DISTRICT COURT, DENVER COUNTY STATE OF COLORADO Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433	
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 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	Case No: 2018CV33011 Div./Courtroom: 424
RECEIVER'S COMBINED RESPONSE TO CHAD HURST'S (1) EMERGENCY MOTION TO STAY THE COURT'S FEBRUARY 26, 2021, ORDER, AND (2) MOTION TO VACATE THAT ORDER	

Harvey Sender, the duly-appointed receiver ("Receiver") for Gary Dragul ("Dragul"), GDA Real Estate Services, LLC, GDA Real Estate Management, LLC, and related entities, hereby responds to Chad Hurst's (1) Partially Stipulated Emergency motion to Stay the Court's February 26, 2021 Order ("Stay Motion," filed March 20, 2021); and (2) Motion to Vacate the February 26, 2021 Order ("Rule 60(b) Motion," filed April 5, 2021).

I. INTRODUCTION

On February 26, 2021, after a two-day evidentiary hearing, the Court granted the Receiver's motion to approve a settlement agreement[1] between the Estate and Brownstein ("Feb. 26th Order"). The Feb. 26th Order also enjoined Dragul and his counsel from pursuing the claims he asserted in the Nevada Action[2] against Brownstein. Pursuant to the settlement, Brownstein paid the Estate $250,000 on March 8, 2021, thereby fulfilling its obligations under the agreement. On March 17, 2021, the Receiver asked Dragul's counsel for confirmation they had complied with the Feb. 26th Order by dismissing the Nevada Action.[3]

Before receiving any response from Dragul's counsel, on March 20, 2021, Hurst filed his Stay Motion, which, although styled as an "Emergency Motion," was filed more than three weeks after entry of the Feb. 26th Order. Hurst is Dragul's long-time friend and business associate, who personally loaned Dragul significant sums purportedly secured by liens Dragul granted to him on Estate properties owned by SPEs that never benefited from those loans. Nearly two years ago, Hurst agreed to purchase 22 residential properties from the Estate. After obtaining Court approval of that transaction over the objection of a secured creditor, Hurst breached his agreement and refused to close.

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1 Receiver's Motion to Approve Settlement Agreement with Brownstein (filed November 17, 2020) ("Motion to Approve").

2 *Gary Dragul, et al. v. Brownstein Hyatt Farber Schreck, LLP, et al. (*Case No. A-20-822625-C, Eighth Judicial District Court, Clark County, Nevada).

3 *See* Gilbert and Vorndran, *et al* Email Chain, attached as **Exhibit A**, at p. 2.

On March 23, 2021, Dragul's counsel finally responded to the Receiver's March 17th email requesting confirmation that Dragul was not in contempt of the Feb. 26th Order. In that email, Dragul's counsel indicated that in light of Hurst's Stay Motion, it had "determined that it should do nothing right now with respect to the Nevada action." **Ex. A** at p. 1. For three weeks, Dragul and his counsel remained in open defiance of this Court's Feb. 26th Order. Only after the Receiver demanded that Dragul comply with the Order and dismiss the Nevada Action did Hurst file his Stay Motion. Hurst and Dragul's collusion is apparent. The Stay Motion asks the Court to "stay execution" of the Feb. 26th Order, "and stay any proceedings to enforce that same order pending Mr. Hurst's Original Proceeding to the Colorado Supreme Court." Stay Mot. at p. 15. Hurst seeks a stay in an apparent attempt to excuse Dragul's continuing contempt.

The Stay Motion is predicated on a C.A.R. 21 petition to the Colorado Supreme Court that was never filed. Hurst argues the Supreme Court will grant his Rule 21 petition and is likely to reverse the Feb. 26th Order because the Court applied the *Kopexa* factors instead of requiring the Receiver "to demonstrate that the price obtained for a receivership asset is commercially reasonable," but fails to explain how these standards would lead to a different result. *Id.* at pp. 8-10. Then, on April 5th, Hurst filed his Rule 60(b) Motion which rests entirely on the false premise that Hurst and other creditors did not receive notice of the Brownstein Motion.[4]

[4] It appears that by filing the Rule 60(b) Motion, Hurst has abandoned his announced C.A.R. Petition, presumably mooting his Stay Motion.

Hurst's Motions should be denied for the following reasons. *First*, Hurst never objected to the Brownstein Motion and therefore lacks standing to challenge the Feb. 26th Order approving it. *Second*, because all obligations under the Brownstein settlement have been fully-performed, Hurst's belated efforts to overturn the Feb. 26th Order are moot. *Third*, Hurst has not and cannot meet the requirements for obtaining a stay, and, significantly, has not offered to post a bond.

II. BACKGROUND

The Receiver was appointed on August 30, 2018 as receiver for Gary Dragul and various GDA Entities and their respective properties and assets (the "Estate"). Under the Receivership Order, the Receiver has the authority to prosecute causes of action against third parties, to the exclusion of Dragul and the GDA Entities. Receivership Order at ¶¶ 13(o) & (s).

On September 3, 2020, Dragul filed a motion in this case seeking a determination that claims Dragul and the GDA Entities purport to hold against certain accountants, attorneys, and consultants, including Brownstein, had been abandoned by the Receiver, so that Dragul could pursue them for his own benefit. The Court denied that motion on October 1, 2020, precluding Dragul from pursuing the purported claims against Brownstein (the "Oct. 1st Order").[5] On October 26, 2020, Dragul filed a second motion to order claims against Brownstein abandoned, and attached as an exhibit the complaint he filed in the Nevada Action against

[5] *See* Partial Transcript of Feb. 26, 2020 Oral Findings of Fact and Conclusions of Law, attached as **Exhibit B** at 9:8-16

Brownstein and 41 of its current and former attorneys and paralegals (the "Nevada Complaint"), in defiance of the Court's Oct. 1st Order. Before filing the Nevada Complaint, Dragul neither notified the Receiver, nor sought his or the Court's permission to do so.[6]

On November 16, 2020, the Receiver filed the Brownstein Motion seeking Court approval of the settlement agreement, pursuant to which Brownstein agreed to pay the Estate $250,00 in exchange for a release of the claims held by the Estate that Dragul had attempted to pursue for his own benefit in the Nevada Action. The Brownstein Motion was served on the Estate's creditors and uploaded to the Receivership website. Dragul was the sole objector to the Brownstein Motion. Following a two-day evidentiary hearing, on February 26th, the Court entered its oral findings of fact and conclusions of law[7] approving the settlement agreement.

On March 20, 2021, **twenty-five days** after entry of the Feb. 26th Order Hurst filed his Stay Motion in which he asked the Court to "stay execution of the Order dated February 26, 2021, and stay and proceedings to enforce that same Order pending Mr. Hurst's Original Proceeding to the Colorado Supreme Court." Stay Mot. at p. 15. After receiving the Stay Motion, the Receiver's counsel twice asked Hurst to provide a copy of the Rule 21 petition, but he never responded to either request. As of the date of this Response, Hurst has not filed a Rule 21 petition, but rather, over two

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6 **Ex. B** at 10:2-9

7 *See id*; *see also* Feb. 26th Order.

weeks after he filed the Stay Motion, Hurst filed his Rule 60(b) Motion asking the Court to vacate the Feb. 26th Order.

III. ARGUMENT AND AUTHORITY

A. Hurst Lacks Standing to Challenge the Feb. 26th Order.

It is axiomatic that to object to a court order, a party must have standing. When a non-party attempts to challenge a court order – as Hurst does here – he must be a "person aggrieved" by that order. *See AMCO Ins. Co. v. Sills*, 166 P.3d 274, 275 (Colo. App. 2007); *In re Parr,* 732 Fed. App'x. 714, 716 (10th Cir. 2018). Under this standard, a nonparty must be "substantially aggrieved by the disposition of the case" to appeal it. *AMCO,* 166 P.3d at 275 (quotation omitted). "The word 'aggrieved' refers to a substantial grievance; the denial to the party of some claim of right, either of property or of person, or the imposition upon him of some burden or obligation." *Wilson v. Bd. of Regents (In re Macky's Estate),* 102 P. 1088, 1089 (Colo. 1909).

At bare minimum, to challenge an order approving a settlement agreement, the party must first have objected to the approval motion and attended the hearing. *See Weston v. Mann (In re Weston),* 18 F.3d 860, 864 (10th Cir. 1994) (attendance and objection are prerequisites for standing); *see also In re Potter*, 101 Fed. App'x. 770, 772 (10th Cir. 2004) (creditor who failed to avail himself of right to be heard was not aggrieved person with standing to appeal); *In re Parr,* 732 Fed. App'x. at 716 (Debtor lacked standing to appeal because he did not object to the sale motion); *see also In re*

Kopexa Realty Venture Co., 240 B.R. 63, 65 n.3 (B.A.P. 10th Cir. 1999).[8] Hurst failed to object to the Brownstein Motion and therefore lacks standing to challenge the Feb. 26th Order either by asking this Court to vacate it under Rule 60(b)(5) or by filing a C.A.R. 21 petition. *Weston,* 18 F.3d at 854.

In addition, Hurst cannot otherwise demonstrate he is a person aggrieved by approval of the Brownstein Motion. In his Stay Motion, he argues he will suffer irreparable harm without a stay because he will lose more than $1 million in hypothetical damages he assumes would be awarded in the Nevada Action which will not be available to pay his claim. Stay Mot. at p. 14. Hurst's purported harm is speculative and no different than any other Estate creditor. His injury was caused by Dragul's fraud, not the Court's approval of the Brownstein settlement.

B. Hurst Received Actual Notice of the Brownstein Motion.

In light of his Rule 60(b) Motion, it appears Hurst has abandoned any intention of filing a C.A.R. 21 petition. It is therefore unclear whether he still seeks a stay, or merely to vacate the Feb. 26th Order. Regardless, both of Hurst's Motions argue that relief is warranted because he did not receive notice of the Brownstein Motion.

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[8] Bankruptcy courts apply the same standards for determining standing, and bankruptcy opinions are therefore applicable here. *See, e.g.*, *In re Parr,* 732 Fed. App'x. at 716. Under the "person aggrieved" standard applied by bankruptcy courts, only "those persons whose rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court" have standing to challenge such an order after having objected and appeared at the hearing. *In re Potter*, 101 Fed. App'x. at 772.

Indeed, that is the sole basis for his Rule 60(b) Motion.[9] Hurst also argues that paragraph 34 of the Receivership Order[10] does not comply with *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). *Mullane* and its progeny merely require "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." *Mullane*, 339 U.S. at 314. Hurst argues the ten-day notice provision does not comply with *Mullane* because "the creditors are all out of state" and elderly. Stay Mot. at p. 13.[11]

Relief under the catchall provision of Rule 60(b)(5) is available only in extreme situations or extraordinary circumstances, neither of which is present here. *Davidson v. McClellan*, 16 P.3d 233, 237 (Colo. 2001) (citations omitted). Hurst bears the burden of establishing the grounds for relief by clear, strong, and satisfactory proof. *Blazer Elec. Supply Co. v. Bertrand*, 952 P.2d 857, 859 (Colo. App. 1998). Colorado courts narrowly interpret Rule 60(b)(5) "to avoid undercutting the finality of judgments." *People v. Caro*, 753 P.2d 196, 200 (Colo. 1988).

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[9] Hurst's Rule 60(b) Motion argues: "Mr. Hurst did not [*sic*] the Trustee's settlement with Brownstein or the Trustee's Motion to Approve the Settlement with Brownstein." Not only is the critical verb missing, Hurst confuses the Receiver with a bankruptcy trustee.

[10] Paragraph 34 of the Receivership Order states: "Court approval of any motion filed by the Receiver shall be given as a 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 such request. Service of motions by facsimile and electronic transmission is acceptable."

[11] Hurst provides no support for these incorrect factual assertions. All creditors of the Estate are not out-of-state and all are not elderly.

The sole basis for Hurst's Rule 60(b) Motion is his contention that he did not receive notice of the Brownstein Motion or a copy of the proposed settlement agreement. This is demonstrably false. Hurst – and all of the Estate's creditors – received notice of the Brownstein Motion (to which the settlement agreement was attached). The Brownstein Motion was sent *via* email to the entire matrix of Estate creditors (more than 900) on November 18, 2020 at 8:44 a.m. *See* **Exhibit C**. The Motion and the proposed settlement agreement were also uploaded to the Receivership's website on November 18th. Both methods of service complied with the Receivership Order that has been in place since August 30, 2018. Indeed, this Court specifically approved this method of service in an Order entered November 13, 2018.[12] This method of service is consistent with the process approved by bankruptcy courts in cases involving numerous creditors. *See e.g. In re S & B Surgery Ctr., Inc.*, 421 B.R. 546, 550 (Bankr. C.D. Cal. 2009) (authorizing use of a website to effect notice). These procedures for service have been used in this case for nearly three years without complaint. In fact, Estate creditors, including Hurst, have responded directly to emails serving pleadings on creditors in this manner.

Now, having engaged new counsel, Hurst takes issue with the notice procedures authorized by this Court and seamlessly used over the course of this entire Receivership. He also baselessly asserts that "the creditors of the Receivership have received no correspondence from the Receivership Estate and have otherwise had

[12] Order Granting Receiver's Motion to Establish Claims Administration Procedure and to Set Claims Bar Date (Nov. 13, 2018).

little to no interaction with the Receivership." Stay Mot. at pp. 12-13; Rule 60(b) Mot. at pp. 2-3. This, too, is false.[13] Plainly, Hurst received actual notice of the Brownstein Motion. [14] Hurst and other creditors received actual notice of the Brownstein Motion, which notice plainly complied with *Mullane*'s requirement that notice be "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." *Mullane*, 339 U.S. at 314.

Hurst received actual notice of the Brownstein Motion and the hearing, as evidenced by his attendance at the hearing through counsel. One who attends a hearing waives any claim that there was a defect in the notice of such hearing. *See Cline v. City of Boulder*, 450 P.2d 335, 337 (Colo. 1969). Indeed, although his counsel appeared at the hearing, Hurst did not object to approval of the Brownstein settlement. Instead, he sought only to continue the hearing to allow more time to negotiate his own purchase of the Brownstein claims from the Estate. Hurst therefore lacks standing to belatedly challenge the Feb. 26th Order approving the settlement.

C. Hurst's Stay Motion is Moot

Assuming Hurst has not abandoned either his request for a stay pending adjudication of his hypothetical C.A.R. 21 petition or the petition itself, the request is moot. A matter is moot when a judgment or ruling would have no practical effect

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[13] *See* Receiver's First, Second, Third, Fourth and Fifth Reports. Indeed, Hurst has communicated by email directly and repeatedly with the Receiver and counsel by email for nearly three years.

[14] *See e.g.* Dragul's Notice of Investor Comment (filed Feb. 18, 2021), at p. 4.

upon an existing controversy. *American Drug Store, Inc. v. Denver,* 831 P.2d 465 (Colo. 1992). It is unclear from Hurst's Stay Motion what a stay would entail at this point as the parties have already fully-performed under the settlement agreement. In compliance with the terms of the settlement agreement. Brownstein paid the settlement amount ($250,000) to the Receiver within ten days of the Feb. 26th Order. Those funds have been deposited into the Receivership Estate account. Because there are no further obligations to perform under the settlement agreement, the transaction is complete and there is nothing to "stay."

D. A Stay Pending Resolution of Hurst's Rule 60 Motion is Unwarranted.

Because Hurst's Stay Motion is predicated entirely on arguments concerning his likelihood of succeeding on a non-existent C.A.R. 21 petition, those arguments appear inapplicable now.[15] To the extent he seeks a stay pending determination of his Rule 60(b) Motion, he cannot demonstrate grounds for a stay. In determining whether to grant a stay, courts consider the following four factors: (1) whether the applicant has shown a strong likelihood of success on the merits; (2) whether the denial of the stay will cause irreparable injury to the applicant; (3) whether the stay

[15] To the extent that his Rule 21 arguments have not been abandoned, Hurst cannot demonstrate grounds for a stay pending a hypothetical Rule 21 petition either. "Original relief pursuant to C.A.R. 21 is an extraordinary remedy that is limited both in purpose and availability." *Dwyer v. State*, 2015 CO 58, ¶ 4, 357 P.3d 185, 187 (quoting *People v Kailey*, 2014 CO 50, ¶ 9, 333 P.3d 89, 92). The Colorado Supreme Court generally elects to hear cases under C.A.R. 21 "that raise issues of first impression and that are of significant public importance." *Id.*, 357 P.3d at 187–88. None of the conditions are present here that would justify granting a Rule 21 petition. Both standards are used to answer the question of whether a proposed settlement is fair and equitable and in the best interest of an estate and its creditors considering all facts and circumstances pertinent to that particular deal. Hurst's argument is premised on a distinction without a difference.

will cause substantial injury to the other parties; and (4) the effect on the public interest. *Romero v. City of Fountain*, 307 P.3d 120 (Colo. App. 2011) (citing *Men v. Holder*, 129 S. Ct. 1749, 1756 (2009)). In considering these factors, Colorado appellate courts have adopted the Sixth Circuit's approach articulated in *Michigan Coalition of Radioactive Material Users, Inc. v. Grienpentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991), where it held that "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere 'possibility' of success on the merits." *Romero*, 307 P.3d at 123 (quotations omitted). Hurst cannot satisfy this burden.

1. Hurst is Unlikely to Succeed on the Merits

Hurst is unlikely to prevail on his Rule 60(b) Motion because he lacks standing to pursue it. *See* § III.A., *supra*. And, as discussed above, relief under Rule 60(b) is an extraordinary remedy available only in extreme situations that are "so unusual or compelling that extraordinary relief is warranted, or when it offends justice to deny such relief." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996) (internal quotations omitted). The sole factual predicate for Hurst's Rule 60(b) Motion – that he did not receive notice of the Brownstein Motion – is demonstrably false as discussed above. *See* § II.B, *supra*.; *see also* **Ex. C.** Notice was provided in accordance with this Court's orders and consistent with the practice in other cases involving a large number of creditors. *Id.*

Assuming *arguendo* that Hurst has not abandoned it, he also would not prevail on a C.A.R. 21 petition because he lacks standing and because the issues on appeal, as stated in his Stay Motion, are factual issues inappropriate for review under C.A.R. 21. *See Dwyer v. State*, 357 P.3d 185, 187-88 (Colo. 2015); *see also* Stay Mot. at pp. 6-7. His contention that it was improper for the Court to "rely solely on a receiver's judgment to determine the value of a receivership asset," is a factual issue improper for review under C.A.R. 21. And, it is an inaccurate statement of the bases for the Feb. 26th Order. *See e.g.* **Ex. B**. Without any explanation as to the differences between the two, Hurst also contends that it was improper for the Court to apply the *Kopexa* factors rather than a "commercially reasonable" standard, which, as discussed above, is also without merit because both standards are intended to answer the same question – whether the proposed settlement is fair and equitable and in the best interest of the Estate and its creditors. *See* n.16, *supra.*

2. Hurst Faces No Threat of Irreparable Harm Absent a Stay

Despite his contention otherwise, Hurst will not be irreparably harmed absent a stay. He claims that absent a stay he will not be paid on the $1 million claim he has filed against the Estate and without the hypothetical damages which he presumes will be awarded in the Nevada Action, he "will have lost his right to recover." Stay Mot. at p. 14. This alleged "harm" is speculative, at best, because no plan of distribution has been formulated or proposed yet. And, it assumes that if a stay is entered, (1) this Court would approve Hurst's putative purchase of the Brownstein claims from the Estate (even though Hurst and the Receiver were nowhere close to

reaching acceptable terms), and (2) that he would prevail on those claims and recover his entire $1 million as a preference over other Estate creditors. This too is entirely speculative. There is no present transaction before the Court, and any preferential recovery to Hurst would be contrary to both the distribution provisions of the Receivership Order and to the purpose of an equity receivership.[16]

3. A Stay Will Substantially Harm the Estate and its Creditors.

A stay of the Court's Feb. 26th Order will cause substantial injury to the Estate and its creditors. Brownstein has paid the $250,000 in settlement funds to the Estate which are being held for the benefit of *all* creditors and to facilitate the further administration of the Estate. Hurst, as Dragul before him, seeks to usurp property of the Estate for his own benefit to the detriment of the Estate's other creditors. Again, any hypothetical recovery by Hurst on the Brownstein claims would essentially be a preference over other Estate creditors. *See* § III.D.2, *supra.*

4. A Stay Would be Contrary to the Public Interest.

Finally, the public interest does not favor a stay. Once a court enters judgment, the public gains a strong interest in protecting its finality. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) (discussing the "important interest in the finality of judgments"). The same is true here. Hurst had every opportunity to object to the Brownstein settlement and appear at the settlement hearing to make them. He failed

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[16] *See* Receivership Order at ¶ 22 (specifying priority of creditor claims); *see also S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (Goal of equity receivership is "to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.").

to do so. It would not be in the public interest to allow him to unwind the settlement now, after all parties in interest and all creditors have relied on it.

5. If the Court even Considers a Stay, it Should be Conditioned on Hurst Posting a Supersedeas Bond of $312,500.

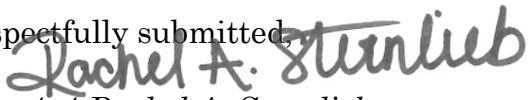
Hurst initially requested a stay pending determination of his Rule 21 petition to the Colorado Supreme Court. Because no such petition has been filed, that request is baseless and moot. To the extent Hurst continues to request a stay, it must necessarily be under C.R.C.P. 62(b)(2), pending disposition of his Rule 60(b) Motion. Rule 62(b) authorizes the Court to enter stay in "its discretion and on such conditions for the security of the adverse party as are proper." Any stay must be conditioned on Hurst posting a supersedeas bond. *See, e.g.*, *Muck v. Arapahoe Cty. Dist. Court,* 814 P.2d 869, 872 (Colo. 1991) ("the language of C.R.C.P. 62 implies that a supersedeas bond is generally necessary to obtain a stay."). To the extent the Court considers a stay, Hurst should be ordered to post a supersedeas bond of $312,500 before it can enter. *See* Colo. R. Civ. P. 121, § 1-23(3)(a).

IV. CONCLUSION

The Receiver respectfully requests that the Court deny Hurst's Stay Motion and his Rule 60(b) Motion, and pursuant to C.R.S. § 13-17-102, award the Receiver the fees and costs he has incurred responding to those Motions, and for such other relief as this Court deems appropriate. The creditors of the Estate should not be forced to bear the costs of Hurst's substantially frivolous and groundless filings.

Dated: April 9, 2021.

Respectfully submitted,



By: */s/ Rachel A. Sternlieb*

Patrick D. Vellone
Michael T. Gilbert
Rachel A. Sternlieb
ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.
1600 Stout Street, Suite 1100
Denver, Colorado 80202
(303) 534-4499
pvellone@allen-vellone.com
mgilbert@allen-vellone.com
rsternlieb@allen-vellone.com

ATTORNEYS FOR THE RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021, I served a true and correct copy of the foregoing **Receiver's Combined Response to Chad Hurst's (1) Emergency Motion to Stay the Court's February 26, 2021 Order and (2) Motion to Vacate that Order** via CCE to the following:

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 Tung Chan, Securities Commissioner

Paul L. Vorndran
Christopher S. Mills
Jones Keller, P.C.
1999 Broadway Street
Suite 3150
Denver, CO 80202
pvorndran@joneskeller.com
pmills@joneskeller.com

and

Bart H. Williams
Jennifer L. Roche
Shawn S. Ledingham Jr.,
Proskauer Rose LLP
2029 Century Park East, 24th Floor
Los Angeles, California 90067
bwilliams@proskauer.com
jroche@proskauer.com
sledingham@proskauer.com

Counsel for Brownstein Hyatt Farber Schreck, LLP

Michael C. Van (admitted *pro hac vice*)
Shumway Van
8985 S. Eastern Ave. Ste. 100
Las Vegas, NV 89123
Michael@shumwayvan.com

Counsel for Defendants, Gary Dragul,

T. Edward Williams
Williams LLP
7 World Trade Center
250 Greenwich St., 46th Floor
New York, NY 10007
edward@williamsllp.com

Counsel for Chad Hurst

Richard Benenson
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street
Denver, Colorado 80202-4432
rbenenson@bhfs.com

/s/ Terri M. Novoa
Allen Vellone Wolf Helfrich & Factor, P.C.

From: Christopher S. Mills <cmills@joneskeller.com>
Sent: Tuesday, March 23, 2021 9:55 AM
To: Michael T. Gilbert; Paul L. Vorndran; Michael C. Van
Cc: Pat Vellone; Rachel Sternlieb; Shawn S. Ledingham, Jr. (sledingham@proskauer.com); Bart H. Williams - Proskauer Rose LLP (bwilliams@proskauer.com); Roche, Jennifer L.
Subject: RE: Dismissal of Nevada Lawsuit

Hi Michael,

In light of the Court's order enjoining Shumway Van & Gary from pursuing the Nevada action, and Chad Hurst's pending motion to stay the Colorado case pending appeal, Shumway Van has determined that it should do nothing right now with respect to the Nevada action. Indeed, if they dismissed the Nevada action right now, that would alter the status quo which Hurst's stay motion seeks to protect. That might both render the stay motion moot, and usurp the (Colorado) Court's power to hear and determine that motion.

Obviously, Shumway Van & Gary do not intend to pursue the Nevada action right now, either. We are all just waiting to see what Judge Gilman wants to do.

Thanks,
Chris

JONES&KELLER

Christopher S. Mills
Attorney & Shareholder

1675 Broadway, 26th Floor
Denver, Colorado 80202
P: 303.573.1600 | F: 303.573.8133

JONES&KELLER, P.C.
cmills@joneskeller.com
www.joneskeller.com

Connect with me on LinkedIn:

https://www.linkedin.com/in/christopher-s-mills/

From: Michael T. Gilbert <mgilbert@allen-vellone.com>
Sent: Monday, March 22, 2021 12:21 PM
To: Paul L. Vorndran <pvorndran@joneskeller.com>; Michael C. Van <michael@shumwayvan.com>; Christopher S. Mills

<cmills@joneskeller.com>
Cc: Pat Vellone <PVellone@allen-vellone.com>; Rachel Sternlieb <rsternlieb@allen-vellone.com>; Shawn S. Ledingham, Jr. (sledingham@proskauer.com) <sledingham@proskauer.com>; Bart H. Williams - Proskauer Rose LLP (bwilliams@proskauer.com) <bwilliams@proskauer.com>; Roche, Jennifer L. <jroche@proskauer.com>
Subject: RE: Dismissal of Nevada Lawsuit

Counsel, I may have missed your response, and if so I apologize and please forward it to me again. Otherwise, please respond to the request below or we will request appropriate orders from the Court.

Thanks, Michael

Michael T. Gilbert
Attorney At Law
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout Street, Suite 1900
Denver, CO 80202

mgilbert@allen-vellone.com
www.allen-vellone.com

(720) 245-2406 | Direct
(303) 534-4499 | Main
(303) 893-8332 | Fax

From: Michael T. Gilbert
Sent: Wednesday, March 17, 2021 10:33 AM
To: Paul Vorndran - Jones & Keller, P.C. (pvorndran@joneskeller.com) <pvorndran@joneskeller.com>; Michael C. Van <michael@shumwayvan.com>; Christopher Mills - JONES & KELLER, P.C. (cmills@joneskeller.com) <cmills@joneskeller.com>
Cc: Pat Vellone <PVellone@allen-vellone.com>; Rachel Sternlieb (rsternlieb@allen-vellone.com) <rsternlieb@allen-vellone.com>; Shawn S. Ledingham, Jr. (sledingham@proskauer.com) <sledingham@proskauer.com>; Bart H. Williams - Proskauer Rose LLP (bwilliams@proskauer.com) <bwilliams@proskauer.com>; Roche, Jennifer L. <jroche@proskauer.com>
Subject: Dismissal of Nevada Lawsuit

Counsel:

We understand the Nevada action has not yet been dismissed and the court's docket states the case is still being prosecuted as an "open" case.

In light of the Receivership Court's injunction against you and your client, the prosecution of the action should have terminated immediately after the February 26 order. Please do so immediately and send us a copy of the dismissal papers so we can confirm you are in compliance with the injunction.

Michael T. Gilbert
Attorney At Law
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout Street, Suite 1900
Denver, CO 80202

mgilbert@allen-vellone.com
www.allen-vellone.com

(720) 245-2406 | Direct
(303) 534-4499 | Main
(303) 893-8332 | Fax

District Court
Denver County
COLORADO
1437 Bannock Street
Denver, Colorado 80202

TUNG CHAN, Securities Commissioner for the State of Colorado,

Plaintiff,

versus

GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC,

Defendants.

FOR COURT USE ONLY

Case No. 2018CV33011

Div/Room 424

For Tung Chan, Securities Commissioner for the State of Colorado:
ROBERT FINKE, ESQ.
JANNA FISHER, ESQ.

For the Receiver:
PATRICK VELLONE, ESQ.
MICHAEL GILBERT, ESQ.
RACHEL STERNLIEB, ESQ.

For the Defendant, Gary Dragul:
PAUL VORNDRAN, ESQ.
CHRISTOPHER MILLS, ESQ.
MICHAEL VAN, ESQ.
DOUGLAS SHUMWAY, ESQ.

For Brownstein Hyatt Farber Schreck, LLP
BART WILLIAMS, ESQ.
SHAWN LEDINGHAM, JR., ESQ.
JENNIFER ROCHE, ESQ.
RICHARD BENENSON, ESQ.
JONATHAN PRAY, ESQ.

The matter came on for a Webex hearing on February 26, 2021, before the HONORABLE SHELLY I. GILMAN, Judge of Denver District Court, and the following FTR proceedings were had.

At the request of the ordering party, this is a partial transcript of the proceedings held.

I N D E X

FEBRUARY 26, 2021

RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH BROWNSTEIN, HYATT, FARBER & SCHRECK, LLC AND GARY DRAGUL'S MOTION TO ORDER CLAIMS AGAINST BROWNSTEIN ABANDONED HEARING

THE COURT: Okay. Then I'll call the case, it's -- um -- 18CV33011 -- um -- Chan versus Dragul, et al. If Counsel could please enter their -- their appearance for the record, starting with the Commissioner.

MR. FINKE: Yes, good morning, Your Honor. Robert Finke, First Assistant Attorney General, representing the Commissioner. With me on the call is Janna Fischer, Assistant Attorney General.

MR. VELLONE: Good morning, Your Honor. Patrick Vellone, appearing on behalf of the Receiver, Harvey Sender, and -- ah -- Michael Gilbert and Rachel Sternlieb -- also, appearing on behalf of Harvey Sender.

MR. MILLS: Appearing on behalf of Defendant, Gary Dragul, Your Honor, Chris Mills and Paul Vorndan from the law firm of Jones & Keller, and Michael Van and Douglas Shumway, the latter, appear as a witness from Shumway Van.

THE COURT: And your sounds is much better, Mr. Mills, without the headset. Thank you.

MR. MILLS: Fantastic.

THE COURT: Yes. Okay. Then -- go ahead.

MR. WILLIAMS: Good morning, Your Honor. Bart Williams on behalf of the Brownstein (indiscernible) appearing pro hac vice. With me on the phone are Shawn Ledingham and Jennifer Roche from my firm -- and we also, I believe, have both of our clients -- ah -- Mr. Benenson, Rich Benenson and Jonathan Pray, who's the General Counsel -- Mr. Benenson's the Chair of the firm.

THE COURT: Thank you. Okay. Then we're -- ah -- set for a continuation of the hearing that we were waiting for Mr. Shumway's testimony. Are you ready to proceed?

(Whereupon further discussion related to his matter was not transcribed at the request of the ordering party)

THE COURT: I do not reply. I am prepared to rule.

So, the Court will make the following findings of fact, conclusions of law and enter the following order:

On August 15th, 2018, the Securities Commissioner filed a complaint for injunctive relief against Gary Dragul, GDA Real Estate Services, LLC and GDA Real Estate Management, LLC.

The complaint alleged that he was the sole control person of the GDA entities, and the complaint was based on violations of the antifraud provisions of the Colorado Securities Act.

Harvey Sender is a licensed attorney in the State of Colorado since 1976. His practice emphasizes bankruptcy. Since the mid to late 1970's, he's served as bankruptcy trustee in more

than 30,000 matters, and as a receiver in about eight matters. He testified that his role as a trustee and as a receiver are almost identical. In those roles, he's acquired great experience in the liquidation of assets and the settlement of claims.

On August 30th, 2018, the Court approved the stipulated order for appointment of Harvey Sender as receiver.

Mr. Sender testified that the Defendants were represented by Springer & Steinberg at the time of the entry of the order, and that the terms of the receivership order were heavily negotiated by Counsel. Um. Mr. Sender, obviously, was not a party to those negotiations.

Pursuant to paragraph 9 of the receivership order, Mr. Sender was appointed as Receiver -- um -- for the Defendants for all of their assets, including, but not limited to, all real and personal property, including tangible and intangible assets, their interest in any subsidiaries or related companies, management and control rights, claims and causes of action, wherever located, including without limitation, the LLC entities identified in the Commissioner's motion and complaint for injunctive and other relief -- or assets including those of Dragul or 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 -- indirectly from investor funds.

The order accepted Mr. Dragul's personal residence -- um -- unless the Receiver determined that an improvement to, or increase in equity in such residence was directly related to the proceeds from the sale of the securities, or matters referenced in the complaint, and which -- ah -- case the improvements or equity would be considered receivership property or part of the Receivership Estate. Ah. Paragraphs 13(o)(s) -- and also accord the Receiver authority to prosecute causes of actions against third parties -- um -- in this jurisdiction and other foreign countries. Um.

Mr. Sender testified that he began his investigation of potential claims upon his appointment, and that the investigation is ongoing.

On September 4th, 2018, shortly after his appointment, Mr. Sender -- ah -- met with Mr. Dragul, Ben Chan and Counsel. At that time they discussed a potential malpractice claim against the Brownstein firm. Dragul and Chan represented that the claim was valued about 40 -- $400,000. They indicated that they provided Stan Garnett, a Brownstein attorney, with verbal notice of the claim in May of 2018. Mr. Sender told Counsel to find a malpractice attorney to advise whether the claim was worth pursuing. He received -- ah -- feedback that there was substantial problems with the claim, and it was not viable.

In -- on August -- on or about August 7th, 2020, Mr. Vorndan, Counsel for Mr. Dragul, sent Mister -- ah -- Michael

Gilbert, Counsel for Mr. Sender, an email advising that the GDA entities may have claims against certain professionals arising from their work with GDA, specifically, some of the law firms and accounting firms. Um.

He noted that the Receiver had pursued some of these types of claims, but not all. He thus -- ah -- concluded that it was clear the Receiver had made a decision to forego pursuant of any other actions against other professionals. He requested that the Receiver confirm abandonment of those claims.

Mr. Gilbert responded in an August 10th, 2020 email. He requested identification of the professionals against whom the Estate had claims, and the bases for the claims, the facts supporting them, and any other supporting documents.

In an August 12th, 2020 email, Mr. Vorndan identified the claim against the Brownstein law firm as follows: Against Brownstein which assisted with, and drafted documents for a variety of transactions, including the purchase of the Pier Entertainment Group, which was then merged with the Angel Management Group in Las Vegas, the transaction for the YN (phonetic) property, Rose LLC's creation and acquisition of Senior Frog's, a variety of notes, the transition involving the (indiscernible) Field property, the transition involving the Clearwater property, the transition involving Plaza Mall of Georgia, and a variety of SPE's. If there was anything improper about any of these transactions, Brownstein played a role.

Mr. Sender testified that he continued to investigate the claims against Brownstein; however, when he asked for details and specific information, Counsel did not -- um -- provide -- Counsel for Mr. Dragul did not provide a meaningful response. Um. In fact, they told Mr. Sender he had a server. Mr. Sender noted that the server had five terabytes worth of information stored on it.

September 3rd, 2020, Mr. Dragul filed a motion to order claims abandoned. In the motion he provided the same basis for the claims against Brownstein, as Mr. Vorndan provided in the August 12th email. Judge Egelhoff denied that motion, and again, it was a denial.

On October 1st, 2020, finding that Mr. Dragul, through his Counsel, had not provided the Receiver with a sufficient basis from which the Receiver could determine whether any purported claim was viable.

On October 26th, 2020, Mr. Dragul filed a motion to order claims against Brownstein abandoned. Notably, he attached as Exhibit 2, a complaint and jury demand asserting malpractice claims, breach of fiduciary -- ah -- duty claims, and other claims against the Brownstein and individual attorneys and employees of the firm. The complaint sought more than $58 million dollars in damages in the Eighth Judicial District, Clark County, Nevada.

The complaint was filed on October 7th, 2020, less than

a week after Judge Egelhoff's order.

Mr. Sender noted that he did not provide any authorization to Dragul or the entities to file the complaint. Indeed, a footnote in the complaint indicated that Mr. Sender was the Receiver in the Colorado action, but, quote, either refused or failed to assert these claims, unquote.

Mr. Sender testified that the complaint was the first time that he had been provided any details about the purported claims about the Brownstein firm.

Mr. Sender continued his investigation of the claims against Brownstein. He read the complaint, consulted -- ah -- Counsel, malpractice counsel, read data, conducted a video interview, and investigated specific allegations. He also reviewed a draft of a Brownstein memo regarding the statute of limitation problems with claim. He remarked that the lawsuit included Defendant attorneys who had no involvement with the case, as well as paralegals. He further noted that some of the acts were attributed to Brownstein when they were performed by another law firm. He questioned the viability of the complaint and the accuracy of its factual content.

Mr. Sender negotiated a settlement with the Brownstein firm on November 16th, 2020, and -- ah -- filed a motion to approve that settlement agreement. The settlement included payment by the Brownstein firm to the Receivership's Estate in the amount of $250,000.

Mr. Dragul filed his objection to that motion on November 23rd, and the Receiver filed his reply on November 30th. The Court then heard -- ordered this hearing on the motion.

So first, it's a threshold matter -- Mr. Dragul contesting inclusion of his claims as part of the Receivership Estate. He argues that these assets, including the claims, are only part of the -- ah -- would only be part of the Estate, insofar as these assets are related to investor funds from the solicitation or sale of securities is -- um -- as described in the Commissioner's complaint or indirectly derived from investor's funds. He does not object to the inclusion of claims asserted by the entities in the Nevada complaint as part of the Estate.

The Court finds that these so-called personal claims are part of the Estate. Um. The Receivership order broadly and unconditionally includes all claims and causes of action held by Mr. Dragul or the entities. Again, the sole exception was his former residence, and again, only to the extent that its equity was unrelated to the proceeds from the sale of securities or matters referenced in the complaint.

The Court finds persuasive the Court of Appeals -- ah -- decision in Peltz v. Shidler, at 952 P.2d 793. Um. These -- ah -- claims are all -- ah -- prepetition -- um -- and are not personal claims of Mr. Dragul; they're prepetition in terms of the Receivership matters.

Moreover, the claims in the Nevada complaint clearly relate to the solicitation of sale of securities set forth in the Commissioner's complaint. The claims arise from the Brownstein firm's representation of Mr. Dragul and the entities, and the solicitation of the sale of securities which are the subject of indictments, civil actions, and administrative proceedings.

The claims concern alleged actions or omissions by the Brownstein firm and the impact on Mr. Dragul -- and as the Receiver summarizes, the gravamen of that action is that Brownstein should have done more in the 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 -- and as Mr. Shumway himself -- ah -- admitted during his testimony, it's hard to -- um -- extricate the claims of the JD -- um -- of JD from other claims.

So, then the Court -- um -- looks -- so, the Court has answered that first question. The Court then looks at the proposed settlement, and in this Court's order regarding the request for limited discovery, the Court noted that the Colorado Courts have not set forth the standard of review to apply when reviewing a Receiver's recommendations regarding settlement, and that the Court, thus, must look at the standards articulated by bankruptcy courts for guidance.

Under these standards, the Court must determine whether

the settlement is fair and equitable in the best interest of the Estate, and the Court is relying on case law cited in its previous order. Um.

The Court's decision to approve the settlement must be an informed one, based upon objective evaluation of developed facts, and that's the Kapeska (phonetic) case -- and that determination requires the Court to consider the probable success of the underlying litigation on the merits, the possible difficulty in collecting a judgment, the complexity and expensive of the litigation, and the interest of the creditors in deference to their reasonable views.

Moreover, is with the Trustees, the Court must grant the Receiver considerable deference to exercise his business judgment with respect to settlements -- and it's important to emphasize that this Court is not required to conduct a mini trial on the merits, and that's In re Armstrong, 285 B.R. 344 -- um -- from the Tenth Circuit, U.S. Bankruptcy Appellate Panel.

The first issue is the probable success of the underlying litigation on the merits. The Court found Mr. Sender's testimony to be very credible. He questioned the viability of the Nevada lawsuit, and that was demonstrated today with the -- um -- significant disconnects between the allegations in that lawsuit and -- um -- other documents presented to the Court.

Mr. Sender -- um -- credibly set forth a substantial

issue with the statute of limitations, which may or may not have been cured by tolling agreements -- um -- there is a substantial issue as to whether or not Mr. Dragul had any authority to enter into these tolling agreements.

He also correctly identified problems with Mr. Dragul as a witness. Something that Mr. Shumway didn't talk about today is the elephant in the room; those glaring Fifth Amendment issues. Um. Mr. Dragul has significant Fifth Amendment -- has the right to protection under the Fifth Amendment. He's facing indictments for securities fraud and -- um -- and there's been no evidence that he would waive those protections in the Nevada lawsuit -- and I suspect that any competent Counsel in his criminal matters would advise him against such a waiver.

The Court also had -- um -- difficulties with Mr. Shumway's testimony. Um. His -- the lawsuit was again, based on all the documents provided to Mr. Dragul, and information given to Mr. Dragul. There -- there was a -- a huge question in the Court's mind as whether any of this was confirmed by any matters -- um -- and any documents that would have been available, including that earlier -- um -- fee -- fee engagement letter. Um.

The Court is also concerned that this lawsuit was even filed. Um. A denial is not suggestion. The Court orders mean what they say, and -- ah -- further, the Receivership order enjoined Mr. Dragul from filing these actions, or from -- um --

or from -- um -- or from entering into any binding -- um -- or purportedly binding agreements.

Mr. Sender also noted factual problems with the Nevada lawsuit, including attributing -- as I said before, acts performed by another -- um -- firm to the Brownstein firm. He was also aware that the in pari delicto defense would have a significant effect on the Nevada claims. And again, those claims are part and parcel with the criminal acts that have been charged against Mr. Dragul, and I don't in any way make any determinations as to whether he's guilty or not guilty; I only can presume him to be innocent at these times, and -- and that the grand jury found probable cause to return the indictments. Um.

Mr. Dragul maintains that the Receiver in the Brownstein firm would not have agreed to a 250,000 settlement if there was no merit to the claim. This Court disagrees, noting the testimony about the expense of litigating these claims. There's no question in the Court's mind based on the testimony, the amount of the settlement would be less than the cost of litigation -- um -- and the testimony does suggest that this is a nuisance value settlement -- settlement -- and while a nuisance value settlement for a State Farm, low impact rear end may be $5,000, it may be -- it's will be a different -- ah -- ballpark when we're talking about major -- ah -- malpractice allegations against a firm.

The second factor is the -- ah -- possible difficulty in collecting a judgment, and everyone agrees that this factor has no impact -- um -- on the Court's determination, and certainly had not impact on the -- the Receiver's -- um -- decision to settle.

The third factor is the complexity and expense of the litigation, and the Court did not find Mr. Shumway's testimony to be credible on this point. It is -- um -- beyond dispute in this Court's mind, that this would be costly -- costly -- costly litigation. It's a 35 page complaint -- um -- addressing representation by the Brownstein frim from 1997 through 2018 -- um -- and involving multiple named defendants, as well as Joe Doe defendants.

There -- um -- this is a malpractice case, which is a case within a case, and not only is Mr. Shumway -- um -- did admit there would be -- um -- experts needed for a development of damages, and to address those issues. There's also, certainly, experts needed to -- um -- on the issues of -- of professional negligence, and the standards and what an attorney should or should not do.

The fourth factor is the interest of the creditors in deference to their reasonable views, and the Court understands from testimony presented last week, that the Receiver conveys information -- ah -- about this case -- ah -- to creditors via the Receiver's website. Um. The Court has not received any

written objections by the creditors, only Mr. Dragul, who's not a creditor, has objected.

The Receiver testified that he received some emails in support of the settlement, and two or three opposed to the settlement. Um. He indicated that two non-creditors who were -- ah -- reported friends of Mr. Dragul -- um -- objected -- objected, but the -- ah -- Receiver credibly testified that this settlement -- ah -- particularly, in light of the expense of litigation and the lack of merit in the lawsuit, was in the best interest of the Estate and in the creditors.

So, for those reasons, the Court will approve -- ah -- the Receiver's motion -- um -- regarding the Brownstein settlement, and I will issue a written order that will just simply say: The Court incorporates by reference its oral findings of fact, conclusions of law, and order.

The final issue is regarding the pending lawsuit in -- um -- Nevada, and the Court has had an opportunity to review the In re Peper, at 554 P.2d 727, and the Court will -- um -- accept the invitation by the Brownstein lawyers that this -- ah -- the lawyers in this case are enjoined from prosecuting that case.

Anything further?

MR. WILLIAMS: One point of clarification, Your Honor; this is Bart Williams on behalf of the Brownstein firm. In addition to enjoining the lawyers from pursuing that case --

THE COURT: And Mr. Dragul --

MR. WILLIAMS: -- is the Court ordering --

THE COURT: -- and Mr. Dragul.

MR. WILLIAMS: And Mr. Dragul; very good. Thank you. That was my question.

THE COURT: Yes. Yes. And I -- I meant to say that. Yes.

MR. WILLIAMS: Thank you.

THE COURT: Okay. Then I -- it was long, but well presented. I appreciate your arguments. Um. We'll be in recess.

MR. WILLIAMS: Your Honor -- Your Honor, there was one other issue. I apologize.

THE COURT: Okay. It's only 4:15.

MR. WILLIAMS: (Laughter). It's simply that in the -- in the order that -- that Court issues setting the issues to be raised today on the Receiver -- the -- ah -- I believe the Court indicated that the Court was going to address the abandonment motion, as well.

THE COURT: Well --

MR. WILLIAMS: I'm fine with it either way, I just -- I believe that was from the December 11th order --

THE COURT: Yes.

MR. WILLIAMS: -- ah -- where Your Honor ordered the hearing, but, I just wanted to raise that to the Court.

THE COURT: Yes. I think implicitly in my order, the

Receiver has not abandoned the claims against the Brownstein firm, and they are the claims of the Estate.

MR. WILLIAMS: All right.

THE COURT: Okay. Thanks.

MR. WILLIAMS: Very well. Thank you, Your Honor.

THE COURT: Any further clarification?

MR. VELLONE: Not from the Receiver, Your Honor.

THE COURT: Okay.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Okay. We'll be in recess. Thank you.

(Whereupon requested portion of proceeding concluded at 4:18 a.m.)

CERTIFICATE

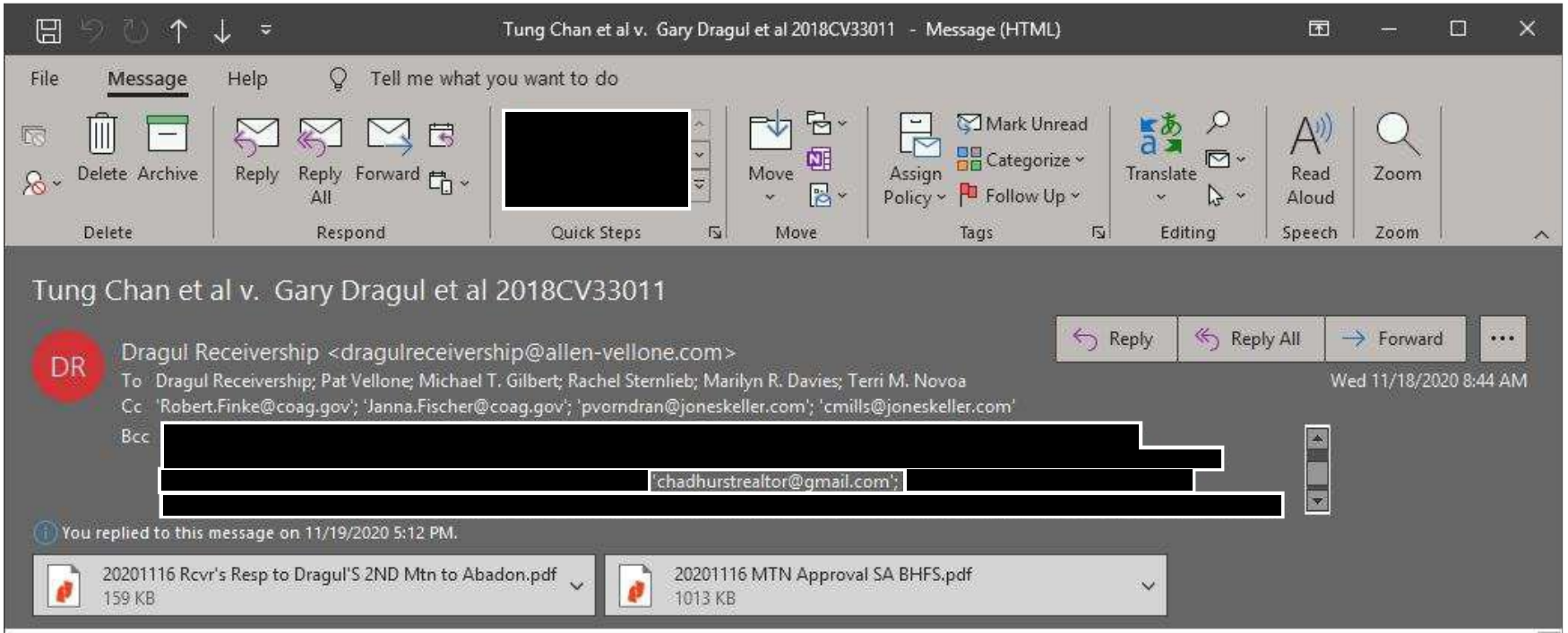
I, Julie Christman, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signed this 4th day of March, 2021.

/s/ Julie Christman

JULIE CHRISTMAN, Transcriber

Notary Public, State of Colorado



Good Morning,

Attached please find the following filed on November 16, 2020 in the above referenced matter:

- Receiver's Response to Defendant Gary Dragul's Motion to Order Claims Against Brownstein Abandoned
- Receiver's Motion to Approve Settlement Agreement With Brownstein Hyatt Farber Schreck, LLP

Thank you.

Very truly,

Legal Assistant Team
Allen Vellone Wolf Helfrich & Factor P.C.
1600 Stout Street, Suite 1900
Denver, CO 80202

dragulreceivership@allen-vellone.com
www.allen-vellone.com

(303) 534-4499 | Main
(303) 893-8332 | Fax