DATE FILED: March 20, 2021 11:15 AM
FILING ID: 1786EC584944F
CASE NUMBER: 2018CV33011

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Denver District Court 1437 Bannock Street Denver, CO 80202 Phone: 720-865-8301 **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** ▲ Case No.: 2018CV33011 Courtroom: 424
Attorneys for Creditor, Chad Hurst: T. Edward Williams, Atty. No. 41891 WILLIAMS LLP 7 World Trade Center 250 Greenwich Street, 46th FL New York, New York, 10007 Telephone: (212) 634-9106 Fax Number: (212) 202-6228 E-mail: edward@williamsllp.com	

PARTIALLY STIPULATED EMERGENCY[1] MOTION TO STAY THE COURT'S FEBRUARY 26, 2021 ORDER

Creditor, Chad Hurst ("Mr. Hurst"), seeks a stay of the February 26, 2021 Order under C.R.C.P. 62(b)(3) and under the *Romero* Factors. A stay is proper because Mr. Hurst can demonstrate he is likely to prevail on appeal and because he can satisfy the other *Romero*

[1] An exigency exists for resolution of this issue because Shumway Van must take certain actions to prevent the malpractice suit from lapsing.

Factors. First, and in support of Mr. Hurst's argument that he will likely prevail on appeal, the Court's ruling that a receiver may rely on nothing more than his own a receiver's judgment to value a receivership asset is not supported by law. The Court cited no Colorado cases to support its ruling, and there is no extant Colorado appellate opinion on point. Trial courts in Colorado have rejected the Court's reasoning and required a receiver to demonstrate that the price of a receivership asset is commercially reasonable.

Second, and in further demonstration that Mr. Hurst will likely prevail on appeal, a stay is appropriate because the Receiver did not provide notice of the settlement to the Receivership's creditors. Paragraph 34 of the Receivership Order, the notice provision, is defective and fails to comply with due process. Although defective, the Receiver did not even comply with Paragraph 34 and failed to provide notice to creditors.

As demonstrated in Section B, below, Mr. Hurst can satisfy the remaining *Romero* Factors because Mr. Hurst will suffer irreparable harm without a stay, because neither the Receivership Estate nor the Receiver will suffer harm, and because the public interest lies with Mr. Hurst.

CERTIFICATION OF CONFERRAL

Counsel for Chad Hurst conferred with the parties in this matter about the relief this Motion seeks. Gary Dragul's attorneys **do not oppose** this Motion. However, attorneys for Brownstein Hyatt Farber and Schreck LLP, attorneys for the Receiver, and attorneys for the Colorado Division of Securities **oppose** this Motion.

BACKGROUND

Defendant, Gary Dragul, owned and operated two entities called GDA Real Estate Services ("GDARES") and GDA Real Estate Management ("GDAREM"). GDARES and GDAREM (together the "GDA Entities"), managed and serviced shopping centers owned by third parties. Among the shopping centers the GDA Entities managed were shopping centers owned by entities Special Purpose Entities ("SPEs") Gary Dragul formed with legal guidance from Brownstein Hyatt Farber and Schreck LLP ("Brownstein"). The SPEs financed their purchases of shopping centers with funds from investors like Chad Hurst.

On April 2, 2018, the Colorado Attorney General indicted Dragul for omitting to disclose to prospective investors the financial conditions of the GDA Entities and of the SPEs ("First Indictment").

Separately, on March 1, 2019, the Colorado Attorney General indicted Gary Dragul for soliciting investments without a license ("Second Indictment"). On August 10, 2018, the Colorado Division of Securities filed this suit to enjoin Gary Dragul from selling securities; on August 30, 2018, Gary Dragul Stipulated to an Order Appointing Harvey Sender as the Receiver ("Receivership Order"). The Receiver took control of assets and claims owned by the GDA Entities and by the SPEs:

> Any parties ***holding claims against Dragul, GDARES and GDAREM*** or the Receivership Estate shall not be entitled to participate as creditors in the distribution of recoveries from the Receiver's administration of the Receivership Estate and collection and liquidation of the assets thereof, ***unless such parties: (I) agree not to file or prosecute independent claims such parties may have (a) on insurance policies and surety bonds issued in connection with Dragul, GDARES and GDAREM operations, or (b) against Dragul, GDARES and GDAREM or any of their Representatives, and (II) promptly dismiss any lawsuits currently pending in connection therewith.***

Receivership Order, ¶ 16 (emphasis added).

When the Receiver took control of the GDA Entities and of the SPEs, the GDA Entities and the SPEs owned a legal malpractice claim against Brownstein. Also, when the Receiver took control of the GDA Entities and the SPEs, the GDA Entities and the SPEs owed Chad Hurst $1,055,668.42, not including interest.

LEGAL STANDARD

This Court may stay its order under C.R.C.P. 62(b)(3), which provides for a stay where a party seeks an appeal. *See* C.R.C.P. 62(b)(3).

The standard for granting a stay is set forth in *Romero v. City of Fountain*, 307 P.3d 120, 122-123 (Colo. App. 2011). Under *Romero*, courts consider the following four factors when granting a stay: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* 307 P.3d at 122-123.

In demonstrating the likelihood of success, the appellant must demonstrate more than "the mere possibility of success on the merits." *Id.* at 123 (*quoting Mohammed v. Reno*, 309 F.3d 95 101 (2nd Cir. 2002)). Probability of success on the merits is demonstrated when the movant raises "questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate

investigation." *Id.* at 122 (*quoting FTC v. Mainstream Marketing Serv., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003)).

ARGUMENT

A. A STAY IS APPROPRIATE BECAUSE MR. HURST IS LIKELY TO PREVAIL ON APPEAL.

i. Mr. Hurst's Petition for Show Cause Order Presents a Novel Question of Law and Presents an Issue of Public Importance. Consequently, the Colorado Supreme Court is likely to Grant Mr. Hurst's C.A.R. 21 Petition.

The issue of whether a Colorado court may rely solely on a receiver's judgment to determine the value of a receivership asset is an issue of first impression in Colorado. *See, e.g., Davis v. GuideOne Mut. Ins. Co.*, 297 P.3d 950, 958 (Colo. App. 2012) (stating that a question of first impression is an issue on which no appellate decision has been issued); *see, also, Hanson v. Colo. Dep't of Revenue*, 140 P.3d 256, 259 (Colo. App. 2006) ("We have found no Colorado case . . . [t]herefore" the issue "appears to be an issue of first impression in Colorado.").

Where a Petition Under C.A.R. 21 presents an issue of first impression, the Supreme Court is likely to grant that Petition. *See, e.g., Smith v. Jeppsen*, 277 P.3d 224, 226 (Colo. 2012) ("The [Colorado Supreme Court] generally elects to hear Colo. App. R. 21 cases that raise issues of first impression and that are of significant public

importance."); *Siewiyumptewa v. State (In re Dwyer)*, 357 P.3d 185, 187–188 (Colo. 2015) (same); *Villas at Highland Park Homeowners Ass'n v. Villas at Highland Park, LLC*, 394 P.3d 1144, 1151 (Colo. 2017) ("We generally exercise jurisdiction under C.A.R. 21 when the normal appellate process provides an inadequate remedy or when a trial court order places one party at a significant disadvantage in litigating the merits of a controversy. In addition, this court will generally elect to hear cases under C.A.R. 21 to consider important issues of first impression."); *Accetta v. Brooks Towers Residence Condo. Ass'n*, 434 P.3d 600, 602 (Colo. 2019)("We generally elect to hear C.A.R. 21 matters that raise issues of first impression and that are of significant public importance. . . ."); *People v. Vanness*, 458 P.3d 901, 904 (Colo. 2020) ("A review of our jurisprudence reflects that we have exercised our . . . 'when an appellate remedy would be inadequate, when a party may otherwise suffer irreparable harm, or when a petition raises issues of significant public importance that we have not yet considered.'").

There is no dispute here that Mr. Hurst's appeal presents a novel legal question and presents an issue of public importance because it concerns the interpretation and construction of the Colorado Rules of Civil Procedure.

ii. Because Colorado Trial Courts Apply the Commercially Reasonable Standard, this Court Erred in Applying the Kopp Standard.

In seeking approval to settle a $58 million-dollar legal malpractice claim for $250,000.00, the Receiver conceded that there is no extant Colorado case on point. Nevertheless, the Receiver likened a receivership to a bankruptcy—as opposed to a custodianship or conservatorship—and argued that the Court apply the standard in stated in *Kopp v. All Am. Life Ins. Co.*, *(In re Kopexa Realty Venture Co.)*, 213 B.R. 1020 (10th Cir. BAP 1997) and *In re OptInRealBig.com, LLC*, 345 B.R. 277 (Bankr. D. Colo. 2006)(hereinafter the "*Kopp* Standard") when deciding the price, a receiver must obtain to compromise a claim owned by the receivership estate. The Court agreed with the Receiver, and the Court applied the *Kopp* Standard.

Under the *Kopp* Standard, courts consider the following factors when reviewing a receiver's motion to compromise or settle a claim: (i) the probable success of the underlying litigation that is to be settled; (ii) the possible difficulty in collecting on the judgement if the litigation is successful; (iii) the complexity and expense of

pursuing the litigation; and (iv) the interests of the creditors in deference to their reasonable view.

No Colorado court has applied the *Kopp* Standard. In fact, the *Kopp* Standard is not consistent with Colorado law on receiverships. In Colorado, a receivership is an extraordinary remedy, and receiverships are closely scrutinized. The *Kopp* Standard is not consistent with the scrutiny Colorado law applies to receiverships because the *Kopp* Standard allows receivers to determine in their sole discretion and without any expertise, the price at which a receiver may sell a receivership claim. States with similar receivership laws as Colorado—see e.g., California, Maryland, Rhode Island, Washington—all require a receiver to demonstrate that the price obtained for a receivership asset is commercially reasonable.

Colorado trial courts have applied the commercially reasonable standard. In *NBH Capital Finance v. Case Drilling & Pump Service, LLC*, 2015CV31544 (Dist. Ct. Denver Cnty. July 24, 2015), for example, the Denver District Court approved the sale of drilling parts after determining that the price at which the drilling parts were to be sold was the ***commercially reasonable price***. The *Case Drilling and Pump Service LLC's* use of the commercially reasonable price standard was cited with approval by *Dos Rios Partners, LP v. Hutto*, 2018 Colo.

Dist. Lexis 583 (Dist. Ct. Denver Cnty. Jan. 31, 2018), another case decided by the Denver District Court.

A second example of Colorado trial courts applying the commercially reasonable standard is found in *Vistar Corp. v. Food Service Corp. & Karrie M. Kai*, 2008 CV 00700 (Dist. Ct. Denver Cnty. July 26, 2010), in which the Denver District Court approved the receiver's motion to sell fast-food restaurants after the receiver demonstrated that the sale price of the restaurants was subjected to a bidding process and was therefore commercially reasonable. A third example is found in *First Tennessee Bank, N.A. v. Community Bankshares, Inc.*, 2013 CV 30158 (Dist. Ct. Arap. Cnty. June 24, 2013), in which the District Court for Arapahoe County applied the commercially reasonable standard in selling company stock.

The same result would obtain in bankruptcy. Under Section 363 (or under Section 1123) of the Bankruptcy Code, a bankruptcy trustee must obtain a commercially reasonable price for a bankruptcy asset the trustee sells. Indeed, if this Court took the Receiver's bankruptcy analogy seriously, what the Receiver has done in this Receivership amounts to a sub rosa plan—a plan done in secret that does not meet the notice or the formal requirements of the bankruptcy confirmation standard—which is largely prohibited under

bankruptcy law. *See, e.g.*, *Motorola, Inc. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir. 2006) ("The trustee is prohibited from such use, sale, or lease if it would amount to a sub rosa plan of reorganization.").

Separately, this Court should also stay its February 26, 2021, Order because it misapplied the *Kopp* Standard when Mr. Hurst's offer is considered.

The last two prongs of the *Kopp* Standard[2] require a receiver to show that the suit would be too expensive or too complex to pursue; and to show that the settlement is in the best interests of the receivership's creditors. Under Mr. Hurst's offer, the Receiver could not have met the too expensive or too complex prong because the Receiver would not have paid the legal expenses incurred in pursuing the malpractice—Hurst would—and, the malpractice suit was not too complex for Shumway Van, the firm retained to litigate the malpractice suit. The unrebutted testimony at the February 26, 2021, hearing was that Shumway Van is capable of litigating the malpractice suit to completion.

[2] Neither the Court nor the Receiver has discussed how the *Kopp* Standard works, and it is unclear which factor is more important or more critical than the other. In any event, based on the arguments above, if the Receiver could not have met the last two *Kopp* Standard, then it could not have made a preponderance of the evidence showing, and therefore, should not have prevailed on its motion. Mr. Hurst does not concede that the Receiver met the first two prongs of the *Kopp* Standard.

iii. The Receiver Failed to Provide Notice to Mr. Hurst and to Other Creditors. In addition, the Receivership Order Notice Provision is Defective.

Paragraph 34 of the Receivership Order provides for service of motions and other documents in this matter on creditors and others:

> Court approval of any motion filed by the Receiver shall be given as matter of course, unless any party objects to the request for Court approval ***within ten (10) days*** after service by the Receiver or written notice of such request. ***Service of motions by facsimile and electronic transmission is acceptable***.

Receivership Order, at ¶ 34 (emphasis added).

Rule 66 of the Colorado Rules of Civil Procedure does not state what notice a receivership must provide to creditors of a receivership. Because, however, Rule 66 is a creature of the common law, the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) governs notice requirements under the commons law. In *Mullane*, the Supreme Court that notice must be such that it is reasonably calculated to apprise interested parties when their interests are being comprised "and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to

be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.”).

Paragraph 34 does not comply with *Mullane* because Paragraph 34 gives creditors—all of whom are outside of Colorado—just ten days to object to a Motion that they do not know about. Ten days is not reasonable because the creditors are all out of state. Besides, the Receiver did not even provide Mr. Hurst and other creditors with actual notice of the Receiver’s settlement of the legal malpractice suit nor did the Receiver provide Mr. Hurst and other creditors notice of the hearing on the Receiver’s motion to approve the Receiver’s settlement with Brownstein. Moreover, because the creditors are all elderly and out of state, a website to which the Receiver posts documents cannot be reasonably calculated to give notice to the creditors. Indeed, the fact that Paragraph 20 of the Receivership Order binds all creditors who received the Receivership Order, all creditors who had actual knowledge of the Receivership Order, and all “other person or business entity. . . .” obligates the Receiver to

take concrete steps to ensure that Creditors are given actual notice consistent with *Mullane*.

B. MR. HURST CAN DEMONSTRATE THE OTHER REMERO FACTORS.

Mr. Hurst can demonstrate the remaining *Romero* Factors because he can show that without a stay, he will be irreparably harmed, that the Receiver and the Receivership Estate will suffer no harm, and the public interest lies with Mr. Hurst.

i. Mr. Hurst Will Suffer Irreparable Harm Without a Stay Because He Will Lose the Right to Recover Sums Owed to Him and the Statute of Limitations on the Legal Malpractice Suit May Lapse.

In *Gilitz v. Bellock*, 171 P.3d 1274, 1278–79 (Colo. App. 2007), the Colorado Court of Appeals held that the loss of a right is irreparable harm. Without sums from the malpractice suit, Mr. Hurst will have lost the right to recover the more than $1 million owed to him by the GDA Entities and by the SPEs.

ii. Neither the Receiver nor the Receivership Estate Will Suffer Harm.

Receiverships work in the interest of the creditors and others with beneficial interests in the receivership estate. Here, obtaining a commercially reasonable price for a receivership asset will benefit rather than harm the Receivership.

iii. The Public Interest Lies with Mr. Hurst.

The public interest lies with Mr. Hurst because the Receivership was instituted to protect creditors like Mr. Hurst and the public has an interest in seeing creditors protected. Indeed, the bases of the criminal cases against Mr. Dragul is to protect the public interests.

CONCLUSION

For the foregoing reasons, a stay under C.R.C.P. 62(b)(3) and under the *Romero* Factors is appropriate.

WHEREFORE, Creditor, Chad Hurst, requests that the Court grant his motion, stay execution of the Order dated February 26, 2021, and stay any proceedings to enforce that same Order pending Mr. Hurst's Original Proceeding to the Colorado Supreme Court, and grant Defendant such further relief as the Court deems just and proper.

DATED: March 19, 2021.
New York, New York

RESPECTFULLY SUBMITTED

WILLIAMS LLP

By: *__/s/ T. Edward Williams, Esq.__*
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CERTIFICATE OF SERVICE

I certify that on March 19, 2021, a true and correct copy of the foregoing **CREDITOR, CHAD HURST, PARTIALLY STIPULATED EMERGENCY MOTION TO STAY THE COURT'S FEBRUARY 26, 2021 ORDER** was served via CCES, addressed to the following:

Brad Williams, Esq. et. al.
Counsels for Brownstein Hyatt Farber & Schreck LLP

Patrick D. Vellone, Esq. et. al.
Counsels for Receiver Harvey Sender, Esq.

Paul Vordran, Esq. et. al.
Counsels for Gary Dragul

Robert W. Finke, Esq. et. al.
Counsels for Tung Chan, Securities Commissioner

Original signature on file at the offices of Williams LLP

By: */s/T. Edward Williams, Esq.*