

DISTRICT COURT, DENVER COUNTY STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: May 23, 2022 4:21 PM FILING ID: 284464B615F05 CASE NUMBER: 2022CV31451
Plaintiff: UNIVERSAL HERBS, LLC, by and through GARY SCHWARTZ in his capacity as Court-Appointed Receiver v. Defendant: TITAN HEALTH, LLC	COURT USE ONLY
<i>Attorneys for Plaintiff:</i> John A. Chanin, Reg. No. 20749 Katherine A. Roush, Reg. No. 39267 Jason M. Spitalnick, Reg. No. 51037 Foster Graham Milstein & Calisher LLP 360 S. Garfield Street, 6 th Floor Denver, Colorado 80209 Phone: (303)333-9810 Fax: (303)333-9786 Email: jchanin@fostergraham.com ; kroush@fostergraham.com ; jspitalnick@fostergraham.com	Case No.: Division:
EMERGENCY MOTION FOR APPOINTMENT OF RECEIVER AND REQUEST FOR FORTHWITH HEARING	

Plaintiff Universal Herbs, LLC, by and through Gary Schwartz in his capacity as Court-Appointed Receiver over Universal, by and through its undersigned counsel, hereby submits this Motion for Appointment of Receiver and Request for Forthwith Hearing as follows:

Certificate of Conferral Pursuant to C.R.C.P. § 121 Section 1-15(8)

Plaintiff has conferred with defendant regarding this Motion. The 60% member of Titan Health, LLC, John Kaweske, opposes this Motion. The 40% member of Titan Health, LLC, Family Legacy, LLC, has no objection and specifically joins in the request for appointment of receiver to prevent any further waste, loss, and dissipation of the assets of Titan Health.

Introduction and Background

Plaintiff holds a secured interest in all or nearly all of Defendant Titan Health's assets pursuant to an asset purchase sale between Universal and Titan in early 2021. Titan is in default of the obligations secured by those assets. Now, those assets are in danger of being dissipated. The only way for Universal to maintain the value of its collateral and achieve payment of its debt is through the appointment of a receiver over Titan's assets pursuant to C.R.C.P. 66. Accordingly, Plaintiff requests the Court appoint Gary Schwartz as receiver over the secured collateral (as defined below) and operate said collateral so its value can be retained and it can be ultimately marketed and sold as a going concern. Absent appointment of a receiver, the value of Universal's collateral will be irreparably impaired.

In 2019, the Colorado Securities Commissioner brought claims against Mark Ray ("Ray"), Reva Stachniw, Custom Consulting & Product Services, LLC, RM Farm & Livestock, LLC, MR Cattle Production Services, LLC, Sunshine Enterprises, Universal Herbs, and DBC Limited, LLC (collectively, the "Receivership Defendants"), alleging that that the Receivership Defendants and others were operating a fraudulent investment scheme involving both alleged cattle trading a wholesale marijuana trading. That case is titled *Chan v. Ray et al* and is pending in the District Court for the City and County of Denver, Case No. 19CV33770 (the "Receivership Case").

In the Receivership case, at the behest of the Colorado Securities Commissioner, Gary Schwartz was appointed as Receiver over all the assets of the Receivership Defendants (the "Estate") and was tasked with managing and preserving the Estate for the benefit of the Estate's creditors and the victims of the fraudulent scheme. This included running Universal's business, and eventually selling Universal's assets for the benefit of the victims.

Universal Herbs is a licensed marijuana business with three locations in the Denver area – a recreational and medical grow facility, and two dispensaries that sell both recreational and medical marijuana products. In total, Universal has six state MED licenses and six local (E&L) licenses.

Universal Herbs (via Schwartz as Receiver over Universal and the Estate) and Titan Health entered into an Asset Purchase Agreement (“APA”) pursuant to which Titan purchased certain assets and properties of Universal for a total purchase price of \$4,000,000. As part of that transaction, Universal Herbs obtained two promissory notes: one for \$2.25 million and another for \$1 million (the “Secured Notes”). Those notes were secured by an interest in all assets transferred to Titan Health pursuant to the APA, including without limitation all equipment, inventory, MED and E&L licenses and its real property lease rights (“Secured Collateral”). *See* Affidavit of Gary Schwartz (“Schwartz Aff”) at ¶¶ 7-9.

As set forth in the Complaint, Titan Health has defaulted on the Secured Notes, and pursuant to the terms of the APA and the Secured Notes, Universal has accelerated the debts owed under the Secured Notes. *See* Schwartz Aff. at ¶¶ 10-12. John Kaweske, Titan’s majority owner and manager, has repeatedly reassured Universal and Schwartz that Titan would cure its defaults under the Notes, and has repeatedly failed to meet these commitments. *Id.* ¶¶ 13-14.

It is undisputed that Titan has breached its obligations under the APA and the Secured Notes. Pursuant to Section 12.1 of the APA, Universal is now entitled to treat the APA as terminated, retaining all payments already made and recovering all assets transferred pursuant to that agreement.

More ominously, in the last week, Universal and Schwartz have learned that Titan, acting through its manager John Kaweske, has placed the Secured Collateral at risk of being materially

impaired and completely lost. First, Titan has failed to pay rent at two of the Universal locations, placing the lease rights and the licenses at those locations in imminent risk of being revoked by the Marijuana Enforcement Division (MED). Titan currently owes \$90,000 in back rent for the Jason Street grow location. The landlord represented that if the back rent was not paid by May 20, 2022, he would begin eviction and/or foreclosure proceedings. *Id.* ¶ 15. Titan is also in default of its lease in one of its two retail dispensaries, and the minority owners of Titan have told Schwartz that the landlord of this location is also in the process of evicting Titan from the location. *Id.* ¶ 17.

If the eviction processes were to occur, this would put the lease rights and the licenses for these two locations in danger of being revoked. *Id.* Kaweske further confirmed to Schwartz on May 20, 2022 that he intended to close the grow operation and employees of the grow operation have been directed to begin destroying plants and dismantling operations beginning May 23, 2022. *Id.* ¶ 20.

Second, Titan, acting through Kaweske, has failed to pay required taxes to both the State and the City and County of Denver. Titan currently owes \$284,772.70 to the state of Colorado and an unknown amount to Denver. The failure to pay taxes also placed the MED and E&L licenses in imminent risk of being revoked.

Third, Titan, acting through Kaweske and without the required consent of Titan's 40% member, obtained a \$1.6 million loan from a third-party and purported to pledge all of Titan's assets as collateral for that loan, even though substantially all of Titan's assets are part of the Secured Collateral and have been previously pledged as security under the APA. *Id.* ¶ 19.

Fourth, Kaweske's business partners have accused him of transferring significant amounts of flower and other Titan inventory to other Kaweske related businesses without any

proper consideration. *Id.* ¶ 21.

Accordingly, Universal Herbs is entitled to appointment of a receiver, licensed under medical marijuana laws, who will protect its Secured Collateral which are in imminent risk of loss.

Legal Standard and Argument

C.R.C.P. 66 provides, in pertinent part:

A receiver may be appointed by the court in which the action is pending at any time:

- (1) Before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired; or
- (2) By or after judgment, to dispose of the property according to the judgment, or to preserve it during appellate proceedings; or
- (3) In other cases where proper and in accordance with the established principles of equity.

The appointment of a receiver is left to the sound discretion of the court, *Oman v. Morris*, 28 Colo. App. 124, 128 (Colo. App. 1970) (citing *Rigel v. Kaveny*, 133 Colo. 556 (Colo. 1956)), except in cases where the receiver will operate a marijuana business. *See Yates v. Hartman*, 488 P.3d 348, 352 (Colo. App. 2018). In those cases, as here, the court may only appoint a receiver licensed pursuant to Colorado's marijuana licensing laws. *Id.* Further, the appointment of a receiver is governed by general equitable principles. *See Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 520 (Colo. App. 2006).

As relevant here, a receiver is appropriate when the value of secured collateral is being diminished and where a lender is trying to recover its secured collateral. *See, e.g., Schwab v. Martin*, 441 P.2d 17, 20 (Colo. 1968) (receiver appointed where the value of the security might be impaired by the owner's conduct); *Phillips v. Webster*, 426 P.2d 774, 777 (Colo. 1967)

(receiver appointed to operate motel business during pending foreclosure); *Premier Farm Credit, supra* (receiver appointed when secured creditor filed action to, among other things, replevin its personal property collateral); *Savageau v. J. & R. A. Savageau, Inc.*, 285 P.2d 810, 813 (Colo. App. 1955) (“Where active fraud and deceit appear, where the corporation is insolvent, or for some reason or other it has ceased to carry on its authorized functions, and because thereof its property and assets are in danger of being dissipated or lost . . . it might well be said that probable grounds for the granting of receivership are proper.”).

Here, as a result of Titan’s actions and inactions, Universal is at risk of losing its Secured Collateral before this Court can adjudicate the underlying breach of contract action. The failure to pay rent at two locations places both the lease rights and the licenses associated with those locations in immediate jeopardy of being irrevocably lost. The failure to pay taxes also places the associated licenses in immediate jeopardy of being revoked. The imminent closing of the grow location, the transfer of inventory to other entities, and the taking out of new loan all risk impairing, wasting, and dissipating Plaintiff’s Secured Collateral. Without the appointment of a receiver, Titan is sure to lose its valuable licenses and inventory within the immediate future. Those assets will not be salvageable by the creditor by the time a judgment on default is rendered.

Plaintiff therefore requests that the Court appoint Gary Schwartz as the receiver in this matter. Not only has Mr. Schwartz already served as Receiver for Universal and has previously administered the Secured Collateral, he has extensive experience serving as a court-appointed receiver for distressed companies and cannabis companies in particular. He is already likened by the MED and is qualified to act as receiver in this case. If the Court believes a bond is necessary, Lender requests that a bond in the amount of ten thousand dollars (\$10,000.00) be required as

security for the faithful performance of the Receiver. Plaintiff requests the receiver have such authority and powers as are set forth in the proposed Order Appointing Receiver, filed with this motion.

Plaintiff also requests a forthwith hearing on this Motion because, in the absence of a receiver, it is in imminent danger of losing valuable assets – Plaintiff understands that Kaweske has directed the grow facility’s employees to begin destroying inventory starting today, May 23, 2022, and eviction is imminent for two of the three locations due to Titan’s failure to pay rent.

WHEREFORE, Plaintiff respectfully requests that the Court consider the Motion on a forthwith basis, grant the Motion, and appoint a receiver for the purpose of overseeing and managing the Secured Collateral until such time that the receiver can sell the assets to a new buyer.

DATED this 23rd day of May, 2022.

FOSTER GRAHAM MILSTEIN
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