

CAUSE NO. D-1-GV-10-000454

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
RETIREMENT VALUE, LLC,	§	
RICHARD H. “DICK” GRAY, HILL	§	
COUNTRY FUNDING, LLC, HILL	§	
COUNTRY FUNDING, and	§	
WENDY ROGERS,	§	TRAVIS COUNTY, TEXAS
	§	
Defendants,	§	
	§	
and	§	
	§	
JAMES SETTLEMENT SERVICES,	§	
LLC, et al.,	§	
	§	
Third Party Defendants.	§	126TH JUDICIAL DISTRICT

**CAIN/EDELSTEIN INTERVENORS’ SECOND AMENDED CLAIM AGAINST
WELLS FARGO THIRD-PARTY DEFENDANTS AND AMENDED CLAIMS
AGAINST RETIREMENT VALUE ASSERTING CLASS ACTION CLAIMS AND
ALTERNATIVELY, INDIVIDUAL CLAIMS**

Intervenors Dr. Gary Cain and Barry Edelstein (“Intervenor Class Representatives” or “Intervenors”), pursuant to TEX. R. CIV. P. 60, file this Second Amended Claim against Wells Fargo Advisors, LLP, Wells Fargo Investments, LLC, Wells Fargo Bank, National Association, and Whitney Giles (collectively, “Wells Fargo”), and Amended Claim against Retirement Value, LLC (“Retirement Value” or “RV”), asserting both class action claims and alternatively, individual claims and allege as follows:

DISCOVERY CONTROL PLAN

1. Discovery in this action is intended to be conducted under Level 3 of Tex. R. Civ. P. 190.2.

PARTIES TO THE CLASS ACTION CLAIM

2. Intervenor Class Representative Dr. Gary Cain is an individual and a Texas resident and all notices and pleadings may be served upon his undersigned counsel.

3. Intervenor Class Representative Barry Edelstein is an individual and a Texas resident and all notices and pleadings may be served upon his undersigned counsel.

4. Retirement Value, through the court-appointed Receiver, Mr. Eduardo S. Espinosa, has already entered an appearance in this case and is hereby served through his counsel of record. Mr. Espinosa was appointed as the Temporary Receiver of Retirement Value and is empowered to defend any suit or claim against Retirement Value.

5. Wells Fargo has already entered an appearance in this case and is hereby served through its counsel of record.

JURISDICTION AND VENUE

6. Intervenor Class Representatives have previously intervened in this case. Retirement Value and Wells Fargo have previously appeared in this case.

7. The Intervenor Class Representatives have a material interest in this case based on the claims asserted in their Original Petition in Intervention. Further, Intervenor Class Representatives assert supplemental claims against Retirement Value and Wells Fargo who are parties to this case and the supplemental claims arise from specific facts at issue in this case. Thus, judicial economy would be served to maintain these supplemental claims in this action.

8. The supplemental claims are asserted by Intervenor Class Representatives as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Texas Rules of Civil Procedure, Rule 42(a) and Rule 42(b)(1)(A), (2) and (3), and for rescission and relief incident and subordinate thereto, including costs and attorneys' fees.

9. Venue is proper in Travis County, Texas.

CLASS ACTION CAUSES OF ACTION AND LEGAL THEORIES

Class Action Allegations

10. Pursuant to Tex. R. Civ. P. 42, Intervenor Class Representatives seek to represent a class consisting of the following:

All participants in the Re-Sale Life Insurance Policy Program created by Retirement Value, LLC.

Intervenor Class Representatives reserve the right to seek to represent sub-classes of the class if such sub-classes are found by the Court to be necessary.

11. *Numerosity.* The number of participants in the proposed class exceeds 900. The persons in the class are so numerous that joinder of all members is impracticable.

12. *Commonality.* There are common questions of law and fact affecting the class. Specifically, predominant common questions include: (1) whether Retirement Value violated the Texas Securities Act by selling unregistered securities; and (2) whether Defendant Wells Fargo violated the Texas Securities Act by aiding and abetting the sale of unregistered securities.

13. *Typicality.* The claims of the above-identified class representatives are typical of the claims of all class members because: (a) the class representatives and all class members are entitled to rescission as a result of Retirement Value's and Wells Fargo's violations of the Texas Securities Act; (b) their claims are based upon the same set of allegations of RV's and Wells

Fargo's conduct which violated the Texas Securities Act; and (c) their claims are based on the same legal theory or theories as those of the class members.

14. *Adequacy of Representation.* The above-identified class representatives are adequate representatives of the class because: (1) they are members of the proposed class; (2) they are willing and able to represent the proposed class and have every incentive to pursue this action to a successful conclusion; (3) their interests are not in any way adverse to those of the other proposed class members; (4) they are entitled to rescission, same as all proposed class members; and (5) they are represented by counsel experienced in litigating class action claims.

15. *Adequacy of Class Counsel.* The attorneys for Intervenor Class Representatives are experienced and capable in the field of commercial litigation and have successfully represented plaintiffs in class action litigation and other litigation of this nature. Prospective Class Counsel will actively conduct and be responsible for Intervenor Class Representatives' case, including that of the representative parties and all class members, and have adequate resources through their law firm to devote to the prosecution of these claims. The undersigned counsel request appointment as class counsel.

Violation of the Texas Securities Act

16. The Court has ruled that the Retirement Value product sold to the investors was a security. It is undisputed and RV has admitted that the security was unregistered. Retirement Value, with the material assistance of Wells Fargo, sold unregistered securities to the Intervenor Class Representatives and all class members.

Retirement Value:

17. The Texas Securities Act establishes liability for "a person who offers or sells" an

unregistered security. Texas Securities Act Art. 581-33(A)(1). Retirement Value sold unregistered securities to the Intervenor Class Representatives and the other class members and, therefore, violated the Act.

18. As a result, Retirement Value is liable for and the Class Representatives and all the class members are entitled to recover, as rescission, the consideration paid for the unregistered security plus interest thereon at the legal rate from the date of payment. No class member, or Class Representative, has received any income from the investment so the full value of the consideration paid should be rescinded. In addition, the Class Representatives and class members are entitled to recover costs plus attorney's fees.

Wells Fargo:

19. Section 33(F)(2) of the Act establishes liability for any person or entity that is any link in the chain of the selling process:

“A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer and to the same extent as if he were the seller, buyer, or issuer.”

Texas Securities Act Art. 581-33(F)(2).

20. Wells Fargo actively participated and materially aided in Retirement Value's selling of the unregistered security. Wells Fargo acted with reckless disregard for the truth or the law. As a result, Wells Fargo is liable for and the Class Representatives and all the class members are entitled to recover, as rescission, the consideration paid for the unregistered security plus interest thereon at the legal rate from the date of payment. No class member, or Class Representative, has received any income from the investment so the full value of the

consideration paid should be rescinded. In addition, the Class Representatives and class members are entitled to recover costs plus attorney's fees.

RESERVATION OF RIGHTS TO NAME ADDITIONAL CLASS DEFENDANTS

21. Intervenor Class Representatives, as representatives for all class members, respectfully reserve their right, if applicable, to name additional individual defendants to this class action.

ALTERNATIVE CLAIMS IN THE EVENT THIS CLASS ACTION CLAIM IS NOT CERTIFIED

22. Intervenors Cain and Edelstein hereby elect to assert their previously asserted individual claims against Wells Fargo as alternative claims, subject to prosecution only if the Court declines to certify the class action claims above. Intervenors Cain and Edelstein hereby alternatively assert individual claims against RV, subject to prosecution only if the Court declines to certify the class action claims above. The alternative individual claims are as follows:

23. Intervenors believe, based upon evidence addressed thus far in the Receivership of RV and the Court's rulings, that generally the facts regarding Wells Fargo as alleged by the Special Receiver in her Second Amended Petition are accurate. Based upon such evidence and Court rulings, Intervenors alternatively seek damages against RV and Wells Fargo on the following claims:

A. Conspiracy to Breach Fiduciary Duties

24. Gray, Rogers and RV owed Intervenors a fiduciary duty. As fiduciaries, they owed Intervenors the duties of loyalty, good faith and due care. They were supposed to put the interests of Intervenors above their own.

25. Wells Fargo entered into a conspiracy with RV to cause, allow or participate with those mentioned above to breach their fiduciary duties to Intervenor. Wells Fargo, RV and its officers enriched themselves by taking commissions, fees and other payments out on the front end, and having the use of over \$77 million flowing through the Wells Fargo New Braunfels branch office.

26. RV and its officers, with the help and aid of Wells Fargo, engaged in a general scheme to defraud the Intervenor and other investors by making false and misleading statements to them, knowing the statements that were made were false. They also illegally sold unregistered securities to the Intervenor and other investors and engaged in the other improper acts described in the Special Receiver's Second Amended Petition. Those actions were in breach of the fiduciary duties that were owed to Intervenor.

27. Wells Fargo engaged in affirmative acts to further the goals of the conspiracy. Wells Fargo, therefore, is jointly and severally liable for all losses that were proximately caused by any member of the conspiracy. Wells Fargo is liable for the actions of the other conspirators regardless of whether Wells Fargo was aware of those actions or not, because those actions were taken in furtherance of the conspiracy.

28. Wells Fargo's participation in this conspiracy to breach fiduciary duties was the proximate cause of damages to Intervenor. Retirement Value is liable to the Intervenor for damages, attorney's fees and for having to return to them all of the money they invested in Retirement Value. Wells Fargo is thus jointly and severally liable for all of those damages, without regard to whether Wells Fargo participated in all aspects of the conspiracy with regard to every person or entity that was harmed in the case.

B. Negligence

29. Wells Fargo owed Intervenors a duty to use reasonable care in the performance of its duties. Wells Fargo breached that duty by virtue of the acts and omissions described above and in the Special Receiver's Second Amended Petition and by failing to do sufficient due diligence regarding RV, and its officers and conduct.

30. The failure to use reasonable care was the proximate cause of both actual and consequential damages to the Intervenors.

C. Fraud

31. Intervenors have a common law claim for rescission against RV and Wells Fargo. This is a general claim against all members of the fraudulent conspiracy for the loss and liability the conspiracy created. The actions of RV and Wells Fargo harmed the Intervenors on a dollar-for-dollar basis with respect to all the money paid by Intervenors to Retirement Value. In addition, under the Texas Securities Act Art. 581-33, Intervenors are entitled to each dollar paid to be returned to them as rescission for Defendants' actions in selling unregistered securities.

D. Violation of the Texas Securities Act

32. The Court has ruled that the Retirement Value product is a security. It is undisputed that the security is unregistered. Retirement Value, with the help and agreement of Wells Fargo, sold unregistered securities to Intervenors and the other investors. The Texas Securities Act establishes liability for "a person who offers or sells" an unregistered Security. Texas Securities Act Art. 581-33(A)(1). Section 33(F)(2) establishes liability for any person or entity that is any link in the chain of the selling process: "A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and

severally with the seller, buyer, or issuer and to the same extent as if he were the seller, buyer, or issuer.” Texas Securities Act Art. 581-33(F)(2). Wells Fargo’s participation in Retirement Value’s fraudulent scheme harmed the Intervenors on a dollar-for-dollar basis with respect to all the money paid by Intervenors to Retirement Value. Under the Texas Securities Act, Intervenors are entitled to each dollar paid to be returned to them as rescission for Defendants’ actions in selling unregistered securities and Wells Fargo is jointly and severally liable to the same extent as if it were Retirement Value. In addition to rescission and/or damages, Intervenors are entitled to recover costs plus attorney's fees from RV and Wells Fargo.

E. Damages

33. As a result of RV’s and Wells Fargo’s conduct, Intervenors have suffered direct and consequential damages detailed herein in an amount in excess of the minimum jurisdictional limits of this court. Those damages include the responsibility to rescind every dollar paid by Intervenors to Retirement Value.

34. RV and Wells Fargo demonstrated a willingness to participate actively in the sale of unregistered securities, the commission of securities fraud, gross negligence, the breaching of fiduciary duties by making material misrepresentations and omissions, and aiding and abetting in such actions. That grossly negligent, malicious, and fraudulent conduct makes an award of punitive damages appropriate.

35. The conduct of RV and Wells Fargo was such that it violated Tex. Penal Code Ann. § 32.46 (securing execution of document by deception). Thus, the statutory caps or exemplary damages do not apply in this case.

36. Intervenors are entitled to recover attorney’s fees and costs in this matter pursuant to Article 581-33D(7) of the Texas Securities Act. Tex. Rev. Civ. Stat. art. 581-33 (2012).

REQUEST FOR JURY TRIAL

37. Intervenor Class Representatives, as representatives for all class members, respectfully request a trial by jury pursuant to Texas Rule of Civil Procedure 216, and submit herewith the requisite jury fee.

WHEREFORE, Intervenor Class Representatives, as representatives for the class members, request that Retirement Value and Wells Fargo be cited to appear and answer herein, and that on final hearing they have judgment as follows:

- a. Judgment for the class against Retirement Value for rescission plus lawful interest, attorney's fees and costs;
- b. Judgment for the class against Wells Fargo for rescission plus lawful interest, attorney's fees and costs;
- c. Alternatively, and individually, damages and/or rescission as allowed by law;
- d. Costs of suit;
- e. Reasonable attorney's fees; and
- f. Such other and further relief, both at law or in equity, to which Intervenor Class Representatives and the class may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record herein by:

- U.S. Mail, First Class or
- Certified Mail (return receipt requested)
- Facsimile
- Federal Express Delivery
- Hand Delivery
- Electronic Service

on this the 10th day of April, 2012, to wit:

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