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<tr><td>DISTRICT COURT, DENVER COUNTY
STATE OF COLORADO

Denver District Court
1437 Bannock St.
Denver, CO 80202
303.606.2433</td><td rowspan="2">▲COURT USE ONLY▲</td></tr>
<tr><td>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</td></tr>
<tr><td>Attorneys for Receiver:

Patrick D. Vellone, #15284
Michael T. Gilbert, #15009
Rachel A. Sternlieb, #51404
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.
1600 Stout St., Suite 1900
Denver, Colorado 80202
Phone Number: (303) 534-4499
E-mail: pvellone@allen-vellone.com
E-mail: mgilbert@allen-vellone.com
E-mail: rsternlieb@allen-vellone.com</td><td>Case Number: 2018CV33011

Division/Courtroom: 424</td></tr>
<tr><td colspan="2">RECEIVER’S REPLY IN SUPPORT OF MOTION TO APPROVE SETTLEMENT AGREEMENT WITH BROWNSTEIN HYATT FARBER SCHRECK, LLP</td></tr>
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Harvey Sender, the duly-appointed Receiver[1] for Dragul and the GDA Entities submits this reply in support of the Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP (the “Motion to Approve Settlement” or “Mot.,” filed November 16, 2020) and in response to Dragul’s Objection to Receiver’s Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck,

[1] Unless separately defined herein, capitalized terms in this Reply have the definitions provided in the Receiver’s Motion to Approve Settlement.

LLP (the "Objection" or "Obj.," filed November 23, 2020).

INTRODUCTION

Dragul's Objection relies entirely on invective, inferences, and innuendo, rather than actually addressing the scope of the Receivership Order, the substantive and procedural defects of his claims against Brownstein, or the substantial value the Settlement Agreement brings to the Estate. Because Dragul cannot demonstrate the settled claims have merit or that they survive the applicable statutes of limitations, he asks the Court to assume the claims are well-founded, asking why else would Brownstein pay to settle them or the Receiver ethically accept that payment? This approach ignores the obvious answer, articulated in the settlement agreement itself – that the settlement was reached so that both Brownstein and the Receiver could "avoid the burden and expense of litigation." (Settlement Agreement Recital L.) And it ignores the $250,000 the settlement will bring to the Estate. Dragul's reliance on a series of "what-ifs" to try to narrow the scope of the Receivership Order likewise fails in the face of the text of the order itself. Having provided the Court no factual or legal basis to reject the settlement, Dragul's Objection should be overruled and the Motion to Approve Settlement granted.

ARGUMENT

I. Dragul's Claims Are Part of the Receivership Estate

In his Objection, Dragul does not dispute that the Receivership Estate includes any and all claims and causes of action belonging to GDARES and GDAREM – including the claims Dragul purported to assert on behalf of those entities in the Nevada Complaint. (*See also* Second Abandonment Mot. at 3-4 ("the GDA Entities'

claims . . . belong to Receiver [*sic*] unless this Court rules otherwise")). The Objection addresses only a subset of the claims asserted in the Nevada Complaint and encompassed by the Settlement Agreement, namely those Dragul contends he still owns in his individual capacity. Dragul's attempt to carve off these claims from the Receivership Estate for his own personal benefit, to the detriment of his creditors, is premised almost entirely on several pages of *reductio ad absurdum* fallacy. Surely the Receivership Order cannot mean what it says, Dragul argues, because the consequences would be too absurd. But the Court need not address any of the frivolous examples Dragul trots out – examples Dragul himself concedes are "wholly contrived." Obj. at 7. Instead, the actual question before the Court is whether the claims *Dragul has brought* against Brownstein are part of the Estate. That analysis starts and ends with the Receivership Order itself. *See Francis v. Camel Point Ranch, Inc.*, P.3d, 2019 COA 108M, at ¶ 8 (Colo. App. July 18, 2019, as modified Sept. 19, 2019). ("The measure of a receiver's power is derived from the scope of the court's order of appointment.").[2]

Under the Receivership Order, with a single limited exception, all of Dragul's assets (and as Dragul conceded, those of GDARES and GDAREM) are unconditionally property of the Receivership Estate, including all "claims, and causes of action" held

[2] Accordingly, Dragul's suggestion in footnote 4 of his Objection that the Receiver "cannot wield power which he lacks as a matter of law, even if the Receivership Order purports to grant him that power" is misplaced. The Receivership Order itself determines the "power" the Receiver may "wield." Dragul provides no authority to the contrary. Nor does Dragul cite any authority supporting his vague insinuation that the breadth of the Receivership Order violates some other law.

by any of them. (Receivership Order ¶ 9.) The sole exception was Dragul's former residence, unless equity in the home was "related to the proceeds from the sale of the securities or matters referenced in the Complaint." (Receivership Order ¶ 9.) Thus the "claims and causes of action" asserted by Dragul, GDARES, and GDAREM in the Nevada Complaint are indisputably property of the Estate.[3]

Property of the Estate includes not only Dragul's personal assets (save his home), it includes all of the LLC entities identified in the Commissioner's Motion and Complaint for Injunctive Relief, and assets "of any kind or of any nature whatsoever related in any manner, or directly or indirectly derived, from investor funds from the solicitation or sale of securities as described in the Complaint, or derived indirectly or indirectly from investor funds." (Receivership Order ¶ 9.) This second category of Receivership property thus includes the assets of the remaining plaintiff in the Nevada Action, Rose, LLC, which was funded by Dragul's defrauded investors.

Dragul seeks to avoid this unambiguous construction of the Receivership Order, arguing confusingly that this plain language conflicts with other language providing that Dragul's assets are only under the Receiver's control if they meet "the definition of the 'Receivership Property' or 'Receivership Estate.'" Obj. at 4 (quoting

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[3] Dragul's contention that his personal assets are not property of the Receivership Estate is inconsistent with his December 2, 2019, Settlement Agreement with the Receiver in which he agreed to turn the majority of his personal assets over to the Estate. *See* Receiver's Motion to Approve Settlement Agreement with Dragul Concerning Turnover Motion (filed Dec. 5, 2019). Dragul's current argument is also inconsistent with the position he took just a few weeks ago in the action brought by the Receiver against him where he admitted that "Mr. Sender was also appointed Receiver for Mr. Dragul personally," and therefore the "Receiver stands in Mr. Dragul's shoes." (Mot. for Reconsideration, Case No. 2020CV30255 (filed Nov. 12, 2020).)

Receivership Order ¶ 9). This circular argument leads nowhere because Dragul's "claims and causes of action" *are* included in the definition of the Receivership Estate, as explained above.

Dragul also contends that, if the Court were to give the Receivership Order its natural meaning, it would "read out" the differentiation between how the order treats Dragul, on the one hand, and the GDA Entities, on the other. (Obj. at 4 n.3.) Not so. Unlike the GDA Entities – which went entirely into the Receivership Estate – the Receivership Order carved out Dragul's former residence. Thus, the language in the Order stating that Dragul's assets in Receivership were limited to those defined as "Receivership Property" or "Receivership Estate," *id.*, serves the sole purpose of allowing Dragul to retain his home.[4] But that language does not, as Dragul now contends, undermine the remainder of the definition of the Receivership Estate.

Dragul's last line of defense is to march out a parade of horribles of all the assets and obligations that would fall to the Estate under the plain language of the Receivership Order. These examples are inapt. The fact that Paragraph 19(c) of the Receivership Order bars Dragul from taking action with regard to assets in the Estate, like his claims and causes of action, does not mean Dragul is prohibited from filing his taxes or getting medical attention. Unlike his claims and causes of action,[5]

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[4] Without this language in the Receivership Order, Dragul's home would be part of the Estate without regard to whether any equity in the home was created using investor money.

[5] Dragul tries to argue by analogy that if his malpractice claims against a law firm are in the Estate so too must be any malpractice claims he has against a physician, but this analogy fails. First, as explained below, unlike medical claims, Dragul's claims against Brownstein are directly related to his dealings with investors. More fundamentally, however, any medical malpractice claims

neither Dragul's physical body nor his personal tax liability is part of the Receivership Estate. Neither example bears any relation to the claims addressed by the proposed settlement.

Additionally, even if Dragul's personal claims and causes of action were part of the second category of assets (only in the Estate if "related in any manner" to Dragul's solicitation or sale of securities), the claims against Brownstein surely meet that test as well. As even a cursory review of the Nevada Complaint reveals, the gravamen of that action is that Brownstein should have done more in its representation of the GDA Entities to prevent Dragul from committing fraud in his dealings with investors or, as it relates to the environmental action, that Brownstein did *too much* to protect Dragul's investors, to the detriment of Dragul. Indeed, Dragul represents that his quantum of damages in the Nevada Action is measured by the value of claims filed by investors, because "Brownstein advised on the very transactions at issue" in those investor claims. (Obj. at 13, 13 n.7.) The claims against Brownstein being settled are plainly "related in any manner" to Dragul's business with investors and, therefore, property of the Estate.[6]

Dragul has *would* be part of the Estate under the plain language of the Receivership Order. This is not unusual, as Dragul seems to imply. In the analogous context of bankruptcy, it is quite common for a trustee to resolve medical malpractice cases on behalf of the debtor. *See, e.g.*, *In re Weinrich*, 2016 WL 2616771, No. 10-62170-7 (Bankr. D. Mont. May 4, 2016) (approving, over objection of debtor, trustee's settlement of medical malpractice claim in bankruptcy estate).

[6] Dragul's additional analogies with regard to the scope of the language "related in any manner" again fall short. Dragul has not sued Brownstein for negligence in a car accident; he has sued for purported negligence in connection with his dealings with investors.

II. The Settlement Is in the Best Interest of the Estate and its Creditors

Dragul's willingness to take inconsistent positions to further his litigation goals is on full view in the second part of his Objection. Dragul's primary argument that the claims asserted against Brownstein have merit is that the settlement amount is too high for baseless claims, emphatically arguing that the Court need only look to "the fact that *Brownstein agreed to pay $250,000 to settle them*." (Obj. at 11 (emphasis in original).) However, when arguing the settlement is not in the best interests of the Estate and its creditors, Dragul claims the amount is so low it must represent a "sweetheart deal." (Obj. at 12.) Neither assertion is accurate. As the Motion to Approve Settlement demonstrates, the settled claims, including those asserted in the Nevada Action, are substantively without merit, time-barred, and subject to other defenses, and the Receiver's extracting $250,000 from those claims for the benefit of the investors Dragul defrauded is a victory for the Estate. The alternative Dragul suggests is that those claims be deemed abandoned so that he alone can reap whatever benefit they may have. This is of a piece with Dragul's historical enrichment of himself at investor expense, and would yield nothing for the Estate or its creditors, which would clearly not be in their best interest.

Notably, Dragul does not address the defects of the Estate's Nevada claims on the merits. Nowhere does he address the underlying facts or establish substantive bases for the claims. Dragul simply asks the Court to defer to his own *ipse dixit* that the "damages alleged in the Brownstein Complaint [are] supportable." Obj. at 14. But the only deference appropriate here is to the business judgment of the Receiver. (*See* Mot. at 7.)

Nor does Dragul respond to the fatal defect, as explained in the Motion to Approve Settlement, that the claims in the Nevada Action lapsed under the statutes of limitations "prior even to the appointment of the Receiver in August 2018."[7] (Mot. ¶ 20.) Rather, Dragul attempts to misdirect the Court, suggesting the statutes of limitations were scheduled to lapse at some point between when he filed the Nevada Complaint on October 7, 2020 and now, framing himself as saving the claims from expiring. (Obj. at 10-11.) Dragul provides no explanation for this assertion or how it is that claims based on transactions occurring in or before April 2016, which Dragul discovered (according to paragraph 81 of his own Nevada Complaint) no later than August 10, 2016, and which expired prior to the Receiver's appointment on August 30, 2018, were somehow resurrected by his filing of the Nevada Action. (*See* Mot. ¶ 20.) As Dragul admits on page 4 of the reply in support of his Second Abandonment Motion, filed alongside the Objection, the value of time-barred claims is "zero."

In a final attempt to demonstrate the released claims have value, Dragul contends that the Receiver may not "ethically settle a meritless and time-barred claim." (Obj. at 10.) Again, not so. To be sure, the Receiver would have been prevented

[7] The claims are also subject to other defenses, such as *in pari delicto*. (*See* Mot. ¶ 23.) Dragul contends that, because he was the victim of malpractice, he cannot be found to be *in pari delicto* for why would he participate in a scheme to commit malpractice against himself. (Obj. at 11.) Lost in Dragul's analysis is that the basis for the indictments against him, *and* the civil claims being pursued against him by the Securities Commissioner and the Receiver, has nothing to do with whether BHFS failed to properly advise him to register securities or otherwise. The indictments and the claims against *Dragul* are based on him making fraudulent representations and failing to disclose material facts to investors and then stealing their money.

by C.R.C.P. 11 from *filing* the baseless lawsuit against Brownstein, as the Court recognized in its October 1, 2020 order denying Dragul's' First Abandonment Motion. But after Dragul's Nevada counsel[8] crossed that line, the Receiver properly acted in accordance with his fiduciary duties to determine whether the meritless claims could nevertheless bring value to the Estate and provide a source for further relief for the Estate's creditors.

The bankruptcy case *In re Akbari-Shamirzadi* is instructive. No. 11-15351-ta7, 2015 WL 2375393 (Bankr. D.N.M. May 15, 2015). There, the debtor insisted the trustee sue her former attorney, asserting – as Dragul does here (*see* Obj. at 11) – the claims were valuable because the attorney had malpractice insurance. *Id.*, at *3. As here, the trustee believed the attorney had caused "no damages" to the debtor and refused to "bring a meritless claim simply to get some of the insurance company's money." *Id.* He nevertheless settled the claims for $12,000. *Id.* The bankruptcy court "agree[d] wholeheartedly with Trustee's counsel that no claim should ever be asserted simply because the target is insured" and that "the malpractice claim is of little or no merit and has little or no value." *Id.* at 5, 5 n.12. But it approved the settlement over the debtor's objection, because the settlement was in the creditors' best interests. *Id.*

Anticipating that Brownstein might see nuisance value in resolving the baseless lawsuit (correctly, as it turned out), the Receiver initiated settlement discussions and was successful in reaching a resolution that will bring substantial

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[8] It is telling that Dragul's Colorado counsel expressly disavows any involvement in drafting the Nevada Complaint or its filing. (*See* Obj. at 13 ("undersigned counsel did not participate in drafting or filing the Brownstein Complaint").)

additional funds into the Receivership Estate. The Receiver's ability to create value for the Estate out of meritless claims was not an ethical violation; it was done in furtherance of his duties to the Estate and is in its best interests.

Moreover, by settling the claims at issue, the Receiver succeeded in preventing a further drain of Estate resources in discovery in the Nevada Action. Dragul suggests this concern is not well-founded because Brownstein could obtain whatever discovery it needed from Dragul directly. (Obj. at 12.) However, the Receiver is in control of the entity plaintiffs in the Nevada Action, which entities employed the relevant witnesses, and the Receiver is the legal custodian of those entities' records. Even under ordinary circumstances, a reasonable litigator would not rely on an opposing party's representation that it had produced all relevant documents without also looking to the legal custodian of those records. All the more so here, where Dragul has demonstrated in this very action his reluctance to turn over documents he is legally obligated to provide. (*See* Receiver's Second Report ¶ 38 (detailing the efforts of Dragul and his former GDA colleagues to prevent the Receiver's access to GDA records, resolved only with the assistance of the Arapahoe County Sheriff).) That discovery would span decades and many distinct matters in which Brownstein represented GDA, and it would require expensive searching and privilege review of the GDA Entities' internal documents. The Receiver would also likely face discovery under C.R.C.P. 45, seeking information such as his communications with Dragul and others affiliated with GDA. The Receivership Estate would not only bear the costs of this discovery, but also the costs and risks of any related motion practice initiated by Brownstein, Dragul, or both. In settling the claims against Brownstein, the Receiver

not only generates funds for the Receivership Estate, he also avoids substantial expense.

Accordingly, the Court should approve the settlement. Dragul's repeated assertions about his claims' value fail to account for the substantive and procedural defects in the claims. Because, as Dragul concedes, the value of time-barred claims is "zero," a settlement that results in a quarter of a million dollars for the Receivership Estate is certainly in the best interests of the Estate. The Settlement Agreement should be approved and Dragul ordered to dismiss the Nevada Action.[9]

CONCLUSION

The Court should reject Dragul's Objection and grant the Motion to Approve Settlement, confirm the settled claims are part of the Estate, and enjoin Dragul from further litigation of those claims in interference with this Court's exclusive jurisdiction over the Estate.

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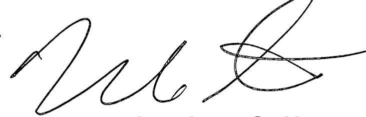
[9] Dragul does not dispute the Court may enjoin him from litigating claims in Nevada, contending only that, factually, those claims are not part of the Estate. (*See* Obj. at 8 n.6.) Because the claims are part of the Estate, the Court should issue the injunction requested in the Motion to Approve Settlement.

Dated: November 30, 2020

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.



By: */s/ Michael T. Gilbert*

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
1600 Stout Street, Suite 1900
Denver, Colorado 80202
(303) 534-4499
E-mail: pvellone@allen-vellone.com
E-mail: mgilbert@allen-vellone.com
E-mail: resternlieb@allen-vellone.com

ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, I served a true and correct copy of the foregoing **RECEIVER'S REPLY IN SUPPORT OF MOTION TO APPROVE SETTLEMENT AGREEMENT WITH BROWNSTEIN HYATT FARBER SCHRECK, LLP** via CCE to:

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

Counsel for David S. Cheval, Acting Securities Commissioner

Paul Vorndran
Chris Mills
Jones & Keller, P.C.
1999 Broadway, Suite 3150
Denver, Colorado 80202
pvorndran@joneskeller.com
cmills@joneskeller.com

Counsel for Defendant Gary Dragul

/s/Salowa Khan
Allen Vellone Wolf Helfrich & Factor P.C.