership Estate.” *See* Receivership Order at ¶ 3, 5.

On December 5, 2019, the Receiver filed a Motion to Approve Settlement Agreement with Dragul Concerning Turnover Motion. Pursuant to the proposed Settlement Agreement, Dragul and his wife will turn over certain property and assets to the Receivership Estate, and Dragul “stipulates to the entry of judgment against him for \$120,000.” Motion at 4, ¶ 7(B). Apparently, property turned over by Dragul and the Dragul Entities is intended to satisfy creditors identified by the Receiver and to apply all such revenues, incomes and sales proceeds according to the priorities established by the Receivership Order at ¶ 22. Mr. Metz has submitted a claim pursuant to the Receiver’s established Claims Procedure authorized by this Court for funds to be used to remediate the Property.

CDPHE intervened in another related matter, *MLMT 2005-LC1 Yale Retail, LLC, v. YM Retail 07 A, LLC*, Case No. 13-cv-33076, a civil action between the lender and the single-asset entity which owns the Property and moved to consolidate that case with the Environmental Action as “necessary to protect the Department’s interests in protecting human health and the

environment by remediating contamination at the subject property.” *See* Colorado Department of Health and Environment’s Motion to Intervene as Plaintiff, Case No. 13-CV-34476 (Jan. 23, 2019). Inexplicably, however, CDPHE has not requested to intervene, or lift the stay imposed by the Civil Fraud Action, so that they could secure funding from three of the five defendants in the Environmental Action for purposes of remediation.

ARGUMENT

Pursuant to C.R.C.P. 42(a), a court may order consolidation “when actions involving a common question of law or fact are pending before the court.” The court also “may made such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” *Id.*

Both actions here involve common questions of fact concerning the availability of funds from defendants Dragul and the Dragul Entities to pay for remediation of the Property as required by the Remediation Order. In the Environmental Action, Dragul and the Dragul Entities are co-defendants, jointly and severally liable under the Remediation Order for funding the environmental clean-up. Should Mr. Metz succeed in his Rule 60(b) motion to be relieved from the judgment because it was the product of conflicted counsel, the *only* remaining parties to fund the clean-up are Dragul and the Dragul Entities.³ Likewise in the Civil Fraud Action, a question of fact involves the availability of the Dragul and Dragul Entities’ funds for the Receivership Estate, designated to pay creditors and others.

³ A receiver, Cordes & Co., has been appointed over the assets of the final defendant, YM Retail. At present, that receiver has advised the Court that she has insufficient funds from the operation of the retail spaces on the property to fund the balance of any remediation.

If Dragul and the Dragul Entities are found in the Environmental Action to be required to perform the remediation at the Property, and pay for it, the cleanup will have to be coordinated with the Receivership under Judge Egelhoff's oversight and direction.

Mr. Metz seeks consolidation of these two actions solely for purposes of judicial efficiency so that the cases will proceed as separate actions before the same judge.

Mr. Metz does not seek to realign the parties in either action.

CONCLUSION

Because the issue of funding pursuant to the Remediation Order is a common question of fact between the two actions, judicial efficiency and economy would be served by consolidating these cases on the limited basis described above. If consolidated, only one judicial officer will need to review and rule on the questions related to the funding pursuant to the Remediation Order at the Property.

Therefore, Mr. Metz requests consolidation of the two actions.

Dated December 13, 2019.

Respectfully submitted,

s/ Laura A. Menninger

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Certificate of Service

I certify that on December 13, 2019, a copy of this *Aaron Metz's Motion to Consolidate* was served via Colorado Courts E-filing system and or U.S. Postal Mail to the following parties:

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