DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202	
Case No. 2013-CV-33076; Division 203 **Plaintiff**: COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, v. **Defendants**: 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.	
Case No. 2018-cv-3301; Division 424 **Plaintiff**: DAVID S. CHEVAL, ACTING SECURITIES COMMISSIONER FOR THE STATE OF COLORADO, v. **Defendants**: GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; and GDA REAL ESTATE MANAGEMENT LLC.	**▲ COURT USE ONLY ▲** Case Nos. 2013CV33076 / Div. 203 2018CV33011 / Div. 424
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REPLY IN FURTHER SUPPORT OF AARON METZ'S MOTION TO CONSOLIDATE

Aaron Metz, through his attorneys Haddon, Morgan & Foreman, P.C., respectfully submits this reply to the Joint Response of the Securities Commissioner and the Receiver

(collectively, "Respondents") in Opposition to Aaron Metz's Motion to Consolidate ("Response"). As further grounds, he asserts as follows:

ARGUMENT

I. The Motion to Consolidate Should Be Granted

A. The Cases Involve Common Questions of Fact

Rule 42(a) contains one prerequisite to consolidation: that the actions involve a "common question of law or fact." Such is the case here: both actions (at their current stages of litigation) concern competing claims for the same property, the assets of Dragul and the Dragul Entities. In the Environmental Action, the justiciable question is who shall pay what amount to whom for purposes of remediating the property pursuant to the Remediation Order. In the Civil Fraud Action, as currently postured, the justiciable question concerns the assets available in the Receivership Estate and their ultimate distribution. A common question of ownership over property is sufficient grounds for consolidation of diverse cases. *See Mortgage Investments Corp. v. Battle Mountain Corp.,* 56 P.3d 1104 (Colo. App. 2001), *as modified on denial of reh'g,* (Jan. 17, 2002) *and rev'd on other grounds and remanded,* 70 P.3d 1176 (Colo. 2003), *as modified on denial of reh'g,* (June 9, 2003) (where two cases had common question of ownership of single parcel of property, consolidation was proper even where two actions had some common but some diverse parties).

The defendants are nearly identical, save for Mr. Metz. In the Environmental Action, it is Dragul, GDA RES and GDA REM, Dragul's property YM Retail, and Aaron Metz. In the Civil Fraud Action, the defendants are Dragul, GDA RES and GDA REM. The plaintiffs in the two actions are two different state agencies, CDPHE and the Securities Commissioner, however, they

both are represented by the same lawyer, Colorado Attorney General Philip Weiser. *Askew v. Gerace,* 851 P.2d 199 (Colo.App.1992) (consolidation proper where both plaintiffs represented by the same attorney); *Battle Mountain Corp.,* 56 P.3d at 1108 ("In addition to the common question of law, the cases involved similar witnesses, similar documentary evidence, and similar parties. Many of the parties were involved in at least two of the various cases consolidated with [the other case]"). Indeed, the commonality of defendants is precisely why consolidation is appropriate: Mr. Dragul's assets are being distributed in the one action rendering fewer assets available for remediation in the other.

The Commissioner and Receiver argue that, because the two state agencies (CDPHE and the Commissioner) have "different statutory mandates and different enforcement authority, consolidation is inappropriate." Resp. at 4. This is a red-herring. Neither case is at its inception. CDPHE is not in the process of initiating an enforcement action or setting a trial to determine liability; it is moving to enforce the Remediation Order, and only doing so with respect to Aaron Metz rather than the three co-defendants who are also defendants in this action. Likewise, the Civil Fraud Action is not litigating liability pursuant to CRS § 25-15-101 *et seq*.; the Commissioner has already settled with Dragul, Dragul and his Entities have consented to the appointment of a Receiver, and the case currently consists of pursuing assets with an eye towards their eventual distribution.

In any event, there is no requirement, suggested by the Response, that the parties be identical. *See Askew, supra* (court did not abuse its discretion in consolidating cases even where parties in the two cases were not identical). Nor must the cases involve the same transaction. *Rosenthal v. Four Corners Oil & Minerals Co*., 403 P.2d 758, 760 (Colo. 1965) ("It cannot be

denied that the transactions sued upon were different, but this fact alone should not prevent the trial court from granting the motion where other valid reasons exist, such as the identical parties in each suit, common questions of laches and estoppel in each case, and the fiduciary issue.").

B. Consolidation Will Promote Judicial Efficiency

Respondents argue consolidation impairs judicial efficiency because, they complain, they will become "embroil[ed]…litigating issues concerning contaminated property." Not so. As they are well aware, all issues "concerning contaminated property" have long-since been resolved. Currently, the only issues pending are enforcement of the Remediation Order, an Order as to which all three defendants in the Civil Fraud Action are parties (pre-existing the Receivership, no less).

They claim there will be "substantial delay" and "additional costs" because consolidation means "dragging the Receiver back into litigation involving the YM Property he has previously abandoned." Resp. at 5. Apart from the fact that the "litigation" does not involve the YM Property but (at this stage) funding of the Remediation Order, Respondents apparently misapprehend the nature of consolidation. The consolidation of two independent cases for trial does not merge two actions into one action in which each party formally becomes a party to the other action. *Biel v. Alcott*, 876 P.2d 60 (Colo. App. 1993); *Mission Viejo Co. v. Willows Water Dist*., 818 P.2d 254 (Colo. 1991). *See also National Farmers Union Property and Cas. Co. v. Frackelton,* 650 P.2d 571 (Colo. App. 1981), *judgment aff'd,* 662 P.2d 1056 (Colo. 1983) (the mere consolidation of two negligence actions against a power company arising from one incident did not make the second plaintiff a party to the first plaintiff's action such that the power company's insurer was entitled to a judgment for contribution in a separate action against the

second plaintiff based on the jury's special finding as to relative fault among the three parties in the consolidated action)." 5A Colo. Prac., Handbook On Civil Litigation § 4:5 (2019 ed.).

Indeed, consolidation will promote judicial efficiency, regardless of which courtroom hears the case. One court will hear both sets of claims against the three common defendants, and the two non-common defendants, to decide appropriate apportionment of a limited set of assets to satisfy two different enforcement actions prosecuted by the same attorney's office. To continue to have two separate actions proceeding on two different time lines risks forcing Mr. Metz to litigate the same question in two different fora. After expending the resources to argue before one judge that he should not have to pay the entire remediation costs, he would then be forced to come litigate the same question in the second courtroom, hopefully before all the assets from his co-defendants have been distributed to others whose interests are solely monetary in nature. The two plaintiffs in this case are represented by the attorney general whose salary, and those of his deputies, are paid by the state. Mr. Metz has no such pool of funding. Forcing him to litigate and re-litigate the same question before different judges is the kind of harm that Rule 42(a) was meant to prevent.

II. There is no procedural bar to consolidation.

Respondents' procedural complaints also lack merit. First, counsel believed that the motion to consolidate *had* been filed in each case number consistent with C.R.C.P. 121, § 1-8; the caption was designed to be filed in both matters and counsel for the parties in both matters were served with the Motion. The motion was filed on the motions filing deadline in the 2013cv33076. Yet, for reasons that are not currently clear, the motion does not show in the

docket of 2013cv33076. Counsel is moving to file it out of time in that action. Because all counsel were served, there is no prejudice to any party due to the clerical error.

Second, it is up to the Courts considering the motions to consolidate to determine the most efficient and effective means of consolidation. Although C.R.C.P. 121, § 1-8 indicates that the later filed case be consolidated with the earlier filed one, that is so "unless otherwise ordered by the court." Should the courts involved decide that one is better situated to hear the matters than the other, such would be their prerogative. Counsel for Mr. Metz is concerned only with not having to re-litigate identical issues, not where his litigation occurs.

CONCLUSION

Because there exists a significant common question of fact, the parties are nearly identical, save for the plaintiffs who are represented by the same counsel, and because judicial efficiency would be promoted, Mr. Metz respectfully requests that the two above-captioned cases be administratively consolidated.

Dated January 10, 2020.

Respectfully submitted,

s/ Laura A. Menninger

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Certificate of Service

I certify that on January 10, 2020, a copy of this *REPLY IN FURTHER SUPPORT OF AARON METZ'S MOTION TO CONSOLIDATE* was served via Colorado Courts E-filing system and or U.S. Postal Mail to the following parties:

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