

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433	DATE FILED: September 24, 2020 10:00 PM FILING ID: BC1041BF9DAD9 CASE NUMBER: 2018CV33011
<p>Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
ATTORNEYS FOR RECEIVER HARVEY SENDER Patrick D. Vellone (#15284) Michael T. Gilbert (#15009) Rachel A. Sternlieb (#51404) ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1100 Denver, Colorado 80202 Tel: (303) 534-4499 E-mail: pvellone@allen-vellone.com E-mail: mgilbert@allen-vellone.com E-mail: rsternlieb@allen-vellone.com	Case No: 2018CV33011 Division/Courtroom: 424
<p>RECEIVER’S RESPONSE TO DRAGUL’S MOTION TO ORDER CLAIMS ABANDONED</p>	

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC (“GDARES”), GDA Real Estate Management, LLC, and related entities (collectively, “Dragul and the GDA Entities”),

hereby responds to Defendant Gary Dragul's Motion to Order Claims Abandoned ("Motion to Abandon," filed September 4, 2020).¹

I. Introduction

The Motion to Abandon asks the Court to deem abandoned purported "malpractice and related claims" against four lawyers/law firms, a CPA, and an environmental consulting firm: (1) Elizabeth Gold, Dragul's former in-house counsel; (2) Robbins, Kelly, Patterson & Tucker, a Cincinnati law firm; (3) Greenberg Traurig, LLP, a national law firm; (4) Brownstein Hyatt Farber Schreck, a Denver law firm; (5) Kelly Reinhart, a CPA located in New York; and (6) Terracon, a national environmental consulting firm. Having defrauded investors of tens of millions, Dragul now seeks authorization from this Court to sue these professionals to recover funds for his personal benefit in a transparent attempt to shift blame for his own criminal conduct to third-parties.

According to Dragul, these professionals "assisted Mr. Dragul and the GDA Entities," whose assets are part of the Receivership Estate. Mot. to Abandon at 5. Dragul acknowledges the claims he wants to assert are property of the Receivership Estate, and accuses the Receiver of breaching his fiduciary duties by not pursuing them. When Dragul's counsel purported to meet and confer under Rule 121, the

¹ The Motion to Abandon was filed under seal. The Receiver was not asked before it was filed whether he agreed it should be under seal. Subsequently, the Receiver informed Dragul's counsel that he did not agree the Motion should be kept under seal. The Receiver believes it should be available to all creditors and parties in interest.

Receiver asked counsel to identify with specificity: (a) who the claims belong to; (b) the particular claims to be asserted; (c) all factual bases for the claims; and (d) the bases for the Receiver's standing to pursue them. *See* Mot. to Abandon, Ex. 1.

Dragul's counsel failed to respond meaningfully. And despite Dragul's bare assertions of purported "breaches of fiduciary duty" by the Receiver, the Motion to Abandon fails to state a plausible basis or any factual support for any of the claims he seeks to pursue. For example, Dragul seeks leave to sue Elizabeth Gold, his former in-house counsel, because she "handled many of the promissory notes, including documentation and negotiations." Mot. to Abandon at 5. As to Brownstein, Dragul alleges it "assisted with and drafted documents for a variety of transactions[.]" as the basis for a legal malpractice claim. *Id.* These and the other cursory statements relating to Dragul's other intended targets do not articulate cognizable claims.

Moreover, Dragul's counsel failed to respond to the Receiver's request that Dragul also specify the bases for the Receiver's standing to bring the "claims." This was particularly important because in the "Insider Case" now pending before Judge McGahey (Case No. 2020CV30255), the Receiver *has* in fact asserted claims against third-parties (including GDA's former outside counsel, Ben Kahn and his law firm, and GDA's CFO and bookkeeper, Susan Markusch). In that case, however, Dragul has consistently argued the Receiver lacks standing to bring such claims. Yet here, Dragul accuses the Receiver of breaching his fiduciary duty by not bringing similar claims against other professionals who were apparently not in his inner circle.

Indeed, five days *after* he filed the Motion to Abandon, Dragul argued to Judge McGahey that “*even if* the Receiver were asserting claims belonging to the GDA Entities or Mr. Dragul, he lacks standing because those people and entities are *in pari delicto* with the Defendants.”² Defendant Gary Dragul’s Reply in Support of Motion to Dismiss First Amended Complaint at 9-10 (filed Sept. 9, 2020, Case No. 2020CV30255). So, in this Court, Dragul accuses the Receiver of breaching his fiduciary duties by not bringing claims that, in Judge McGahey’s courtroom, he contends the Receiver lacks standing to pursue, and which Dragul argues the Receiver is barred from bringing by *in pari delicto*. Dragul is apparently willing to take whatever position he feels suits his present needs, without regard to the irreconcilable inconsistencies between them.

II. Argument

Although the Motion to Abandon cites 11 U.S.C. §§ 445(b)³ and 544,⁴ as well as § 554, abandonment under the Bankruptcy Code is governed by § 554. Under that section, bankruptcy courts may order claims abandoned when they are either burdensome or of inconsequential value to a bankruptcy estate. Dragul has failed to demonstrate that the claims he asks this Court to deem abandoned are either

² “Defendants” as used here, includes, *inter alia*, Alan Fox, ACF Property Management, Inc., Susan Markusch, Ben Kahn, the Conundrum Group, LLP, and Dragul.

³ Mot. to Abandon at 8.

⁴ Mot. to Abandon at 7.

burdensome or of inconsequential value to the Receivership Estate. To the contrary, he maintains the claims have substantial value and accuses the Receiver of breaching *his* fiduciary duties by failing to pursue them, citing authority that a receiver is grossly negligent for failing to pursue causes of action that would result in paying creditors in full. *See* Mot. to Abandon at 8. Again, the Receiver asked Dragul's counsel to articulate the bases for the claims and the Receiver's standing to pursue them in an effort to meaningfully confer. Dragul's counsel, however, refused to do so, opting instead to accuse the Receiver of breaching his fiduciary duty by failing to ferret out the basis for the claims and his standing to pursue them. According to Dragul's attorneys, because the Receiver has been in possession of the GDA server "since the inception of the Receivership," he has "all the facts and evidence to identify and support such claims." Dragul's counsel therefore declined to respond meaningfully to the Receiver's request for specificity. *See* Mot. to Abandon, Ex. 1, at 2. Essentially, Dragul's counsel directed the Receiver to the more than 1.148 terabytes of data on the server, saying "go fish." The documents and files on the GDA server are completely disorganized and haphazardly maintained. *Id.* at 1. Even targeted searches for specific documents on the server are cumbersome and oftentimes fail to locate useful information. Given Dragul's repeated complaints about the cost of the Receivership, it is remarkable he suggests the Receiver comb through more than a terabyte of data on a fishing expedition to unearth the legal and factual support for claims which his lawyers purport have at their fingertips.

Dragul has also not indicated what he believes the value of these claims are, nor has he responded to the Receiver's inquiry as to whether he seeks to pursue the claims for the benefit of the Estate and his creditors or for his own enrichment. Absent this information, neither the Court nor the Receiver can determine whether grounds for abandonment exist. The Receiver therefore objects both to Dragul's accusations and his attempt to usurp claims of potential value to the Estate without disclosing their basis or their estimated value. The Receiver does not believe it appropriate to deem these loosely described "claims" abandoned so that Dragul can try to extort funds from third-parties for assisting his own fraud, or by failing to adequately ferret it out.

The sole possible exception relates to what Dragul has identified as a potential claim against Terracon. But absent the information the Receiver has requested as to ownership of that claim, the Receiver is unable to state a position. If the claim is owned by Dragul or GDA, the Receiver needs more information concerning the nature of the claim and its value. If instead the claim is owned by YM Retail 07A, LLC, or its manager, Safeway Marketplace Manager 07, Inc., the Receiver abandoned the Estate's interest in those entities long ago. *See* Order Granting Receiver's Motion to Abandon the YM Interests, December 13, 2018. Dragul's refusal to provide the requested information places the Receiver and the Court in the untenable position of having to guess concerning these material issues.

WHEREFORE, the Receiver asks the Court to deny Dragul's Motion to Abandon and to enter any further relief the Court deems appropriate.

Dated: September 24, 2020.

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



/s/ Rachel A. Sternlieb

Patrick D. Vellone

Michael T. Gilbert

Rachel A. Sternlieb

1600 Stout Street, Suite 1900

Denver, Colorado 80202

(303) 534-4499

pvellone@allen-vellone.com

mgilbert@allen-vellone.com

rsternlieb@allen-vellone.com

ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I served a true and correct copy of the foregoing **RECEIVER'S RESPONSE TO DRAGUL'S MOTION TO ORDER CLAIMS ABANDONED** via CCE to the following:

Robert W. Finke
Janna K. Fischer
Ralph L. Carr Judicial Building
1300 Broadway, 8th Floor
Denver, Colorado 80203
E-mail: robert.finke@coag.gov
E-mail: janna.fischer@coag.gov

*Counsel for Plaintiff, David Cheval,
Acting Securities Commissioner*

Paul L. Vorndran
Christopher S. Mills
JONES & KELLER, P.C.
1999 Broadway, Suite 3150
Denver, CO 80202

*Counsel for Defendants, Gary Dragul,
GDA Real Estate Services, LLC and GDA
Real Estate Management, LLC*

s/Salowa Khan

Allen Vellone Wolf Helfrich & Factor, P.C.