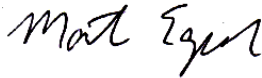


DISTRICT COURT, DENVER COUNTY, COLORADO	
Court Address: 1437 BANNOCK STREET, RM 256, DENVER, CO, 80202	
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF et al.	DATE FILED: April 26, 2024 10:58 AM CASE NUMBER: 2018CV33011
v.	
Defendant(s) GARY DRAGUL et al.	
△ COURT USE ONLY △	
Case Number: 2018CV33011 Division: 424 Courtroom:	
Order: RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH CLEARWATER BANKRUPTCY ESTATES W/ATTACH	

The motion/proposed order attached hereto: SET FOR HEARING.

Counsel for the Receiver shall be responsible for contacting the Court's division staff to obtain a date for a hearing/oral argument on the motion to approve the settlement agreement and the objection thereto.

Issue Date: 4/26/2024



MARTIN FOSTER EGELHOFF
District Court Judge

<p>DISTRICT COURT, DENVER COUNTY STATE OF COLORADO</p> <p>Denver District Court 1437 Bannock St. Denver, CO 80202 303.606.2433</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiff: Tung Chan, Securities Commissioner for the State of Colorado</p> <p>v.</p> <p>Defendants: Gary Dragul; GDA Real Estate Services, LLC; and GDA Real Estate Management, LLC</p>	
<p>Attorneys for Receiver:</p> <p>Patrick D. Vellone, #15284 Michael T. Gilbert, #15009 Averil K. Andrews, # 56148 ALLEN VELLONE WOLF HELFRICH & FACTOR P.C. 1600 Stout St., Suite 1900 Denver, Colorado 80202 Phone Number: (303) 534-4499 pvellone@allen-vellone.com mgilbert@allen-vellone.com aandrews@allen-vellone.com</p>	<p>Case Number: 2018CV33011</p> <p>Division/Courtroom: 424</p>
<p style="text-align: center;">RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH CLEARWATER BANKRUPTCY ESTATES</p>	

Harvey Sender, the duly-appointed receiver (“Receiver”) for Gary Dragul (“Dragul”), GDA Real Estate Services, LLC (“GDARES”), GDA Real Estate Management, Inc. (“GDAREM”), and related entities (collectively, “Dragul and the GDA Entities”), moves this Court to enter an order approving a settlement agreement the Receivership Estate has entered into with the Liquidating Trustee for the estates of Clearwater Collection 15, LLC (“Collection”) and Clearwater Plainfield 15, LLC

(“Plainfield”) (jointly, the “Clearwater Entities”). A copy of the settlement agreement is submitted as **Exhibit 1** (the “Settlement Agreement”).

I. Background

1. On August 15, 2018, Gerald Rome, Securities Commissioner for the State of Colorado (the “Commissioner”), filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities (the “Receivership Case”).

2. On August 30, 2018, the Court entered a Stipulated Order Appointing Receiver (the “Receivership Order”), appointing Harvey Sender receiver for Dragul and the GDA Entities and their respective properties and assets, as well as their interests and management rights in related affiliated and subsidiary businesses (the “Receivership Estate” or the “Estate”). Receivership Order ¶ 5.

3. The Receivership Order expressly includes Dragul, GDARES, and GDAREM, and all of their assets, within the Receivership Estate. Receivership Order ¶ 9. The Estate also includes all of the interests of Dragul, GDARES, and GDAREM in any of their subsidiaries or related companies “including without limitation the ‘LLC Entities’ identified in the Commissioner’s Motion and Complaint for Injunctive and Other Relief.” Receivership Order ¶ 9. The Clearwater Entities are both “LLC Entities” identified in the Commissioner’s Complaint and therefore included within the Receivership Estate. *See* Aug. 15, 2018, Compl. ¶ 21 (table).

4. Collection and Plainfield are tenants-in-common and formerly owned the Clearwater Collection Shopping Center, a retail shopping center at 21688-21800 US Highway 19N, Clearwater, Florida 33765 (the “Property”). Under their Tenancy-

in-Common Agreement, Collection held a 82.52% interest in the Property and Plainfield held a 17.48% interest.

5. Collection is a single purpose entity (“SPE”) that is owned by two other SPEs, GDA Clearwater 15, LLC (34.82%) and GDA Clearwater Investors, LLC (65.18%). The members of GDA Clearwater 15, LLC were Dragul, who purportedly held a 5.38% interest, and 15 other individuals who purportedly owned the remaining 94.62%.

6. GDA Clearwater Investors, LLC is owned by Hagshama Florida 13, LLC (71.43%) and CoFund V, LLC (28.57%) (the “Hagshama Entities”). The Property’s other tenant-in-common, Plainfield, was owned by yet another SPE, Plainfield 09 A, LLC, which was purportedly owned by Dragul (36.94%) and approximately 33 other individuals, most of whom originally invested in a prior Dragul-promoted project. Their interests were then “rolled over” or exchanged for ownership interests in Plainfield. The Hagshama Entities purportedly owned a majority of the membership interests in the entities that ultimately owned the Property.

7. On August 16, 2018, a predecessor entity to RSS WFCM 2015-LC22-FL CC15, LLC (“Lender”) commenced a foreclosure action on the Property, Case No. 1805459-CI, in the 6th Judicial Circuit in and for Pinellas County, Florida (the “Foreclosure Action”). The Foreclosure Action was stayed by the Receivership Order.

8. Despite his efforts to market and sell the Property and entering into a contract and letter of intent with two separate potential buyers to do so, after the buyers backed out of the sales contracts, as set forth in the Receiver’s

February 19, 2020, Motion to Abandon Clearwater Collection, the Receiver moved to abandon the Estate's equity interest in Collection and Plainfield. On March 3, 2020, the Court entered an order authorizing the Receiver to abandon those interests.

9. After the March 3, 2020, Abandonment Order, on or about March 10, 2020, the Lender in the Foreclosure Action appointed Michal Vullis as receiver for the Property (the "Florida Receiver").

10. On April 19, 2022 (the "Petition Date"), Collection and Plainfield (jointly, "Debtors") each filed voluntary petitions under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Colorado commencing their bankruptcy cases, Case Nos. 22-11320-JGR, and 11321-JGR, respectively. These "Bankruptcy Cases" are jointly administered.

11. After the Petition Date, the Florida Receiver sold the Property to the Philadelphia Phillies for \$22,500,000. The sale, after paying the Lender, the Florida Receiver and his counsel, and other costs of sale, resulted approximately \$5 million being paid to the Clearwater Bankruptcy Estates.

12. On April 11, 2023, the Bankruptcy Court entered an Order confirming the Debtors' First Amended Joint Plan of Liquidation (the "Plan"). The Plan incorporated a Liquidating Trust Agreement pursuant to which Thomas Kim was appointed as the Liquidating Trustee.

13. On June 6, 2023, the Liquidating Trustee settled a litigation claim with a former tenant at the Property, LA Fitness, bringing an additional \$1,000,000 into the Bankruptcy Estates.

14. On August 22, 2022, the Receiver filed a Proof of Claim in the Collection case for \$2,806,545.25 based on claims filed in the Receivership Case by defrauded investors in Collection. On July 7, 2023, the Receiver filed an amended Proof of Claim for \$8,453,171.24, which included claims filed in the Receivership Case by defrauded investors and transfers that had been made to Collection by other GDA Entities.

15. On August 22, 2022, the Receiver filed a Proof of Claim in the Plainfield case for \$941,091.44 based on claims filed in the Receivership Case by defrauded investors in Plainfield. On July 7, 2023, the Receiver filed an amended Proof of Claim in the amount of \$2,527,656.16, which included claims filed in the Receivership Case by defrauded investors and transfers that had been made to Plainfield by other GDA Entities.

16. On May 26, 2023, the Liquidating Trustee filed Objections to the Receiver's Claims in the Bankruptcy Cases (the "Sender Claim Objections").

17. On June 14, 2023, the Hagshama Entities – two of the largest claimants in Debtors' Bankruptcy Estates – joined in the Sender Claim Objections. The objections to the Receiver's Claims were based in large part on the Receiver's alleged lack of standing due to the Receiver's 2020 abandonment of his equity interests in Collection and Plainfield.

18. On July 18, 2023, the Receiver filed ten claim objections in the Collection case: (a) two omnibus objections to claims (ECF Nos. 372, 375); (b) the two claims filed by Hagshama Florida 13 Clearwater LLC and Cofund V, LLC (ECF No. 378); (c) the claim filed by Robert and Jodi Eisen (ECF No. 381); (d) the claim filed by Scott

Friedman (ECF No. 384); (e) the claim filed by David and Darcea Haar (ECF No. 387); (f) the claim filed by Hilltoppers Capital Growth, LLC (ECF No. 390); (f) the claims of Chad Hurst (ECF No. 393); (g) the claim of 3G2B Partners, LLC (ECF No. 396); and (h) the claim of Martin Rosenbaum (ECF No. 399). The claims objections were based in part on the fact that these claimants submitted claims as equity investors rather than creditors, because the claims were not filed on a cash-in, cash-out basis to reflect the near universal rule in Ponzi scheme cases, and that these investors had filed claims in the Receivership Case and that any recovery should be paid from the Receivership Estate.

19. On August 7, 2023, the Receiver also filed an objection to Chad Hurst's Motion for Allowance of Administrative Expense Claim in the Collection case in which Hurst seeks to recover \$380,171.31 based on purported payments to professionals in violation of the Bankruptcy Code, and a \$225,000 Disposition Fee for the sale of the Property. (ECF No. 419).

20. On July 20, 2023, the Receiver filed a total of eight claim objections in the Plainfield case: (a) an omnibus objections to claims (ECF No. 152); (b) the claims filed by Benzmiller Family Trust and Ken Benzmiller (ECF No. 155); (c) the claim of Charles Jerome Eisen (ECF No. 158); (d) the claim filed by David and Darcea Haar (ECF No. 161); (e) the claim of Chad Hurst (ECF No. 164); (f) the claim of Thomas McCaffery (ECF No. 167); (g) the claim of Scott Ruckerfeller-Pensco (ECF No. 170); (h) the claim of Martin Rosenbaum (ECF No. 173); and (i) the claim of Southern Performance Group (ECF No. 176). These claims objections were similar to the claims

objections filed in the Collection case. Collectively, the Receivers' claims objections are referred to as the "Sender Commenced Claim Objections."

21. On August 1, 2023, the Liquidating Trustee filed Motions to Strike the Sender Commenced Claim Objections (other than the Receiver's objection to Hurst's administrative expense claim). (ECF No. 410 in the Collection case and ECF No. 202 in the Plainfield case). The motions to strike were based in part on the Receiver's alleged lack of standing.

22. In August and September 2023, the Receiver participated in a mediation with Dragul and the Liquidating Trustee's counsel in which a settlement was reached with Dragul with respect to the Receiver's claims in the Insider Case as detailed in the Receiver's Eighth Report (filed December 20, 2023, in the Receivership Case). Following the mediation, negotiations continued with the Liquidating Trustee which resulted in the present Settlement Agreement in which the Liquidating Trustee has agreed to pay the Receivership Estate \$500,000, in exchange for which the Receiver has, among other things, agreed to withdraw his Claims in the Bankruptcy Cases, and assign the Sender Commenced Claims Objections to the Liquidating Trustee to pursue or dispose of in the Bankruptcy Cases.

II. The Settlement Agreement is in the best interest of the Estate and its creditors.

23. There exists little Colorado authority with respect to factors the Court should consider in determining whether to approve a Receiver's settlement agreement. In analogous bankruptcy contexts, courts consider whether "the settlement is fair and equitable and in the best interests of the estate." In considering

whether to approve a settlement, bankruptcy courts consider four primary factors: “the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views.” *Kopp v. All Am. Life Ins. Co. (In re Kopexa Realty Venture Co.)*, 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 105 B.R. 971, 977 (D. Colo. 1989). Courts also recognize that deference should be given to the business judgment of the Receiver. *See, e.g., In re OptInRealBig.com, LLC*, 345 B.R. 277, 291 (Bankr. D. Colo. 2006) (deferring to the business judgment of the bankruptcy trustee).

24. Considering these factors, the Court should approve the Settlement Agreement. While the Receiver believes his Claims in the Bankruptcy Cases are valid, the threshold legal challenge to the Receiver’s standing remains pending before the Bankruptcy Court; if determined adversely to the Receiver, this would eliminate *any* claim of the Receiver in the Bankruptcy Cases. There are also factual issues that could affect the amount of the Receiver’s Claims. The outcome of litigation is always uncertain. Here, there are significant legal and factual issues that could invalidate the Receiver’s Claims in whole or in part.

25. Prosecuting the Receiver’s Claims and litigating the objections to them would be fact-intensive and costly to both the Receivership Estate and the Bankruptcy Estates and would require expert testimony from the Receiver’s forensic accountants and the Receiver. These administrative expenses would deplete resources of both the Receivership and the Bankruptcy Estates. The litigation would

further delay distributions in and closing of the Receivership Estate. Risk of collection is not a factor because the funds are held in the Bankruptcy Estates.

26. As to the interests of creditors, in the Settlement Agreement, the Liquidating Trustee has agreed to make distributions from the Bankruptcy Estates to all interest holders in Collection and Plainfield based on their capital accounts as provided in the Bankruptcy Court-approved Distribution Plan and the Clearwater Operating Agreements. The Receiver specifically negotiated for the Liquidating Trustee to make payments to *all* purported equity holders in Collection and Plainfield regardless of whether they filed claims in the Bankruptcy Cases. These payments will reduce investor claims in the Receivership case based on Clearwater investments, and thereby increase the percentage of Receivership funds to be distributed to other claimants in the Receivership Case. Schedules showing the anticipated distributions to Clearwater interest holders are attached to the Settlement Agreement as Exhibits 1(C) and 1(D). This will result in payments to Clearwater claimants in the Receivership that will exceed distributions they would obtain solely from the Receivership Estate with respect to their Clearwater claims.

27. Although the Receiver has not yet submitted his proposed Plan of Distribution in this case, based on existing known facts and circumstances, it is probable the Plan will recommend distributions based on a rising tide methodology. Assuming the proposed Settlement is approved, and Dragul pays his \$850,000 settlement amount, the proposed Settlement will reduce claims in the Receivership Estate by \$4.4 million attributed to 34 claimants who invested in Clearwater, and

will increase distributions to other Allowed Claimants by \$500,000, which under the anticipated rising tide Plan, would allow additional non-Clearwater investors to recover a larger portion of their losses.

28. Balancing the likelihood of success of prevailing on the Receiver's Claims in the Bankruptcy Cases against the risk and expense involved in litigating those claims through trial, including expert witness testimony, the Receiver believes the proposed settlement is in the best interest of the Estate and its creditors. Upon approval of the Clearwater Settlement Agreement and payment of the \$500,000 to the Receivership Estate, the Receiver will be in a position to file his proposed distribution plan.

III. Notice and deadline to object: April 8, 2024

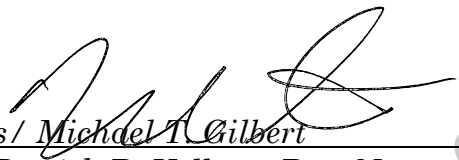
29. The Settlement Agreement is not effective unless and until it is approved by both this Court and the Bankruptcy Court. The Liquidating Trustee filed a motion seeking Bankruptcy Court approval of the Settlement Agreement on March 26, 2024; objections in the Bankruptcy Court are due by April 16, 2024.

30. Pursuant to paragraph 34 of the Receivership Order, Receivership Court approval of any motion filed by the Receiver shall be given as a matter of course within 10 days after the motion is filed and served. As reflected by the certificate of service below, this Motion is being served on all parties who have appeared in this case, on all currently known creditors of the Estate, and on the Liquidating Trustee.

WHEREFORE, the Receiver asks the Court to enter an Order approving the Settlement Agreement.

Dated: March 29, 2024.

ALLEN VELLONE WOLF HELFRICH & FACTOR
P.C.

By: 
s/ Michael T. Gilbert
Patrick D. Vellone, Reg. No. 15284
Michael T. Gilbert, Reg. No. 15009
Averil K. Andrews, Reg. No. 56148

ATTORNEYS FOR THE RECEIVER, HARVEY
SENDER

Attachment to Order - 2018CV00011

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2024, I served a true and correct copy of the foregoing **RECEIVER'S MOTION TO APPROVE SETTLEMENT AGREEMENT WITH CLEARWATER BANKRUPTCY ESTATES** via CCE to:

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**

Arthur Tyrone Glover
TYRONE GLOVER LAW, LLC
2590 Walnut St.
Denver, CO 80205
tyrone@tyroneglover.com


Counsel for Gary Dragul

Aaron A. Garber
Wadsworth Garber Warner Conrardy,
P.C.
2580 West Main Street, Suite 200
Littleton, CO 80120

**Counsel for the Liquidating
Trustee**

CERTIFICATION OF E-SERVICE ON KNOWN CREDITORS

In accordance with this Court's February 1, 2019 Order clarifying notice procedures for this case, I also certify that a copy of the foregoing is being served by electronic mail on all currently known creditors of the Receivership Estate to the addresses set forth on the service list maintained in the Receiver's records.


/s/ Lisa A. Vos

Allen Vellone Wolf Helfrich & Factor P.C.