DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202	
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 No. 2018CV33011 Division: 424
Laura A. Menninger, #34444 Jeffrey S. Pagliuca, #12462 HADDON, MORGAN AND FOREMAN, P.C. 150 East 10th Avenue Denver, CO 80203 Tel: 303.831.7364 Fax: 303.832.2628 lmenninger@hmflaw.com jpagliuca@hmflaw.com *Attorneys for Aaron Metz*	

REPLY IN FURTHER SUPPORT OF AARON METZ'S MOTION TO INTERVENE AND TO LIFT STAY FOR LIMITED PURPOSES

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 Intervene and Lift Stay ("Response"). As further grounds, he asserts as follows:

INTRODUCTION

Mr. Metz is not, as the Commissioner and Receiver contend, simply an "investor" or a "creditor" "no different than Dragul's other defrauded creditors" attempting through his intervention to "prematurely adjudicate plan issues" or "short-circuit the orderly prosecution of

this case." Resp. at 5, 8. Unlike any of Dragul's "defrauded creditors" who simply seek a return on their investments, Mr. Metz imminently faces being held in contempt of court for not fully funding the environmental remediation of a property he never owned for damage he never caused. Should he fail to pay the potentially millions of dollars in clean-up costs *forthwith*, he can be punished up by means of remedial sanctions up to and including a sentence to jail. And because the Colorado Department of Public Health and Environment ("CDPHE") has chosen (through their conflicted counsel) not to intervene in this case to secure immediate funding from Dragul or GDA RES for purposes of the environmental remediation, Mr. Metz has unwittingly been forced to interject in this action the need for immediate funding from contributing co-defendants Dragul and GDA RES to prevent further public harm to the environment occasioned by their failure to fund and perform under the Remediation Order.

Refusal to permit intervention by Mr. Metz "may as a practical matter impair [his] ability to protect [his] interest[s]"; in the interim, he may be held in contempt of court and jailed for failure to fully fund the remediation and the property may remain environmentally contaminated with dangerous pollutants. Numerous state and federal courts have held impairment of the right to contribution, and potential harm to environmental interests, present adequate grounds for intervention. Given the stay as to all actions against Dragul and GDA RES or their assets, Mr. Metz lacks alternative fora for adjudicating his interests against them. Nor are the Commissioner, Receiver or other parties to this action adequately representing Mr. Metz's rights herein. The Respondents' contention that intervention will lead to increased costs of litigation are overblown, have been rejected as defenses to intervention by other courts, and, in any event, overlook the real and substantial increase in costs attendant to forcing Mr. Metz to sequentially

litigate contempt in one court, attempt to preserve his rights as a claimant in this action, and then later seek contribution from Dragul and GDA RES, after all of their assets have been distributed according to a plan that places no priority on environmental concerns. For the additional reasons set forth below, Mr. Metz requests that this Court grant his Motion to Intervene.

ARGUMENT

I. Mr. Metz Satisfies Rule 24(a)(2) Intervention Test

A. Mr. Metz Has Interests in Both Dragul and GDA RES's Property and Also in Lifting the Stay of Proceedings to Further Prompt Environmental Remediation

Mr. Metz easily satisfies Rule 24(a)(2)'s first requirement that he possess "an interest relating to the property … which is the subject of the action." *See also Cherokee Metro. Dist. v. Meridian Svc. Metro. Dist.,* 266 P.3d 401, 404 (Colo. 2011) (quoting *Feigin v. Alexa Grp., Ltd.* 19 P.3d 23, 29 (Colo. 2001)). Colorado determines the existence of an interest "in a liberal manner" through a "flexible approach." *Id.* Although the Commissioner and Receiver concede Mr. Metz is an interested party due to his status as a Dragul investor (Resp. at 5-6), his interest in this action goes beyond simply recovering on a bad investment. The determination of which "interest" is at stake affects the determination of the second and third prongs of the Rule 24(a)(2) test: that failure to intervene will impair that interest and the interest is not adequately represented by existing parties.

In *U.S. v. Albert Inv. Co., Inc.*, 585 F.3d 1386 (10th Cir. 2009), the Tenth Circuit considered a proposed intervention under the analogous federal rule 24(a) to protect a right of contribution in a CERCLA environmental remediation case. The proposed intervenor wanted to participate in an action that, if successful, would have precluded its right to seek contribution for

the costs of remediation. The Tenth Circuit held such a right a "sufficient interest" for purposes of intervention, noting "Congress designed CERCLA to promote both 'timely cleanup…and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.'" *Id.* at 1397 (quoting *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599 (2009)). "Allowing intervention furthers the latter of those goals because Union Pacific [the intervenor] will have the opportunity to argue that the consent decree will result in it paying more than its fair share of the cleanup costs." *Id.* Similarly, Mr. Metz seeks the ability to argue that the contempt proceeding will result in his paying more than his fair share of the cleanup costs and that delay in adjudicating could preclude his ability to obtain contribution *and* delay timely cleanup of the property. He seeks to make such an argument in this action *and* to make such argument in the Enforcement Action by bringing an Order to Show Cause against Dragul and GDA RES. *See also Western Energy Alliance v. Zinke*, 877 F.3d 1157, 1165 (10th Cir. 2017) ("indisputable that a prospective intervenor's environmental concern is a legally protectable interest"); *San Juan County v. U.S.,* 503 F.3d 1163, 1199 (10th Cir. 2007) (*en banc)* (same).

B. Disposition of this Action May, As a Practical Matter, Impair Mr. Metz's Ability to Protect His Interests

"Under the second part of Rule 24(a)(2), the party seeking intervention must show that it is so situated that the disposition of the underlying action may *as a practical matter* impair its ability to protect its interest. In contrast to the prior version of the rule, which required an intervenor to be potentially 'bound' by the disposition of the underlying action, the current version of Rule 24(a) allows intervention of right where a party's interest may be impaired 'as a practical matter.'" *Cherokee Metro. Dist.*, 266 P.3d at 406 (emphasis added).

Respondents cleverly omit the words, "as a practical matter," when recounting the second element and argue that Mr. Metz's interests are well-protected by the claims administration process in this case where he "will have an opportunity to object to and advocate for priority under any proposed plan of distribution." Resp. at 6. The Tenth Circuit rejected the identical argument when considering whether a similar notice and objection process sufficed to protect the intervenor's interests:

> The notice-and-comment mechanism is not an adequate substitute for intervention, contrary to the government's claims….[T]he government is free to ignore the comments because the notice-and comment mechanism is not statutorily mandated. The district court may also disregard [the intervenor's] comments in the absence of any requirement to consider them or any appellate review of the court's consideration of comments. The failure to consider adequately an intervenor's objections, on the other hand, is subject to appellate review.

Albert Inv. Co, 585 F.3d at 1398-99. Likewise, here the Receiver and Court may choose to ignore or disregard Mr. Metz's request for priority and he will have no appellate recourse.

More importantly, as a practical matter, the contempt proceeding against Mr. Metz is scheduled in a matter of weeks. He may be held in contempt, and, should he fail to satisfy a disproportionate share of the remediation costs, he can be put in jail. The plan of distribution, whenever it might be put forth in a matter of months or years, will come too late for Mr. Metz to cure any contempt. Moreover, even if Mr. Metz makes an argument for priority in the distribution to satisfy Dragul and GDA RES's contribution towards any judgment in the Enforcement Action, the Receiver and this Court would not be obligated to consider his argument and, should he not prevail in obtaining a priority interest, he would have no appellate right. The assets of Dragul and GDA RES may be distributed to other claimants in the Receiver's discretion and there would be no remaining assets from Dragul and GDA RES to

satisfy their contribution obligation. In the meantime, the environmental remediation would not take place and the public would presumably be harmed by the failure to clean up the mess.

Respondents' reliance on the *Alexa Grp.* case is misplaced. In that case, the defrauded investors were "entitled, but not required, to file applications for claims pursuant to the claims resolution process." 19 P.3d at 30. Investors there could opt out of the claims resolution process and bring a private cause of action, thus, without intervention, their future ability to recover (solely monetary) relief would not be impaired in the absence of intervention. *Id*. The *Alexa Grp.* was not subject to a receivership wherein *all* of the defendants' assets were being collected and distributed. Here, the Receivership Order tells a different story. Although a claimant could presumably bring a separate cause of action against Dragul and GDA RES by not agreeing to participate in the distribution process (*see* Receivership Order ¶ 16), such a suit would be futile because (a) due to the stay imposed by ¶ 26, any such suit could not be pursued until conclusion of the Receivership, and (b) the conclusion of the Receivership means *all* of Dragul and GDA RES's assets had been distributed (or spent on the Receiver's fees). Thus, to the extent the *Alexa Grp.* case finds no impairment of interest where a future action may be pursued, here, as a practical matter, no future matters for contribution may be pursued against Dragul and GDA RES. Intervention in this action is necessary to protect Mr. Metz's interests.

C. Mr. Metz's Interests Inadequately Represented by the Parties to the Action.

Mr. Metz also satisfies the final element of Rule 24(a)(2), that his interests are inadequately represented by the parties to this action. The Commissioner and Receiver define Mr. Metz's interests narrowly – as only a defrauded investor rather than a co-defendant facing imminent contempt, so as to cleverly argue that the Commissioner is "charged with protecting

investors and brought this action to further that goal." Resp. at 7. But Mr. Metz is not just a defrauded investor and the Commissioner is not charged with either keeping him out of jail nor protecting the environmental remediation interests pursued by CDPHE for the benefit of the public at large. In fact, it is the Commissioner's sole focus on defrauded investors, to the exclusion of other types of claimants against Dragul and GDA RES, that fully illuminates the injustice of allowing separate actions to proceed simultaneously in two separate courtrooms in the Denver District Court. The Commissioner argues that he is "charged by law with representing" Mr. Metz's interests but that is true only to the extent that Mr. Metz's interests solely relate to being an investor. *Compare Alexa Grp*., 19 P.3d at 31-32 (proposed intervenors interest "in being compensated for their losses coincides directly with the Commissioner's interest in protecting investors").

As the Tenth Circuit has concluded with respect to this prong, "[T]he burden to satisfy this condition is 'minimal,' and that '[t]he possibility of divergence of interest need not be so great in order to satisfy the burden of the applicants." *Western Energy Alliance,* 877 F.3d at 1168 (quoting *WildEarth Guardians v. U.S. Forest Svc.,* 573 F.3d 992, 996 (10th Cir. 2009). "[T]he government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. In litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor." *Id.* (*quoting Utah Ass'n of Ctys. v. Clinton,* 255 F.3d 1246, 1251 (10th Cir. 2001)). The same is true here: simply because the Commission is charged with representing the views of defrauded investors does not mean its'

views may conflict with Mr. Metz's with regard to their respective claims against Dragul and the Dragul entities.

Neither the Receiver nor the Commissioner is intent on securing the most money from Dragul or GDA RES to contribute to any judgment in the Enforcement Action, nor are they bound by statute or otherwise to consider the environmental impact caused by their distribution of funds. Mr. Metz's interests are therefore not adequately represented in this action and intervention as of right should be permitted.

II. The Court Should Lift the Stay in the Receivership Order to Permit Mr. Metz to Pursue Immediate Contempt Against Dragul and His Entities to Be Heard Simultaneously with his Own Contempt

Respondents oppose Mr. Metz's request to lift the stay to permit him to pursue a simultaneous contempt action against Dragul and his Entities because, they contend, Mr. Metz will be permitted to pursue his right of contribution later in this action as a claimant. Resp. at 10. Fundamentally, Respondents misapprehend how a contempt proceeding works. For all of the reasons already set forth *infra*, Mr. Metz faces imminent contempt, an imminent order for him to pay *all* of the remediation costs (currently estimated in the millions of dollars), and failure to do so may result in punitive sanctions. The *timing* of any right to contribution is key, not to mention that Mr. Metz is not seeking money from Dragul or his entities for his own benefit, but rather to fund the environmental remediation of one of Dragul's properties.

Again, the *Albert Inv.* case is instructive. There, the government argued that the intervenor could go "first be found liable in the separate suit, be held liable for a disproportionate share of the cleanup costs, and then establish the settling defendants' liability." 585 F.3d at 1397. For separate reasons, the intervenor in that case would be barred statutorily from later

seeking such contribution. Here, although there would not be a statutory bar to contribution, there would be a practical bar, because this action may already have resulted in the distribution of all available funds to other creditors.

The Receiver is not, as he claims, obligated to "litigate the contempt claims in another forum using Estate assets at the expense of other Estate creditors," no more than the Receiver is obligated to litigate the two criminal actions against Dragul and his Entities. This is a non-sensical argument. What makes less sense is having a Court in the Enforcement Action determine Mr. Metz's disproportionate share of the cleanup costs and then forcing Mr. Metz in a separate action to establish the Dragul and GDA RES's portion of the liability. His individual funds being expended to face double litigation only diminishes the assets available to pay any court-ordered remediation costs.

III. Mr. Metz's Objection to the Turnover Settlement Agreement is Well-Founded

Mr. Metz sought to interpose an objection to the Turnover Settlement agreement. The Commissioner concedes, as he must, that Mr. Metz's objection filed on December 13, 2019 was timely as it was filed within the ten-day period allowed for objections. Resp. at 12 n.5. That the Commissioner and Receiver ignored the objection merely highlights their failure to adequately represent Mr. Metz's interests and the need for intervention. Respondents argue that "there is no basis to prioritize Mr. Metz's claim over other unsecured Estate creditors." *Id*. at 13. To the contrary, none of the other "unsecured Estate creditors" are facing contempt or jail based on Dragul's failure to satisfy an obligation. His interests are far different from those of other "unsecured creditors" for the additional reason that public harm – not just private investor interests – are at stake in the funding of remediation. Imposing an additional judgment against

Dragul diminishes the assets otherwise available to secure contribution from him for purposes of the remediation and Mr. Metz's objection to the settlement agreement was well-founded.

CONCLUSION

As outlined above Mr. Metz is entitled to intervene in the instant matter by right and permission. The Complaint filed by the Attorney General in this action against Mr. Dragul and his GDA Entities resulted in a Receivership Order which is asserted to stay enforcement of the Remediation Order against all Defendants in the Environmental Action, except Mr. Metz and YM Retail. The Notice filed in the Enforcement Action by Mr. Metz's own counsel at the time of filing, specifically asked the Court to construe the Receivership Order as a stay as to all Defendants, except Mr. Metz. As it stands, based on the actions of others, and due to circumstances beyond his control, CDHPE seeks to enforce the Remediation Order against Mr. Metz alone. Consequently, his interest in this matter, and the questions of fact and law in common with the Enforcement Action, support granting his request to intervene.

Likewise, this Court should lift the stay imposed by the Receivership Order to the extent it bars a request by Mr. Metz to join Mr. Dragul and his Entities to the contempt proceedings concerning the failure to fund the remediation of the Property. Permitting Mr. Dragul and his entities' liability for funding in the same hearing, before one judge, conserves judicial resources and those of the parties, ensures that all funds available for the remediation are conserved for that purpose, and reduces the risk of inconsistent judgments in different courtrooms.

Finally, this Court should permit Mr. Metz to intervene for the limited purpose of filing a separate objection to the Proposed Settlement Agreement to the extent it imposes an additional $120,000 judgment against Mr. Dragul.

WHEREFORE, Mr. Metz moves to intervene by right and permission in the instant matter pursuant to Colorado Rule of Civil Procedure 24 and asks that the Receivership Order stay be lifted to the extent it will permit Mr. Metz to file a Motion for Order to Show Cause and Contempt Citation against Defendants Gary Dragul, GDA RES and GDA REM in Case No. 13-CV-33076. He also asks that he be permitted to interpose a limited objection to the Proposed Settlement Agreement.

Dated January 10, 2020.

Respectfully submitted,

s/ Laura A. Menninger
Laura A. Menninger, #34444
Jeffrey S. Pagliuca, #12462
HADDON, MORGAN AND FOREMAN, P.C.
150 East 10th Avenue
Denver, CO 80203
Tel: 303.831.7364
Fax: 303.832.2628
lmenninger@hmflaw.com
jpagliuca@hmflaw.com

Attorneys for Aaron Metz

Certificate of Service

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

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.
1600 Stout St., Suite 1100
Denver, CO 80202
pvellone@allen-vellone.com
mgilbert@allen-vellone.com
rsternlieb@allen-vellone.com

Attorneys for Receiver

Jason E. King
Mary Emily Splitek
Attorney General's Office
1300 Broadway, 7th Floor
Denver, CO 80203
jason.king@coag.gov
emily.splitek@coag.gov

Attorneys for Colorado Dept. of Public Health & Environment

Jeffrey A. Springer
Springer & Steinberg P.C.
1600 Broadway, Suite 1200
Denver, CO 80202
jspringer@springersteinberg.com

Attorneys for Gary Dragul; GDA CO; GDA Real Estate Services, LLC; GDA Real Estate Management LLC

Robert W. Finke
Sueanna P. Johnson
Ralph L. Carr Judicial Building
1300 Broadway, 8th Floor
Denver, CO 80203
Robert.Finke@coag.gov
Sueanna.Johnson@coag.gov

Attorneys for David S. Cheval, Acting Securities Commissioner for the State of Colorado

s/ Holly Rogers