DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
Plaintiff: Tung Chan, 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 ▲
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DEFENDANT GARY DRAGUL'S OBJECTION TO RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH BROWNSTEIN HYATT FARBER SCHRECK, LLP

The Receiver has done something very odd in his Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP ("Motion") and attached settlement agreement. As far as Mr. Dragul can tell, in every other motion to approve a settlement, the Receiver never suggested his claims lack merit, and often expressly stated they did have merit and "were strong"; he would then describe reasons why settlement still made sense. Not so here. In this Motion, he says he believes the claims against Brownstein "are not factually supported [and] not meritorious[.]" (Mot. ¶ 20.) And in the settlement agreement itself ("Settlement", attached to Mot. as Ex. 1), the Receiver also states that he believes the claims against Brownstein

"are not factually supported [and] not meritorious." (Mot. Ex. 1 ¶ J.) No other settlement agreement for which the Receiver sought approval contains such language. Here, the Receiver further states that "[t]he Receiver is not aware of any facts indicating BHFS, or any attorney or employee of BHFS, while employed by BHFS, committed malpractice against, received excessive fees or costs from, or breached any fiduciary duty owed to Dragul or any GDA entity." (Mot. Ex. 1 ¶ K.) And unlike in every other motion to approve a settlement agreement, in which the Receiver said that the settling party might have statute of limitations defenses, the Receiver here simply asserts he believes "the claims asserted in the Nevada Complaint are barred by applicable statutes of limitations." (Mot. ¶ 20.)

It is unclear how the Receiver can ethically settle claims that "are not factually supported [and] not meritorious." Nor is it clear why Brownstein would agree to pay $250,000 to settle claims that "are not factually supported [and] not meritorious." In reality, it is readily apparent from what transpired here that both the Receiver and Brownstein *do* believe the claims are meritorious, despite the Receiver's statements to the contrary.

Why then would the Receiver settle the claims by offering a sweetheart deal to Brownstein—$250,000 is 232 times less than the $58 million alleged in the Brownstein Complaint[1]—and publicly state that the claims are not meritorious, unlike what he said for every other settlement? While he might argue the cost of litigating against a firm like Brownstein with deep pockets is not worth the anticipated recovery (though that seems unlikely with damages of $58 million), that would not explain why he says the claims are not meritorious. The only

[1] The Brownstein Complaint is attached as Ex. 2 to Dragul's October 26, 2020 Motion to Order Claims Against Brownstein Abandoned

plausible explanation arises from the admittedly awkward predicament the Receiver is in by virtue of the Brownstein Complaint. If he takes up and prosecutes the claims against Brownstein, that would necessarily impact his civil claims against Mr. Dragul because, if Brownstein is at fault, that means Mr. Dragul is not. But if the Receiver abandons the claims, Mr. Dragul can demonstrate the same thing, and also expose the value of the claims for which the Receiver missed the limitations period, and then walked away from after Mr. Dragul timely filed them. And if the Receiver settles the claims for what they are worth and notes in the motion to approve that settlement that he believes the claims are meritorious, as he has in nearly every other motion to approve a settlement, that also would show that if there was any wrongdoing here, it was on behalf of Brownstein, not Mr. Dragul.

Despite knowing about Brownstein's involvement for years, it appears the Receiver just hoped the issue would never come up. When that became impossible because Mr. Dragul raised these claims, the Receiver's next best option was to surreptitiously settle with Brownstein for a tiny fraction of the recoverable damages and state the claims are not meritorious. That way, he can avoid any negative repercussions to his case against Mr. Dragul that would result if he acknowledged that fault instead lies with Brownstein.

The problem with this approach is that there is no way to justify it as good for the Estate and its creditors. The Brownstein claims represent a very large source of money for creditors—far larger than any other claims the Receiver has settled here. And the Receiver cannot possibly argue that his claims against Mr. Dragul, which the Receiver aims to protect by giving Brownstein a relative pass, have more potential value to the Estate since he already seized Mr. Dragul's assets, meaning the Receiver is pursuing a dry hole going after Mr. Dragul.

But in addition to working out a deal very favorable to Brownstein to settle the GDA Entities'[2] claims, the Receiver went much further and purports to settle claims that belong to Mr. Dragul personally, for injuries Mr. Dragul personally suffered. Such claims were never within the scope of the August 30, 2018 Order Appointing Receiver ("Receivership Order"), and the Receiver has no authority to settle them.

ARGUMENT

I. MR. DRAGUL'S PERSONAL CLAIMS HAVE NEVER BEEN PART OF THE RECEIVERSHIP ESTATE

The Receiver was appointed receiver for Mr. Dragul and the two GDA Entities. (Receivership Order ¶ 9.) But as to Mr. Dragul, the scope of the Receivership is expressly limited: the Receiver is appointed Receiver "for Dragul (limited to the definition of the "Receivership Property" or "Receivership Estate" as defined below)[.]" (*Id.*)[3] That limitation does *not* exist as to the GDA Entities. (*Id.*) "Receivership Property" and "Receivership Estate" are defined as assets, including "claims, and causes of action" "related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the [Commissioner's] Complaint, or derived indirectly or indirectly [sic] from investor funds" (and not including Mr. Dragul's house). (*Id.*) Thus, the Receiver serves as receiver for Mr.

[2] GDA Real Estate Services, LLC and GDA Real Estate Management, LLC.

[3] In paragraph 16 of his Motion, the Receiver argues the limitation to assets related to investor funds from the solicitation or sale of securities or derived from investor funds "applies only to the catch-all category of assets beyond those (like claims and causes of action) specifically enumerated as part of the Estate." The Receiver's interpretation reads out the parenthetical "(limited to the definition of the "Receivership Property" or "Receivership Estate" as defined below)" which defines the scope of the Receiver's appointment over Mr. Dragul. That parenthetical has meaning: that the Receiver's appointment is more limited as to Mr. Dragul than it is as to the GDA Entities. The Receiver may not ignore that limitation.

Dragul *only* as to Mr. Dragul's assets (including claims), and *only* insofar as those assets are related to "investor funds from the solicitation or sale of securities as described in the [Commissioner's] Complaint" or are indirectly derived from investor funds. (*Id.*) Since this describes the scope of the Receivership as it applies to Mr. Dragul, every other provision in the Receivership Order is necessarily limited by it—the Receiver cannot exercise power over something or someone that is outside the scope of the Receivership.[4]

Thus, the Receiver's authority to "investigate any claims and causes of action which may be pursued for the benefit of Dragul" (Receivership Order ¶ 9), to take Mr. Dragul's assets to the exclusion of Mr. Dragul (*id.* ¶ 13(a)), or to "prosecute causes of action of Dragul" (*id.* ¶ 13(n)), are all necessary limited to "Receivership Property" and "Receivership Estate", as the Receivership as to Mr. Dragul extends no further than that.[5]

For example, Paragraph 19(c) of the Receivership Order purports to preclude Mr. Dragul from holding himself out as, or "acting or attempting to take any and all actions of any kind or nature as Representatives of Dragul[.]" Under the Receiver's argument (Mot. ¶¶ 6, 16), Mr. Dragul could not hold himself out as himself with respect to *anything*. Thus, in the Receiver's view, Mr. Dragul would be unable to hold himself out as himself in order to file his personal income tax returns, for example. And if Mr. Dragul needed medical care for an injury, he would be precluded from going to the hospital, describing his injury, providing his past medical history,

[4] He also cannot wield power which he lacks as a matter of law, even if the Receivership Order purports to grant him that power.

[5] As an example (fictional for purposes of explanation), if Mr. Dragul loaned investor funds to a borrower and the borrower defaulted under the loan agreement, Mr. Dragul's claim for breach of the loan agreement would belong to the Receiver, as the claim is related to investor funds. Mr. Dragul's personal claims against Brownstein, on the other hand, do not fall within the Receivership Order.

getting treatment, or authorizing the medical provider to bill his health insurance. Instead, the Receiver would have to do all of that for Mr. Dragul, and only if the Receiver felt like it. That, of course, is untenable.

Similarly, under the Receiver's view of the Receivership Order, if Mr. Dragul suffered a personal injury as the result of medical malpractice during his treatment, Mr. Dragul would be precluded from suing the negligent doctor to recover his injuries. As the Receiver sees it, only the Receiver can sue the doctor, and only the Receiver can collect any recovery, even though only Mr. Dragul personally suffered the injury.

Nor does the Receiver's argument that the Brownstein claims are "'related in any manner' to investor funds or the solicitation or sale of securities" help the Receiver here. (Mot. ¶ 17.) He stretches the definition of "related . . . or derived . . . from investor funds" far beyond its breaking point.

Under the Receiver's argument, if a Brownstein attorney were advising Mr. Dragul on investor funds while Mr. Dragul were a passenger in that attorney's car, and the Brownstein attorney negligently crashed and injured Mr. Dragul, Mr. Dragul's personal injury claim against the attorney would be "related to" investor funds and thus would belong exclusively to the Receiver.

And if Mr. Dragul were driving to the Receiver's office to turn over or provide information about investor funds, that drive would, under the Receiver's view, be related to investor funds. Thus, if Mr. Dragul were injured by a negligent driver while making that trip to the Receiver's office, Mr. Dragul's personal injury claim would belong exclusively to the Receiver under the Receiver's reading.

In fact, the aforementioned example of Mr. Dragul filing his personal tax return is also related to investor funds under the Receiver's view. The Receiver alleges Mr. Dragul's income was related or derived from investor funds, and his tax returns undeniably relate to his income. Thus, Mr. Dragul is prohibited from filing his personal tax returns on his own behalf even under the Receiver's narrower "related to" argument.

Closer to home, if Mr. Dragul had counterclaims against the Receiver, they would assuredly be more closely related to investor funds than the damages Mr. Dragul suffered as a result of Brownstein's legal advice. Under the Receiver's view, the Receiver alone would be authorized to assert and recover on those counterclaims . . . against himself.

These examples may seem wholly contrived. But that is the point. Just as these examples stretch the definition of "related to investor funds" beyond reason, so too does the Receiver's stretching of that definition to cover the malpractice and related claims against Brownstein. As these examples show, the Receiver's interpretation of the Receivership Order is not only inconsistent with the plain language of that Order, but defies common sense and leads to absurd results. Here, Mr. Dragul's personal claims against Brownstein arise in part from the attorney-client relationship Mr. Dragul personally had with Brownstein (Brownstein Complaint ¶¶ 11, 13), as the Receiver and Brownstein appear to acknowledge (Settlement ¶ H (in which Brownstein denies claims "arising from or relating to its representation *of Dragul* and the GDA Entities") (emphasis added).) The typical advice Brownstein provided related to a transaction, including how to structure the transaction "to protect Mr. Dragul or limit his personal liability related to the Transaction." (Brownstein Compl. ¶ 15(c); *see also id.* ¶ 15(d)-(e).) Mr. Dragul's personal claims are not related to or derived from investor funds from the solicitation or sale of

securities, but instead are related to Mr. Dragul's *personal* liability arising from myriad transactions on which Brownstein advised, and the attorneys' fees it charged.

Mr. Dragul alleges *personal* injuries flowing from him being the subject of several indictments, civil suits, and administrative proceedings, several lawsuits from individuals relating to the transactions on which Brownstein advised, and from the Receiver dismantling and squandering the value of Mr. Dragul's businesses. (Brownstein Compl. ¶¶ 22, 133, 164-168.) These are not injuries relating to investor funds. For example, the injury flowing from the Receiver's mismanagement and squandering of the assets Mr. Dragul turned over to him could have occurred with no investors or investor funds at all. Nor is Brownstein's block-billing related to investor funds—such over-billing practices could have occurred had there been no investors at all. (Brownstein Compl. ¶ 140.) And it is unclear how Mr. Dragul's damages from Brownstein advising him to personally pay for the costs to clean up environmental contamination at a property so that the Brownstein attorneys who personally held interests in that property could avoid liability for it, is related to investor funds. (Brownstein Compl. ¶¶ 44, 49-51, 53-54 Even if some of Brownstein's advice was related to the solicitation or sale of securities or investor funds, the injuries Mr. Dragul sustained as a result of that and other advice are not.

Under the plain language of the Receivership Order, the Receiver was never appointed to control Mr. Dragul's claims for personal injuries. Those claims have never been part of the Receivership Estate, and the Receiver has no authority to assert or settle them.[6]

[6] Thus, the Receiver has no authority to have this Court enjoin Mr. Dragul from asserting his personal claims against Brownstein. (Mot. ¶ 30.)

II. THE BROWNSTEIN SETTLEMENT IS NOT IN THE INTERESTS OF THE ESTATE AND SHOULD BE REJECTED

Unlike Mr. Dragul's personal claims, the parties agree that the GDA Entities' claims belong to the Receiver, at least unless and until they are abandoned. But that does not mean the Receiver can dispose of those claims to the detriment of the Estate and its creditors.

"A receiver is a fiduciary of the court and of the persons interested in the estate." *K-Partners III, Ltd. v. WLM Hosp. Corp.*, 883 P.2d 604, 606 (Colo. App. 1994); *see also Zeligman v. Juergens*, 762 P.2d 783, 785 (Colo. App. 1988) (same). The Receiver himself notes that in evaluating a motion to approve a settlement agreement, courts consider whether "the settlement is fair and in the best interests of the estate." (Mot. ¶ 18.) In making this determination, courts consider:

(1) The probable success of the underlying litigation on the merits;

(2) The possible difficulty in collection of a judgment;

(3) The complexity and expense of the litigation; and

(4) The interests of creditors in deference to their reasonable views.

(Mot. ¶ 18 (quoting and citing cases).) These factors demonstrate the Receiver's $250,000 settlement with Brownstein is neither fair nor in the best interests of the Estate.

As to the first factor, the Receiver argues that based on his review of the Brownstein Complaint and his "familiarity with the GDA records and information in his possession", he "believes [the claims] are not factually supported, not meritorious, and subject to several strong, and potentially insurmountable defenses." (Mot. ¶ 19.) He further says he "does not believe the claims are factually or legally substantiated" and that he "is not aware of any facts indicating BHFS, or any attorney or employee of BHFS, while employed by BHFS, committed malpractice

against, received excessive fees or costs from, or breached any fiduciary duty owed to Dragul or any GDA entity." (Mot. ¶ 21.) As mentioned above, the Receiver has never made such an assertion in any other motion to approve a settlement agreement. For example, in paragraph 7 of his November 18, 2020 Motion to Approve Settlement Agreements with Audrey Ahrendt and Juniper Consulting, the Receiver said that "although he believes his claims to recover transfers to her dating back to 2007 *are* meritorious, Ahrendt's counsel has raised various defenses to those claims, including the statute of limitations. In addition, the Receiver has obtained financial disclosures from Ahrendt concerning her ability to satisfy any judgment that might enter against her, and those disclosures raise collectability concerns." (emphasis added).

That is a far cry from here, where the Receiver says the Brownstein Claims are not factually supported and are not meritorious, and that "it appears the claims asserted in the Nevada Complaint are barred by the applicable statutes of limitations" and "it appears that all of the claims are time-barred." (Mot. ¶ 20.) The Receiver goes further to say "[i]n fact, based on the Receiver's understanding of the claims and purported wrongdoing, the claims appear to have lapsed prior even to the appointment of the Receiver in August 2018." (*Id*.) How can the Receiver ethically settle a meritless and time-barred claim? If the Receiver truly believes this, the claims should be abandoned because they are of no value to the Estate.

But in fact, the claims are meritorious. While the Receiver did indeed miss the limitations period on these claims, that is precisely why Mr. Dragul filed the Brownstein Complaint when he did. A receiver "is chargeable with the value of property which would have come into his hands but was lost due to his failure to act" and "a receiver may be liable for failure to ask for authority to bring suit if his lack of diligence results in loss of the claim." *In re*

American Bridge Products, Inc., 328 B.R. 274, 334 (Bankr. D. Mass 2005), *vacated on other grounds by* 599 F.3d 1 (1st Cir. 2010). The only thing that kept the Receiver from breaching his fiduciary duties here and facing liability for missing the limitations periods was that Mr. Dragul preserved the claims for him.

The Receiver's purported reasons why there is no probability of success on these claims are specious. For example, he argues the claims are subject to an *in pari delicto* defense. (Mot. ¶ 23.) *In pari delicto* flows from "the principle . . . that when a participant in illegal, fraudulent, or inequitable conduct seeks to recover from another participant in that conduct, the parties are deemed *in pari delicto*, and the law will aid neither, but rather, will leave them where it finds them." *Sender v. Kidder Peabody & Co., Inc.*, 952 P.2d 779, 782 (Colo. App 1997). Thus, for *in pari delicto* to apply to Mr. Dragul's claims against Brownstein, it would necessarily mean that Brownstein and Mr. Dragul together participated in a scheme to commit malpractice *against Mr. Dragul*. Why would Mr. Dragul collude with Brownstein to commit malpractice against himself? None of the Receiver's purported reasons for a low probability of success—which are never explained or supported—hold water in light of the fact that the Receiver cannot ethically assert and settle meritless claims, and the fact that *Brownstein agreed to pay $250,000 to settle them*.

As to the second factor, the Receiver does not try to argue he would have difficulty collecting from Brownstein. Nor could he, since Brownstein has deep pockets and assuredly a robust insurance policy (or several) to cover claims such as those alleged.

As to the third factor, the Receiver is likely correct that litigating the claims against Brownstein would involve some complexity and expense. But so do many of the lawsuits the

Receiver has pursued, including the civil suit he filed against Mr. Dragul and others (Case No. 2020CV30255; hereafter "2020 Action"). And the Receiver's argument that, if he abandoned the Brownstein claims and Mr. Dragul pursued them, "the Estate would still be subject to significant litigation expense as the Estate controls the GDA entities, its documents and witnesses" is a red herring. If the Receiver abandoned the GDA Entities' claims against Brownstein, it is unclear why it would matter if the Estate controlled the GDA Entities for other purposes, as Mr. Dragul would bear the burden of representing them as to the Brownstein claims. And according to the Receiver, Mr. Dragul already has a copy of the GDA Server, and with it all the documents related to all of the transactions at issue. (Receiver's Resp. to Mot. to Dismiss Am. Complaint 22-23, filed in the 2020 Action.) In any event, the Receiver would have to produce those documents to Mr. Dragul in the 2020 Action anyway. Finally, the Receiver does not serve as Receiver for any person other than, to a limited extent, Mr. Dragul. Thus, he does not control any witnesses' testimony, and Mr. Dragul would be obligated to compel those witnesses to testify if Mr. Dragul were prosecuting the case.

As to the fourth factor, while a $250,000 settlement is clearly enough to show the claims are meritorious, it facially reflects a sweetheart deal for Brownstein and is not in the interests of creditors. In the Brownstein Complaint, Mr. Dragul alleges damages of approximately $50 million arising from the indictments, civil suits, Receiver mismanagement of assets, and the consequences flowing from these events (Brownstein Compl. ¶ 168), $7 million representing the amount of attorneys' fees Brownstein collected from Mr. Dragul and the GDA Entities for advice which resulted in indictments and civil suits (Brownstein Compl. ¶¶ 177, 183), and $1.1 million reflecting damages from, and Mr. Dragul's personal liability for, the contaminated

property which Brownstein designed so that its attorneys who were personally involved in that property could avoid any liability (Brownstein Compl. ¶ 193). In total, it alleges damages of over $58 million.

While Mr. Dragul's personal damages should not be relevant here since the Receiver only has authority to settle the GDA Entitites' claims, both Mr. Dragul's and the GDA Entities' damages under the Brownstein Complaint are large. While undersigned counsel did not participate in drafting or filing the Brownstein Complaint, even a cursory scan of its 34 pages of allegations demonstrates it was thoroughly researched. The amount of $7,000,000 in attorneys' fees Brownstein received for its work ought to be easily proven. Same for the $1,000,000, plus legal fees to Brownstein, that Mr. Dragul personally spent related to the environmental contamination cleanup. The fees are what they are, and the amounts should not be readily subject to dispute. Those fees alone are already over 32 times the amount for which the Receiver wants to settle with Brownstein.

The GDA Entities also face exposure from investor-creditors. In paragraph 26 of the Receiver's most recent May 11, 2020 Fourth Report filed in this case, he says "[a]pproximately 261 investors filed claims totaling approximately $58 million." Thus, according to the Receiver, the GDA Entities face damages of up to $58 million—for which Brownstein may be at fault.[7]

[7] Though not relevant, to support Mr. Dragul's personal damages arising from the indictments, civil suits, Receiver mismanagement of assets, and related consequences, one need only look to the Receiver's 2020 Action. There, the Receiver does not state the precise dollar figure he seeks, but does allege treble damages, and that Mr. Dragul and the other defendants "solicited more than $52 million from hundreds of investors", and that Mr. Dragul received $19,148,047.10 of "impermissible commissions". (Receiver First Am. Compl. ¶¶ 1, 87, filed in 2020 Action.) Since Brownstein advised on the very transactions at issue in the 2020 Action, the damages Mr. Dragul may suffer in the 2020 Action could constitute the damages Mr. Dragul suffered on account of Brownstein's advice.

The $58 million in damages alleged in the Brownstein Complaint is supportable, and may actually be understating it. The $250,000 the Receiver aims to collect in settling those very claims—which is 232 times less than the damages alleged—is not. It is true that prosecuting the Brownstein claims would come at the expense of the Receiver's claims against Mr. Dragul, because if Brownstein was responsible for any wrongdoing that occurred with the transactions at issue, that means Mr. Dragul was not. But that cannot possibly justify settling with Brownstein for $250,000. Because "all assets of Dragul . . . were placed in the Receivership Estate" already (Mot. ¶ 4), the Receiver has no hope of recovering anything on his claims against Mr. Dragul. There is simply no way to characterize the Receiver's $250,000 settlement with Brownstein as being in the interests of the Estate or its creditors.

CONCLUSION

A receiver's power is not limitless. He cannot act outside the limits the law and the order appointing him establish. And he serves as a fiduciary to the court and the receivership estate. The Court should reject the Receiver's *ultra vires* attempt to settle Mr. Dragul's personal claims, which have never been part of the Receivership Estate. The Court should also deny the Receiver's Motion to approve the Settlement because it appears the Receiver has not analyzed the Brownstein claims in good faith and the proposed settlement is not in the best interests of the Estate and its creditors. The Receiver can and should do better.

Respectfully submitted this 23rd day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S OBJECTION TO RECEIVER'S MOTION TO APPROVE SETTELEMENT AGREEMENT WITH BROWNSTEIN HYATT FARBER SCHRECK, LLP** was filed and served via the ICCES e-file system on this 23rd day of November 2020 to the following counsel of record for the parties to the action:

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