

<p><b>DISTRICT COURT, DENVER COUNTY STATE OF COLORADO</b></p> <p>1437 Bannock St. Denver, CO 80202 (720) 865-8612</p>	
<p><b>Plaintiff:</b> Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p><b>Defendants:</b> Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones &amp; Keller, P.C. 1999 Broadway, Suite 3150 Denver, CO 80202 Phone: 303-573-1600 Email: <a href="mailto:pvorndran@joneskeller.com">pvorndran@joneskeller.com</a> <a href="mailto:cmills@joneskeller.com">cmills@joneskeller.com</a></p>	<p>Case No. 2018CV33011</p> <p>Courtroom: 424</p>
<p><b>DEFENDANT GARY DRAGUL’S MOTION FOR EXTENSION OF TIME TO RESPOND TO RECEIVER’S FOURTH APPLICATION FOR PROFESSIONAL FEES AND EXPENSES</b></p>	

Defendant Gary Dragul (“Dragul”) through undersigned counsel, seeks a fifteen day extension to respond to the Receiver’s Fourth Application for Professional Fees and Expenses (“Fee Application”), up to and including June 5, 2020. The Receiver filed the Fee Application on May 11, 2020, seeking an additional \$392,064.76 for himself, his counsel, accountants, and a property manager, for five months of work, in addition to the \$2,546,774.81 in fees he has already been awarded. After deducting this amount from the Receiver’s operating account, that would leave about \$520,000 remaining for distribution to creditors of the Estate—approximately

17% of the fees the Receiver and his colleagues receive. In the Fee Application, the Receiver notes that “Court approval of any motion filed by the Receiver shall be given as a matter of course unless a party objects within ten days after service.” (Fee Application ¶ 6.) Presumably, he is relying on Paragraph 34 of the August 30, 2018 order appointing the Receiver (“Receivership Order”). The ten days runs today, May 21, 2020. But the Fee Application is substantive and fact-intensive. The material submitted with the Receiver’s Fee Application includes 71 pages of time entries alone, and other information bearing on the appropriateness of the fee is similarly voluminous. That, combined with the COVID-19-associated delay in being able to research and obtain relevant information, has prompted Mr. Dragul to seek the modest extension here. Indeed, if the Fee Application were subject to the normal 21-day response deadline under the Rules, Mr. Dragul would be seeking only a four-day extension.

#### **Certification of Conferral**

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Mr. Dragul conferred with counsel for the Plaintiff Commissioner. The Commissioner does not oppose the requested extension. Though the Receiver is not a party in this proceeding, Mr. Dragul also conferred with him as a matter of courtesy. The Receiver, unlike the Commissioner, does oppose. He does so not because the extension will cause any sort of prejudice, but because he believes Mr. Dragul lacks standing to object to the Fee Application, and as such “there is no need for an extension.”

As an initial matter, it is unclear why a substantive argument about whether the movant is entitled to relief on the underlying pleading is a basis to object to an extension to file it. The Receiver is free to argue Mr. Dragul lacks standing to object to the Fee Application in response to Mr. Dragul’s objection. Indeed, in the 2020 action the Receiver filed against Mr. Dragul

(Case No. 2020CV30255, hereafter the “2020 Action”), the Receiver sought two extensions to file an amended complaint in response to Mr. Dragul’s motion to dismiss—the first for over 3 weeks of additional time and the second for another four weeks. Mr. Dragul believes he can demonstrate that such an amended complaint is futile and must also be dismissed because the Receiver cannot sue Mr. Dragul since Mr. Dragul is in the Receivership (among other reasons). However, as a matter of professional courtesy, Mr. Dragul did not oppose the Receiver’s combined extensions of nearly two months, as Mr. Dragul can demonstrate the substantive failings in the planned amended complaint after it is filed.

Moreover, Mr. Dragul has standing to object to the Fee Application. “Resolution of a standing issue presents two considerations: whether the complaining party has alleged an actual injury from the challenged action; and whether the injury is to a legally protected or cognizable interest as contemplated by statutory or constitutional provisions.” *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 781 (Colo. App 1997). Here, Mr. Dragul seeks to be heard on an issue in which he has a clear legally protected interest that will be harmed: if the Receiver inappropriately depletes the Receivership Estate, it directly increases Mr. Dragul’s damages exposure. Unlike in a bankruptcy proceeding, Mr. Dragul is unaware of any operation of law that automatically extinguishes creditors’ claims against the person or entity in receivership at the conclusion of the receivership. That is, unless the creditors waive the right to later assert claims against Mr. Dragul as a condition of receiving an equitable distribution. But they are less likely to do that if the amount available for distribution is low. Moreover, the November 13, 2018 Order Granting Receiver’s Motion to Establish Claims Administration Procedure and to Set Claims Bar Date states on the last page that as a condition of participating in the equitable claims

process, the creditor “shall dismiss (*without prejudice*) any claim or cause of action pending against Dragul[.]” (emphasis added). This raises the question of whether creditors participating in an equitable distribution will be free to refile currently pending claims and file new claims against Mr. Dragul once the Receivership concludes. If they are, and assuming *arguendo* that creditors had legitimate claims against Mr. Dragul, he may remain liable to creditors to the extent their losses are not covered by the distribution from the Receivership Estate. As a result, if the Receiver pays himself and his colleagues excessive fees and thereby depletes the Estate, that directly increases Mr. Dragul’s exposure on creditors’ claims.

And the Receiver sued Mr. Dragul in a separate civil suit—the 2020 Action—purportedly on creditors’ claims. Again, Mr. Dragul’s damages exposure on those claims depends on how much creditors are paid out of the Estate. Since Mr. Dragul’s exposure for damages is directly impacted by the Receiver’s fees, it would be difficult to imagine a scenario in which someone would have more of a clear and direct legally-protected interest establishing standing as Mr. Dragul does here.

Additionally, the Receivership Order and the Receiver’s Fee Application both appear to expressly provide Mr. Dragul a right to object. Paragraph 34 of the Receivership Order provides that “Court approval of any motion filed by the Receiver shall be given as a matter of course unless *any party* objects to the request for Court approval within ten (10) days after service by the Receiver or written notice of such request.” (emphasis added). And Paragraph 6 of the Fee Application says the same. Mr. Dragul is a party to this proceeding. Under the plain language of the Receivership Order and the Fee Application itself, Mr. Dragul has a right to object.

It is not clear anyone other than Mr. Dragul can realistically scrutinize the Receiver's fees. The creditors of the Receivership Estate are not parties. If the Receiver provided them some means of objecting without intervening in the case—and as both the Receiver and Commissioner argued in response to the Hershey Defendants' intervention motion, creditor intervention is disfavored—Mr. Dragul is unaware of that means. Additionally, creditors might be reluctant to object since the Receiver has sued several of them. And for obvious reasons, the Commissioner who was responsible for having the Receiver appointed has little incentive to object. Thus, if Mr. Dragul were unable to object, the Receiver would face no scrutiny of his actions and fees. The Receiver may want to preclude Mr. Dragul from objecting to avoid accountability. But that is not prejudice, and is not a reason to oppose an extension here. The Receiver is free to assert his standing argument in response to Mr. Dragul's objection. The only thing at issue in this Motion is whether Mr. Dragul may have an extension to file that objection.

Here, Mr. Dragul seeks a modest 15-day extension to respond to the Fee Application—which would only be four days if the normal 21-day deadline applied. The Receiver has not, and cannot, demonstrate any prejudice such a short delay would cause. His last fee application was filed in mid-November of last year. If the timing of payment were urgent, one would have expected the Receiver to file this Fee Application sooner than six months following his last one. The Commissioner does not oppose the extension Mr. Dragul seeks, which demonstrates the Commissioner will suffer no prejudice.

Mr. Dragul has not previously sought an extension to respond to a fee application. This action is stayed, but even if it were not, there is no reason to think the requested extension would have any impact on any other applicable deadlines. Good cause exists to grant this extension

because the voluminous material filed with the Fee Application, and the scope of additional evidence that must be gathered and analyzed to respond to it, make the current truncated timeline ill-suited—particularly since the impact of COVID-19 makes gathering such evidence more difficult and time consuming.

Pursuant to C.R.C.P. 121 § 1-11, undersigned counsel is concurrently serving a copy of this Motion upon its client. A proposed order is attached.

WHEREFORE, Mr. Dragul respectfully requests the Court extend the deadline to object to the Receiver's Fee Application by fifteen days, up to and including June 5, 2020.

Respectfully submitted this 21st day of May, 2020.

**JONES & KELLER, P.C.**

/s/ Christopher S. Mills

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*ATTORNEYS FOR DEFENDANT GARY DRAGUL*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION FOR EXTENSION OF TIME TO RESPOND TO RECEIVER'S FOURTH APPLICATION FOR PROFESSIONAL FEES AND EXPENSES** was filed and served via the ICCES e-file system on this 21st day of May 2020 to all counsel of record for the parties to the action, including the following:

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/s/ Christopher S. Mills  
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