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D-1-GV-10-000454

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

STATE OF TEXAS, **Plaintiff,** **v.** **RETIREMENT VALUE, LLC, RICHARD H. "DICK" GRAY, HILL COUNTRY FUNDING, LLC, a Texas Limited Liability Company, HILL COUNTRY FUNDING, a Nevada Limited Liability Company, and WENDY ROGERS,** **Defendants,** **AND** **KIESLING, PORTER, KIESLING, & FREE, P.C.,** **Relief Defendant.**	§ §	**IN THE DISTRICT COURT OF** **TRAVIS COUNTY, TEXAS** **126th JUDICIAL DISTRICT**

RECEIVER'S MOTION TO CONSOLIDATE PORTFOLIO

Eduardo S. Espinosa, court-appointed temporary receiver for Retirement Value, LLC, moves the Court for entry of an order pooling the portfolio of life insurance policies owned by Retirement Value, LLC for the benefit of all of its investors.

INTRODUCTION

By this motion, the Receiver seeks to de-couple the investors' claims from the individual policies to which their loans to Retirement Value were matched. As it currently stands, Retirement Value's investors are slotted into 57 different investment pools. Each pool is matched to a specific insurance policy, some of which Retirement Value never acquired. The existing structure is inequitable, unworkable and inefficient. Equity demands that the interests of Retirement Value's investors be changed from an interest in receiving a payment based on the maturity of specific insurance policies to an interest in the overall portfolio. In this manner, the Receiver can maximize the value of the estate for the benefit of all investors.

FACTUAL BACKGROUND

From April 2009 through March 29, 2010, Retirement Value raised approximately $77 million from more than 900 investors through the sale of investments in its Re-Sale Life Insurance Policy Program. Each of the investments was structured as a loan to Retirement Value, whereby the investors provided Retirement Value with funds in exchange for Retirement Value's promise to pay a fixed sum of money at an undetermined date in the future. The amount that Retirement Value agreed to pay was tied to the calculated life expectancy of insureds under life insurance policies purportedly owned by Retirement Value. In all instances, Retirement Value agreed to pay a return of 16.5% simple interest per year for the insured's calculated life expectancy. Thus, on a $10,000 investment in a policy where the insured had a calculated life expectancy of 64 months Retirement Value would pay $18,800.[1] The date on which the insured under the policy died set the date that the investment matured and when Retirement Value would be required to repay the loan. The loan's maturity date did not affect the amount of money that Retirement Value was obligated to pay the investor, except that investors were entitled to a return of unused premiums, if any. Each investor was allowed to allocate his or her investment so that it was matched with a rotating portfolio of life insurance policies maintained by Retirement Value. As of the date of the cease and desist order (the "C&D") by the State

[1] Principal and simple interest being calculated as Principal x (1+ rate of interest x time), in this instance $10,000 (1+ 0.165/12 x 64) = $18,800.

Securities Board, Retirement Value had offered or was offering 57 policies to which an investment could be matched.[2]

Retirement Value used funds received from investors to purchase insurance policies, to set up premium reserves, to pay administrative costs, including commissions to its licensees, fees payable to Kiesling Porter and to fund its operations. All money paid by investors was received by and held in accounts administered by Kiesling Porter. On every investment, Retirement Value instructed Kiesling Porter as to the allocation and distribution of the funds. Based on Retirement Value's instructions, Kiesling Porter distributed money to the licensees involved in the particular investment,[3] to Retirement Value's operating account and to itself as payment for its fee.

The remaining funds were placed in sub-accounts dedicated to the particular policies in which the investor invested. The funds in each account were to be used only for the purchase of the specific policy for which that account was dedicated and for the payment of premiums on that account. As currently structured, Retirement Value is set up as 57 separate investment pools, with the investors in each pool looking to the proceeds of a specific policy of insurance as the source of repayment for their loans.

This structure creates inherent inequities among the investors. If adhered to, certain investors would receive a distribution from Retirement Value's assets to the detriment of

[2] The actual number is somewhat higher. On occasion, Retirement Value was either unable or unwilling to acquire policies for which it had contracted to purchase and offered to investors. When that occurred, Retirement Value substituted a different policy for the policy that it did not acquire and the investors in the policy not acquired were assigned to the substitute policy. The Receiver has not determined how often that occurred.

[3] The licensees were compensated in a multi-layer marketing structure whereby in addition to the commissions paid to the selling licensee, commissions were also paid, in varying degrees, to his or her up-line.

Retirement Values remaining investors. This is unfair for two reasons. First, the loans made by the investors were fully recourse to Retirement Value. There is nothing in the investment agreements that limits Retirement Value's obligation to repay the loans it received to the proceeds of any particular policy of life insurance. Retirement Value's obligation to repay is triggered upon the insured's death regardless of whether the insurer pays the claim or whether the policy even remains in force. As such, the investors in each pool have a claim to all of Retirement Value's assets. Treating the investors differently in Receivership in order to honor an attempt at an escrow system makes no sense.

For its part, Retirement Value did not honor the separation of the investments into 57 separate pools. It treated all of the investments as a pool by repeatedly commingling the funds held in the sub-accounts. On at least 50 separate occasions (almost every time a payment was made to purchase a policy beginning in November 2009), Retirement Value directed Kiesling Porter to take funds out of a sub-account dedicated to one policy to pay the purchase price owed to James Settlement Services on another policy. As of the date of the Receivership, some sub-accounts were over funded in relation to what is expected to be in those accounts while many others are under funded by that measure. It would be a difficult, expensive and quite likely fruitless task to attempt to reverse the commingling.

Second, each investor has a claim for rescission under the Texas Securities Act and for damages under the Texas Deceptive Trade Practices Act. As currently structured, however, investors who invested the same amount of money could potentially recover widely varying amounts. Investors whose funds were allocated to policies that were not acquired would recover a different amount from those whose funds were never allocated by Retirement Value. Investors whose funds were improperly used to fund the purchase policies other than those they had selected would likely recover less than the investors who selected policies that were purchased with other investors' money. Equally likely is that investors who were fortunate enough to be allocated to a policy that has an early maturity would recover fully where investors unfortunate enough to be allocated to a late maturing policy may recover nothing at all. Treating similarly situated investors differently is inequitable and contrary to the purpose of the Receivership.

The current structure of 57 separate investment pools based on the 57 policies offered also does not reflect the current reality of the portfolio. Retirement Value ultimately acquired only 49 policies. It abandoned its agreement to purchase four of these polices prior to the Receivership and the Receiver was unable to complete the acquisition of an additional four policies.[4] According to Retirement Value's sales records, investors invested $4,916,957 (approximately 6% of the total invested) in the eight policies that were not acquired. There was $1,714,609 allocated to these eight policies in the premium accounts seized by the Receiver. In addition, there was $2,600,850 on deposit in the main Wells Fargo bank account which had not been allocated to particular policies. This money was deposited by 40 investors shortly before the C&D was issued.

Moreover, investments matched with particular policies are not actually tied to those policies. Although the death of the insured triggers Retirement Value's obligation to pay the investors who are matched to a policy, the investors have no direct interest in the policy. Retirement Value owned the policies. Kiesling Porter was the sole beneficiary and acted in that capacity for the benefit of Retirement Value, not the investors. Despite being promised that they would be irrevocable co-beneficiaries of the policies, the investors received no actual interest in any policy.

[4] Attached as Exhibit A is a list of the 57 policies showing which policies were acquired and which were not.

The current structure perpetuates Retirement Value's material misstatements and omissions and denies the Receiver the flexibility needed to maximize the estate's value and the return to the investors. As discussed in detail in the Receiver's Initial Report (filed with the Court on July 28, 2010), it is very likely that the estate does not have sufficient funds on reserve to pay premiums through the likely maturity of the policies in the portfolio.[5] The portfolio's current structure exacerbates the inadequacy of the premium reserves. Retirement Value's Re-Sale Program was designed as a series of individual investments associated with individual policies. In other words, when an insured dies the corresponding loan matures and Retirement Value is supposed to use 100% of the insurance proceeds to satisfy its debt, but only as to those investors who facilitated Retirement Value's purchase of that particular policy. Accordingly, any early maturities would not generate any of the funds that are needed to support the premium payment on policies that are slower to mature.

In addition, the premium accounts formerly maintained by Kiesling Porter are out of balance. As discussed above, many premium accounts are under funded because money was taken from these accounts to purchase other policies. In addition, Retirement Value acquired policies from James Settlement Services before establishing the requisite premium reserves. Commencing in the 4th quarter of 2009, Retirement Value accelerated payments for the purchase price to James Settlement Services by shorting the premium reserves from early subscribers to a policy and making it up from the late subscribers. When Retirement Value was barred from soliciting investments at the end of March 2010, it was unable to make up the premium

[5] The exact amount of the premium shortfall has not been estimated. The Receiver is currently in the process of obtaining updated health information as to each of the insureds and new life expectancy calculations based on the updated health information. Once this has been completed, the Receiver's actuarial consultants will be able to provide a better estimate of the premiums needed to keep the policies in the portfolio in force.

shortfalls. In order to keep policies in force, the Receiver needs to be able to use the funds available in the estate to pay premiums without regard to the previous allocation of any particular funds.

The situation has become critical for a number of policies. Five policies with a face value totaling $23 million (or 17% of the portfolio) will exhaust their respective premium reserves in less than 12 months.

Internal Code	**Net Death Benefit**	**Next Payment Due Date**	**Quarterly Payment**	**Total on Deposit**	**End of Funds (EST)**[6]
LFG735-030510-AS	$ 5,000,000.00	12/20/2010	$ 50,775.00	$ 55,836.10	3/30/2011
AXA091-012110-PC	$ 5,000,000.00	12/8/2010	$ 58,327.00	$ 119,970.03	6/13/2011
LFG311-031210-HM	$ 5,000,000.00	11/25/2010	$ 26,469.00	$ 70,256.11	7/25/2011
AVL180-030510-MR	$ 5,000,000.00	12/28/2010	$ 53,781.00	$ 124,362.42	7/27/2011
AXA335-022410-PS	$ 3,000,000.00	11/12/2010	$ 28,379.00	$ 86,160.14	8/16/2011

Based on the current structure of the portfolio, the Receiver must either abandon or liquidate these policies to preserve any of their value.

If, however, the Receiver is allowed to use funds available to the estate without regard to the policies to which these funds were previously allocated, the Receiver has sufficient funds on hand to maintain the policies for between four and five years.[7] Consolidation will allow the Receiver sufficient time to operate the portfolio or, if that turns out to be unviable, to engage in an orderly liquidation.

[6] The quarterly payments due have been optimized by ASG to reduce the amount required to maintain the policies in force. As a result of this work by his experts, the Receiver has been able to reduce premium payments by $17,000 per month on the overall portfolio for the next policy year. The "end of funds" date is an estimate which does not take into account anticipated increases in the cost of insurance which will occur as the policies age.

[7] The premium accounts contain approximately $22 million. The current annual premium cost for the entire portfolio is about $4.5 million. The annual premium cost is expected to grow each year.

Finally, the maintenance of and accounting for 57 separate investment pools creates an increased administrative burden and expense to the estate. Each time premiums are paid, the Receiver has to transfer funds from 49 accounts (eight accounts are inactive having no matching policies) and to account for these transfers. This work could be avoided if the portfolio was pooled and the 57 separate accounts eliminated.

The Receiver seeks the authority to consolidate the portfolio so that he may take the following actions to preserve the assets of the estate:

- Use any Receivership assets to pay premiums or other expenses as they come due on policies without regard to the specific policy to which those assets may be allocated;
- Use the proceeds (either from maturity or sale) of any policy owned by the Retirement Value to pay premiums on unrelated policies or other expenses as they come due; and
- Restructure the portfolio so that each investor's interest is changed from an interest in receiving a payment based on the maturity of specific insurance policies to an interest in the overall assets of the estate.

A consolidation of this sort is in the best interest of the investors and within the equitable discretion of this Court.

ARGUMENT AND AUTHORITIES

The consolidation of the portfolio is in the best interest of the investors and necessary for the efficient administration of the estate. The Receiver is charged, among other things, "to effect fair restitution, if possible, from assets under control of the Receiver." Agreed TI at p. 6. In this case, fair restitution may be made only if all investors are allowed to share pro rata in the assets of the estate. Moreover, unless the Receiver is allowed to use all of the assets of the estate for the benefit of all investors, his ability to protect the estate's assets is severely compromised, as the funds allocated to specific assets are, in many cases, insufficient to support them.

This Court has broad authority to administer the estate of Retirement Value to achieve an equitable distribution to the investors. The "rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver and to the powers of a court regarding a receiver." *Huston v. Federal Deposit Insurance Corporation*, 800 S.W.2d 845, 849 (Tex. 1990); *also* TEX. CIV. PRAC. & REM. CODE § 64.004. Under Texas law, a court sitting in equity is a "court of conscience" which "acts in accordance with conscience and good faith and promotes fair dealing" in order to do justice. *First Heights Bank, FSB v. Gutierrez,* 852 S.W.2d 596, 605 (Tex. App. – Corpus Christi 1993, writ denied).

Here, justice and equity require that the assets of the portfolio be pooled for the benefit of all investors. It is well within the Court's equitable powers to do so. And, the Court should exercise its discretion to pool the assets for the benefit of the investors. *SEC v. Tyler*, 2003 WL 21281646 (N.D. Tex. 2003).

Tyler involved life settlement transactions similar to those at issue here. Each of the investors in *Tyler* purchased an interest in life settlement contracts and entered into an agreement with the defendant which provided that the policy would be held in the name of an affiliate with the investor being a unit-holder in the affiliate. Funds were to be escrowed to insure that premium payments would be made during the lives of the insureds. *Id.* at *2. Some of the policies had lapsed prior to the receivership and the receiver allowed other policies to lapse where the premiums owed exceed the return on the policy. *Id.* The receiver in *Tyler* sought permission to use the proceeds from the sale of policies and any death benefits obtained to pay premiums on other policies which had not yet matured. *Id.* at *5. A number of investors objected arguing that they should recover all of the proceeds of the specific policies in which they had invested. *Id.*

In deciding to pool the assets of the estate for the benefit of all investors, the *Tyler* court expressly rejected segregating the claims of investors based on the investors' ability to trace their funds to specific assets under a constructive trust theory. *Id.* at *5 ("Notwithstanding an individual's ability to trace assets, where such a procedure places one victim in a position superior to that of other victims, equity dictates that tracing rules be suspended."). The court reasoned that

> All of the investors who purchased interests in insurance policies from AFS are in essentially a similar situation as victims of fraud. All received the same "sales pitch" …. All entered into the same agency/policy funding agreement with Trade Partners and the same tri-partite agreements between themselves, Trade Partners and Grand Bank, now known as Macatawa Bank Corp. Finally, all have either lost their individual investments through the lapse of policies or have suffered substantial, if not irreparable impairment of their investments. Under such circumstances the property and assets of AFS, Larry W. Tyler and the relief defendants should be pooled for the benefit of all AFS investors

Id. at *6. In so holding, the *Tyler* court relied on general principles of equity equally applicable in Texas courts as set forth in *SEC v. Forex Asset Management, LLC*, 242 F.3d 325, 331-32 (5th Cir. 2001)(affirming pro rata distribution among victims of securities fraud under general principles of equity and Texas law).

In *Forex Asset Management*, the Fifth Circuit held that a pro rata distribution of the assets held by a receiver to the victims of a securities fraud was proper. One of the assets of the estate was an account that could be directly traced to the deposit of a single investor. Nevertheless, the receiver proposed to distribute the all of the estate's assets, including the account, to the investors pro rata. The investor whose funds could be traced to the account objected arguing that, under Texas law, a constructive trust should be imposed on the account for his sole benefit. *Id.* at 332. The *Forex Asset Management* court rejected this argument holding that under Texas law a constructive trust should be imposed only where required by equity. Because it would have been inequitable to allow a single investor to take most of the assets of the estate leaving little or nothing to other investors, the court refused to apply tracing and affirmed a pro rata distribution. *Id.*; *also United States v. Durham*, 86 F.3d 70, 72-73 (5th Cir. 1996)(affirming pro rata distribution of seized assets among victims under general principles of equity despite ability of one victim to trace its investment to a specific asset).

The investors here are in the same position as those in *Tyler* and *Forex Asset Management*. Each of the Retirement Value investors has made substantially the same investment by loaning money to Retirement Value to buy policies of insurance. That some investors can trace their investment to specific assets; or that some can trace to more assets than others is mere fortuity based on Retirement Value's decision to purchase or not to purchase certain policies and to misuse funds. In these circumstances, equity requires pooling here as it did in *Tyler* and *Forex Asset Management*.

Although he is not at this time proposing a plan of distribution, the Receiver recognizes that the inevitable result of pooling the assets of the estate will require a plan of distribution that pays each investor on a pro rata basis rather than on the specific policy to which an investor may be matched. Good faith and justice require that the investors share pro rata in the assets of the estate. As a general matter, Texas law favors distribution of assets to creditors on a pro rata basis. *Henry I. Siegel Co. v. Holliday*, 663 S.W.2d 824, 827 (Tex. 1984)(holding that Texas law has historically required defunct corporations to make a pro rata distribution of assets to creditors); *also Rome Industries, Inc. v. Intsel Southwest*, 683 S.W.2d 777, 780 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.)(interpreting the Bulk Transfer Act to require payment of the proceeds of the transfer to all creditors on a pro rata basis). There is no reason to treat the investors – all of whom are creditors of Retirement Value – in any different manner. *See General Trimming Products, Inc. v. SC Nelson & Co., Inc.*, 398 S.W.2d 775, 782 (Tex. Civ.

App. 1966, writ ref'd n.r.e.)(noting that a purchaser in violation of the bulk sales laws is treated as a receiver who "must pay the creditors pro rata as any other receiver would do").

Pro rata payment is particularly appropriate in this case. A number of investors were never matched to any particular policy. For other investors, the policies to which they were matched were not acquired or were inadequately funded and may lapse. *Tyler*, *supra*, at *6 (finding that pro rata distribution was appropriate because certain investors were no longer matched to policies). And, for virtually all investors, funds that they invested for specific policies were used to pay expenses (either purchase price or premiums) for other policies. *Durham*, *supra*, at 73 (holding that tracing would not be allowed because the ability of one investor to trace was a mere fortuity caused by the actions of the defendants who spent other victim's money first).

CONCLUSION

There are substantial, equitable reasons to pool the assets of the Receivership estate for the benefit of all of Retirement Value's victims. Doing so will eliminate inequities, allow the Reciever the flexibility necessary to maximize the value of the portfolio and reduce the cost of administering the portfolio. The Court, therefore, should exercise its discretion and order that the assets of Retirement Value, including the portfolio of insurance policies held by it, be consolidated for the benefit of all investors.

ACCORDINGLY the Receiver requests that his motion to be granted in its entirety.

Respectfully submitted,

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ATTORNEYS FOR THE COURT-APPOINTED RECEIVER OF RETIREMENT VALUE, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above pleading has been served on the following, via certified mail, return receipt requested and e-mail on this the 27th day of September 2010:

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RETIREMENT VALUE POLICIES			
	Internal Code	**Carrier**	**Face Amount**
Policies Owned by Retirement Value			
1	LFG177-031909-MC	Lincoln Financial	$1,500,000
2	LFG081-021710-RC	Lincoln Financial	$1,250,000
3	LFG740-071509RL	Lincoln Financial	$5,000,000
4	LFG006-103009-JC	Lincoln Financial	$2,000,000
5	LFG591-031909-DH	Lincoln Financial	$1,000,000
6	LFG008-102909-RB	Lincoln Financial	$3,000,000
7	LFG782-090409-HO	Lincoln Financial	$5,000,000
8	LFG272-112009-PS	Lincoln Financial	$1,300,000
9	LFG566-071509-MR	Lincoln Financial	$4,700,000
10	LFG183-111109-MR	Lincoln Financial	$5,000,000
11	LFG117-021710-HW	Lincoln Financial	$2,000,000
12	LFG735-030510-AS	Lincoln Financial	$5,000,000
13	LFG311-031210-HM	Lincoln Financial	$5,000,000
14	LFG248-012610-HM	Lincoln Financial	$3,000,000
15	LBL165-031909-NL	Lincoln Benefit Life	$750,000
16	LBL771-110209-MF	Lincoln Benefit Life	$2,000,000
17	LBL361-021710-SW	Lincoln Benefit Life	$2,085,000
18	AGL73L-031909-WK	American General	$3,000,000
19	AGL66L-071509-LB	American General	$750,000
20	AGL06L-102009-LM	American General	$2,500,000
21	AGL130-012110-PM	American General	$2,000,000
22	ANI852-031909-HO	American National	$5,000,000
23	ANI521-102209-BW	American National	$1,000,000
24	AXA804-031909-RM	AXA Equitable	$4,500,000
25	AXA146-090409-GJ	AXA Equitable	$2,000,000
26	AXA826-110509-IC	AXA Equitable	$1,250,000
27	AXA994-011510-BD	AXA Equitable	$2,100,000
28	AXA729-112009-SF	AXA Equitable	$2,000,000
29	AXA597-110209-HM	AXA Equitable	$1,250,000
30	AXA091-012110-PC	AXA Equitable	$5,000,000
31	AXA335-022410-PS	AXA Equitable	$3,000,000
32	SLA338-112009-CD	Sun Life Assurance	$2,000,000
33	SLA534-031909-LC	Sun Life Assurance	$650,000
34	MMI860-071509-ML	Mass Mutual	$1,500,000
35	PLI980-111109-JS	Pacific Life	$4,000,000
36	PLI680-102909-JS	Pacific Life	$1,000,000
37	PLI930-102009-HM	Pacific Life	$1,250,000
38	PLI140-111109-DM	Pacific Life	$10,000,000
39	ING036-071509-EB	ING	$3,000,000
40	ING201-071509-AG	ING	$5,000,000
41	ING15J-121409-AK	ING	$1,000,000
42	ING283-031909-AI	ING	$2,000,000
43	LLI899-102209-AT	Lafayette Life	$7,000,000
44	MET650-071509-DF	Met Life	$1,000,000
45	TRA281-071509-RJ	Transamerica	$1,500,000
46	HLI814-092509-MI	Hartford Life	$1,500,000
47	WPL982-071509-LB	William Penn Life	$500,000
48	OML446-031909-RL	Old Mutual Life	$2,000,000
49	AVL180-030510-MR	AVIVA Life & Annuity	$5,000,000
		Total Death Benefit	$134,835,000
	Legend	in transition to RV	

Exhibit

	Internal Code	Carrier	Face Amount
Policies Not Acquired by Retirement Value			
1	LBL918-022410-RW	Lincoln Benefit Life	$1,000,000
2	AGL76L-012810-WS	American General	$3,000,000
3	AXA777-012310-TP	AXA Equitable	$1,000,000
4	AXA036-031610-PC	AXA Equitable	$5,000,000
5	AXA826-032410-CD	AXA Equitable	$3,000,000
6	GLG089-012110-RF	Genworth Life	$1,000,000
7	JHL633-031210-CT	John Hancock	$10,000,000
8	JHL383-031610-GR	John Hancock	$5,000,000
		Total Death Benefit	$29,000,000