DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	DATE FILED: January 25, 2021 10:43 AM CASE NUMBER: 2018CV33011
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF et al. v. **Defendant(s)** GARY DRAGUL et al.	⚠ **COURT USE ONLY** ⚠ Case Number: 2018CV33011 Division: 424 Courtroom:

Order: Briefing Schedule: DEFENDANT GARY DRAGUL'S MOTION FOR LIMITED DISCOVERY REGARDING BROWNSTEIN SETTLEMENT AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE

The motion/proposed order attached hereto: SO ORDERED.

Any response to the attached motion shall be filed on or before January 28, 2021. Any reply shall be filed on or before February 1, 2021.

Issue Date: 1/25/2021

SHELLEY ILENE GILMAN
District Court Judge

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 ▲
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, 26th Floor Denver, CO 80202 Phone: 303-573-1600 Email: pvorndran@joneskeller.com cmills@joneskeller.com	Case No. 2018CV33011 Courtroom: 424
DEFENDANT GARY DRAGUL'S MOTION FOR LIMITED DISCOVERY REGARDING BROWNSTEIN SETTLEMENT AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE	

In the meet-and-confer process leading up to Mr. Dragul filing his motion seeking to have the claims against Brownstein abandoned, Mr. Dragul shared the complaint against Brownstein ("Brownstein Complaint"), and the Receiver's counsel said he would require a "a significant amount of time" to "fact check each allegation", and that Mr. Dragul should "not expect an answer from us any time soon." Mr. Dragul agreed to wait an additional ten days, then followed up again, received no response, and ultimately filed his Motion to Order Claims Against Brownstein Abandoned on October 26th. Three weeks later, the Receiver filed his Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP ("Motion"), indicating that he either: (1) performs legal work at incredible speed and was able to

investigate the claims in good faith *and* negotiate the settlement with Brownstein *and* draft and file the Brownstein Settlement Motion *and* his reply to Mr. Dragul's abandonment motion; or (2) he did not investigate the claims and spent that three weeks talking to Brownstein and drafting the settlement agreement.

The Receiver's pleadings suggest that (2) is a real possibility. In support of his Motion and in the attached proposed settlement agreement, the Receiver asserted that the claims against Brownstein "are not factually supported [and] not meritorious" (Mot. ¶ 20), that he was not aware of any facts supporting the claims, (*id*. Ex. 1 ¶ K), and that all of the claims are barred by the applicable statutes of limitation (*id*. ¶ 20). But he never explained the basis for those beliefs[1] or what efforts he made to investigate the claims.

Mr. Dragul pointed this out when he filed an objection to the Motion. In his reply in support of the Motion ("Reply"), the Receiver again simply asserts the claims are "substantively without merit, time-barred, and subject to other defenses" (Reply 7), but never explains why or what investigation he did to make this determination. On December 11, 2020, after reviewing these pleadings, the Court issued an order ("Order") which directed the parties to set a hearing on these issues. The hearing will occur on February 19, 2021

There is an easy way to determine whether the Receiver investigated the claims in good faith and determined they lacked merit, and whether he properly kept Brownstein at arms-reach when negotiating settlement. First, the Receiver should produce his communications with Brownstein related to the claims asserted in Brownstein Complaint and the proposed settlement.

[1] Other than vaguely asserting the claims must be time-barred because they pertain to transactions that concluded years ago and into which the Commissioner and Attorney General began investigations in 2014, without any mention of the discovery rule or when the injury occurred. (Mot. ¶ 20.)

The Receiver cannot claim such communications are privileged, as they are all with an adverse third party.

Second, the Receiver should produce documents and communications[2] reflecting the efforts the Receiver undertook to investigate the claims at issue. This would include, for example, billing records. Since the Receiver has publicly filed his billing records in support of his prior fee applications, such discovery ought to be unobjectionable.

Certification of Conferral

Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Mr. Dragul conferred with counsel for the Receiver and Brownstein about the relief requested herein. The Receiver and Brownstein oppose. Counsel for Mr. Dragul also reached out on multiple occasions to the Plaintiff Commissioner, who has not provided a position.

ARGUMENT

I. Limited Discovery Will Demonstrate Whether the Settlement is in the Interests of the Estate and its Creditors

A. Limited Discovery Will Show Whether the Receiver Complied with his Fiduciary Duties

"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). Thus, a receiver owes a fiduciary duty to the estate and the court appointing him or her to investigate potential claims in good faith and handle such claims with the interests of the estate and its creditors in mind. A receiver cannot just take the opposing party's word for it that the claims the receiver seeks to settle are meritless. Limited discovery will allow the Court and Mr. Dragul to determine whether the Receiver acted

[2] Redacted where necessary for privilege to the extent the Receiver has a good-faith privilege claim.

appropriately and whether the proposed settlement is in the interests of the Estate and its creditors.

B. Discovery is Available Here

While it does not appear a case management order has entered, the case was filed and the Receiver was appointed long ago, and the case has been pending for two and a half years. There are 488 entries on the docket showing the Receiver has been quite active. There should be no rules-based impediment to the limited discovery sought, and even if there were, C.R.C.P. 26(d) provides that discovery may be had before a case management order is served "when authorized by these Rules, by order, or by agreement of the parties."[3] *See also Cameron v. District Court*, 565 P.2d 925, 928 (Colo. 1977) (matters of discovery are generally left to the discretion of the trial court).

Nor does it matter that the Receiver is not a named party to this action. Having been appointed Receiver, he is expressly subject to this Court's direction under the Receivership Order, and has availed himself of this Court on myriad occasions, including by filing and having this Court approve his motions to approve settlement agreements, motions to abandon assets, and fee applications. The Receiver serves as an officer of the Court, *Charles Alan Wright, Arthur R. Miller & Richard L. Marcus*, 12 Fed. Prac. & Proc. Civ. § 2981 (3d ed. 1975), and as a fiduciary of the Court, *K-Partners III, Ltd.*, 883 P.2d at 606, so there is no question this Court has power to order discovery against the Receiver.[4]

C. The Information Sought is Relevant

[3] Not to mention that, by seizing all of Mr. Dragul's and the GDA Entities' information, the Receiver already obtained all the discovery he might want, and more, from Mr. Dragul, including Mr. Dragul's attorney-client privileged information which was saved on the server the Receiver seized.

[4] And discovery against third parties is authorized under C.R.C.P. 45 in any event.

The information Mr. Dragul seeks is relevant pursuant to C.R.C.P. 26(b)(1). The questions at issue with respect to the Receiver's Motion include whether the Receiver investigated the claims in good faith and determined they were "meritless" as he contends, and whether the proposed settlement is in the best interests of the Estate and its creditors. The Receiver's documents reflecting his efforts to investigate the claims could not be more relevant to whether the Receiver investigated them in good faith. And the Receiver's communications with Brownstein could not be more relevant to whether the Receiver negotiated with Brownstein in good faith and at arms-length with the interests of the creditors in mind, or whether his objective was something else. If the Receiver did not investigate the claims in good faith, or if the Receiver did not negotiate with Brownstein with the best interests of the creditors in mind, that is direct evidence the proposed settlement is not in the interests of the Estate as required for approval. Since these are among the issues for which the Court ordered a hearing, discovery is key.

Since the Receiver bears the burden to support his Motion to approve the settlement agreement, he ought to be eager to share this material with the Court and Mr. Dragul to prove that the proposed settlement is in the Estate's interest. Moreover, if the Receiver acted appropriately here, that information would comfort creditors. It is unclear why the Receiver opposes this limited discovery.

D. The Discovery Sought is Proportional to the Needs of the Case

The discovery sought is narrowly-tailored—in topic, volume, and timeframe—so the burden to gather and produce it will be minimal. Yet the importance of that material for the matters at issue is clear. Plus, the amount in controversy associated with the claims against

Brownstein is over $50 million,[5] and even under the proposed settlement agreement is $250,000. Finally, only the Receiver (and to a certain extent, Brownstein) has access to this information—Mr. Dragul does not. The limited discovery sought here meets the proportionality test under C.R.C.P. 26(b)(1).

CONCLUSION

The Court ordered a hearing "to address the issues raised in the Receiver's Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck and Gary Dragul's Motion to Order Claims Against Brownstein Abandoned." (Order.) The main issues raised in those pleadings are: (1) do Mr. Dragul's personal claims against Brownstein belong to him personally or to the Receiver?; (2) did the Receiver fulfill his fiduciary duty in investigating and then settling the Brownstein claims?; and (3) is the proposed settlement in the interest of the Estate and its creditors? The limited discovery sought here bears directly on issues (2) and (3), and possibly issue (1). It is hard to imagine evidence that would be more relevant to the matters to be addressed at the hearing. But this information is in the Receiver's possession, so there is no way for Mr. Dragul and the Court to obtain it absent limited discovery. Since the discovery sought is so circumscribed, the burden on the Receiver is minimal. The Court should allow the following discovery from the Receiver so that the parties, and most importantly the Court, will have all the necessary information to adequately evaluate the issues at the hearing:

(1) All communications between (a) the Receiver or its counsel, representatives, or agents, and (b) Brownstein or its counsel, representatives, or agents, relating to the claims alleged in the Brownstein Complaint and/or settlement of those claims;

[5] The Receiver and Brownstein dispute this amount, but when determining whether the discovery sought is proportional to the needs of the case under C.R.C.P. 26(b)(1), what matters is the amount in controversy, not what is ultimately recovered. Indeed, the amount ultimately recovered is necessarily unknown while discovery is still ongoing, as the recovery is not known until the case is over.

(2) All documents and/or communications, including billing records, relating to the Receiver's, or the Receiver's counsel's, representatives', or agents', efforts to investigate the claims alleged in the Brownstein Complaint.

Since the material sought would make a significant impact on the hearing, Mr. Dragul further requests an expedited briefing schedule so that the Receiver can produce the requested information with sufficient time before the hearing for the parties to make use of it. Thus, Mr. Dragul requests that the Court order the Receiver to respond no later than January 28th, that Mr. Dragul reply no later than February 1st, and that the Receiver be ordered to produce the requested material no later than February 10, 2021.

Respectfully submitted this 21st day of January, 2021.

JONES & KELLER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S MOTION FOR LIMITED DISCOVERY REGARDING BROWNSTEIN SETTLEMENT AND REQUEST FOR EXPEDITED BRIEFING SCHEDULE** was filed and served via the Colorado Courts E-filing system on this 21st day of January 2021 to the following counsel of record for the parties to the action and interested third parties:

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