DISTRICT COURT, DENVER COUNTY **STATE OF COLORADO** 1437 Bannock St. Denver, CO 80202 (720) 865-8612	DATE FILED November 4, 2024 9:39 PM FILING ID: F52E7A14A14D6 CASE NUMBER: 2018CV33011
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 ▲
Attorney for Investor/Creditor/Claimant Chad Hurst Christopher S. Mills, Atty. Reg. No. 42042 Jones & Keller, P.C. 1675 Broadway, 26th Floor Denver, CO 80202 Phone: 303-573-1600 Email: cmills@joneskeller.com	Case No. 2018CV33011 Courtroom: 424

CHAD HURST'S REPLY IN SUPPORT OF MOTION TO CONTINUE HEARING ON MOTION TO APPROVE SETTLEMENT AGREEMENT AND REQUEST FOR EXPEDITED BRIEFING

The Receiver devotes over half of his Objection ("Objection") to Chad Hurst's Motion to Continue Hearing to re-arguing whether the Receiver has standing to pursue claims in the Bankruptcy Court and whether this Court should approve the settlement he reached with the Liquidating Trustee. The Receiver already briefed that at least five times. First, in his motion to approve the settlement, and response to Mr. Hurst's objection, filed in this Court. Second, in his response to the Liquidating Trustee's motion to strike the Receiver's Claim Objection in the Bankruptcy Court. Third, in his response to the Liquidating Trustee's motion to hold certificates of contested matter in abeyance in the Bankruptcy Court. Fourth, in his joinder in the Liquidating Trustee's motion to approve the same settlement agreement in the Bankruptcy Court.

Finally, after the Bankruptcy Court indicated it was skeptical that the Receiver had standing to be there and ordered additional briefing, the Receiver argued those issues again in its brief on standing and response to Mr. Hurst's brief. (Mot. Exs. B & D.)

But Mr. Hurst's Motion to Continue ("Motion") is about whether the Court should continue the November 13th hearing, not the underlying merits. The Court should continue the hearing because doing so will likely avoid prejudice to the parties, to claimants in the Receivership, and to the Court. The Receiver's proposed settlement agreement cannot be effective if *either* this Court *or* the Bankruptcy Court decline to approve it. The Bankruptcy Court already indicated it is inclined not to approve the settlement, and briefing on the threshold issue of whether the Receiver can even assert and settle claims in that court closed in late August. It therefore appears highly likely that if the November 13th hearing went forward as scheduled, the Bankruptcy Court would rule against the Receiver shortly thereafter, before this Court could rule. That means that this Court's and the parties' time and resources expended for the hearing would be a waste—a waste which the Receiver and his counsel would bill against the funds available to distribute to the claimants in the Receivership. And even if the Bankruptcy Court approves the settlement agreement, the Court here would have the benefit of that analysis before the hearing.

ARGUMENT

I. HOLDING THE HEARING AS SCHEDULED IS LIKELY TO WASTE JUDICIAL AND PARTY RESOURCES AND PREJUDICE RECEIVERSHIP CLAIMANTS

The Receiver argues that "[i]f the Bankruptcy Court approves the settlement agreement, this Court must still address Hurst's Objection, which could potentially result in inconsistent rulings and waste judicial resources." (Obj. ¶ 10.) Inconsistent rulings and waste of judicial

(and party) resources is precisely what Mr. Hurst is trying to avoid by continuing the hearing. The Receiver does not dispute that both this Court and the Bankruptcy Court must approve the proposed settlement before it could become effective; the Receiver said exactly that in paragraph 29 of his March 29, 2023 Settlement Motion. Thus, if the Bankruptcy Court declines to approve the proposed settlement, there will be no need for this Court to hold a hearing on the Receiver's Settlement Motion.

If the hearing is held on November 13th, and the Bankruptcy Court thereafter rules against approving the settlement, the hearing would have been a substantial waste. The parties and Court would have to prepare for and hold a half-day evidentiary hearing, which would (based on the Receiver's representations) involve preparing witnesses and hearing testimony from them. The Receiver's assertion that "the Receiver and his counsel have already spent significant time preparing for the hearing" (Obj. ¶ 9) itself indicates that the time and cost likely to be wasted is truly substantial. The Receiver and his counsel have little to lose since they bill the Receivership Estate for their time. But this reduces the funds available to distribute to creditors/claimants in the Receivership. They, Mr. Hurst, and anyone else appearing other than the Receiver and his counsel, stand to waste a significant amount of money and time if the hearing is not continued.

II. NO MATERIAL PREJUDICE WOULD RESULT FROM CONTINUING THE HEARING

The Receiver is not entirely clear about what prejudice he believes will result from continuing the hearing. He notes that he has already spent significant time preparing for the hearing (Obj. ¶ 9), but as addressed above, that only demonstrates the harm to Receivership claimants if the hearing is not continued. And there is no reason the Receiver could not make use of his preparation work later, if the hearing is ultimately held.

The Receiver asserts that Mr. Hurst has "no basis whatsoever" for arguing that the Bankruptcy Court is likely to rule on whether to approve the settlement agreement before this Court does. (Obj. ¶ 8.) But the Receiver himself identifies that basis when he says that briefing on the Receiver's standing to pursue and settle claims in the Bankruptcy Court "was completed on August 29, 2024 . . . over two months ago." (Obj. ¶ 6.)

The Receiver also argues that "[t]he Bankruptcy Court has not ruled on the issue nor set a hearing on it, *presumably* because it awaits this Court's determination as to the scope and effect of its own [Abandonment] Orders." (Obj. ¶ 7 (emphasis added).) However, the Bankruptcy Court *did* set a hearing on this for late September, then vacated it because it determined it could rule on the standing issue (and other issues) based on the briefs. (Mot. Ex. A.) Moreover, the Receiver does not explain the basis for his presumption that the Bankruptcy Court is waiting on this Court, and the Bankruptcy Court has said nothing to suggest that. The Receiver simply asserts that the "scope and effect" of the Abandonment Orders must be decided by this Court, not the Bankruptcy Court, and that this Court's decision on that scope and effect will be binding on the Bankruptcy Court. (Obj. ¶¶ 7-8, 10.) While this Court's views on the Abandonment Orders are no doubt relevant, the Receiver cites no authority that this Court's ruling would be binding on the Federal Bankruptcy Court. Indeed, the issue before the Bankruptcy Court is not the scope and effect of the Abandonment Orders per se, but whether the Receiver has standing to pursue and settle claims *in the Bankruptcy Court*. The Bankruptcy Court must necessarily determine who can pursue and settle claims in *its court*.[1]

[1] The issues before the Bankruptcy Court are not just whether the Receiver has standing in light of the Abandonment Orders. The Bankruptcy Court specifically ordered briefing on "the Receiver's standing to modify the [liquidation] plan, waiver by the Receiver [by failing to timely

Additionally, it is not clear why the Bankruptcy Court would need guidance on the "scope and effect of the Abandonment Orders[.]" (Obj. ¶ 8.) In its April 15, 2020 Abandonment Order, this Court ruled that abandoned "property reverts back to the pre-receivership owner; that such abandonment is irrevocable and divests the receiver and the receivership estate from managing and/or controlling the property (inasmuch as the property is no longer part of the receivership estate); and that the receiver has no claim from any equity that might later be derived from such abandoned property." The Bankruptcy Court likely believes this language is so clear that further guidance on its scope and effect is wholly unnecessary.

Only after the Bankruptcy Court indicated that it was skeptical whether the Receiver had standing to pursue and settle claims there did the Receiver take the position that this Court must address the scope and effect of the Abandonment Orders before the Bankruptcy Court can rule. In his September 15, 2023 Response to the Liquidating Trustee's Motion to Hold Certificates of Contested Matter in Abeyance, the Receiver argued to the Bankruptcy Court that the issue of his standing required an evidentiary hearing which should be set after the Bankruptcy Court addressed two other preliminary legal issues, but said nothing about needing this Court to opine on the Abandonment Orders first. (Ex. E ¶¶ 4-5 (attached hereto).) Once the Bankruptcy Court set the four-day evidentiary hearing for late September, the Receiver did not ask to have it continued until after this Court opined on the Abandonment Orders. The first time he mentioned it was in two sentences in his brief on standing (Mot. Ex. D at 10), which he filed only after the Bankruptcy Court expressed skepticism about whether the Receiver should be there.

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object to the plan], and abandonment by the Receiver[.]" (Mot. Ex. A; *see also* Mot Ex. B.) Thus, even if this Court were to opine on the "scope and effect" of the Abandonment Orders in a way favorable to the Receiver, much would still remain for the Bankruptcy Court.

Until he filed his Objection last Thursday, the Receiver also expressed no urgency to this Court for it to address the "scope and effect" of the Abandonment Orders before the Bankruptcy Court ruled. He argues that the November 13th date "was the first half-day hearing date available on this Court's docket when the matter was set over five and a half months ago." (Obj. ¶ 9.) But that is not true. The Court's April 29, 2024 Minute Order entry states:

> CLERKS NOTE: CNSL FOR RECEIVER CALLED TO OBTAIN DATES FOR A 1/2 DAY REQUESTED BY CNSL; DATES PROVIDED 5/23, 5/28, 5/29, 5/30, 6/20 AND 8/1. ADDL DATES REQUESTED AND GIVEN 6/18, 7/2 AND 7/30. 5/9/24: ADDL DATES REQUESTED 10/8, 10/9, 11/7, 11/12 AND 11/13. /NEM

Back then, the Receiver appeared to want this Court to address the issue as late as possible—perhaps after the Bankruptcy Court ruled on the settlement agreement. Only after the Bankruptcy Court expressed skepticism did the Receiver change tact.

To the extent the Receiver is genuinely worried that continuing the hearing will delay closing the Receivership Case (Obj. ¶¶ 2; 9-10), that must be balanced against the substantial time and cost that will be incurred in connection with the hearing, for which the claimants in the Receivership will have to pay. Additionally, any delay can be mitigated. Mr. Hurst suggested a three-month continuance to give the Bankruptcy Court enough time to rule, so the Court and parties will know whether a hearing is necessary before it occurs. But Mr. Hurst would be happy to instead continue the hearing to as soon as this Court has availability following the Bankruptcy Court's ruling, even if that is less than three months. In fact, that would be preferable.

III. THE RECEIVER'S ARGUMENTS ON THE UNDERLYING MERITS DO NOT SUPPORT APPROVING THE SETTLEMENT

The Receiver's arguments about the underlying merits of whether he has standing in the Bankruptcy Court and whether this Court should approve his proposed settlement are not

germane to Mr. Hurst's Motion to Continue the hearing. Nonetheless, Mr. Hurst will briefly address them.

The Receiver again argues that the proposed settlement "will bring an additional $500,000 into the Receivership Estate, reduce claims against the Receivership Estate, and result in increased distributions to Receivership Estate creditors." (Obj. ¶ 2.) As Mr. Hurst demonstrated in his April 16, 2024 Objection to Receiver's Settlement Agreement with Clearwater Bankruptcy Estates and June 24, 2024 Response to Lone Pine's Joinder & Supplement in Receiver's Motion to Approve Settlement Agreement with Clearwater Bankruptcy Estates, the Receiver's proposed settlement would instead have the effect of transferring money from one pool (the Bankruptcy Estates) to the Receiver's pool (the Receivership Estate) to distribute to claimants who have nothing to do with the Clearwater Entities—robbing Peter to pay Paul. In doing so, the Receiver, his attorneys, and his accountants will take a substantial cut, resulting in a net loss of money to be distributed to investors/creditors. And the Receiver purports to release the Clearwater investors/creditors' claims in the Receivership. The Receivership Estate creditors therefore do worse under the settlement agreement, even if they have not taken the time to examine it and realize this themselves.[2]

The Receiver argues that his "claims in the Clearwater [bankruptcy] cases are not based on an equity claim", (Obj. ¶ 5), and are instead based on creditor claims, and that this somehow magically exempts him from the Abandonment Orders which held that the Receiver was

[2] The Receiver notes in footnote 1 in his Objection that Mr. Hurst did not serve the Motion on non-party creditor Lone Pine Resources, LP. Mr. Hurst has since email-served Lone Pine. Notably, the Receiver says in the certificate of service for his Objection that he served Lone Pine via CCE, but as a non-party, Lone Pine did not receive service via CCE. (Ex. F.) Perhaps the Receiver served Lone Pine via another method not indicated on his certificate of service.

irrevocably divested from managing or controlling the Property, "(inasmuch as the property is no longer part of the receivership estate); and that the receiver has no claim from any equity that might later be derived from such abandoned property." Perhaps the Receiver is seizing on the two different uses of the word "equity" to circumvent the Abandonment Orders, conflating whether his claims derive from an interest he held in the Clearwater Entities and their Property ("equity") with the value ("equity") the Bankruptcy Estates derived from selling the abandoned Property through Mr. Hurst's efforts. But the April 15, 2020 Abandonment Order did not say that "the receiver has no *equity* claim from any equity that might later be derived from such abandoned property." It said "the receiver has *no claim* from any equity that might later be derived from such abandoned property." It does not matter whether the Receiver's claims are equity claims or creditor claims—the Property and proceeds from its sale are not an asset from which he can recover, and its value (equity) is off limits.

It is also unclear why the Receiver believes he has standing to assert claims belonging to defrauded Clearwater investors in the Bankruptcy Court. (Obj. ¶ 5.) Shouldn't those investors assert their own claims there? In fact, it appears the majority of them did. And the Receiver does not explain why he thinks he can recover supposedly fraudulent transfers Mr. Dragul made to the Clearwater Entities before the Receiver was appointed. (*Id*.) The Clearwater Entities were in the Receivership, and the Receiver was free to strip their assets—which he did as to all of their assets except the Property, which he abandoned instead. The Receiver already "recovered" those supposedly fraudulent transfers, and does not get a do-over to get a larger recovery just because he abandoned and someone else (Mr. Hurst) turned the Property the Receiver argued was worthless into nearly $6 million to be distributed to creditors through the Bankruptcy Court. If

the Receiver wanted more out of the Property, he should have kept it and handled it like Mr. Hurst did, then recovered nearly $6 million himself.

The Receiver argues that Mr. Hurst should not receive distributions in the Bankruptcy Court based on his equity interest in the Clearwater Entities that he acquired from Mr. Dragul because that would "circumvent this Court's Receivership Order, which precludes distributions to Dragul or insiders without an order of this Court." (Obj. ¶ 4.) This again reflects a misunderstanding of how abandonment works. On April 15, 2020, this Court ruled that the abandoned "property reverts back to the pre-receivership owner [that is Mr. Dragul]; that such abandonment is irrevocable and divests the receiver and the receivership estate from managing and/or controlling the property (inasmuch as the property is no longer part of the receivership estate); and that the receiver has no claim from any equity that might later be derived from such abandoned property." By abandoning, the Receiver kicked the Property out of the Receivership and the Receiver was irrevocably divested of any power over that Property. The Abandonment Orders were each "an order of this Court" (Obj. ¶ 4) that distributed the Property to Mr. Dragul free of any interest or control by the Receiver, and the Receivership Order ceased applying to the Property after that.

CONCLUSION

Mr. Hurst hopes to avoid wasting the time and expense of holding the hearing on November 13th since the Bankruptcy Court appears poised to rule on issues that would result in disapproving the settlement. Since the wasted expense of the hearing would also come out of the pockets of the claimants in the Receivership Estate, the Receiver should want to continue the hearing as well. For those reasons, the Court should grant the Motion and continue the hearing,

either for three months or, if the Bankruptcy Court approves the settlement, as soon after the Bankruptcy Court rules as this Court can accommodate. If the Bankruptcy Court declines to approve the settlement, this Court can simply vacate the hearing, saving everyone a lot of time and money.

DATED this 4th day of November, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **CHAD HURST'S REPLY IN SUPPORT OF MOTION TO CONTINUE HEARING ON MOTION TO APPROVE SETTLEMENT AGREEMENT AND REQUEST FOR EXPEDITED BRIEFING** was filed and served via the CCE e-file system on this 4th day of November, 2024 to all counsel of record for the parties to the action, including the following, and also via email to nonparty Lone Pine Resources, LP:

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