SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Co 80203 **IN RE:** Tung Chan, Securities Commission for the state of Colorado v. Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC **Petitioner:** Chad Hurst, a Creditor of the Gary Dragul Receivership **Proposed Respondents:** District Court for the Second Judicial District (the Hon. Shelley I. Gilman, Presiding) **Attorney: For Nonparty, Chad Hurst** T. Edward Williams, Reg. 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	DATE FILED: April 13, 2021 2:12 PM FILING ID: 3A3EAEB2ABAC4 CASE NUMBER: 2018CV33011 ▲ **COURT USE ONLY** ▲ Case Number: ___SA___ Related Case Below: 2018CV33011(Tung Chan v. Gary Dragul, et. al.)-Denver District Ct.
NOTICE OF SERVICE OF CORRECT PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21	

PLEASE TAKE NOTICE, that this Corrected Petition for Rule to Show Cause Pursuant to C.A.R. 21 is being served on all Parties attached in Exhibit A and on the Clerk of Court for the Second Judicial District under C.A.R. 21(d)(3) and (4).

Dated: April 13, 2021.

RESPECTFULLY SUBMITTED,

WILLIAMS LLP

By: *<u>/s/ T. Edward Williams, Esq.</u>*
T. Edward Williams
7 World Trade Center
250 Greenwich Street 46th FL.
New York, New York 10007
Tel: (212) 634-9106
Email: Edward@williamsllp.com
ATTORNEYS FOR NONPARTY, CHAD HURST

SUPREME COURT, STATE OF COLORADO

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Denver, Co 80203

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Petitioner:

Chad Hurst, a Creditor of the Gary Dragul Receivership

Proposed Respondents:
District Court for the Second Judicial District (the Hon. Shelley I. Gilman, Presiding)

Attorney For Interested Party, Chad Hurst:
T. Edward Williams, Reg. 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

▲ **COURT USE ONLY** ▲

Case Number: 21SA121

Related Case Below: 2018CV33011(Tung Chan v. Gary Dragul, et. al.)-Denver District Ct.

CORRECTED PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21

Petitioner, Chad Hurst, through counsel, Williams LLP, submit this Petition for a Rule to Show Cause under C.A.R.

21. In Support of this Petition, Petitioner states as follows:

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CERTIFICATE OF COMMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

Words **4500**.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

X For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

X In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

WILLIAMS LLP
By: */s/ T. Edward Williams, Esq.*
T. Edward Williams
7 World Trade Center
250 Greenwich Street 46th FL.
New York, New York 10007
Tel: (212) 634-9106
Email: Edward@williamsllp.com
ATTORNEYS FOR NONPARTY, CHAD HURST

INTRODUCTION

The Receiver in this matter compromised a $58 million-dollar legal malpractice claim, owned by the receivership estate, for a mere $250,000. Before compromising the malpractice claim, the Receiver did not determine the commercially reasonable price of the malpractice claim. In addition, the Receiver did not provide notice to creditors of the receivership and did not allow creditors of the receivership to participate in the negotiations to compromise the malpractice claim. To date, creditors of the receivership has received nothing from the receivership estate, even though the receivership was intended to protect the creditor's interests.

At a hearing to determine whether the Receiver was allowed to consummate his compromise of the malpractice claim, the District Court for the City and County of Denver determined that the Receiver could compromise the malpractice claim without providing notice to the receivership's creditors and without obtaining a

commercially reasonable price in exchange for compromising the malpractice claim.

In arguing that the trial court accept his value of the legal malpractice claim, the Receiver conceded that there is no extant Colorado appellate opinion on what standard governs the price a receiver must seek when selling or compromising a receivership asset. 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 District Court agreed with the Receiver that there was no extant ruling from the Colorado Supreme Court or from the Court of Appeals, and so, applied the *Kopp* Standard using the bankruptcy standard. *See* Tr. Of Oral Ruling dated Feb.

16, 2021, 12:18–25 ("The Court then looks at the proposed settlement, and in this court's order regarding the request for limited recovery, the Court noted that the Colorado Courts have not set forth the standard of review to apply when reviewing a Receiver's recommendation regarding settlement, and that the Court, thus, must look at the standards articulated by bankruptcy courts for guidance.").

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.

However, 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. *See* Contra, Tr. Of Oral Ruling 13:12–17 ("Moreover, is [sic] 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 [(10th Cir. BAP March 28, 2002)].").

The *Kopp* Standard is not consistent with the scrutiny Colorado law applies to receiverships because the *Kopp* Standard allows a receiver to dictate—without any expertise whatsoever—the price at which a receiver may sell a receivership asset. A survey of receivership laws that are similar to Colorado's receivership law—see e.g., California, Maryland, Rhode Island, Washington State—demonstrates that before a court approves a settlement or a compromise of a receivership asset, the receiver must demonstrate that the price obtained was the commercially reasonable price.

In addition, unreported Colorado trial court cases have all applied the commercially reasonable standard in

determining the price a receiver must seek when selling or compromising a receivership asset. In *NBH Capital Finance v. Case Drilling & Pump Service, LLC*, 2015 CV 31544 (Dist. Ct. Denver Cnty.), 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 division of the Denver District Court.

A second example 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 a chain of 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.

As well, the Receiver's comparison of a receivership with a bankruptcy substantially supports Mr. Hurst's argument because under Section 363 of the Bankruptcy Code, a bankruptcy trustee must obtain a commercially reasonable price for a bankruptcy asset, or the trustee cannot sell or compromise an asset of the bankruptcy estate.

Furthermore, Even if the District Court was correct, it misapplied the last two prongs of the *Kopp* Standard. The last two prongs of the *Kopp* Standard[1] 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.

[1] 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.

In seeking to preserve the malpractice claim as a receivership asset, Mr. Hurst offered to pay the Receiver substantially more than what Brownstein Hyatt Farber & Schreck had offered to compromise the malpractice claim and also promised to fund all the costs and pay the fees incurred in prosecuting the malpractice claim. Accordingly, 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—Mr. Hurst would—and, the malpractice suit was not too complex for Shumway Van, the firm retained to litigate the malpractice suit.

Also, and equally as important, the Receiver did not satisfy the best interest of the creditors prong. First, the Receiver did not provide prior notice of settlement of the malpractice claim to the creditors, and the Receiver barely argued this prong. Second, the District Court did not address what benefit, if any, the creditors would obtain from the Receiver's insignificant compromise of the $58 million

dollar malpractice claim.

IDENTITIES OF THE PARTIES AND THEIR STATUS IN THE COURT BELOW

Petitioner, Chad Hurst, is a creditor of the Receivership of Gary Dragul, a creditor of the Receivership of GDA Real Estate Services, LLC, and a creditor of the other receiverships established in the names of Gary Dragul, GDA Real Estate Services, LLC, and Special Purpose Entities formed by Gary Dragul. Petitioner invested substantial sums in Special Purpose Entities ("SPEs") formed by Gary Dragul and structured by Brownstein Hyatt Farber and Schreck.

The proposed respondent is the District Court for the Second Judicial District of the State of Colorado (Hon. Shelley I. Gilman). The District Court ordered that the Receivership's attorney may settle the legal malpractice claim to against Brownstein for $250,000.00, even though Petitioner had offered substantially more than that amount to purchase and pursue the legal malpractice claim that the attorneys for the receivership rejected without reason.

IDENTIFY OF THE COURT BELOW AND RELEVANT CASE NAMES AND NUMBERS

Tung Chan, Securities Commission for the state of Colorado v. Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC, 2018 CV 33011, District Court for the Second Judicial District of Colorado (City and County of Denver).

INDENTITY OF THE PERSONS OR ENTITIES AGAINST WHOM RELIEF IS SOUGHT,THE ACTION COMPLAINED OF, AND THE RELIEF PETITIONER SEEKS

This is a matter of first impression that presents a novel question of law about the operation of receiverships. Petitioner requests that this Court declare that the District Court's February 26, 2021 Order void as contrary to law, because no court in Colorado (or outside of Colorado for that matter), has allowed a Receiver to name his own value for a receivership asset. In addition, no court (in or outside of Colorado) has held that a receiver may act without providing meaningful notice to creditors of the receivership.

PETITIONER DOES NOT HAVE OTHER ADEQUATE REMEDY AVAILABLE

Rule 21 of the Colorado Appellate Rules authorizes this Court to consider whether a district court acts without authority, where a district court exceeds the authority granted to it, or where a district court has abused its discretion. *See, e.g., Morgan v. Genesee Co.*, 86 P.3d 388, 391 (Colo. 2004); *Weaver Constr. Co. v. Dist. Ct.*, 545 P.2d 1042, 1044 (Colo. 1976); *Vail/Arrowhead, Inc. v. District Court*, 954 P.2d 608, 611–612 (Colo. 1998) ("We may exercise original jurisdiction under C.A.R. 21 when a district court exceeds its jurisdiction or ***abuses its discretion in exercising its functions***, and appeal is not an adequate remedy . . . .Intervention by way of original jurisdiction may be appropriate under the supervisory powers of this court to enforce its own rules where, as here, the issue presented is the district court's failure to observe the rules of this court.").

An original proceeding is the only adequate remedy available to the creditors because if no relief is granted through this original proceeding, the statute of limitations will run on the malpractice claim, which is worth at least $58 million dollars. Without relief from this Court, the malpractice suit will be dismissed. In addition, an appeal would not salvage the malpractice suit because by the time the appeal is completed, the malpractice suit would be time barred.

THE ISSUES PRESENTED

A. Did the District Court err when it held that a receiver may determine, in his sole discretion, the price of a receivership asset?

Preservation of the Issue. Mr. Hurst preserved this issue on February 26, 2021 during the hearing on the approval of the compromise by the Court. *See* Hr. Tr. Vol. 2 dated Feb. 26, 2021, 8:21–25, 9:1–25; 10:1-18. This issue is reviewed *de novo* because it is a question of law.

B. Did the District Court err in not requiring the Receiver to provide actual notice to creditors of the Receivership to allow the creditors to participate in the Receivership?

Preservation of the Issue. Mr. Hurst preserved this issue on February 26, 2021 during the hearing on the approval of the compromise by the Court. *See* Hr. Trans. Vol. 2 dated Feb. 26, 2021, 8:21–25, 9:1–25; 10:1-18. This issue is also reviewed

de novo because it is a question of law.

FACTUAL BACKGROUND

GDA Real Estate Services, LLC and GDA Real Estate Management, LLC (collectively, "the GDA Entities") managed and serviced commercial shopping centers. Gary Dragul ("Dragul") was the sole owner of the GDA Entities. Dragul also formed Special Purpose Entities ("SPEs" or "SPE") to acquire, develop, and hold (or sell) shopping centers that were serviced and managed by the GDA entities. If, for example, Dragul found a new shopping center that showed could yield the substantial economic return, Dragul would form a special purpose entity to purchase that shopping center. That SPE would, in turn, seek investments from investors to allow for the purchase and development of the shopping center.

In each transaction that involved the SPEs, Dragul and the particular SPE were represented by Brownstein Hyatt Farber and Schreck LLP ("Brownstein"). *See* Legal Malpractice Complaint, attached at Appendix. Specifically,

and according to the Malpractice Complaint, Brownstein was heavily involved in the day-to-day issues that concerned the SPEs and provided detailed legal advice on the formation of the SPEs, drafted all promissory notes needed to structure the investments in the particular SPE, and advised on all matters related to Colorado and federal securities laws. *See* Malpractice Complaint.

In August 2013 and in April 2019, the Colorado Attorney General indicted Dragul for, *inter alia*, soliciting funds from third parties without a securities license, for engaging in a course of business designed to defraud investors in violation of Colo. Rev. Stat. 11-51-501(1)(c), and for failing to disclose material information about the SPEs, including the debt of the SPEs, the corporate structure of the SPEs, the number of investors in the SPEs, among other material omissions that the Attorney General alleged would have made a difference to investors in whether or not invested in a particular SPE. Dragul is awaiting trial on the first and second indictments. Dragul has also filed a Motion to Bar

Prosecution on the first indictment because the statute of limitations has run.

After his indictment, Dragul entered into a Stipulation for the Appointment of the Receiver. *See* Stipulation for the Appointment of Receiver, attached at Appendix. the Stipulation appoints Harvey Sender as Receiver and permits the Receiver to sue and undertake all efforts to obtain assets that belong to the DGA entities or the Dragul in order to satisfy the GDA and Dragul entities' obligations to various creditors. *See* Hrg. Tr. Vol. 1, dated Feb. 19, 2021, 17:4–15. The Receiver essentially took control of all assets, including assets that belonged to the creditors:

> 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. Mr. Hursts debt are secured against commercial properties purchased by the SPEs in which he invested.

On November 18, 2020, the Receiver filed a motion to approve settlement with Brownstein, arguing that it had reached an agreement to settle the malpractice claim with Brownstein for $250,000.00. On November 23, 2020, Dragul objected to the Receiver's Motion. Neither Dragul nor the Receiver served their respective pleadings on the creditors, and the creditors did not know of a settlement of the malpractice claim or compromise of any other claims that was property of the receivership estate.

The District Court scheduled a one-day hearing on the Receiver's Motion to Approve Settlement with Brownstein for

February 19, 2021. *See* Vol. 1, Hrg. Tr. Dated Feb. 19, 2021.[2] The hearing was all but completed on February 19, but the District Court scheduled an additional hearing for February 26, 2021, because Dragul's attorney could not be present on the February 19, 2021 hearing because Dragul's attorney had suffered a power outage during the storm in Texas. *See id.* at 3:12–21, 5:2–25, 6:1–20, 7:1–25, 8:1–25, 9:1–25, 10:1–25.

Petitioner learned of the February 26, 2021 hearing one day before, on February 25, 2021 and retained counsel to represent his interests and the interests of the other creditors of the receivership. On February 25, 2021, counsel for Petitioner reached out to the Receiver and learned that the Receiver was attempting to compromise the malpractice claim. In that same conversation, Petitioner learned that Brownstein had offered $250,000.00 to compromise the malpractice claim. Petitioner then offered substantially more than $250,000.00 to the Receiver so that Petitioner

[2] The transcript from the February 19, 2021 hearing is barely legible. One cannot discern what arguments were made or what rulings were made at the February 19, 2021 hearing. See, e.g., the Direct and Cross Examination of Harvey Sender, beginning at pg. 15–25 of the Hearing Transcript.

could purchase the proceeds of the malpractice and allow the malpractice claim to be prosecuted to conclusion to allow for the recovery that would benefit the receivership estate. In addition to offering to pay substantially more money for the malpractice claim, Petitioner also agreed to pay for all of the costs to be incurred in prosecuting the malpractice claim. Hrg. Tr.

The Receiver rejected Petitioner's offer, which would have preserved. The Receiver rejected Petitioner's offer, however, and claimed that he had adequately valued the malpractice claim at $250,000.00 based on the information he had. *See* Hrg. Tr. Vol. 1, 20:3-24. The Receiver did not seek out any expertise on the value of the malpractice claim, and the District Court did not require the Receiver to obtain any expert valuation of the malpractice claim.

ARGUMENT AND AUTHORITIES

A. THIS ORIGNAL PROCEEDING PRESENTS A NOVEL QUESTION OF LAW THAT REQUIRES SUPREME COURT GUIDANCE, AND SO, THIS COURT SHOULD GRANT THIS 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 this 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. *See CLPF-Parkridge One, L.P. v. Harwell Invs., Inc.*, 105 P.3d 658, 661–665 (Colo. 2005) (construing C.R.C.P. 13 and 14 together with other statutes in a C.A.R. 21 proceeding); *see, also, Sanchez v. Dist. Ct. of Larimer Cnty.*, 624 P.2d 1314, 1316–17 (Colo. 1981) (granting a C.A.R. 21 Petition to review pretrial discovery issues under the Colorado Rules of Civil Procedure).

The rights here are more substantial than the rights under at play in matters in which this Court has granted a C.A.R. 21 review. In addition, Rule 66 of the Colorado Rules of Civil Procedure needs review. Indeed, there are no appellate opinions on point that determines what standard applies when it comes to sale of a receivership assets.

B. THIS COURT APPROVED THE COMMERCIALLY REASONABLE STANDARD IN ANOTHER CONTEXT.

In *May v. Women's Bank, N.A.*, 807 P.2d 1145, 1146 (Colo. 1991), this Court reviewed the commercially reasonable standard in the context of the construing Colo. Rev. Stat. 4–9–504(3), which provides specific protections to debtors regarding the disposition of property pledged to secure a debt.

The issue before the Court was what price a bank may sell assets that had been pledged as collateral to obtain a loan. The bank argued that the debtor had waived his right to require that the property pledged as collateral be sold at a reasonably commercial price. *May*, 807 P.2d at 1147. This Court disagreed. In discussing and applying the commercially reasonable standard, this Court held that the commercially reasonable standard assures "confidence in the integrity and fairness" in transactions so that all parties can assume that sale is not an insider transaction but rather is a result of fairness and business dealing. *See id.* (reasoning that a method other than the commercially reasonable standard

"would encourage inequitable, collusive and fraudulent manipulations of sales of collateral by creditors, third parties and debtors.").

The same result reached in *May* should be reached in this case. Although this Court construed a statute in *May*, this Court's reasoning as to the transparency afforded by the commercially reasonable standard applies with equal, if not more, force to the facts in this case. Here, a receivership that was seemingly established for the benefits of creditors have not served the creditors' interests. In fact, the creditors, including Petitioner, have no insights into the workings of the receivership.

In addition, there is not a principled or an important analytical distinction between the facts before this Court in *May* and the facts that Petitioner has put before this Court in this matter. In *May* and in this matter, the question for decision is what price must be obtained for assets owned by a third party that has been placed under the control of another party. Just like it made sense in *May* to use the

commercially reasonably standard because it provided transparency to the sale process, it also makes sense to apply that standard to sales undertaken by receivers regarding receivership assets. *May*, 807 P.2d at 1147.

It is clear from reviewing the District Court's oral ruling that had it focused on the correct standard, the District Court would not have reached the conclusion it reached. See Tr. Of Oral Ruling, 13:1–25, 14:1–25. Whatever the factual problems may have been, Petitioner was willing to bare that risk, and the District Court should have allowed him to bare that risk so long as he offered a commercially reasonable price for the receivership asset.

C. THE COMMERCIALLY REASONABLE STANDARD IS THE STANDARD THAT IS APPLIED WHEN A RECEIVER SELLS OR COMPROMISES RECEIVER ASSET.

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. *See* 11 U.S.C. § 363. 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.").

Even if the District Court was correct in applying the *Kopp* Standard, the District Court still misapplied the last two prongs of the *Kopp* Standard. The last two prongs of the *Kopp* Standard[3] require a receiver to show that the suit would

[3] Neither the District 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

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.

D. THE RECEIVER FAILED TO PROVIDE NOTICE TO MR. HURST AND TO OTHER CREDITORS. IN ADDITION, THE RECEIVERSHIP ORDER NOTICE PROVISION IS LEGALLY 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***

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.

(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.”).

The Colorado Court of Appeals held the same in F*irst National Bank v. Cillessen*, 622 P.2d 598, 600–601 (Colo. App. 1980) (requiring that reasonable notice, which is calculated to alert the recipient, must be provided when selling or compromising an asset).

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*.

CONCLUSION

For the reasons above, Petitioner seeks an Order to Show Cause Under C.A.R. 21.

Dated: April 12, 2021.
New York, New York

WILLIAMS LLP
By: */s/ T. Edward Williams, Esq.*
T. Edward Williams
7 World Trade Center
250 Greenwich Street 46th FL.
New York, New York 10007
Tel: (212) 634-9106
Email: Edward@williamsllp.com
ATTORNEYS FOR NONPARTY, CHAD HURST

CERTIFICATE OF SERVICE

I certify that on April 12, 2021, a true and correct copy of the foregoing **PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21** was served via CCES, addressed to the following:

Bart Williams, 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.*