DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	
Plaintiff: Tung Chan, Acting 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 REPLY IN SUPPORT OF MOTION FOR LIMITED DISCOVERY	

INTRODUCTION

Approving a settlement must be "based upon an objective evaluation of developed facts." *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989). The Receiver never developed any facts to support his proposed settlement with Brownstein, instead just asserting the settlement is in the best interests of the Estate and its creditors. The Receiver's and Brownstein's actions provide ample reason to doubt these assertions. The information sought would be used to show whether the Receiver investigated the claims in order to know whether, as he represents to the Court, the

settlement is in creditors' best interests, and whether he kept Brownstein at arms-length as creditors' bests interests would require. The information is facially relevant, and it would not be used for purposes prohibited under C.R.E. 408. Discovery makes sense here, as without it, the Court lacks the information it needs to evaluate the proposed settlement and must deny the Receiver's motion to approve it for that reason.

ARGUMENT

I. THE INFORMATION SOUGHT IS ADMISSIBLE

The Receiver and Brownstein both argue the information Mr. Dragul seeks is inadmissible because C.R.E. 408 precludes admission of conduct or statements made in compromise negotiations "when offered to prove liability for, invalidity of, or amount of a claim[.]"[1] C.R.E. 408(a); (*see also* Receiver's Response to Dragul's Motion for Limited Discovery ("Receiver Resp.") 9; Brownstein Hyatt Farber Schreck, LLP's Opposition to Defendant Gary Dragul's Motion for Limited Discovery Regarding Brownstein Settlement ("Brownstein Resp.") 2-10.) But Mr. Dragul does not seek the information to prove liability for, invalidity of, or the amount of damages on the Brownstein claims. There is a separate proceeding—pending in Nevada—to determine that. Those issues are not before this Court.

[1] C.R.E. 408(b) expressly provides that settlement negotiation evidence is not excluded under the Rule if the evidence is offered for a purpose that is not prohibited under 408(a). *In Am. Guarantee & Liab. Ins. Co. v. King*, 97 P.3d 161, 169 (Colo. App. 2003), which the Receiver cites (Receiver Resp. 9), the court *rejected* a C.R.E. 408 argument, noting that the mediator's statements regarding the validity of a subrogation claim were not offered to prove invalidity, but to show the insurer's knowledge that its subrogation claim was questionable, which was a factor supporting that the insurer acted "in violation of its duty to investigate in good faith." Here, the information sought will show whether the Receiver investigated the Brownstein claims in good faith, and whether he determined the settlement is in the best interests of the Estate and its creditors as he told the Court.

Rather, as the Receiver notes "[t]he sole issue to be determined at the February 19th hearing is whether the Brownstein settlement is in the best interest of the Estate." (Receiver Resp. 6.) Specifically, whether the Receiver has met his burden to demonstrate this?[2]

The Receiver argues that this question turns on four primary factors: "the probably success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views." (Receiver Resp. 7 (quoting *Kopp v. All Am. Life Ins. Co.*, 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997) & citing other cases).) None of those factors require this Court to determine Brownstein's liability on, or damages awardable from, the Brownstein claims.[3] As the Receiver notes, "[t]he Court is not required to decide questions of law or fact,

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[2] "A trustee bears the burden to show that a proposed settlement is in the best interests of the estate and the debtor." *In re NJ Affordable Homes Corp.*, No. 05-60442(DHS), 2007 WL 3166950, *7 (Bankr. D.N.J. Oct. 22, 2007) (citing *In re Neshaminy Office Bldg. Assocs.*, 62 B.R. 798, 804 (E.D. Pa. 1986); *see also In re Boone*, No. 3:18-BK-30150-SHB, 2018 WL 5885451, at *4 (Bankr. E.D. Tenn. Nov. 6, 2018) (same). As Brownstein's and the Receiver's reliance on bankruptcy cases demonstrates, there is no reason the burden would be different for a receiver.

[3] This difference is why cases Brownstein and the Receiver cite, such as *Cyr v. Reliance Standard Life Ins. Co.*, 525 F. Supp. 2d 1165 (C.D. Cal. 2007) (Brownstein Resp. 7-8), are inapposite. In *Cyr*, the court was ruling on motions for summary judgment, not evaluating whether to approve a settlement, and the settlement negotiation evidence was offered to prove what Rule 408 prohibits, not whether a receiver or trustee met its burden to show the settlement agreement is in the best interests of the Estate and its creditors. *Id*. at 1170-71. And none of the parties were a receiver or a trustee who owe fiduciary duties to creditors and the court. Moreover, the fact that the party trying to introduce the evidence of settlement negotiations had them to begin with suggests such information is discoverable. *In re Adelphia Commc'ns Corp.*, 336 B.R. 610, n.48 (S.D.N.Y. 2006) (Brownstein Resp. 8, n.7) involved negotiation about a reorganization plan, not settlement, and no trustee had been appointed. Similarly, *In re C.M. Meiers Co., Inc.*, No. 1:12-bk-10229-MT, 2016 WL 9458553, at *37 (C.D. Cal. Bankr. Dec. 20, 2016) (Brownstein Resp. 8, n.7), was a recommendation on a motion for summary judgment on an affirmative defense of, and did not involve approval of a settlement agreement (and there, it was unclear the court barred admission of any evidence, and the Trustee explained the basis for his damages calculation, *id*. at *37-38.). *In In re Tawil*, No. 14-10649, 2017 WL 3309693, at *2 (D.N.J. Aug. 1, 2017) (Brownstein Resp. 9), there was no indication for what purpose the

nor conduct a detailed analysis of the underlying law or a risk-adjusted value of the litigation." (Receiver Resp. 7 (citing *In re: Rich Global, LLC*, 652 F. App'x 625, 631-32 (10th Cir. 2016).)[4] Thus, Mr. Dragul does not seek to admit the information sought for a use prohibited under C.R.E. 408—those uses are not before this Court.[5] As addressed below, the information sought is directly relevant to the issue that is before this Court: whether the Receiver met his burden to demonstrate that the proposed settlement is in the best interests of the Estate and its creditors.

II. THE MOTION FOR LIMITED DISCOVERY IS ABOUT DISCOVERABILITY, NOT ADMISSIBILITY

Though the information sought is also admissible, that issue is not before the Court now. Rather, the Court can make that determination at the hearing. On the Motion for Limited Discovery, the issue is instead discoverability.

Under C.R.C.P. 26(b), "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of

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statements made in settlement negotiations were offered, and they appear irrelevant in any event since the objector presented merely legal reasons not to approve the settlement which the court resolved in a few sentences without reference to any evidence.

[4] The *Rich Global* court ultimately approved the settlement there after reviewing "the history of the litigation [on which settlement was sought], the counts alleged, . . . the District Court opinions and the supporting documents found in the record" *id.*, none of which the Receiver or Brownstein provide here.

[5] Brownstein quotes *Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 866 F. Supp. 1560, 1576 (D.N.M. 1994), which noted that many courts "have explicitly or impliedly found that Rule 408 expresses the policy of protecting settlement negotiations *and agreements* from unnecessary intrusion in order to encourage settlements." (emphasis added) (Brownstein Resp. 11). But receiverships are different—the receiver is *required* to disclose settlement agreements. And since a receiver must act in the best interests of the Estate and its creditors, any encouragement to settle that *the receiver* obtains from confidentiality is irrelevant. A receiver cannot settle, whether or not he is encouraged to do so, unless it is the interests of the estate and creditors.

the cease[.]" C.R.C.P. 26(b) expressly provides that "[i]nformation within the scope of discovery need not be admissible in evidence to be discoverable."

The Receiver claims work product protection over his "investigation and conclusions" regarding the Brownstein claims (Receiver Resp. 9), and privilege over communications between the Receiver and his counsel about the Brownstein claims (Receiver Resp. 10). As Mr. Dragul noted in the Motion for Limited Discovery, the Receiver is free to make good faith privilege objections and redact/withhold on that basis. But the Receiver already stated his conclusions about the Brownstein claims in his Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP ("Settlement Motion") and reply in support thereof, and was supposed to demonstrate to the Court why those conclusions were correct. Since the Receiver must provide this to meet his burden to have the settlement approved, claiming privilege to hold it back means the settlement must be rejected because the Receiver failed to show it was in the best interests of the Estate and its creditors. This is what distinguishes this case from *In re Lee Way Holding Co.*, 120 B.R. 881, 891-904 (Bankr. S.D. Ohio 1990), which the Receiver cites (Receiver Resp. 10), as in *In re Lee Way Holding*, the trustee provided ample analysis and evidence to demonstrate the proposed settlement agreement was in the best interests of the estate and its creditors.

Plus, the Receiver owes fiduciary duties to the creditors and the Court. *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). Indeed, he is required to disclose all settlement agreements, unlike private litigants. By virtue of his position as Receiver, he lacks the same rights to confidentiality other parties have.

Brownstein also argues that its outline draft of its motion to dismiss the Brownstein Complaint, which Brownstein shared with the Receiver, is protected from discovery under C.R.E. 408, even though Rule 408 is about admissibility. (Brownstein Resp. 12-13.) Mr. Dragul does not mean to argue Brownstein is barred from asserting good-faith privilege claims. But it is unclear how the outline draft of its motion to dismiss counts. Brownstein shared it with the Receiver, who is (supposed to be) adverse to Brownstein, and who, if settlement were not reached or not approved, could prosecute the GDA Entities' claims against Brownstein. Sharing the outline draft of its motion to dismiss with the Receiver ought to be as prejudicial to Brownstein as sharing it with Mr. Dragul. Yet, Brownstein shared it with the Receiver, and waived any privilege or protection it might claim.

Indeed, the Receiver expressly relied on Brownstein's outline draft to support his Settlement Motion, waiving any privilege or protection it might have. (Settlement Mot. ¶ 24.) While the Receiver now argues settlement negotiation exchanges are inadmissible and irrelevant, he clearly thought the draft outline motion to dismiss was relevant to settlement approval then, and believed it could be considered by the Court in approving the settlement. Information cannot be relevant and admissible only when favorable to the Receiver and Brownstein, but not when it weighs against settlement approval.

Most importantly, the fact that Brownstein voluntarily shared the outline draft of its motion to dismiss with the Receiver, but would be "irreparably harmed" if Mr. Dragul sees it, raises concerning questions. Why would Brownstein be less concerned about the Receiver seeing it, particularly since the Receiver would not be subject to arguments like Mr. Dragul would, such as the credibility attacks on Mr. Dragul that Brownstein has already leveled? Again,

this demonstrates the Receiver and Brownstein did not negotiate at arms-length. The Court is entitled to evidence about this so it can make a reasoned and objective decision about the proposed settlement.

III. THE INFORMATION SOUGHT IS RELEVANT

A court's decision to approve a settlement agreement "must be an informed one based upon an objective evaluation of developed facts." *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989) (citing *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 434 (1968), among other cases). Thus, "[a]n approval of a compromise, absent a sufficient factual foundation, inherently constitutes an abuse of discretion." *Id*. at 892 (internal quotation omitted). While a trustee's judgment may deserve some deference, "[t]he court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is reasonable." *In re W. Pointe Properties, L.P.*, 249 B.R. 273, 281 (Bankr. E.D. Tenn. 2000) (internal quotation omitted).

But here, all the Receiver provides is his word. He merely asserts he believes the claims against Brownstein "are not factually supported [and] not meritorious[,]" (Settlement Mot. ¶ 20), 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[,]" (*Id*. Ex. 1 ¶ K), and that he believes "the claims asserted in the Nevada Complaint are barred by applicable

statutes of limitations" (*Id*. ¶ 20.) He never explains the basis for these assertions,[6] or what efforts he made to investigate the claims.[7]

Even if the Receiver's word were ordinarily good enough (which it is not), here he and Brownstein have given the Court ample reason for doubt. As Mr. Dragul already addressed in his November 23, 2020 Objection to Receiver's Motion to Approve Settlement Agreement with Brownstein Hyatt Farber Schreck, LLP ("Objection") and January 21, 2021 Reply Brief re Receiver's Motion to Approve Brownstein Settlement ("January 21, 2021 Brief"), unlike in every other settlement for which the Receiver has sought approval, in which the Receiver has said the claims have merit, but that settlement nonetheless makes sense, here the Receiver and Brownstein say the claims are wholly factually unsupported and meritless. Yet, the Receiver thinks it is ethical to settle these "meritless" claims, and Brownstein is willing to pay $250,000 to settle those unsupported and baseless claims. And Brownstein hired expensive out-of-state counsel from Proskauer to represent it in settling these mere "meritless" claims.

And in his Response, the Receiver now argues the discovery sought would be burdensome because it "seeks information dating back to the Receiver's appointment on August 30, 2018, which is when the Receiver, his counsel, and his consulting experts began to investigate potential litigation claims against third parties, including Brownstein." (Resp. 9.)

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[6] Except that he vaguely asserts 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, though he does not address the discovery rule or when the injury occurred. (Settlement Mot. ¶ 20.)

[7] While Brownstein tried to provide a bit more substance, its arguments fail as well as Mr. Dragul described in his January 21, 2021 Brief. More importantly, Brownstein does not owe a fiduciary duty to the creditors or Court like the Receiver does, and Brownstein has no duty to ensure the settlement is in the best interests of the Estate and its creditors.

That is quite different from what the Receiver told Mr. Dragul during the meet-and-confer process, when he said 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. to Order Claims Against Brownstein Abandoned, Ex. 1 at 4.) Much worse, it is not what the Receiver told the Court in his September 24, 2020 response to Mr. Dragul's Motion to Order Claims Abandoned. There, he complained that Mr. Dragul had not provided sufficient factual and legal research to the Receiver to evaluate the claims against Brownstein, and instead complained that it was too cumbersome to expect the Receiver to investigate such claims because searching through 1.148 terabytes of data is "cumbersome and oftentimes fail[s] to locate useful information." (Receiver's Sept. 24 Response 5.) He thus argued that since Mr. Dragul did not provide this information "neither the Court nor the Receiver can determine whether grounds for abandonment exist." (Id. at 6.) The Court then relied on the Receiver's representations, noting in its October 1, 2020 order denying Mr. Dragul's motion that 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."[8] But now the Receiver argues he has been investigating claims

[8] The Receiver argues this Order barred Mr. Dragul from filing the Brownstein Complaint. (Receiver Resp. 5, ¶¶ 5-6.) It is unclear why. It denied Mr. Dragul's motion to order the claims abandoned for lack of information, but Mr. Dragul's personal claims against Brownstein were never at issue in that motion, and the Court never ordered Mr. Dragul not to file the claims. When Mr. Dragul did file, he expressly noted the GDA Entities' claims belonged to the Receiver, and he was asserting those claims to ensure they were not time-barred regardless of whether it was the Receiver or Mr. Dragul that prosecuted them, consistent with the holding in *Barletta v. Tedeschi*, 121 B.R. 669 (1990). (*See* Mr. Dragul's October 26, 2020 Motion to Order Claims Against Brownstein Abandoned 3-4 & n.3.) As the Receiver argues the claims are time-

against Brownstein for nearly two-and-a-half years (Receiver Resp. 9), and apparently had ample information about those claims all along.

However, the Receiver has not provided any of that information, or any other information sufficient for the Court to ensure its decision to approve the settlement agreement is "an informed one based upon an objective evaluation of developed facts[,]" *Reiss*, 881 F.2d at 892. The information Mr. Dragul seeks, however, will either (1) provide the support for the settlement agreement the Receiver was supposed to have already provided, or (2) demonstrate the Receiver's assertion the settlement is in the best interest of the Estate and its creditors is baseless and that the settlement should not be approved.

The Receiver and Brownstein argue the Receiver's investigation of the claims is not relevant. (Receiver Resp. 14; Brownstein Resp. 6-7.) The Tenth Circuit in *Reiss v. Hagmann* reversed the lower court's approval of a settlement agreement because "[t]here is no indication in the record that the trustee or the courts did any legal research or made any attempt to properly separate the issues and evaluate the facts[,]" and the trustee therefore it confused claims and failed to evaluate its chances of success appropriately. 881 F.2d at 892. Here, the Receiver has also provided no indication—other than his simple assertion—that he researched the claims or evaluated the facts. The information Mr. Dragul seeks regarding the Receiver's investigation of the claims is precisely what the Receiver has a duty to provide under *Reiss*. It is hard to see how this information could be more relevant.[9] How could the Receiver represent to the Court, let

barred, he has Mr. Dragul to thank for persevering them so he was in a position to negotiate settlement with Brownstein.

[9] Citing pages 9-11 of Mr. Dragul's Objection, Brownstein argues that "Dragul conceded that questions regarding the depth of the Receiver's investigation were relevant only insofar as

alone factually and legally support, that the settlement is in the best interests of the Estate and its creditors if he never bothered to research the claims to make that determination? If he did conduct that investigation, it is past due for the Receiver to provide information about it. He cannot meet his burden until he does.

Brownstein and the Receiver also argue that whether the Receiver complied with his fiduciary duty to the Estate, its creditors, and the Court is irrelevant. (Brownstein Resp. 6-7; Receiver Resp. 12.) Mr. Dragul does not understand how the question of whether the Receiver complied with his fiduciary duty to act in the best interests of creditors could be irrelevant to whether the Receiver's actions in attempting to settle with Brownstein are in the best interests of the Estate and its creditors. The standard the Receiver must meet to have the settlement approved is the same as his fiduciary duty.

Similarly, the Receiver's communications with Brownstein about the settlement will show whether the Receiver kept Brownstein at arms-length (along with myriad other relevant facts, such as whether the Receiver believed the claims are meritless). If the Receiver did not keep Brownstein at arms-length, he could not have been negotiating a settlement in the best interests of the Estate and its creditors.

This is not like the circumstances in *McDonough v. Horizon Blue Cross Blue Shield of New Jersey*, 641 Fed. Appx. 146, 152-53 (3d Cir. 2015), which the Receiver cites (Receiver Resp. 12), and where the claims at issue had been litigated for give years, and a million pages of discovery exchanged. Here, the Brownstein claims have not been litigated, and the Receiver has

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Dragul argued the Receiver undervalued the value of the claims' merits." (Brownstein Resp. 7.) Mr. Dragul did not say that on pages 9-11 or anywhere else.

not even disclosed what, if anything, he did to research them. As the *McDonough* court noted, courts have "wide latitude to employ the procedures that is perceives will best permit it to evaluate the fairness of settlement." *Id*. at 152 (internal quotation and citation omitted). Here, that should include ordering discovery.

And while the information sought will likely itself be admissible, it will also lead to discovery of admissible evidence before the hearing, contrary to Brownstein's assertion. (Brownstein Resp. 10.) As the Receiver makes clear, he plans on calling witnesses. So does Mr. Dragul. The discovery sought will inform the questioning and the testimony it elicits.[10]

IV. THE ONLY EVIDENCE THUS FAR AVAILABLE DEMONSTRATES THE SETTLEMENT IS NOT IN THE BEST INTERESTS OF THE ESTATE OR CREDITORS

The Receiver argues the proposed settlement is in the best interests of the Estate and its creditors, though often through personal attacks on Mr. Dragul.[11] While it is not clear how this relates to whether discovery should be allowed, Mr. Dragul is happy to address the Receiver's arguments.

[10] The Receiver also argues Mr. Dragul's Motion for Limited Discovery is untimely. (Receiver Resp. 8.) But Mr. Dragul was not aware the Court would receive evidence at a hearing until the Court issued its December 11, 2021 Order directing the parties to set the hearing.

[11] Brownstein argues, for the second time, that Mr. Dragul's Colorado counsel "feels the need to remind the Court that they had nothing to do with the lawsuit Dragul filed" (Brownstein Resp. 5 n.6), as though this suggests undersigned counsel doubts Brownstein's malfeasance. To be clear, as Mr. Dragul's Colorado counsel has told Brownstein, they are fully-prepared to name Brownstein a non-party at fault and assert an advise-of-counsel defense based on Brownstein's malfeasance here. But Mr. Dragul's undersigned counsel (1) are not licensed in Nevada; (2) generally do not take cases on contingency and as a factual matter did not research, draft, or file the Brownstein Complaint; and (3) do not want to bill Mr. Dragul for re-doing work that his Nevada counsel already performed just so undersigned counsel take credit for that work.

First, the Receiver argues that Mr. Dragul seeks for the Brownstein claims to be abandoned so Mr. Dragul can pursue them for his personal benefit at the expense of the creditors. (Receiver Resp. 2-3.) But Mr. Dragul has always acknowledged the GDA Entities' claims against Brownstein belong to the Receiver, and only requested they be abandoned after the Receiver refused to prosecute them, even after receiving the Brownstein Complaint in which Mr. Dragul had done all the work for the Receiver. (Mot. to Order Claims Against Brownstein Abandoned 8; Reply In Support of Mot. to Order Claims Against Brownstein Abandoned 2.) Additionally, while Mr. Dragul hopes some recovery from the Brownstein claims might allow him to fund his legal defense, he plans for the rest of the recovery to go to creditors as part of a broad resolution with the Commissioner. However, he intends for the recovery to go through the Commissioner to the creditors, not through the Receiver. Why cut the Receiver out? Because the Receiver took in assets worth approximately $4,315,000 on a book liquidation value matrix, plus contingent assets of $4,270,000 for real property assets after anticipated appreciation, and a range of $12,475,000 to $22,475,000 for the Special Purpose Entity membership interest assets, and ran them into the ground. He failed to make a single mortgage payment on properties in the Estate, resulting in the lenders foreclosing, and until the recent settlement with the Fox Defendants, had only $520,000 left to distribute to creditors after paying himself and his counsel and accountants nearly $4 million. Mr. Dragul fears little of the Brownstein settlement money will make its way to creditors once the Receiver has it. And the less creditors receive, the more likely they are to opt out of the equitable claims pool and pursue individual claims directly against Mr. Dragul. What Mr. Dragul does not intend is for any Brownstein settlement money to go directly to him.

The Receiver also argues that Mr. Dragul's personal claims against Brownstein belong to the Receivership Estate. (Receiver Resp. 4, ¶ 2.) As Mr. Dragul demonstrated on pages 2-4 of his January 21, 2021 Brief, the Receivership Order does not include Mr. Dragul's personal claims against Brownstein, distinguishing the situation here from the bankruptcy cases the Receiver cites.

The Receiver's argument that Dragul is seeking damages from Brownstein because Brownstein has deep pockets and is insured on the claims (Receiver Resp. 5, ¶ 6), is particularly specious. One of the factors in evaluating whether to approve a settlement under the test the Receiver argues should be applied is "the possible difficulty in collection of a judgment[.]" (Receiver Resp. 7 (quoting *Kopp*, 213 B.R. at 1022.) And Mr. Dragul mentioned Brownstein's ability to pay and insurance for the claims *only* in connection with this collectability factor, not in connection with whether the claims are meritorious, or in any other context. (Obj. 11.)

The Receiver's argument that Mr. Dragul "is the disgruntled perpetrator of a Ponzi scheme which resulted in his indictment on 14 counts of securities fraud" (Receiver Resp. 13) is both irrelevant and baseless. "Ponzi scheme" is not mentioned in either of the indictments (neither is theft), and it is only the Receiver who has alleged (but not proven) anything about a Ponzi scheme. Nothing in Receiver's argument about the Estate's financial condition when he was appointed (Receiver Resp. 13 n.10) is accurate either. For example, as Mr. Dragul looks forward to demonstrating at the hearing, there was $735,842.37 in the accounts (not $32,936.23 as the Receiver asserts), only one commercial mortgage was in (non-monetary) default, and no foreclosures were pending—they were only instituted after the Receiver took over.

The Receiver argues no creditors have objected to the Brownstein settlement, and disparages Russell Becker's complaint. (Receiver Resp. 11; *id*. n.6.) But the Receiver has not given creditors a viable path to object beyond something like Mr. Becker's email. It is not reasonable to expect every creditor to hire an attorney to seek to intervene to assert an objection, and the Receiver previously argued against another creditor, Marlin Hershey, intervening in the case, asserting that "investors and creditors have no right to intervene in a securities case where the Commissioner can adequately protect their interests." (April 27, 2020 Receiver's Response to Hershey's Motion to Intervene 9.) And it is no wonder creditors have been reluctant to object since, as the Receiver's lawsuit against Mr. Becker and Mr. Hershey demonstrate, the Receiver often sues creditors. Notably, the Receiver does not address the emailed objections to the Fox settlement it received from two other creditors, or tell the Court whether it received any other objections which of which Mr. Dragul is unaware. As a fiduciary of the Court, the Receiver should be informing the Court about creditors concerns about the Brownstein settlement and anything else material.

CONCLUSION

The Receiver bears the burden to demonstrate the proposed settlement is in the best interests of the Estate and its creditors, and he must do so by providing facts and reasoning sufficient that the Court may make an objective and fact-based determination that approving the settlement is appropriate. He never did that, instead just asserting the Brownstein claims are meritless, and thus the settlement makes sense. The discovery Mr. Dragul seeks, if it shows the proposed settlement is in the best interests of the Estate and its creditors, would provide what the Receiver has failed to thus far provide, and which the Court needs to approve the settlement.

One would think the Receiver would be anxious to provide it. The fact that the Receiver is opposes this discovery, when it is only with it that he can satisfy his burden to show the settlement is in the best interests of the Estate and its creditors, speaks volumes.

Respectfully submitted this 1st day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT GARY DRAGUL'S REPLY IN SUPPORT OF MOTION FOR LIMITED DISCOVERY** was filed and served via the ICCES e-file system or email on this 1st day of February 2021 to the following counsel of record for the parties to the action and interested third parties:

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