DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
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 ▲
Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2018CV33011 Courtroom: 424

DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER AND ORDERS AUTHORIZING ABANDONMENT AND FOR EXPEDITED BRIEFING SCHEDULE

The Receiver and Defendant Gary Dragul are largely in agreement about the relief Mr. Dragul seeks in his Motion for Clarification of Order Appointing Receiver and Orders Authorizing Abandonment and for Expedited Briefing Schedule ("Motion"). In the Motion, Mr. Dragul sought: (1) clarification of the Order Appointing Receiver ("Receivership Order") that when the Receiver abandons property of the Receivership Estate as permitted under that Order, the Receiver relinquishes ownership and management rights, and recovery from, that property as a matter of law and the property and management of it reverts back to the pre-receivership

owner; and (2) as applied to specific properties, clarification that the orders granting the Receiver's motions to abandon the YM Properties, Residential Properties, Clearwater Property, and Ash & Bellaire Properties have the same effect—that having been abandoned, these properties revert back to the pre-receivership owner and the Receiver relinquishes ownership, management, and recovery from them.

In its Response, the Receiver stated that he "abandoned both Dragul's 17.86% equity interest in YM Retail and the Estate's interest in Safeway Manager and the Estate no longer has any equity interest or management responsibilities concerning the YM Property." (Resp. ¶ 2.)[1] As to YM Retail, that was precisely the relief Mr. Dragul seeks.

With respect to the 15 Residential Properties and the Ash & Bellaire Properties, the Receiver says that its

> motions to abandon the 15 Residential Properties and the Ash & Bellaire Properties sought Court authority to abandon 'any interests the Estate may have' in those properties as well as any obligation to manage or pay expenses for the properties. The Receiver thus intended to abandon the Estate's interest in the 21 LLCs that own those properties, and the Estate's interest in the 21 LLCs that own those properties, and the Estate's interests in X12 Housing, LLC, and X12 Housing Management. The Receiver therefore holds no equity or control interest in these 21 LLCs or the underlying real estate.

[1] The Receiver appears to acknowledge that control of the YM Property reverted back to Mr. Dragul, but questions whether Mr. Dragul's exercise of that control violates the Court's August 30, 2018 Preliminary Injunction Order or enforcement proceeding. (Resp. ¶ 2.) It does not. The terms of the Preliminary Injunction Order do nothing more than restrain and enjoin Mr. Dragul from violating the Colorado Securities Act ("CSA"). (Preliminary Injunction Order, ¶ 3a-c.) Retaining control and management over the YM Property is not a violation of the CSA and, thus, would not violate the Preliminary Injunction Order. To the extent that any court order freezes assets or accounts of Mr. Dragul or any entities managed or controlled by him, the Preliminary Injunction Order expressly states that it does not extend to any assets that are not governed by the Order Appointing Receiver. (*Id.* at ¶ 6.) The Order Appointing Receiver no longer governs the YM Property because the Receiver abandoned it.

The Receiver also notes that Mr. Dragul is the sole shareholder and President of the corporation that owns the LLCs owning these properties.[2] Thus, the Receiver acknowledges it retains no interest or control over these properties and they revert to Mr. Dragul. That also is the relief Mr. Dragul seeks with respect to these properties.

That leaves only the Clearwater Property, and clarifying the Receivership Order to reflect what the law already requires—that when a receiver abandons an asset, it reverts back to the pre-receivership owner and the receiver relinquishes ownership and control of, and the ability to recover profit or equity increase from, the abandoned asset.

I. The Receivership Order Should Be Clarified to Reflect that Abandon Means Abandon

In his Response, the Receiver asserts that "[c]ontrary to its title, the Motion for Clarification does not seek clarification of the Receivership Order[.]" (Resp. 2.) It is unclear why the Receiver says this. In the first paragraph of the Motion, Mr. Dragul framed the issue as a challenge to the Receiver's "position that, under the authority in Paragraph 13(t) of the Receivership Order and applicable bankruptcy law, he may abandon properties yet retain an interest in, and management and control rights over, the single purpose LLCs that own those properties." (Mot. 4.) Mr. Dragul then devoted the next four pages of the motion—the entire argument section—setting forth why, as a matter of law, title to, management of, and the ability to recover profit or increased equity from, abandoned property reverts back to the pre-receivership owner after abandonment. This is a universally-applicable legal principle that applies to all abandoned assets and is not unique to any particular property. While it certainly

[2] That is, with the exception of one condominium which is owned by Mr. Dragul's son. (Resp. ¶ 8 n.5.)

applies to the YM Property, Residential Properties, Clearwater Property, and Ash & Bellaire Properties, that is only because the Receiver abandoned them. Mr. Dragul seeks for the Court to clarify the Receivership Order to make clear that when the Receiver abandons an asset—whether that be the YM Property, Residential Properties, Clearwater Property, and Ash & Bellaire Properties, or any other property, in the past, now, or in the future, he actually abandons that asset.

The Receiver never responded to this argument. In support of this legal principle, Mr. Dragul cited 17 cases, but the Receiver did not address any of them. Rather, he addressed the circumstances of the YM Property, Residential Properties, Clearwater Property, and Ash & Bellaire Properties, but studiously avoided the overarching issue upon which the Motion is based—the effect of the Receiver abandoning, as a legal matter. Having failed to oppose, the Receiver confessed to this relief.[3]

II. Like With Any Other Abandoned Property, By Abandoning the Clearwater Property, the Receiver Relinquished Any Control or Ability to Profit

The Receiver appears to agree Mr. Dragul is entitled to the relief he seeks with respect to the Clearwater Property in part. He says that when he abandoned the two LLCs holding title to the Property, Clearwater Collection 15 ("Collection") and Clearwater Plainfield 15

[3] "Other than motions seeking to resolve a claim or defense under C.R.C.P. 12 or 56, failure of a responding party to file a responsive brief may be considered a confession of the motion." C.R.C.P. 121, § 1-15.3. Courts in other jurisdictions have interpreted similar local rules to "appl[y] not only to instances where a litigant entirely fails to oppose a motion but also where a party files an opposition that addresses only some of the arguments raised in the underlying motion." *Texas v. United States*, 49 F.Supp.3d 27, 39 (D.D.C. 2014) (citing *Hopkins v. Women's Div., Gen. Bd. Of Global Ministries*, 238 F.Supp.2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a [non-movant] files an opposition to a motion . . . addressing only certain arguments raised by the [movant], a court may treat those arguments that the [non-movant] failed to address as conceded.").

("Plainfield"), "were removed from the Receivership Estate and those entities were free to replace GDA Clearwater Management, LLC as manager." (Resp. ¶ 6.) He further states that "[t]he Estate holds no equity or managerial interest in Clearwater." (Resp. ¶ 7.) However, the Receiver also states that Collection and Plainfield "were managed by GDA Clearwater Management, LLC, a wholly-owned Dragul entity that is ultimately managed by GDA Real Estate Management, Inc. whose president and sole shareholder is also Dragul. The Estate did not abandon its interest in GDA Clearwater Management, LLC or GDA Real Estate Management, Inc." (Resp. ¶ 5.) It is unclear what point the Receiver is trying to make with that last statement.

If he merely seeks to make clear that by abandoning the Collection, Plainfield, and the Clearwater Property, he was not abandoning his interest and control in GDA Clearwater Management and GDA Real Estate Management *except as to their management and control of* Collection, Plainfield, and the Clearwater Property, Mr. Dragul has no dispute, and what the Receiver sets forth provides Mr. Dragul the relief he is seeking. If, however, the Receiver means to suggest that by retaining management and control of GDA Clearwater Management and GDA Real Estate Management, he also retains management or control over Collection and Plainfield (and thereby the Clearwater Property), or the right to recover profit or equity increase someone else obtains from the Clearwater Property post-abandonment, that would be contrary to the Receiver's statement that "[t]he Estate holds no equity or managerial interest in Clearwater." (Resp. ¶ 7.)

More importantly, it is contrary to law, as addressed above. Indeed, "[t]he effect of abandonment is that *ownership* ***and control*** *of the asset is reinstated in the debtor with all rights and obligations as before filing a petition in bankruptcy*." *In re Purco*, 76 B.R. 523, 532 (Bankr.

W.D. Pa. 1987) (emphasis added). The Receiver may believe he can abandon a property, and perhaps even the LLCs that own the property, but retain management and control nonetheless by retaining LLCs up the chain. But the relevant question is: Can he? Under black letter law, described above and addressed in the Motion, the answer is no. The Receiver cannot have it both ways. By abandoning a property, the Receiver necessarily abandons management and control of that property as far up the chain of LLCs as that management and control of goes.

Even if the Receivership Estate retains its interests in GDA Clearwater Management and GDA Real Estate for *some* purpose, such as management of other properties that the Receiver has not abandoned, the purpose for which the Receiver retains those assets cannot be to retain control and management of the abandoned properties or to preclude control or management of the properties from being reinstated with the pre-receivership owner. As the Receiver appears to acknowledge (Resp. ¶ 5), Mr. Dragul is the ultimate manager to whom that equity and managerial interest reverts.

The unrefuted case law cited in the Motion, however, makes clear that the effect of the abandonment is to preclude the Estate from recovering any proceeds or profits derived from the abandoned property. For example, any claims to equity derived from the YM Property are now held by the parties who invested in that property in proportion to their investment, including Mr. Dragul. Any claims to equity derived from the Clearwater Property are held proportionally by Mr. Dragul and the 33 other individual members of SPEs that own Collection and Plainfield. Further, as the sole owner and manager of the LLCs that hold title to the 15 Residential and Ash & Bellaire Properties, Mr. Dragul possesses all claims to any equity derived from those properties. Thus, Mr. Dragul is entitled to benefit personally from the profits or proceeds derived

from abandoned properties in proportion to the equity interests he had in the now-abandoned LLCs, and any assets abandoned in the future, prior to the creation of the Receivership.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and enter an order clarifying that under the Receivership Order and the Abandonment Orders (i) the control, management, and equity in the assets already abandoned by the Receiver, including the YM assets, the 15 Residential assets, the Clearwater assets, and the Ash & Bellaire assets, and any assets abandoned in the future, revert to the LLCs that own and manage them, including those held by Mr. Dragul; (ii) those LLCs and their managers, not the Receiver, retain control of assets abandoned by the Receiver and the Receiver is precluded from dictating otherwise; and (iii) equity or profit derived from the disposition of assets abandoned by the Receiver are not property of the Receivership Estate, but belong to their pre-receivership owners, including Mr. Dragul if applicable.

Respectfully submitted this 13th day of April, 2020.

JONES & KELLER, P.C.

/s/ Christopher S. Mills

Paul Vorndran, #22098
Chris Mills, #42042
1999 Broadway, Suite 3150
Denver, CO 80202
Teleph: (303) 573-1600
Facsimile: (303) 573-8133

ATTORNEYS FOR DEFENDANT GARY DRAGUL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF ORDER APPOINTING RECEIVER AND ORDERS AUTHORIZING ABANDONMENT AND FOR EXPEDITED BRIEFING SCHEDULE** was filed and served via the ICCES e-file system on this 13th day of April 2020 to all counsel of record for the parties to the action, including the following:

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout St., Suite 1100
Denver, Colorado 80202
Phone Number: (303) 534-4499
pvellone@allen-vellone.com
mgilbert@allen-vellone.com
rsternlieb@allen-vellone.com

Counsel for Receiver

Robert W. Finke
Janna K. Fischer
Ralph L. Carr Judicial Building
1300 Broadway, 8th Floor
Denver, Colorado 80203
Janna.Fischer@coag.gov
Robert.Finke@coag.gov

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

/s/ Blaine K. Bengtson
Blaine K. Bengtson