<table>
<tr><td>DISTRICT COURT, DENVER COUNTY, COLORADO
1437 Bannock Street
Denver, CO 80202
(720) 865-8612
<hr>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.</td><td>▲ COURT USE ONLY ▲</td></tr>
<tr><td>ATTORNEYS FOR PLAINTIFF, David S. Cheval, ACTING SECURITIES COMMISSIONER FOR THE STATE OF COLORADO

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Courtroom: 424</td></tr>
<tr><td colspan="2">JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY</td></tr>
</table>

Plaintiff, David S. Cheval, Acting Securities Commissioner for the State of Colorado, and the Receiver, Harvey Sender, hereby oppose Aaron Metz's Motion to Intervene and to Lift Stay for Limited Purposes ("Motion," filed December 13, 2019).[1]

I. Introduction

Aaron Metz is a former employee of GDA Real Estate Services, LLC ("GDARES"). Metz, YM Retail 07 A, LLC ("YM Retail"), Gary Dragul, GDARES, and GDA Real Estate Management, LLC ("GDAREM") are co-defendants in an environmental enforcement action filed in 2013 by the Colorado Department of Health and Environment, *CDPHE v. YM Retail 07 A, LLC, et al.,* Denver District Court Case No. 2013-CV-33076 (the "CDPHE Lawsuit").[2]

The CDPHE Lawsuit concerns a retail shopping mall at Yale and Monaco in Denver (the "YM Property") owned by YM Retail, a special purpose entity owned and managed by Dragul. A portion of the YM Property is contaminated with tetrachloroethylene ("PCE"). In 2013, at the lender's request, a receiver was appointed to take control of the YM Property in *MLMT 2005-LC1 Yale Retail, LLC v. YM Retail 07 A, LLC*, Case No. 2013-CV-34476, Denver District Court. On November 26, 2013, that receivership case was administratively consolidated with the CDPHE Lawsuit. *See* **Exhibit 1** (CDPHE Contempt Motion).

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[1] Metz has also filed a motion to consolidate this action with the CDPHE Lawsuit. The Commissioner and Receiver also object to that request as set forth in their separately filed response to that motion.

[2] Metz defines the CDPHE Lawsuit as the "Environmental Action," but refers to it throughout his Motion as the "Enforcement Action." *See* Motion at 2 and *passim*.

On January 20, 2015, the court in the CDPHE Lawsuit approved – and made an order of the court – a Stipulation between CDPHE and the defendants in that case making the defendants jointly and severally liable for the costs of remediating the contamination at the YM Property (the "Remediation Order"). Remediation Order ¶ 9 (**Exhibit A** to Metz's Motion submitted with this Court). The court ordered the remediation work to begin by August 3, 2015. *Id.* The defendants also confessed liability to a $62,500 civil penalty imposed by CDPHE to be paid in five monthly installments beginning September 1, 2015. *Id.* ¶ 11.

Due to the costs of remediating the contamination, and the provision in this Court's Receivership Order that prohibits the Receiver from taking any action with regard to the ownership, operation, or disposal of hazardous substances (Receivership Order ¶ 30), on December 13, 2018, this Court granted the Receiver's motion to abandon the YM Property. Thus, the Receivership Estate has no interest in that Property, nor any obligation to fund its remediation.

The genesis of Metz's present filings in this case is a January 23, 2019, motion for contempt CDPHE filed against him in the CDPHE Lawsuit. **Exhibit 1**. That motion chronicles events after the 2015 Remediation Order entered. In short, defendants have not completed the court-ordered remediation so CDPHE seeks to hold Metz in contempt for failing to do so.

Significantly, on January 29, 2019 – six days after CDPHE filed its contempt motion – Metz filed a claim against the Receivership Estate in this case claiming that, based on promises Dragul made to him before the Remediation Order entered, the Estate should be responsible for all remediation costs; alternatively, he asserted

a claim against the Estate based on Dragul and the GDA entities' previously adjudicated joint and several liability under the Remediation Order. **Exhibit 2**.

Metz now seeks leave to: (1) intervene in this securities enforcement/receivership action; (2) consolidate this case with the CDPHE Lawsuit (itself a consolidated receivership action); (3) lift the litigation stay against Dragul so that Metz can file his own contempt motion against them for failure to pay for the remediation of the YM Property; and (4) file an objection to the Receiver's December 5, 2019, motion seeking Court approval of a settlement agreement between the Receiver and Dragul, which resolved the June 4, 2019, turnover motion filed by the Commissioner and the Receiver against Dragul. All of this is admittedly an effort to have this Court determine Metz's contribution claim against Dragul and the GDA entities under the Remediation Order has "priority" over all other creditors of the Estate. Motion at 10.

The Court should reject Metz's attempt to circumvent the claims and distribution process mandated by this Court's Receivership Order to the detriment of and at the expense of other investors and creditors. *See* Receivership Order ¶ 13(u) (requiring Receiver to establish procedure for asserting claims against the Estate, for resolving claim disputes, and for distributing Estate assets). When appropriate, the Receiver will propose a plan of distribution. At that time, Metz can object to the plan's proposed treatment of his claim and argue for priority. There is no legal basis or practical reason to increase the expense to this Estate, and the complexity of this already complex case, by allowing Metz to intervene to

prematurely adjudicate plan issues, or to consolidate this case with the CDPHE Lawsuit.

II. Argument

A. Metz does not meet the requirements for intervention.

Non-party investors/creditors, like Metz, have no right to intervene in a Securities Commissioner's enforcement action. *Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 31-32 (Colo. 2001). Based on *Alexa Group,* the Securities Commissioner has successfully opposed non-party intervention in other securities enforcement actions.[3] Indeed, a previous creditor sought to intervene in this case. After extensive conferral with that intervenor (the Rosenbaum family), their previously granted motion to intervene (which had been erroneously filed as unopposed) was vacated. *See Order Vacating Order Granting Motion to Intervene* (Jan. 15, 2019). Consistent with *Alexa Group,* and other Denver District Court judges who refuse intervention by non-party creditors, this Court should deny Metz's motion to intervene.

1. Metz does not have a right to intervene.

Under C.R.C.P. 24(a)(2), a non-party has a right to intervene if they are: (1) an interested party; (2) disposition of the action may impair or impede their ability to protect their interest; and (3) the interest is not adequately represented by existing parties. Under *Alexa Group,* investors — like Metz — are interested parties

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[3] *See, e.g.,* Order Denying Schott's Motion to Intervene for an Order Securing Funds, *Joseph v. Providence Fin. Servs., Inc.,* Denver District Court Case No. 2013 CV 31667 (Jan. 9, 2014) (**Exhibit 3)**; Order Regarding Motion to Intervene of Applicants, *Joseph v. Mueller,* Denver District Court Case No. 2010 CV 3280, (Nov. 23, 2010) (**Exhibit 4**).

and therefore meet the first requirement. They do not, however, satisfy the second or third.

With respect to the second, "[a]n intervenor's interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue his interests." *Alexa Grp.*, 19 P.3d at 30. Metz's argument as to why that is the case here never really addresses the issue. He argues: (1) he has an interest in having as much money as possible allocated from Estate proceeds to remediate the YM Property; (2) he has a due process right to be heard on how Estate proceeds are distributed; and (3) this case directly affects his liability under the Remediation Order. Motion at 7-8. None of these justify intervention.

As to the first two arguments, Metz has filed a claim against the Estate based on his right to contribution from Dragul and the GDA entities because they are jointly and severally liable under the Remediation Order. As a creditor, Metz receives notice of pleadings filed in this case and will have an opportunity to object to and advocate for priority under any proposed plan of distribution. This protects his interest in obtaining as much money as possible from the Estate and provides him due process. As to the third, Metz's liability under the Remediation Order is not affected in any way by this enforcement/Receivership action. He and his co-defendants in the CDPHE Lawsuit have already been adjudicated jointly and severally liable to remediate the YM Property. Ongoing proceedings in this case will have no effect on the Remediation Order.

Finally, Metz has not made the required "compelling showing" that his interests are not adequately protected in this action.

> If the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, *or if there is a party charged by law with representing his interest*, then a compelling showing should be required to demonstrate why this representation is not adequate.

Alexa Grp., 19 P.3d at 31 (italics added) (citing WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1909 (2d ed. 1986)). The Commissioner is charged with protecting investors, and brought this action to further that goal. *See* COLO. REV. STAT. §§ 11-51-602(2); 11-51-101(2) (legislative purpose of the Colorado Securities Act is to be broadly construed to protect investors and instill confidence in the securities markets).

Receivers are officers of the Court charged with impartially exercising the duties prescribed by the appointing order. *E.g.*, *Hart v. Ed-Ley*, 482 P.2d 421 (Colo. App. 1971). Supervision and disposition of the receivership estate lies within the appointing court's jurisdiction. *Midland Bank v. Galley Co.*, 971 P.2d 273 (Colo. App. 1998). The goal of a receivership is to safeguard estate assets and assist the court in achieving an equitable distribution of funds. *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2009). Where, as here, there are many competing claims to Estate assets, courts consistently defer to a receiver's decision on how best to distribute them. *See, e.g.*, *Cunningham v. Brown*, 265 U.S. 1, 13-14 (1924); *In re Madoff Inv. Secs. LLC*, 654 F.3d 229, 236, 238 (2d Cir. 2011); *SEC v. Byers*, 637 F. Supp. 2d 166, 176-77 (S.D.N.Y. 2009).

Metz has submitted a claim against the Estate based on Dragul and the GDA entities' joint and several liability under the Remediation Order. Metz is free to argue for a priority distribution in connection the Receiver proposed plan of distribution. *See, e.g.*, *Vescor*, 599 F.3d at 1194-95 (creditors may object after distribution plan is proposed and before assets are distributed). But there is no distribution plan at present so Metz's request to be treated as a priority creditor is both premature and unsupported by the Receivership Order. *See* Receivership Order ¶¶ 22(a) through (f). Metz is no different than Dragul's other defrauded creditors; he is not entitled to short-circuit the orderly prosecution of this case or the Court-ordered claims process. Metz has not shown a compelling reason his interests are not adequately protected by the Receivership Order.

2. Metz is not entitled to permissive intervention.

C.R.C.P. 24(b)(2) gives the Court discretion to allow intervention when an applicant's claim or defense to the main action has a question of law or fact in common and intervention will not unduly delay or prejudice the rights of the original parties. Neither is so here.

Metz argues his "claim and the main action have questions of law and fact in common" because he is competing for limited Estate assets to fund remediation of the YM Property. Motion at 8. That is simply not the case. In the CDPHE Lawsuit, the defendants have stipulated to, and the court has ordered they are jointly and severally liability for the remediation costs. CDPHE's attempt in that lawsuit to determine those costs in a contempt proceeding (or otherwise) has nothing to do with the how Estate assets in this case should be distributed.

Allowing Metz to intervene here will inject new claims and defenses into this case and will cause delay and prejudice to the Commissioner, the Receiver, and other creditors. For example, in the CDPHE Lawsuit on February 27, 2019, Metz sought relief from the Remediation Order under C.R.C.P. 60(b). **Exhibit 5**. His Rule 60 motion is based on allegedly unforeseen increased remediation costs, false or negligent representations Dragul made to induce him to stipulate to the Remediation Order, Dragul's criminal indictment, this lawsuit, the Receiver's abandonment of the YM Property, and conflicts of interest his counsel had when advising him to stipulate to the Remediation Order. These issues have nothing to do with the collection and distribution of Estate assets, or the Commissioner's enforcement action against Dragul.

The court in the CDPHE Lawsuit has set a two-day hearing on February 10-11, 2020, to address Metz's Rule 60(b) motion and CDPHE's contempt motion. All these issues can and should be litigated separately in that Lawsuit, not here. There is no reason to adjudicate those issues in this case and doing so would substantially increase the costs to the parties here at the expense of Estate creditors. Because Metz seeks to inject new claims or defenses here, permissive intervention is inappropriate. *See In re K.L.O-V.,* 151 P.3d 637, 642 (Colo. App. 2006) (denying permissive intervention that would inject new claim of grandparent visitation into dependency and neglect proceeding).

Metz seeks to intervene (and to consolidate this case with the CDPHE Lawsuit) to litigate issues that are already being litigated in that case. Yet the Receiver abandoned the Estate's interest in the YM Property to avoid expending

Estate resources litigating issues at the expense of Estate creditors relating to a property that has no value to the Estate. Metz seeks to drag the Receiver (and the Commissioner) back into litigating those issues at the expense of other creditors. If Metz were allowed to intervene, it would open the proverbial Pandora's Box for other investors to seek intervention to prematurely seek priority treatment under an as yet unformulated distribution plan. This would prejudice the Estate and disrupt the orderly marshaling and distribution of assets required by the Receivership Order.

B. The Court should deny Metz's request to lift the stay imposed by the Receivership Order.

This Court's August 30, 2018, Receivership Order enjoins all actions in equity or at law against the Receiver, Dragul, the GDA Entities, or the Receivership Estate, absent an order from this Court. Receivership Order at 18, ¶ 26. Metz asks the Court to lift that stay so that he can seek to hold Dragul and the GDA entities in contempt for failing to fund remediate the YM Property. Motion at 9.

Metz argues that unless the stay is lifted, he will be precluded from seeking contribution from Dragul and the GDA entities. *Id.* That is just not so. As discussed, the Remediation Order already imposes joint and several liability on Dragul and the GDA entities for the remediation costs, and Metz has already filed a contribution claim against the Estate for any remediation costs he may be ordered to pay. Metz's real complaint is that "the Receivership Order makes no special allowance for payment of funds pursuant to the Court Ordered Remediation agreement." *Id.* at 9; Receivership Order ¶¶ 22(a) through (f). So, he wants to impose a monetary contempt award against Dragul and the GDA entities and then

have the award "entered in this Court and deemed a priority for payment from the Receivership Estate." *Id.* at 10. Metz does not need relief from stay to capitate his contribution claim. If he is ordered to pay anything in the CDPHE Lawsuit, he has already filed his contribution claim against the Estate.[4] And the priority of Metz's contribution claim is something to determine at the plan stage, not now. Lifting the stay will require the Receiver to litigate the contempt claims in another forum using Estate assets at the expense of other Estate creditors. Metz's motion for relief from stay should be denied.

C. Metz's proposed objection to the turnover settlement agreement is baseless and moot.

On June 4, 2019, the Commissioner and the Receiver filed a motion seeking an order requiring Dragul to turnover and account for property of the estate (the "Turnover Motion"). The parties negotiated a settlement of the issues raised in the Turnover Motion and on December 5, 2019, the Receiver filed a motion seeking court approval of that agreement. Pursuant to the Receivership Order, objections to motions filed by the Receiver are due within ten days. Receivership Order ¶10. A copy of the motion seeking approval of the turnover settlement agreement was served on Metz on December 5, 2019. As a creditor, Metz had a right to object within ten days. On December 17, 2019, the Court entered an order approving the settlement agreement. On December 17, 2019, as required by the agreement, Dragul and the Receiver filed a Stipulation for Entry of Judgment, a copy of which

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[4] Moreover, Metz has moved under C.R.C.P. 60 to vacate or modify the Remediation Order in the CDPHE Lawsuit. If granted, that might entirely moot the present Motion and Metz's motion to consolidate.

was served on Metz's counsel. On December 18, 2019, the Court entered a $120,000 judgment in favor of the Receiver and against Dragul and certified it as final pursuant to C.R.C.P. 54(b).

On December 13, 2019, Metz filed his Motion to Intervene and Lift Stay. Section III of that Motion asks the Court to lift the Receivership Order's "stay to the extent necessary to allow Mr. Metz to interpose a limited objection to the" turnover settlement agreement. Motion at 10. But as a creditor, Metz had standing to file an objection without leave of Court without violating the stay.[5]

Even if Metz's Motion could be considered a timely objection, the proposed limited objection attached to his Motion as **Exhibit E** is without merit and is moot. Metz objects only to the entry of the $120,000 judgment against Dragul and "only to the extent that such moneys reduce the funds available from Mr. Dragul to satisfy his obligations to fund remediation of the [YM] Property as he is obligated to do pursuant to the Remediation Order entered in [the CDPHE Lawsuit]." Motion, **Exhibit E** at 2. This would not have been a basis to deny approval of the settlement agreement and would not provide a reason either to vacate the order approving it or the $120,000 judgment.

Metz's contribution claim arises from the Remediation Order entered on January 20, 2015, more than three-and-a-half years before the Receiver was appointed. Once the Receiver was appointed on August 30, 2018, Dragul's assets

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[5] The Commissioner takes the position that by having standing to object to a settlement agreement as a third-party creditor, Metz timely filed a placeholder by seeking leave to file such with the Court. That being said, Metz's timely objection is without merit and moot.

became property of the Receivership Estate. Metz has a pre-appointment claim against the Estate, and he has filed it. As discussed, there is no basis to prioritize Metz's claim over other unsecured Estate creditors. On the other hand, Dragul's pre-appointment assets are already part of the Estate, so the Receiver will seek to execute his judgment against Dragul's post-Receivership assets.

III. Conclusion

For the reasons stated above, the Court should deny Metz's motion to intervene and to lift the litigation stay. If granted, those motions would substantially increase the costs to the Estate and unnecessarily complicate this case at the expense of the Estate's creditors.

Dated: January 3, 2020.

PHILIP J. WEISER, ATTORNEY GENERAL

/s/ Sueanna P. Johnson

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Senior Assistant Attorney General
Financial and Health Services Unit

Attorney *for Plaintiff David S. Cheval, Acting Securities Commissioner for* the *State of Colorado*
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ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

/s/ Michael T. Gilbert

PATRICK P. VELLONE, #15284
MICHAEL T. GILBERT, #15009
RACHEL A. STERNLIEB, #51404

Attorneys for Harvey Sender, Receiver

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2020, I served a true and correct copy of the foregoing **JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY with EXHIBITS 1-5** via CCE or first-class mail, postage prepaid, to the following:

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/s/ *William Russell*

JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY

Exhibit 1

DATE FILED: January 23, 2019 6:19 PM
FILING ID: 605D965F3F338
CASE NUMBER: 2013CV33076

<table>
<tr><td>DISTRICT COURT, DENVER COUNTY, COLORADO

1437 Bannock Street, Room 256
Denver, CO 80202
____
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT,

Plaintiff,

v.

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,

Defendants.</td><td>▲ COURT USE ONLY ▲</td></tr>
<tr><td>PHILIP J. WEISER, Attorney General
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*Counsel of Record</td><td>Case No.: 13CV33076
(previously consolidated with 13CV34476)

Division: 203</td></tr>
<tr><td colspan="2">PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE AND CONTEMPT CITATION AGAINST DEFENDANT AARON METZ AND TO RE-OPEN DISCOVERY</td></tr>
</table>

Plaintiff, the Colorado Department of Public Health and Environment, ("the Department"), by and through the Office of the Colorado Attorney General, hereby moves this Court, pursuant to C.R.C.P. 107, to direct the issuance of a citation to Defendant Aaron Metz, ordering him to appear before the Court to show cause why

he should not be held in contempt for willful violation of the Stipulation and Order Regarding Parties' Settlement Agreement dated January 20, 2015 ("Remediation Order") **attached hereto as Exhibit 1,** and thereafter, issue an order requiring Aaron Metz to pay remedial contempt sanctions. The Department also moves the court to re-open discovery for the limited purpose of obtaining relevant financial information regarding Mr. Metz' present ability to comply with the Remediation Order. Contrary to Mr. Metz' assertion, this case is not stayed against him, as further explained below.

The Court consolidated this case with *MLMT 2005-LC1 Yale Retail, LLC v. YM Retail 07 A, LLC,* Case No. 13-CV-34476 ("Receivership Action") for administrative purposes. The Receivership Action appointed Brian J. Baker as Receiver ("Receiver") for Defendant YM Retail 07, LLC ("YM Retail") and associated real property it owns - a shopping center located at 6460 East Yale Avenue, Denver, Colorado, ("Property"). The Department concurrently filed two separate motions to formally intervene in the Receivership Action and to amend the First Amended Receivership Order authorizing the Receiver to direct YM Retail assets to fund environmental cleanup at the Property.

In support of this Motion, the Department submits the Affidavit of Colleen Brisnehan, an employee of the Department, **attached hereto as Exhibit 2,** and states as follows:

C.R.C.P. 121 § 1-15(8) CONFERRAL

Although conferral is not required for this Motion, undersigned counsel conferred with the following regarding this Motion: Laura Menninger, counsel for Defendant Aaron Metz; Jason Wesoky, counsel for Defendants YM Retail and GDA Real Estate Management, Inc. ("GDA REM"); Benjamin Kahn, counsel for Defendants Gary Dragul and GDA Real Estate Services, LLC ("GDA RES"); and Brad Schacht and Betsy Temkin, counsel for the Receiver. Mr. Metz' opposes this motion. The Receiver does not oppose the Motion. The remaining parties did not offer a position.

BACKGROUND AND ARGUMENT

Aaron Metz is a Party to the Remediation Order, and it is thus binding on him. *Ex. 1: Remediation Order* at p.3 ¶ 14(a). By its terms, the Remediation Order remains an enforceable Order of the Court until the Court determines all requirements of the Agreement have been satisfied. *Id.* at p.3 ¶ 14(b).

Pursuant to the Remediation Order, all five Defendants are jointly and severally liable for performing environmental remediation work ("Remediation Work") to address contaminated soils and groundwater at the Property. *Id.* p.2 ¶ 4; p.3 ¶ 9. The purpose of the work is to ensure conditions at the property achieve compliance with Colorado's Hazardous Waste Act, § 25-15-101, *et seq.*, C.R.S. ("Act"); the Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3 ("Regulations"); the Colorado Basic Standards for Groundwater, 5 C.C.R. 1002-41;

and other applicable state laws and regulations pertaining to environmental pollution. *Id.* at p.2 ¶ 4.

The Remediation Order required Defendants and Receiver to deposit $250,000 into an escrow account to fund the Remediation Work. *Id.* at p.2 ¶¶ 6, 7. The escrow account funded some Remediation Work including soil remediation activities, and investigation and characterization activities to determine the extent of contamination. *Ex. 2: Brisnehan Affidavit* at p.3 ¶ 9.

The Remediation Order states Defendants are responsible for providing additional funding if the cost of the Remediation Work exceeds $250,000. *Ex.1: Remediation Order* at p.3 ¶ (8)(d). Defendants have not made additional funds available for the Remediation Work. *Ex. 2: Brisnehan Affidavit* at p.3 ¶ 12.

In July of 2018, Defendants' contractor submitted a remediation work plan on Defendants' behalf to the Department for approval. *Id.* at p.3 ¶ 11. The Department approved the work plan later that same month. *Id.* The contractor also presented Defendants with the proposed plan and cost estimate for the remaining Remediation Work, along with a request for approval to move forward with the work. *Id.* In September of 2018, the contractor notified the Department it had not obtained approval to implement the remaining Remedial Work. *Id.* Defendants owe approximately $40,000 to the contractor for services in relation to the Remedial Work performed to date. *Id.* at p.3 ¶ 12.

The remediation work plan proposes implementing the remaining Remediation Work in three phases: Phase I would cost approximately $143,000 to $193,000; and Phases II and III would together cost approximately $400,000 to $600,000. *Id*. The total cost of remediation would thus be approximately $543,000 to $833,000. *Id.*

On August 15, 2018, the Colorado Securities Commissioner filed a civil fraud action against three of the five Defendants – Gary Dragul, GDA REM, and GDA RES in *Rome v. Dragul*, *et al.*, Denver County District Court Case No. 2018CV33011 ("Fraud Action"). On August 30, 2018, Judge Egelhoff granted the parties' Stipulated Order Appointing Receiver ("Fraud Receiver Order"), **attached hereto as Exhibit 3,** staying "all actions in equity or at law against the Fraud Receiver, Dragul, GDA RES, and GDA REM, or the Receivership Estate." *Id.* at p.18 ¶ 26. The Fraud Receiver Order defined the "Receivership Estate" as the assets of Gary Dragul, GDA RES, GDA REM, as well as assets of subsidiaries or related companies. *Id.* at p.3 ¶ 9.

On September 26, 2018, Defendants filed a Notice of Receivership and Stay in the instant case ("Stay Notice"), **attached hereto as Exhibit 4.** The Stay Notice incorrectly states the assets of all Defendants are part of the Fraud Action's Receivership Estate. *Id.* at p.2 ¶ 3. Mr. Metz is not a party to the Fraud Action, and there is no reason why Mr. Metz' assets would be considered part of the

Receivership Estate. As such, the Fraud Receiver Order's stay provision does not apply to Mr. Metz or his assets.

Mr. Metz willfully violated the Remediation Order by not funding the Remediation Work in derogation of the authority and dignity of the Court.

THEREFORE, THE DEPARTMENT REQUESTS THIS COURT TO:

1. Issue an Order to Show Cause, directing the Clerk of the Court to issue a Citation to Show Cause, and set a Show Cause hearing requiring Mr. Metz to show cause why he should not be found in contempt of the Remediation Order;

2. If no cause is found, set the matter for a Contempt Hearing to coincide with the hearing requested in the Department's concurrently filed Motion to Amend the First Amended Receivership Order;

3. Re-open discovery for a three-month period for the limited purpose of obtaining relevant financial information regarding Mr. Metz' present ability to comply with the Remediation Order. Discovery shall be conducted pursuant to C.R.C.P. 26(b) and limited to:

    a. 20 interrogatories;

    b. 20 requests for production of documents; and

    c. one deposition of Mr. Metz;

4. If found in contempt, impose remedial sanctions against Mr. Metz requiring him to fund the Remediation Work, or a portion thereof;

5. Award the Department its reasonable attorney fees in connection with this Motion; and

6. Provide such other relief as the Court determines is appropriate.

Respectfully submitted this 23rd day of January, 2019.

PHILIP J. WEISER
Attorney General

E-filed pursuant to C.R.C.P. 121 § 1-26. A duly signed original is on file at the Colorado Department of Law.

/s/ Jason E. King

JASON E. KING, 34376*
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MARY EMILY SPLITEK, 46619*
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Natural Resources & Environment Section
Attorneys for Colorado Department of Public Health and Environment
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **MOTION FOR ORDER TO SHOW CAUSE AND CONTEMPT CITATION AGAINST DEFENDANT AARON METZ, AND TO RE-OPEN DISCOVERY (with Exhibits 1-4 and Proposed Order)** upon the following Parties this 23rd day of January, 2019, via the Colorado Courts E-Filing System, as follows:

Party Name	**Party Type**	**Party Status**	**Attorney Name**
Aaron Metz	Defendant	Active	Brian Rowland Leedy (Haddon Morgan and Foreman PC) Laura A Menninger (Haddon Morgan and Foreman PC)
Brian J. Baker	Receiver	Active	Brad W Schacht (Otten Johnson Robinson Neff and Ragonetti PC)
Gary Dragul	Defendant	Active	Benjamin Alexander Kahn (The Conundrum Group LLP) Megan Rae Kahn (The Conundrum Group LLP)
GDA Co	DBA	Active	N/A
GDA Real Estate Mgmt Inc	Defendant	Active	Jason Bryan Wesoky (Darling Milligan PC)
GDA Real Estate Serv LLC	Defendant	Active	Benjamin Alexander Kahn (The Conundrum Group LLP) Megan Rae Kahn (The Conundrum Group LLP)
Mlmt 2005-LC1 Yale Retail LLC	Plaintiff	Active	Gregory Paul Szewczyk (Ballard Spahr LLP) Patrick Harold Pugh (Ballard Spahr LLP)
Ym Retail 07 A LLC	Defendant	Active	Jason Bryan Wesoky (Darling Milligan PC)

*/s/ Laura F. Kelly*____________________
Laura F. Kelly

JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY

Exhibit 2

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202	
Plaintiff: Gerald Rome, Securities Commissioner for the State of Colorado v. **Defendants:** Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC	▲COURT USE ONLY▲
	Case Number: 2018CV33011 Division/Courtroom: 424

CLAIM FORM

The undersigned Claimant hereby asserts a claim against the Receivership Estate of Gary J. Dragul ("Dragul"); GDA Real Estate Services, LLC; GDA Real Estate Management, LLC; and related entities (collectively, "Dragul and the GDA Entities" or the "Estate").

1. Amount of Claim as it existed on August 30, 2018.

Claim is asserted against:	Gary J. Dragul, GDA Real Estate Services, LLC, GDA Real Estate Management, Inc., GDA Res, Fort Collins WF 02, LLC, YM Retail 07 A, LLC, Summit 06 A, LLC, GDA Clearwater 15, LLC
Actual damages:	TBD
Consequential and other damages, if any:	TBD
Interest, if any:	$20,000 based on $4000/mo from March to August 2018
Attorneys' fees and costs, if any:	None as of August 30, 2018, current balance is $14,980
Other:	TBD
TOTAL:	**TBD**

2. The foregoing claim arose on **04/13/2018**, and is based upon the following events:

   See attached.

DOCUMENTS SUPPORTING THE CLAIM MUST BE ATTACHED TO THIS CLAIM FORM.

3. This claim is:

Secured by the following collateral or security:

Various real estate, see attached summary

4. If the claim is secured, please identify the location of all collateral:

   Colorado, California, Florida, Arizona and Texas

5. If the claim includes interest, please specify each of the reasons for such interest and the rate thereof (e.g. contract, statute, etc.):

   Contract as to real estate; statute and equity as to loan Gary Dragul has not yet documented.

6. The nature and value of any offset or counterclaim (i.e., money or property that you owe Dragul, the GDA Entities, or the Estate, or any claims that Dragul, the GDA Entities, or the Estate may have against you):

   None

7. If you are represented by an attorney, please provide details:

   Name of Attorney: Laura Menninger and Brian Leedy - Hadden, Morgan and Foreman, PC

   Attorney's Address:

   Street Address: 150 East 10th Avenue
   City: Denver State: Colorado
   Zip Code: 80203

   Attorney's Phone Number: (303) 831-7364

   Attorney's Facsimile Number: 3038322628

   Attoryney's Email: lmenninger@hmflaw.com

CLAIMANT HEREBY CERTIFIES THAT IT HAS DISMISSED ANY OTHER PENDING SUITS OR PROCEEDINGS IT HAS COMMENCED AGAINST DRAGUL, THE DRAGUL ENTITIES, OR THE RECEIVERSHIP ESTATE AND THAT IT WILL NOT FILE (OR RE-FILE) ANY SUIT OR PROCEEDING IN ANOTHER FORUM WITHOUT THE RECEIVER'S PERMISSION OR LEAVE OF THIS COURT.

8. I hereby certify and attest, under the penalty of perjury, that the information contained in the foregoing Claim Form is true and correct:

   Claimant Name: Aaron Joseh Metz

Claimant Address:

Street Address: 2701 Castle Pines Drive North
City: Castle Rock State: Colorado
Zip Code: 80108

Claimant Phone Number: (303) 909-2801

Claimant Facsimile Number:

Claimant Email: aaron@archerproperty.com

Aaron Joseh Metz

Dated: 1/29/2019

Claims

1. Clearwater Collection Shopping Center – I invested $100,000 for a 1.86% membership interest in the shopping center. Also, I understand the mortgage was not paid and the ownership has therefore accrued substantial default interest and penalty. However, to my knowledge, nothing had changed at the shopping center that would justify the Manger not paying the mortgage. To my knowledge, no tenants vacated, there were no catastrophic events and, in fact, the largest tenant, Floor and Décor, had a substantial rental increase. My claim for monies owed and damages is TBD upon the receiver or courts accounting of the financial activity for this property. Attached is my Membership Purchase Agreement.

2. Fort Collins WF 02, LLC –

    a. For labor and services rendered, I own 0.529% of this entity, which, in turn, as I understand it owns various percentages in Laveen Ranch Marketplace, Shoppes at the Meadows Shopping Center, Highlands Ranch Shopping Center, Southwest Commons and Trophy Club Shopping Center. I have attached my 2017 K1 received from GDA Real Estate Services, LLC, along with the last update I received (February 2010). Monies owed to me and damages is TBD upon the receiver or courts accounting of these various real estate holdings, and the amounts Fort Collins WF 02, LLC received, either in the form of missed distributions or capital events (refinance and/or sales). The last time I received funds from this entity for any of these properties was in the form of distributions in 2009 (Shoppes at the Meadows $914.94, Southwest Commons $214.56).

    b. In addition to the equity earned above, I also invested $15,000 in Fort Collins WF 02, LLC for an additional 0.124% interest in Shoppes at the Meadows. The Participation of Membership Interest is attached. I have not received distributions on these property since 2009 and have not received an update from Fort Collins since 2010. Monies owed and damages is TBD upon the receiver or courts accounting.

3. Cherry Knolls Shopping Center – I purchased a 0.27% interest in this shopping center for $10,000 directly from Gary Dragul. I have not received an update on this piece of real estate since investing and the latest distribution I received was in 2009 ($262.02). Monies owed and damages are TBD upon the receiver or courts accounting of missed distributions or capital events. The Participation of Membership Interest is attached.

4. Broadstone Plaza Shopping Center – I purchased a 0.21% interest in this shopping center for $11,000 directly from Gary Dragul. I have not received an update on this piece of real estate since investing and the latest distribution I received was in 2009 ($330). Monies owed and damages are TBD upon the receiver or courts accounting of missed distributions or capital events. The Participation of Membership Interest and an email from Gary Dragul confirming this purchase is attached.

5. Summit Marketplace – For labor and services rendered, I own 1% of this shopping center. I have not received a distribution from this piece of real estate since 2010 ($958.44) and was surprised

to have recently learned that perhaps other investors, including family of Gary Dragul, may have been receiving distributions since 2010. Monies owed and damages are TBD upon the receiver or courts accounting of missed distributions. The Agreement for Assignment or Partnership Interest is attached.

6. Claim related to CDPHE – YM Retail 07 A, LLC; GDA Real Estate Management, Inc.; GDA Real Estate Services, LLC; myself and Gary Dragul are alleged to share joint and several liability regarding the Stipulation and Proposed Order Regarding Parties' Settlement Agreement (attached). I preserve a claim under (1) a theory of joint and serval liability, (2) for no liability to myself pursuant to promises Gary Dragul made both before and after signing the settlement that he would "take full responsibility and cover all of my costs" to satisfy the order and (3) other potential claims, include fraudulent inducement. I trust that the court will preserve emails and legal documents (including Operating Agreements) from the GDA server showing I was not an officer, showing a pattern of my subordinate position, having no ownership or decision-making authority in GDA or any entity affiliated with the entities that manage or own(ed) the property, had no control as to whether Gary Dragul or his entities would comply with the CAP that they (not me) committed to, for which his lack of compliance resulted in a contempt of court motion against me.

7. Unsecured Note – I personally lent Gary Dragul and GDA Real Estate Services $50,000 in March 2018 and $100,000 in April/May 2018. The $50,000 note was to be paid back, plus $4,000 interest, on April 9th. The $100,000 was meant to be interest free and was to be paid back in one week. To date, I have only received $20,000, leaving a principal balance of $130,000 plus interest. While I have numerous written and verbal promises to pay, I have been unable to get Gary Dragul to document or confirm the loans in writing.

JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY

Exhibit 3

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street, Denver, CO 80202	DATE FILED: January 9, 2014 CASE NUMBER: 2013CV31667
Plaintiff: FRED J. JOSEPH, Securities Commissioner for the State of Colorado v. Defendant: PROVIDENCE FINANCIAL SERVICES, INC., et al.,	**COURT USE ONLY▲** __________________________ Case No: 13CV31667 Courtroom: 269

ORDER RE: JEAN A. SCHOTT'S MOTION TO INTERVENE FOR AN ORDER SECURING FUNDS AND OPPOSITION TO PLAINTIFF'S MOTION TO APPROVE SETTLEMENT AND LIFT FREEZE ORDER

THIS MATTER is before the Court on Jean A. Schott's Motion to Intervene for an Order Securing Funds and Opposition to Plaintiff's Motion to Approve Settlement and Lift Freeze Order filed on December 10, 2013. The Court, having reviewed all of the briefing filed in connection with Schott's Motion, and being fully advised, hereby enters the following findings and order:

Schott's Motion is **DENIED**. A receiver will be appointed, Schott's litigation will be stayed, Schott may not secure her funds, and Schott has no right to intervene in the pending action.

I. BACKGROUND

Perry Sawano ("Defendant") is an investment adviser accused of misusing funds from approximately twenty-six clients. (Complaint at 2). The Securities Commissioner alleges that Sawano used his firm, Providence Financial Services, d/b/a Integrity Financial Consulting, to purportedly invest a total of $2.7 million dollars in "alternative investments" mostly unbeknownst to his clients. (Complaint at 2). The Commissioner alleges that Defendant was engaging in a classic Ponzi strategy of using new clients' money to pay off or pay back previous clients. (Complaint at 2).

Jean A. Schott ("Schott") was one of the investors whose $500,000 was allegedly misappropriated by Defendant. (Schott's Motion to Intervene at 2). While most of the other clients' funds have been completely commingled, Schott's funds are at least partially traceable. (Schott's Motion to Intervene at 2).

On November 21, 2013, this Court approved the settlement agreements between Defendant and Plaintiff and lifted the freeze order on Defendant's accounts. Schott filed a motion to intervene for an order securing funds and to oppose the appointment of a receiver.

II. DISCUSSION

Schott asserts that she should be able to prevent a receiver from being appointed, secure her funds, and to intervene in this case. The Court disagrees.

A. Appointing a receiver and staying litigation

Schott objects to the appointment of a receiver and the staying of her current lawsuits against the Defendant and the other investors. (Schott's Opposition at 4). However the Court finds that a receiver is warranted in this case. Whether to appoint a receiver is within the discretion of the trial court, and the decision will not be overturned unless the trial court's actions were manifestly arbitrary, unreasonable or unfair. *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 512 (Colo. App. 2006). A court may appoint a receiver at any time after one party:

> [E]stablishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired. C.R.C.P. 66(a)(1).

Appointing a receiver is a drastic measure and should only be undertaken when a receiver is integral to protecting property rights. *Eureka Coal Co. v. McGowan*, 212 P. 521, 521 (Colo. 1922). A receiver is warranted in cases of fraudulent conduct or when the assets are in danger of dissipation or loss. *Savageau v. J. & R. A. Savageau, Inc.*, 285 P.2d 810, 813 (1955). When determining whether to appoint a receiver, the court should consider the totality of the circumstances including: (1) the existence of a valid claim by the moving party; (2) the probability that fraudulent conduct has occurred or will occur to frustrate the claim; (3) imminent danger that property will be lost, concealed, or diminished in value; (4) inadequacy of available legal remedies; (5) lack of a less drastic equitable remedy; and (6) the likelihood that appointment of a receiver will do more harm than good. *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998); *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 520 (Colo. App. 2006).

Defendant's pattern of fraudulent conduct and pending litigation create a substantial danger, here, that the funds will be dissipated or lost. Schott does not dispute the existence of a valid claim by the moving party, or the probability that fraudulent conduct occurred. Rather, Schott asserts her right to reclaim her own assets, thereby diminishing the funds and contributing to the need for a receiver. Schott argues that the appointment of a receiver may diminish the amount of her eventual recovery, not that a receiver would do more harm than good for the investors, generally. Considering the totality of the circumstances, the Court finds that a receiver should be appointed, and Schott's litigation stayed.

B. Right of Intervention

Schott claims to have the right to intervene in this case to protect her interests. (Schott's Motion to Intervene at 7). The Court disagrees.

An individual has a right to intervene:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
> C.R.C.P. 24

A party's interest is impaired when the resolution of the pending action will prevent the party from pursuing the party's interest in the future and when the party's interests are not adequately represented in the pending action. *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 30-1 (Colo. 2001). In actions by the State Securities Commissioner against fraudulent brokers, investors' interests are considered adequately represented by the Commissioner, who has a duty to protect investors from fraud in the securities market. *Feigin*, 19 P.3d 23 at 31-2. When a Commissioner is representing the investors, parties must make a compelling showing to the court to demonstrate that the party's interests are not being protected. *Feigin*, 19 P.3d 23 at 31-2.

In *Feigin*, the Colorado Supreme Court held that "investors are not entitled to intervene as a matter of right under Rule 24(a)(2) in the commissioner's civil enforcement action." *Feigin*, 19 P.3d 23 at 32. In that case, defrauded investors who objected to a provision of the Colorado Securities Commissioner's settlement plan tried to intervene. *Feigin*, 19 P.3d 23 at 30-32. The Court found that because the investors were not forced to participate in the plan but, rather, retained the ability to bring independent causes of action, the investors' rights were neither impaired nor impeded and the investors had no right to intervene. *Feigin*, 19 P.3d 23 at 30-32.

Here, Schott states her interests are not shared by the Commissioner because a Commissioner may seek to combine Schott's funds into the general pool and later disburse them equally among the investors. (Schott's Motion to Intervene at 7). The pending action does not preclude Schott from objecting to the receiver's plan later in the proceedings. Moreover, Schott retains the right to file an independent cause of action. Nowhere in Schott's briefs on this matter does Schott differentiate her situation from that of the investors in *Feigin*. Accordingly, the Court finds that Schott has failed to make a compelling showing that her interests are not adequately represented by the Commissioner and, therefore, Schott has no right to intervene in the present case.

C. Securing Funds

Schott asserts that because her money is still traceable, it has not been fully commingled with the assets of Defendant's other victims, and, therefore, she should be entitled to recover such identifiable funds before a receiver is appointed. (Schott's Motion to Intervene). The Court disagrees.

Schott has cited no case law for her position. (Schott's Motion to Intervene at 1-7). Instead, Schott states that because her funds were stolen and traceable, she should be allowed to recover her assets directly. (Schott's Motion to Intervene at 2-7). Schott asserts that her funds are traceable even though the Defendant deposited Schott's funds into accounts that contained other funds. (Schott's Motion to Intervene at 5-6).

It is inequitable to allow one investor to secure her funds once they have been commingled with the funds of others. While there is little Colorado case law on the subject of

receiverships and pro rata distribution, the Court finds federal case law to be persuasive. In a receivership case such as this one, where the investors were the victims of a Ponzi scheme, pro rata distribution is the favored and fairest way to distribute the funds. *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 176-77 (S.D.N.Y. 2009). The goal of a receivership is to safeguard the assets, and assist the court in achieving an equitable distribution of the funds. *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2009). Investors who object to the receiver's plan for distribution may object after the plan's formulation and before the assets are distributed. *Vescor.*, 599 F.3d 1189 at 1194-5. A plan may be equitable, even if it does not provide for all of the investors to recover all of their funds. *Vescor.*, 599 F.3d 1189 at 1195.

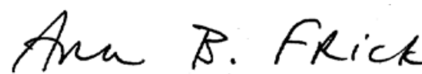
In Schott's case, while some of her funds may be traceable, they are commingled. (Schott's Motion to Intervene at 5-6). Any commingling of funds is enough that courts should treat the entire fund as tainted. *Byers*, 637 F. Supp. 2d 166 at 177. In the interests of providing an equitable remedy for all of the investors regardless of when they began investing with Defendant, this Court holds that Schott may not secure her commingled funds separately from those of other investors.

III. CONCLUSION

Schott's Motion is DENIED. A receiver will be appointed, Schott's litigation will be stayed, Schott may not secure her funds, and Schott has no right to intervene in the pending action.

SO ORDERED this 9th day of January 2014.

BY THE COURT:



ANN B. FRICK
DISTRICT JUDGE

JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY

Exhibit 4

DENIED

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

Dated: Nov 23, 2010

Brian Whitney
District Court Judge
DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301	
IN RE APPLICATION FOR INTERVENTION: **Applicants: JOHN ELWAY and MITCHELL D. PIERCE** **Applicants for Intervention**	**COURT USE ONLY**
Plaintiff: FRED J. JOSEPH, Securities Commissioner for the State of Colorado, v. **Defendants**: SEAN MICHAEL MUELLER, MUELLER CAPITAL MANAGEMENT, LLC, and MUELLER OVER UNDER FUND, LP.	Case No. 2010 CV 3280 Division:

ORDER REGARDING MOTION TO INTERVENE OF APPLICANTS

Applicants for Intervention, John Elway ("Elway") and Mitchell D. Pierce ("Pierce") (collectively "Applicants"), having filed their Motion to Intervene, and the Court having considered the same and being duly advised in the premises, hereby FINDS that the Motion is meritorious and should therefore be GRANTED:

IT IS THEREFORE ORDERED that Applicants are now a party to this action, and shall formally file and serve their Complaint in this matter within ten (10) days of this Order.

DONE this _____ day of October, 2010.

BY THE COURT:

____
District Court Judge

This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

Movants have failed to demonstrate how thier interests are not sufficiently protected by the Court ordered reciever and its process of review. Each argument made concerning priority rights can be sufficiently addressed in the claims process. If an equitable trust exists, the Reciever, as an extension of the Court, can take that into consideration in its processing and evaluating duties. Further, movants seem to rely on what information was given to them at the time of thier investmant rather than what actually occured. The Reciever, in its objection, informs the Court that the priority of claims is belied by the actual use of the proceeds. While the Court is not making this as a finding of fact, it is sufficient cause to deny intervention at this juncture.

JOINT RESPONSE OF THE SECURITIES COMMISSIONER AND THE RECEIVER IN OPPOSITION TO AARON METZ'S MOTION TO INTERVENE AND LIFT STAY

Exhibit 5

DATE FILED: February 27, 2019 7:12 PM
FILING ID: 4138818B1111C
CASE NUMBER: 2013CV33076

DISTRICT COURT, DENVER COUNTY, COLORADO
1437 Bannock Street, Room 256
Denver, CO 80202

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

▲ COURT USE ONLY ▲

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bleedy@hmflaw.com
Attorneys for Aaron Metz

Case No. 2013CV33076

Division: 203

DEFENDANT AARON METZ'S MOTION FOR RELIEF FROM JUDGMENT, REQUEST FOR STAY AND FOR DECLARATORY JUDGMENT

Aaron Metz, through his attorneys, Haddon, Morgan & Foreman, P.C., moves pursuant to C.R.C.P. 60(b) for relief from the Order of the Court issued on January 20, 2015 (Ex. A, "Order"), obligating him to the terms of the "Stipulation and Proposed Order Regarding Parties' Settlement Agreement" (hereafter "Agreement").

Mr. Metz further moves this Court pursuant to C.R.C.P. 62(b)(2) for an Order staying the execution of, or any proceedings to enforce the Order, pending resolution of this Rule 60 Motion. Additionally, Mr. Metz moves this Court under C.R.C.P. 57 for a declaratory judgment of the

"construction" of the Agreement as it is a "writing constituting a contract" and "order" in which he is a "person interested." As grounds he states as follows:

C.R.C.P. 121 § 1-15(8) Certificate of Conferral

Counsel for Mr. Metz certifies that she has conferred with counsel for Plaintiff Colorado Department of Public Health and Environment ("CDPHE") regarding the relief requested herein. Counsel for Mr. Metz is authorized to state that Plaintiff opposes this Motion.

Introduction

Circumstances have changed. An Order of this Court, née a settlement agreement reached without the benefit of conflict-free counsel for Mr. Metz, commanded that five Defendants would bear responsibility for any environmental clean-up costs at a retail property owned by Mr. Metz's employer. While the cost estimate at the time of the Order included a maximum of $250,000, now, without explanation, the environmental group estimates the cost to run to the millions of dollars. In the meantime, the other four defendants have fallen by the way-side: indicted on criminal charges, sued for civil fraud, even the property at issue abandoned for lack of value, receiverships appointed and stays of actions put in place, all without the benefit of Mr. Metz's input or right to contest. Now the one person without a single shred of financial interest in the property is being asked to cover the entire cost of its clean-up. Rule 60(b) provides this Court the authority to relieve Mr. Metz from this unjust, inequitable result. Mr. Metz seeks such relief in this Motion, as well as a stay of any contempt proceeding against him and a declaratory judgment that the Order requires *all* the Defendants fund any clean-up, as the Order's plain language provides, not just Mr. Metz.

Factual Background

Litigation in this matter has been protracted and expansive. For purposes of this Motion, a few of the pertinent facts are re-stated together with procedural history giving rise, and subsequent, to entry of the Order.

This case concerns the clean-up of a property located at 6460 East Yale Avenue in the City and County of Denver (the "Property"), located at the corner of East Yale and Monaco Parkway. From the mid-1980s until approximately 1993, a dry-cleaning operator named the Silver State Cleaners purportedly released perchloroethylene ("PCE") onto the Property. PCE is a "hazardous waste" regulated by the Colorado Hazardous Waste Act, C.R.S. § 25-15-101 to 327, and Regulations, 6 C.C.R. 1007-3. After the years in which Silver State Cleaners conducted its dry-cleaning business, ownership of the Property changed hands several times.

Defendant Gary Dragul, a real estate investor, formed several entities involved in this action. He formed defendant YM Retail 07 A, LLC ("YM Retail") and invested with others in it to purchase the Property.

GDA[1] Real Estate Services, LLC ("GDA-RES"), the entity responsible for managing services for YM Retail at the Property, had Mr. Dragul as its president Registered Agent. GDA-RES is the parent corporation of YM Retail. The sole members of GDA-RES are defendant Gary Dragul and his wife, Shelly. Defendant GDA-RES provided consulting services for YM Retail regarding the Property.

GDA Real Estate Management, Inc. ("GDA-REM") is the manager of GDA-RES and the Property. Mr. Dragul is the Manager and sole employee of GDA-REM.

[1] "GDA" stands for Gary Dragul & Associates. Ex. B, Stipulated Fact 8.

I. CDPHE Litigation and Defendant Aaron Metz

A. Aaron Metz

From 2001 until 2018, Aaron Metz served as an employee of GDA-RES under the direct supervision and direction of Mr. Gary Dragul. Ex. C, at ¶¶ 1-2. Mr. Dragul hired Mr. Metz shortly after he graduated from college in 2001. *Id*. In 2002, when Mr. Metz had worked at GDA-RES for less than one year, Mr. Dragul and other investors acquired the already-contaminated Property through the YM Retail LLC. Later, after the acquisition of the Property, Mr. Metz was promoted to the title Director of Acquisitions at GDA-RES. Ex. B, Stipulated Fact 10.[2] During the mid-1980s, when the Property was allegedly contaminated with the release of perchloroethylene ("PCE") by a now-defunct dry cleaner, Mr. Metz was a mere six years old.

Throughout his Mr. Metz's employment with GDA-RES, Mr. Dragul acted as his "boss" and directed him how to proceed on matters involving the Property. Ex. B, Stipulated Fact 20. Mr. Dragul had final decision-making authority over all GDA-RES projects. *Id*., Stipulated Fact 27. Mr. Metz did not operate the Property in his individual capacity pursuant to a contract or otherwise. *Id.*, Stipulated Fact 41. He did not make any decisions regarding management of the Property in relation to compliance with any "CAP" in his individual capacity. *Id.,* Stipulated Fact 42. CDPHE admits that Mr. Metz did not realize *any* economic benefit as a result of the alleged "CAP" implementation failures at issue in the litigation. *Id.,* Stipulated Fact 131.

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[2] Shortly before trial in this matter, CDPHE retracted its agreement to a number of Stipulated Facts based on evidentiary objections such as relevance. The Court then issued an Order directing the parties to meet and confer, on pain of sanctions, to reach agreement as to any fact which the parties did not dispute the veracity of the fact, without regard to evidentiary objections. Ex. D (Order of Jan. 7, 2015). The attached Stipulated Facts refer to those the CDPHE had previously agreed were, in fact, true as evidenced by their correspondence with counsel for Mr. Metz.

In 2013, CDPHE sued Gary Dragul, GDA-RES, YM Retail, and GDA-REM (the management company in which Mr. Dragul and his wife were sole members). *Id.*, Stipulated Fact 12. Mr. Metz, although a mere W-2 employee of GDA-RES and without any financial interest in the outcome of the litigation, also was sued by CDPHE under a novel legal theory that he served as an "operator" pursuant to the Colorado Hazardous Waste Act, C.R.S. § 25-15-101. *See* Third Amended Complaint at 8-9. No case has ever held that an employee could be an "operator" under the Colorado statute. The litigation was resolved prior to any finding by the Court or any jury that Mr. Metz was, in fact, an "operator" and subject to liability under Colorado's Hazardous Waste Act.

B. Terms of the Agreement and Order

After 18 months of litigation, trial was scheduled to begin in January of 2015. On January 20, 2015, the first day of the scheduled trial, a settlement was reached culminating in the Agreement among defendants YM Retail, GDA-REM, GDA-RES, Gary Dragul, and Mr. Metz, plaintiff CDPHE (represented by the Attorney General's Office), and Brian J. Baker, the Receiver appointed over the Property. At the request of the parties, the Agreement was made an Order of the Court. At the time the Agreement was executed, GDA-RES, Mr. Dragul, and Mr. Metz, all were represented by the same counsel, as discussed below.

The Agreement obligated *all* of the Defendants to "cause remedial work to be performed" at the Property "sufficient to bring the Property into compliance with the Colorado Hazardous Waste Act…, the Colorado Hazardous Waste Regulations…, the Colorado Basic Standards for Groundwater…, and other applicable state laws and regulations pertaining to environmental

pollution."[3] Ex. A, at ¶ 4. Pursuant to the Agreement the Defendants collectively were required to hire and pay an environmental contractor to bid and supervise the work.

At the time of the Agreement and Order, the Defendants *and the Receiver* "estimated the cost of the Work will be between $126,540 and $252,200" and required the Defendants *and the Receiver* to deposit a total of $250,000 into an Escrow account. *Id.*, at ¶¶ 5-7. The parties agreed that the "cost of work," i.e., out-of-pocket costs paid to third-party contractors and environmental consultants hired by Defendants to complete the Work, may be less than the escrowed $250,000, in which case the balance would be released to the payors in proportionate shares. *Id.*, at ¶ 8(c).

Significantly, the Agreement further provided, "In the event that the Cost of Work is in excess of $250,000, Defendants shall be solely responsible for such excess." *Id.*, at ¶ 8(d). The Agreement is silent with respect to any potential limit on exposure by any particular Defendant. Thus, if the clean-up costs exceed $10 million, the Defendants purportedly are collectively liable for the full amount. No further obligation was imposed on the Receiver appointed by the Court for the benefit of the property. The Agreement provided for "joint and several liability" as to the Defendants' obligation to perform the work. *Id.*, at ¶ 9.

One other noteworthy portion of the Agreement provides that "each Party shall execute all instruments and documents and take all actions as may be reasonably required to effectuate this Stipulation." *Id.*, at ¶ 13. The Parties included both the Defendants and CDPHE.

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[3] C.R.S. § 25- 15-101 *et seq.*, 6 C.C.R. 1007-3, 5 C.C.R. 1 002-41.

C. Mr. Metz's Legal Representation by Conflicted Counsel

At the outset of litigation, Mr. Dragul selected counsel to represent himself, his company GDA-RES, and his employee, Mr. Metz. Ex. C, at 8. That counsel was Benjamin Kahn of the Conundrum Law Group. *Id*. Mr. Dragul funded the legal representation. *Id*. Mr. Dragul told Mr. Metz to "not worry," promising that he would be indemnified by GDA-RES and Mr. Dragul personally. *Id*. Indeed, Mr. Dragul and his companies, GDA-RES and GDA-REM, as well as YM Retail with its stream of income emanating from the Property, each had a financial stake in the clean-up of the Property, and each served as "operators" of the Property under Colorado law.

Although an inherent conflict of interest existed between Mr. Metz on the one hand and Mr. Dragul and his entities on the other, counsel never sought or obtained from Mr. Metz any waiver of conflict pursuant to Colorado Rule of Professional Conduct 1.7. *Id*., at 10. Certainly there is no written waiver of conflict for Mr. Kahn to represent Mr. Dragul, GDA-RES and Mr. Metz simultaneously.

Throughout the litigation, counsel failed to keep Mr. Metz informed regarding the progression of the litigation, the litigation strategy, or any defenses particularly available to Mr. Metz. *Id*., at 11. At least to Mr. Metz's knowledge, counsel never approached CDPHE about a separate resolution of the matter for him. Upon information and belief, counsel took all of his litigation direction from Mr. Dragul for the benefit of Mr. Dragul and his entities.

On the day of trial, when the settlement at issue was brokered, counsel simply directed Mr. Metz to sign the document. *Id*., at ¶ 14. He did not explain its terms, including the potential for Mr. Metz to be personally liable for indeterminate expenses associated with clean-up of the PCEs at the Property. *Id*. He did not seek to limit Mr. Metz's exposure on a basis different from

the Property's owner or managers, Mr. Dragul, GDA-RES, and GDA-REM. *Id*. He did not advise Mr. Metz of his right to seek separate counsel or tell him that he should seek separate counsel to protect his interests. *Id*.

Likewise, before Mr. Metz signed the Agreement, neither the Agreement itself, the Attorney General's Office as counsel for CDPHE, nor the Court who entered and signed off on the Agreement as an Order of the Court advised Mr. Metz of his separate rights to conflict-free counsel.

In sum, Mr. Metz did not enter the Agreement voluntarily or with knowledge that he was assenting to potentially millions of dollars of clean-up costs on the same terms as the company, its owners, and its managers, all of whom were straightforward "operators" of the Property.

D. Post-Agreement Cleanup Efforts and Exponentially Compounded Clean-Up Estimates

In early 2015, following entry of the Order, the parties initially proceeded according to its terms. The Defendants and the Receiver each contributed their respective amounts into an escrow account totaling the required $250,000. Upon information and belief, Mr. Dragul contributed the entirety of the Defendants' $100,000 share.

In November and December 2015, funded by the escrow account, soil remediation activities were conducted at the Property in accordance with a CDPHE-approved remediation plan. Ex. E (Affidavit of Colleen Brisnehan), at ¶ 9. Contaminated soil was excavated from underneath an existing parking lot at the old dry-cleaners' location. *Id.* From 2015-2017, Casey Resources, the contractor hired by Mr. Dragul and his entities as contemplated by the Agreement, conducted investigation and characterization work at the site. *Id.*, at ¶ 10.

At some point, Mr. Dragul and his entities replaced Casey Resources with another contractor, Terracon Consultants, Inc. ("Terracon"). On July 2, 2018, Terracon submitted a remediation work plan to CDPHE which contemplated a groundwater treatment and monitoring system and a soil vapor extraction system. *Id.,* at ¶ 11. CDPHE approved this plan on or about July 16, 2018. *Id.* It appears based on pleadings filed by CDPHE that this work has not yet commenced. *Id*.

Remarkably, although the Agreement and Order reflected an estimated remediation cost of $126,540 and $252,200, Terracon recently advised CDPHE that the true cost of remediation is "approximately $583,00 to $833,000." *Id.,* at ¶ 12*;* Ex. F ("Corrective Action Cost Estimate Memorandum," Terracon (Nov. 13, 2018) (hereafter "Terracon Memo")). In fact, certain estimates by Terracon to complete all future cleanup activities with no use-restrictions on the property "yields an estimated cost range of $1,600,000 to $2,400,000." Ex. F, at 2. Thus, the estimated costs of future cleanup in the Terracon Memo represent 1,265 – 1,896% (or 13-19x) greater than the costs estimates in the Agreement signed by Mr. Metz.

Since 2015 and the signing of the Agreement, CDPHE and the environmental contractors, Casey and Terracon, have looked to all of the Defendants *except* Aaron Metz for compliance with its terms. Terracon did not, for example, reach out to Aaron Metz in September 2018 to seek approval to move forward with the remediation. Mr. Metz was not asked, nor did he possess the authority to approve, any of the remediation plans or work. Throughout, CDPHE, Casey Resources and Terracon sought performance of the Agreement from Mr. Dragul and his entities, not from his employee Aaron Metz. To the extent Mr. Metz has been involved as an employee of

GDA-RES, he was required to seek and obtain approval of Mr. Dragul or the Receiver, Brian Baker, regarding any of the remediation work.

Similarly, Mr. Metz was never contacted by CDPHE or the Attorney General's Office in connection with this remediation from 2015 through today. To the extent that CDPHE communicated with counsel for the defendants, counsel never contacted Mr. Metz regarding any remediation efforts.

In short, since the Agreement, the parties have treated Mr. Metz as the non-operator that he was prior to the Agreement.

II. Subsequent Related Litigation

Now, four years after the fact, CDPHE seeks enforcement of the Agreement solely from Mr. Metz by way of a Motion for Order to Show Cause and Contempt Citation filed January 23, 2019. The apparent reason CDPHE seeks enforcement for the first time against Mr. Metz is due to the substantial intervening litigation against Mr. Dragul and his entities, litigation almost entirely instigated by the same Attorney General's Office who brought this action.

A. Criminal Complaint Against Gary Dragul brought by AG's Office

On April 12, 2018, a grand jury returned an indictment against Gary Dragul, Arapahoe County District Court Case No. 2018CR1092. In that case, brought by the Attorney General's Office representing CDPHE in this litigation, Mr. Dragul faces nine counts of Securities Fraud. Ex. G. Mr. Metz was not charged with any criminal conduct in that case and has not been contacted as a witness in connection with the case. Mr. Dragul is set for his third continued arraignment on March 3, 2019.

B. Civil Complaint Against Gary Dragul brought by AG's Office

A few months later, on August 15, 2018, the Attorney General's Office, acting on behalf of the Securities Commissioner for the State of Colorado, instituted a civil action against Mr. Dragul, GDA-RES and GDA-REM in the form of a Complaint for Injunctive and Other Relief (Ex. H); an Ex Parte Motion for Appointment of a Receiver; and an Ex Parte Motion for a Temporary Restraining Order, Order Freezing Assets, Order of Non-Destruction of Records, and Preliminary Injunction. That action, pending in Denver District Court in 2018CV33011 in Division 424, alleges securities fraud committed by Mr. Dragul via his GDA-REM and GDA-RES entities.

Notably, the Attorney General attest in their Complaint that:

> "[GDA-RES and GDA-REM] are referred to collectively as 'GDA.' Dragul is the sole control person of GDA, controlling employees' access to books and records, with sole access to the GDA bank accounts, investor disclosures, and serving as GDA's executive officer."

Ex. H, at ¶ 9. Mr. Metz, then an employee of a GDA entity, is not mentioned in the Complaint nor the supporting documents.

On August 30, 2018, the Denver District Court signed a Stipulated Order Appointing Receiver Harvey Sender for Dragul and the Receivership Property as defined in the Order ("Receivership Order"). Ex. I. The Receivership Order enjoined and stayed all actions that may affect the Receivership Estate, which includes "Dragul…GDA-RES, GDA-REM, and all of their assets, including but not limited to, all real and personal property, including tangible and intangible assets…or 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, or derived directly or indirectly from investor

funds." Ex. I, at ¶¶ 9, 26. Thereafter, the Receiver has entered into agreements to sell property from the GDA entities and has established a claims administration procedure.

On November 9, 2018, the court in the civil securities fraud matter entered a stay of the case as to Mr. Dragul and GDA entities given the pendency of the criminal matter. On January 11th, 2019, the court extended the stay an additional 63 days. The court did not bar any action taken on or behalf of the Receiver. *See* Ex. J, at ¶ 3 . Potential claimants now have until March 18, 2019 to submit a claim against the Receivership Estate.

C. Stay Requested as to All Defendants -- *Except* Mr. Metz.

Following entry of the Receivership Order, on September 26, 2018, Benjamin Kahn, on behalf *only* of defendants Gary Dragul, GDA-RES, GDA-REM and YM Retail filed in this Court "Notice of Receivership and Stay." ("Notice") The Notice specifically excludes Mr. Metz from the Defendants to whom the requested stay should apply.

The Notice states that on August 30, 2018 a "Receivership Order" was entered, in *Rome v. Dragul, et al.*[4] appointing Harvey Sender as Receiver for Mr. Dragul and "related entities." The Notice asserts that the "Receivership Order" "expressly enjoins and stays all actions that may affect the Receivership Estate" and that the "assets of the defendants in this case are part of the Receivership Estate." Notice, at ¶ 1

The Notice was not filed on behalf of Mr. Metz, despite his status as a Defendant, and despite the fact that he was represented by the same counsel as Mr. Dragul and GDA-RES. The request made in the Notice effectively renders Mr. Metz as the *only* defendant to whom the

[4] Case No. 2018CV33011, Denver District Court (the "Receivership Court").

"Settlement Agreement" currently can be enforced. Mr. Metz was not consulted by counsel prior to his filing of the Notice in this Court.

D. Motion to Abandon Property.

On December 13, 2018, the "Receiver's Motion to Abandon Property (YM Retail 07 A, LLC and Safeway Marketplace Manager 07, Inc.)" ("Motion to Abandon") was granted in the civil securities fraud matter, Denver 18CV33011. Ex. K. The Motion to Abandon pertained to the Property subject of the Agreement, specifically "Parcel 1" or the "Contaminated Parcel." *Id.*, at. 3. The Motion to Abandon asserts that "[w]hether the Lender can foreclose only the Clean Parcel and not pay to remediate the Contaminated Parcel is an issue that needs to be addressed in the pending environmental action." *Id.*, at 8, n.2.

E. Plaintiff's Motion for Order to Show Cause and Contempt Citation Against Metz and to Re-Open Discovery

On January 23, 2019, CDPHE through the same Attorney General's Office that is seeking criminal charges against Mr. Dragul, sued Mr. Dragul and the GDA entities, pursued appointment of a Receiver who has authority over the GDA assets, and acquiesced in the stay of the civil action pending the outcome of the criminal case, now seeks to hold Aaron Metz responsible for the entire increased cost of remediation of the Property. In fact, in their Verified Complaint against Mr. Dragul in Denver 18CV33011, the Attorney General's Office swears that "Dragul is the sole control person of GDA, controlling employees' access to books and records, with sole access to the GDA bank accounts, investor disclosures, and serving as GDA's executive officer," and thereby conceding that Mr. Metz lacks control and authority over GDA and, of course, any ownership interest, financial stake, or control it has or had in or concerning the Property. Ex. H, at ¶ 9.

Despite the fact that he was a mere employee of Mr. Dragul and the GDA-RES, received no financial benefit from the contamination or clean-up of the Property, and no longer is affiliated with the indicted and civilly-sued entities, CDPHE argues that Mr. Metz "willfully violated the" Agreement and Order "by not funding the Remediation Work in derogation of the authority and dignity of the Court." Plaintiff's Motion for Order to Show Cause and Contempt Citation Against Defendant Aaron Metz and to Re-Open Discovery (hereafter "Show Cause Motion") at 6, January 23, 2019.

Argument

I. Rule 60(b)(4): Prospective Application of the Order is No Longer Equitable.

Rule 60(b)(4) authorizes relief from a final judgment or order, irrespective of the lapse of time, where it is "no longer equitable that judgment should have prospective application." Rule 60(b)(4) is rooted in "the historic power of a court of equity to modify a decree in light of changes in circumstances occurring after the date of the judgment." *Craven v. S. Farm Bureau Cas. Ins. Co.*, 117 P.3d 11, 16 (Colo. App. 2004). As Justice Cardozo noted in *United States v. Swift & Company*, 286 U.S. 106, 114 (1932):

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. … Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.

11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.)

A. Changed Circumstances Render Application of the Court's Order Inequitable.

In this case, dramatically "changed circumstances occurring after date of the judgment" render "prospective application of the Court's order inequitable." While the estimated costs of clean-up have mushroomed from $150,000 to anywhere from $500,000 to $2.4 million (Ex. F, at 2), all of the other Defendants have obtained stays of enforcement by virtue of criminal and civil charges lodged against them at the behest of the Attorney General's Office who now seeks unilateral enforcement as to Mr. Metz, a defendant who was only theoretically and marginally liable in the first instance. As to the Property, the state has acquiesced in draining assets from the property's income to benefit the lender without regard to the clean-up costs and efforts, and now, in permitting the Receiver to withdraw without any known meaningful participation in the remediation funding. By waiting four years to even engage with or contact Mr. Metz regarding the clean-up efforts, the state has waived its equitable arguments that he alone should bear the brunt of the magnified clean-up costs. The specific changed circumstances rendering enforcement of the Order as to Mr. Metz inequitable include:

1. Indictment of Mr. Dragul.

Mr. Dragul, the "sole control person" of GDA entities who "controlled employees' access to books, had sole access to bank accounts, and was GDA's executive officer," has been indicted on allegations of securities fraud. On April 12, 2018, a Grand Jury Indictment was filed by the Attorney General. *See* Ex. G. The Indictment states that Mr. Dragul is the president, registered agent, and manager of GDA. Mr. Dragul is the sole defendant named in the Indictment, and Mr. Metz is not named in the Indictment nor is he listed as a witness by the Attorney General. The case is scheduled for Arraignment in March of 2019. Because of the pendency of the criminal

case, a stay has been entered barring any separate suit against Mr. Dragul for contribution to the clean-up costs. *See* Notice, at ¶ 2, Ex. I, at ¶¶ 9, 26.

2. Complaint for Injunctive and Other Relief.

The Attorney General, on behalf of the Securities Commissioner, filed a "Complaint for Injunctive and Other Relief" against Mr. Dragul and the GDA entities subject to the Agreement. Ex. G. On August 15, 2018, the Attorney General filed the Complaint stating that Mr. Dragul managed the GDA entities and was indicted on nine counts of securities fraud for failing to pay back investors on promissory notes he issued. On the same day the Complaint was filed the court issued a "Temporary Restraining Order, Order Freezing Assets, Order of Non-Destruction of Records, and Preliminary Injunction."

3. Receivership Order.

The "Complaint for Injunctive and Other Relief" and ensuing proceedings resulted in a Stipulated Order Appointing Receiver being issued on August 30, 2018. The Receivership Order stays all actions that may affect the Receivership Estate that includes the assets of Gary Dragul and GDA-RES and GDA-REM. Ex. I.

4. Notice of Receivership and Stay.

On September 26, 2018, prior counsel for Mr. Metz has asserted that the "stay" resulting from the Receivership Order applies in the instant matter to all Defendants except Mr. Metz. The Notice was filed on behalf of all Defendants, *except* Mr. Metz. *See* Notice at 2.

5. Motion to Abandon.

On December 13, 2018, the "Receiver's Motion to Abandon Property" ("Motion to Abandon") was granted in 18CV33011, giving the Receiver permission to abandon the interests

in the Property, at 6460 East Yale Avenue. The Motion to Abandon asserts that "[w]hether or not the Lender can foreclose only the Clean Parcel and not pay to remediate the Contaminated Parcel is an issue that needs to be addressed in the pending environmental action." Ex. K, at 8 n.2 Whether or not the Lender is required to pay to remediate the parcel that is the subject to the Agreement is an issue that should be resolved in advance of any action to enforce the Agreement as to Mr. Metz solely. Mr. Metz was not consulted prior to the filing of the Motion to Abandon nor was he a participant in the litigation in which it was resolved.

6. Estimated Remediation Costs Have Multiplied Exponentially.

On November 13, 2018, CDHPE provided undersigned counsel with the "Terracon Memo" which states the estimated costs for remediation range from $1,600,000 to $2,400,000, orders of magnitude greater than any costs estimated in the Agreement. More recently, CDHPE has asserted that the remediation will cost between $543,000 and $833,000, which is two to four times greater than that estimated in the Agreement. Show Cause Motion at 5.

7. Motion for Order to Show Cause and Contempt Against Mr. Metz.

On January 23, 2019, the Attorney General filed the "Plaintiff's Motion for Order to Show Cause and Contempt Citation Against Defendant Aaron Metz and to Re-Open Discovery". ("Show Cause Motion"). The Show Cause Motion references the Civil Fraud Action filed by the Attorney General against Mr. Dragul and his entities, the resulting Receivership Order and the Notice of Receivership Stay filed in this case by prior counsel in support of their requests.

B. Unforeseen Events Unrelated to Mr. Metz Shape the Need for Relief.

Here, "events shape the need" for relief from the Court's order. The Agreement did not contemplate the significant and unpredictable "changed circumstances occurring after the date of

judgment." The changed circumstances render the prospective application of the Agreement to Mr. Metz no longer equitable. The consequences of permitting the application of the Agreement to apply prospectively, in light of the "changed circumstances," are clear. The indictment of Mr. Dragul and sequence of events that followed will leave Mr. Metz as the sole defendant responsible for payment of remediation costs that far exceed those estimated in the Agreement.

Mr. Metz was not indicted. Mr. Metz is not named in the Attorney General's complaint. Mr. Metz is not subject to the Receivership Order. Mr. Metz was not named by prior counsel as a defendant to whom the "stay" should apply. Consequently, Mr. Metz, and not the individual who controlled the GDA entities, its employees and finances, is left holding the bag based on actions unrelated to his own, and events in which he had no part, during which time he was deprived of conflict-free counsel. Equity demands relief from the Order.

II. Rule 60(b)(5): Relief from the Operation of the Court's Order is Justified for Other Reasons.

Rule 60(b)(5) permits relief from judgment, irrespective of the lapse of time, for "any other reason justifying relief from the operation of the judgment." Mr. Metz claims relief alternatively under these provisions based on the circumstances in this case.

Under the "residual" Rule 60(b) grounds for relief, the Court has broad authority to grant relief from judgment by vacatur or other means when necessary to accomplish justice. As the United States Supreme Court held in *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949):

> Furthermore 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

See Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538, 542 (2d Cir. 1963) (holding that "[t]his catch-all clause in Rule 60 gives the district court a grand reservoir of equitable power to do justice in a particular case," and that it "should be liberally construed when substantial justice will thus be served") (internal quotations omitted).

The "force of C.R.C.P. 60(b) is to grant a trial court which has rendered judgment the ability to reconsider and, if appropriate, to change its ruling when [a] significant new matter of fact or law arises which is extrinsic to it because of not having been presented to the court." *State Farm Mut. Auto. Ins. Co. v. McMillan*, 925 P.2d 785, 789–90 (Colo. 1996)(citing *E.B. Jones Constr. v. City & County of Denver*, 717 P.2d 1009, 1013 (Colo.App.1986)) (internal citations omitted). C.R.C.P. 60(b) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Canton Oil Corp. v. Dist. Court In & For Second Judicial Dist.*, 731 P.2d 687, 694 (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2851, at 140 (1973)). To achieve this balance, the rule provides in clause 60(b)(5) that trial courts may set aside a judgment for "*any other reason justifying relief from the operation of the judgment.*" C.R.C.P. 60(b)(5) (emphasis added). *See generally* 5 Robert M. Hardaway & Sheila K. Hyatt, *Colorado Civil Rules Annotated,* at 169-72 (2d ed. 1985).

These "residual" relief provisions of Rule 60(b) apply forcefully to the facts of this case. Mr. Metz acknowledges, for purposes of this Motion, the validity of the Court's Order pertaining to the Agreement. Nonetheless, the facts unquestionably give perspective and context to whether the judgment is equitable. This Court should open the "grand reservoir [of] equitable…justice," *Radack,* 318 F.2d at 542, and relieve Mr. Metz from the judgment.

A. Significant New Matters of Fact and Law Support Relief.

Compounding the inequitable prospective application of the Agreement to Mr. Metz are the actions of the Attorney General and prior counsel for Mr. Metz. The Complaint filed by the Attorney General against Mr. Dragul and his GDA entities resulted in a Receivership Order which is asserted to stay enforcement of the Agreement against all Defendants, except Mr. Metz. The Notice filed in the instant matter, by Mr. Metz's own counsel at the time of filing, specifically asks this Court to construe the Receivership Order as a stay as to all Defendants, except Mr. Metz. Certainly, the indictment of Mr. Dragul and resulting Complaint, Receivership Order, request for stay and Motion to Abandon are "significant new matter(s)" of fact and law which are "extrinsic" to the Agreement because of not having been presented to the Court.

The changed circumstances when coupled with the Attorney General's admissions that Mr. Dragul was the "sole control person" and "executive officer of GDA" warrants the Court's exercise of its "broad authority to grant relief from judgment is necessary to accomplish justice."

B. Mr. Metz's Execution of Settlement Agreement Product of Conflicted Counsel

Until November 2018, prior counsel represented multiple defendants in this instant matter. Mr. Dragul, GDA-RES d/b/a the GDA Companies, and Mr. Metz, were represented by the same attorney at the time of the Settlement Agreement and up to and including when the Notice was filed requesting a stay on behalf of all Defendants but Mr. Metz. The representation of the Defendants created a "Current Conflict of Interest" not consented to by Mr. Metz.

1. Rule 1.7.

Colorado Rule of Professional Conduct 1.7 provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A "concurrent conflict of

interest" exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." If a concurrent conflict of interest exists "a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) **each affected client gives informed consent, confirmed in writing**."

Colo. RPC 1.7(b)(1-4)[5]

A conflict of interest exists if there is a "significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Colo. RPC 1.7, Cmt. 8. A lawyer when "asked to represent several individuals . . . is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others." *Id.* A conflict "in effect forecloses alternatives that would otherwise be available to the client." *Id.*

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[5] "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. Colo. RPC 1.0(b) and (e).

To evaluate whether or not representation of one client will be materially limited by representation of another, the "critical questions" are:

- "the **likelihood that a difference in interests will eventuate** and, if it does,"
- "whether it will **materially interfere with the lawyer's independent professional judgment in considering alternatives** or"
- **"foreclose courses of action that reasonably should be pursued on behalf of the client."**

Colo. RPC 1.7, Cmt. 8.

Representing codefendants implicates the risk that a "conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." *Id.*, Cmt. 23.

Informed consent confirmed in writing ordinarily requires a lawyer to (1) disclose the facts and circumstances giving rise to the conflict; (2) explain the advantages and disadvantages of the proposed course of conduct; (3) discuss other options or alternatives; and (4) in some circumstances, advise the client to seek advice from independent counsel. Colo. RPC 1.0, Cmt. 6.

For informed consent to be valid, the lawyer must explain the risks and benefits in sufficient detail. The analysis of the Wisconsin Supreme Court is instructive:

> An effective waiver of a conflict or potential conflict of interest which is knowing and voluntary requires the lawyer to disclose the following: (1) the existence of all conflicts or potential conflicts in the representation; (2) the nature of the conflicts or potential conflicts, in relationship to the lawyer's representation of the client's interests; and (3) that the exercise of the lawyer's independent professional judgment could be affected by the lawyer's own interests or those of another client. On the part of the client, it also requires: (1) an understanding of the conflicts or potential conflicts and how they could affect the lawyer's

> representation of the client; (2) an understanding of the risks inherent in the dual representation then under consideration; and (3) the ability to choose other representation.

In re Guardianship of Lillian P., 617 N.W.2d 849, 856 (Wis. Ct. App. 2000).

As explained below, the representation by prior counsel of all the Defendants created a "Current Conflict of Interest" which was not consented to by Mr. Metz. Prior counsel failed to disclose the existence of the conflict which precluded any communication with Mr. Metz about the potential consequences.

2. Prior Counsel's Representation of Mr. Metz was "Materially Limited" by his Responsibilities to Mr. Dragul and GDA-RES.

Here, prior counsel represented Mr. Dragul, GDA-RES, the entity over which Mr. Dragul had "sole control," and Mr. Metz in the same case. The representation of the Defendants created a "concurrent conflict of interest" due to the "significant risk" that the representation of Mr. Metz would be "materially limited" by prior counsel's responsibilities to Mr. Dragul and his entity.

Mr. Metz was an employee of Mr. Dragul and lacked any control of GDA-RES. His limited role and position in relation to that of Mr. Dragul made it clear to prior counsel that "difference in interests" would eventuate to interfere with his independent judgment in considering alternatives for Mr. Metz and foreclose courses of action that reasonably should have been pursued on behalf of Mr. Metz.

3. Representation of Mr. Dragul Foreclosed Courses of Action that Should Have Been Pursued.

Colo. RPC 1.8(g) states that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client." The Agreement at issue

was an aggregate settlement of the claims against Mr. Dragul and the entities over which he had "sole control." The Agreement was made without the informed, written consent of Mr. Metz. In fact, the Agreement was not discussed with Mr. Metz prior to the first day of trial when it was presented to him by prior counsel. The limitations as to him were not discussed, the terms were not explained, and the potential unlimited future liability was never explained, much less the product of his knowing consent. Ex. C, at ¶¶ 14-15.

4. No Waiver of the Conflict of Interest was Addressed by Prior Counsel or Provided by Mr. Metz.

Even if a lawyer reasonably believes that he will be able to provide competent representation to multiple clients, and representation is legal and does not involve one client making assertions against another, each affected client must give informed consent to waive the conflict. No such waiver exists here. *Id.*, at ¶ 10.

Mr. Metz was not informed of the conflict by prior counsel. *Id.*, at ¶ 9. Prior counsel did not communicate adequate information and explanation to Mr. Metz about the "material risks of and reasonably available alternatives to the proposed course of conduct" presented in the Agreement. In short, prior counsel failed to communicate or explain the significant risk that representation of Mr. Metz would be materially limited by the lawyer's responsibilities to Mr. Dragul and his entities. At no time was Mr. Metz was advised by prior counsel of the material limitations in his ability to "recommend or advocate all possible positions" on behalf of Mr. Metz because of his duty of loyalty to Mr. Dragul and his entities.

III. Rule 62: A Discretionary Stay is Warranted.

An order staying the execution of, or any proceedings to enforce the January 20, 2015, Order pending his motion for relief from the order is warranted under C.R.C.P 62(b)(2). Rule

62(b)(2) states that "[i]n its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment . . . pending a motion for relief from a judgment or order made pursuant to C.R.C.P. 60."

Given the circumstances articulated above, the Court should exercise its discretion and stay the execution or any proceedings to enforce the Agreement. Failure to stay the proceeding would result in CDHPE enforcing the Agreement as to a single defendant, Mr. Metz, despite the Attorney General's complicity in efforts to stay the proceedings as to all other Defendants, including the Mr. Dragul, who had "sole control" of the GDA entities.

The Show Cause Motion filed by CDHPE exploits circumstances that are unrelated that result directly result from the Attorney General's Indictment of Mr. Dragul, filing of the Complaint for Injunctive Relief against Mr. Dragul and his entities, and resulting Receivership Order. The Court should utilize its discretion and stay the enforcement of the Agreement, judgment pending the above motions for relief.

IV. Rule 57.

Mr. Metz also moves the Court pursuant to C.R.C.P 57 for a declaratory judgment as to the "construction" of the Agreement as it is a "writing constituting a contract" and "order" in which he is a "person interested." Here, Mr. Metz is entitled to a declaratory judgement of the construction and validity of the Agreement, given the present circumstances.

At the time the Agreement was executed, the Defendants and the Receiver estimated that the cost of remedial work to be bring the property into compliance would be between $126,540 and $252,200. Ex. A at ¶ 5 The Agreement provided that if the cost of work was less than $250,000, the Defendants and the Receiver would cause the difference to be released from

escrow to the Owner and Receiver in proportionate shares. *Id.* at ¶ 8(c). The Agreement further provided that if the cost of work was more than $250,000 the Defendants would be responsible. *Id.*, at ¶ 8(d).

The parties to the Agreement understood that highest cost estimate for completion of the remediation work was $252,200. *Id.*, at ¶ 5 The performance required by the Agreement reflects this understanding. The Agreement required the Defendants to put $100,000 in escrow in the first eight months. *Id.*, at ¶ 6. The Agreement required that the Receiver deposit another $150,000 into escrow on August 3, 2015. *Id.*, at ¶ 7. The escrow payments required amounted to $250,000 for good reason. $252,200 was the highest cost estimate for completion of the work.

Mr. Metz moves the Court to issue a declaratory judgment that the "construction" of the Agreement requires to the Defendants to pay the "cost of the work" up to the highest estimated cost at the time of the Agreement, specifically $252,200.

Mr. Metz further moves the Court to issue a declaratory judgment finding that the prior counsel violated Colorado Rule of Professional Conduct 1.7 and 1.8, and the Agreement was the product of conflicted counsel.

Additionally, consistent with the language of the Agreement, Mr. Metz moves the Court to issue a declaratory judgment finding that the Agreement should be construed to apply "joint and several liability" only to the duty to "perform[] the Work," following the requirement that the defendants "shall cause the Work to be commenced on or before August 3, 2014."

Finally, Mr. Metz moves the Court to issue a declaratory judgment finding that the Agreement does <u>not</u> require the defendants to advance funding for the cost of work to any

environmental consultant to pay for the cost of the work, as the Agreement includes no such provision.

Conclusion

WHEREFORE, Mr. Metz moves pursuant to C.R.C.P 60(b) for an order relieving him from the "Order of the Court" requiring him to proceed according to terms set out in the Agreement. Mr. Metz further moves this Court pursuant to C.R.C.P 62(b)(2) for an order staying any proceedings to enforce the January 20, 2015, order pending his motion under Rule 60(b). Additionally, Mr. Metz moves this Court pursuant to C.R.C.P 57 for a declaratory judgment that the Agreement should be construed to require the Defendants to pay the "cost of the work" up to $252,200, that prior counsel violated Colorado Rule of Professional Conduct 1.7 and 1.8, and that the Agreement was the product of conflicted counsel and contains no requirement that any defendant must advance costs of clean-up.

Dated February 27, 2019.

Respectfully submitted,

s/ Brian R. Leedy

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Certificate of Service

I certify that on February 27, 2019, a copy of this *Defendant Aaron Metz's Motion for Relief from Judgment, Request for Stay and for Declaratory Judgment* was served via Colorado Courts E-filing system and or U.S. Postal Mail to the following parties:

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