

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock St. Denver, CO 80202 (720) 865-8612	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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	
Attorneys for Defendant Gary J. Dragul Paul L. Vorndran, Atty. Reg. No. 22098 Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1675 Broadway, 26 th Floor 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 TO ORDER CLAIMS AGAINST BROWNSTEIN ABANDONED	

In the meet-and-confer process leading up to Mr. Dragul’s October 26, 2020 Motion to Order Claims Against Brownstein Abandoned (“Motion”), the Receiver’s counsel wrote on October 14th that he would require “a significant amount of time” to “fact check each allegation” in the Brownstein Complaint by reviewing the information on the GDA Server, and that Mr. Dragul should “not expect an answer from us any time soon.” (Mot. Ex. 1 at 4.) Mr. Dragul agreed to delay filing a motion until October 23rd to give the Receiver more time to research evidence relating to the claims, then reached out to the Receiver again on the 23rd (*Id.* at 1.) Apparently, it did not take the Receiver “significant time” to fact check the allegations in the

Brownstein Complaint, as he was apparently able to not only research the claims, but surreptitiously negotiate, draft, and execute a settlement agreement with Brownstein in about three weeks.

Though, it is unclear whether the Receiver actually did research the claims before settling them. In the meet-and-confer process, he stated that he “observed that several of the factual allegations are contradicted by documents and communications contained on the GDA server and emails[.]” (*Id.* at 4.) However, he refused to disclose the purportedly contradictory information when Mr. Dragul’s counsel asked. (*Id.* at 2-3.) And in his November 16, 2020 Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP (“Settlement Motion”), the Receiver also did not convey this purportedly contradictory information, or explain any basis for his broad assertions that the claims in the Brownstein Complaint “are not factually supported [and] not meritorious”, and are time-barred.

That is why the Court should deem the GDA Entities’ claims abandoned even though the Receiver purports to settle them. The Receiver (1) provides no basis to demonstrate he actually investigated those claims, and (2) seeks to settle them for far less than they are worth at the expense of the Estate and its creditors. Mr. Dragul does not dispute that the GDA Entities’ claims (but not Mr. Dragul’s personal claims) belong to the Receiver, but the Receiver owes a fiduciary duty to handle those claims in a reasonable way for the benefit of the Estate. If he is not willing to do so, the claims should be abandoned.

ARGUMENT

In his Settlement Motion, the Receiver seeks to settle: (1) Mr. Dragul’s personal claims which were never part of the Receivership Estate and which the Receiver lacks authority to

settle; and (2) the GDA Entities' claims, which he does have authority to settle as a general matter, but which he seeks here to settle to the detriment of the Estate and its creditors. The majority of Mr. Dragul's substantive arguments on these issues are set forth in his concurrently filed objection to the Settlement Motion ("Objection"), and Mr. Dragul adopts and incorporates by reference those arguments here. Additionally:

- The Receiver argues Mr. Dragul's Motion is moot because the Receiver has settled with Brownstein. (Receiver's Response to Defendant Gary Dragul's Motion to Order Claims Against Brownstein Abandoned ("Resp.") ¶ 4.) The Receiver has not settled with Brownstein unless and until the Court approves that settlement agreement. Here, the Court should not approve that settlement agreement for the reasons stated in Mr. Dragul's Objection.
- The Receiver implies Mr. Dragul violated the Court's October 1, 2020 Order which denied Mr. Dragul's September 3, 2020 Motion to Order Claims Abandoned (not to be confused with the October 26, 2020 Motion in support of which this Reply is filed). (Resp. ¶ 2.) The October 1 Order denied Mr. Dragul's motion to order certain civil claims, including but not limited to those against Brownstein, abandoned because the Court believed it did not "appear from the pleadings that Mr. Dragul, through his counsel, has provided the receiver (through conferral or otherwise) a sufficient basis from which the receiver can determine whether or not viable claims may be asserted as to third parties. As such, the Court cannot determine whether or not any purported claims are viable and/or are deemed abandoned." It did not order Mr. Dragul not to assert his personal claims or the GDA Entities' claims against Brownstein, and in the October 26, 2020 Motion in support of which Mr. Dragul files this Reply, Mr. Dragul cured the issue the Court raised in its October 1 Order. Mr. Dragul does not and never has disputed

that the GDA Entities' claims (but not his personal claims) belong to the Receiver, and he expressly stated in the Brownstein Complaint that the GDA Entities' claims belonged to the Receiver and Mr. Dragul was filing them merely to prevent them from becoming stale. (Mot. Ex. 2, Brownstein Compl. n.1.) This is consistent with the holding in *Barletta v. Tedeschi*, 121 B.R. 669 (N.D.N.Y. 1990). Moreover, by filing and preserving the GDA Entities' claims for the Receiver, Mr. Dragul prevented the Receiver from missing the limitations period and thereby breaching his fiduciary duty to the Estate and facing exposure himself. Indeed, the only reason the Receiver could agree on settlement terms with Brownstein and seek the Court's approval of that settlement is because Mr. Dragul saved those claims. While the \$250,000 for which the Receiver proposes to settle is 232 times less than what those claims may be worth (*see* Objection), he has Mr. Dragul to thank for that amount not being zero.

- In paragraph 3 of his Response, the Receiver states that "Dragul acknowledges that the claims asserted in the Nevada Action are property of the Receivership Estate[.]" That is not accurate. Mr. Dragul acknowledged the GDA Entities' claims in the Brownstein Complaint (which the Receiver calls the Nevada Action) are property of the Receivership Estate. But as discussed at length in his concurrently filed Objection, Mr. Dragul's personal claims for personal injuries, which are also alleged in the Brownstein Complaint, are not and never have been property of the Receivership Estate. The Receiver lacks any authority to settle Mr. Dragul's personal claims.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Dragul's Objection, the Court should grant the Motion and order the Brownstein claims abandoned.

Respectfully submitted this 23rd day of November, 2020.

JONES & KELLER, P.C.

/s/ Christopher S. Mills

Paul Vorndran, #22098
Christopher Mills, #42042
1675 Broadway, 26th Floor
Denver, CO 80202
Tel: (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 TO ORDER CLAIMS AGAINST BROWNSTEIN ABANDONED** 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:

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
Sueanna.Johnson@coag.gov
Robert.Finke@coag.gov
*Counsel for Tung Chan,
Securities Commissioner for the
State of Colorado*

/s/ Christopher S. Mills

Christopher S. Mills