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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**Case No. 11-35165-7**
	§	
RETIREMENT VALUE, LLC,	§	**Involuntary Chapter 7**
	§	
DEBTOR.	§	

RECEIVER'S EXPEDITED MOTION FOR INTERIM AND FINAL RELIEF PURSUANT TO 11 U.S.C. § 543(D) FROM TURNOVER OF PROPERTY, OR, ALTERNATIVELY, FOR ABSTENTION PURSUANT TO 11 U.S.C. § 305(A)

Eduardo S. Espinosa, in his capacity as the State Court Receiver (the "Receiver") for Retirement Value, LLC (the "Alleged Debtor") appointed by the District Court of Travis County, Texas for the 126th Judicial District (the "State Court") in *Texas v. Retirement Value, LLC, Richard H. "Dick" Gray, and Bruce Collins, and Keisling, Porter & Free, P.,C., Relief Defendant*, Cause No. D-1-GV-10-000454 (the "Receivership Action") files this Expedited Motion for Interim and Final Relief Pursuant to 11 U.S.C. § 543(d) From Turnover of Property, or, Alternatively, for Abstention Pursuant to 11 U.S.C. § 305(a) (the "Motion"). In support of the Motion, the Receiver states the following:[1]

[1] By filing this Expedited Motion, the Receiver does not consent to venue in the Northern District of Texas. The Receiver hereby reserves his right to contest the proper venue of these proceedings.

I. SUMMARY OF ARGUMENT

1. Richard Stafford, Frank Marlow, Yvonne Staley, and Hugh Dunn (together, the "Petitioners") filed this involuntary bankruptcy case (the "Involuntary") and the Expedited Motion for Appointment of Chapter 7 Interim Trustee [Docket No. 2] (the "Trustee Motion") on August 12, 2011, the last business day before a State Court hearing in the Receivership Action that would have brought the active portion of the Receivership Action to a close. They did so despite failing to intervene in the Receivership Action until the eleventh hour, without having participated in any of its contested elements, and without ever expressing any substantive objections to either the work the Receiver has done or the proposed plan of distribution that the State Court was set to consider on August 15, 2011.

2. Instead, they ran to this Court and filed the Involuntary, so preventing the conclusion of the active portion of the Receivership Action and imposing additional costs on the Receiver, the Alleged Debtor's estate, and the other interested parties in the Receivership Action. In due time, the Receiver will argue that the Involuntary must be dismissed, for at least the following reasons: (i) it was filed in bad-faith to delay the State Court from resolving the Receivership Action; (ii) the Alleged Debtor has more than 900 creditors, but only one of the Petitioners holds a claim against the Alleged Debtor; and (iii) that Petitioner's claim is subject to a bona fide dispute as to its amount. The Petitioners filed the Involuntary despite the fact that the Receiver has been timely paying the administrative debts of the Receivership Action and was actively seeking authority from the State Court to pay claims. The Involuntary is an impermissible collateral attack on the State Court's earlier decisions in the Receivership Action and an attempt to thwart the State of Texas's enforcement of its securities laws.

3. The Petitioners' bad-faith filing of the Involuntary undermines the Receiver's grant of authority from the State Court and potentially requires the Receiver to turnover assets of the Alleged Debtor, if and when a trustee is appointed. And while the Court decides on the merits of whether this Involuntary should be dismissed or maintained, it is imperative that the Alleged Debtor's estate is preserved in the most efficient way and without harming creditors. Accordingly, the Receiver is requesting that, at least on an interim basis, the Court maintain the status quo and excuse the Receiver from its obligations under Section 543 of the Bankruptcy Code, including turnover of the Alleged Debtor's estate.

4. The Petitioners principal argument in favor of the Involuntary and appointment of an interim trustee seems to focus on the amount of professional expenses incurred by the Receiver. Notwithstanding the complete lack of merit and jurisdictional inadequacy of the Petitioners' argument, their allegations are counterintuitive on their face. The professional fees would exponentially increase if a trustee, unfamiliar with this highly complicated and pervasive fraud scheme, took control of estate administration.

5. Therefore, the Receiver requests interim and final orders excusing the Receiver from complying with Section 543(a), (b), and (c) of the Bankruptcy Code. Alternatively, the Receiver requests that this Court abstain from all proceedings in this Involuntary until the Receivership Action is fully administered.

II. BACKGROUND

A. THE ALLEGED DEBTOR'S FRAUDULENT ENTERPRISE

6. The Alleged Debtor's sole business was to perpetrate a securities fraud on the general public. It was extraordinarily successful. Using false claims, the Alleged Debtor stole approximately $77.6 million from more than 900 investors to whom it promised approximately

$125 million in return. The proceeds of this scam were used to acquire insurance policies at a grossly inflated purchase price of approximately $28 million from a co-conspirator and to establish a premium reserve of approximately $25 million; the balance was dissipated to the Alleged Debtor's principals and to other co-participants in its fraud.

B. ORIGINS OF THE RECEIVERSHIP ACTION

7. Upon learning of the scheme, the Texas State Securities Board issued a cease and desist order on March 29, 2010. The Texas Department of Insurance followed shortly with a cease and desist order of its own. The State of Texas filed the Receivership Action against the Alleged Debtor and two of its principals on May 5, 2010, alleging that the defendants had perpetrated a massive fraud on the investing public through the sale of "participations" in policies of life insurance to be purchased by the Alleged Debtors.

8. At the request of the State, the State Court appointed the Receiver. The State Court directed the Receiver to: (a) collect and preserve the receivership assets; (b) notify the investor-victims of the Receivership Action; (c) attempt to effect fair restitution to the investor-victims based on a plan to be approved by the State Court; and (d) assist the State in its investigation of the Alleged Debtor, its principals, and those who dealt with them. On May 28, 2010, the State Court continued the Receiver's appointment indefinitely.

C. EXPANSIONS OF THE RECEIVERSHIP ACTION

9. The Receivership Action significantly expanded after the initial filing. In June 2010, the State added another principal of the Alleged Debtor as a defendant and sought additional receiverships for two of the Alleged Debtor's affiliates: Hill Country Funding, LLC, a Texas limited liability company ("HCF-TX"), and Hill Country Funding, LLC, a Nevada limited liability company ("HCF-NV"). The State Court established the requested additional

receiverships and appointed Don Taylor (the "HCF Receiver") as the receiver for HCF-TX and HCF-NV. By the time the Involuntary was filed, the Receiver had asserted cross-claims against 59 additional persons and entities (including Mike Beste, the Petitioners' witness)[2] seeking to recover amounts paid to them by the Alleged Debtor, as well as damages for breaches of their fiduciary duties and indemnity under their contracts with the Alleged Debtor.

10. The State Court established a deadline of May 9, 2011 for parties, including investors, to intervene in the Receivership Action. Three groups did, asserting their rights and participating throughout the Receivership Action in some cases more than a year. Gary Cain, Barry Edelstein and Qvest III Master Fund, LLC intervened on July 30, 2010;[3] Grant W. Bejcek and Opal E. Bejcek intervened on October 25, 2010; and Ladell Harrison, on behalf of Matthew C. Allen, Jr., Teddie J. Allen and the Matthew and Teddie Allen Charitable Remainder Annuity Trust intervened on January 21, 2011.[4]

11. The Petitioners received the same notice of the Receivership Action as these interveners. Unlike them, the Petitioners only attempted to intervene in the Receivership Action through a motion filed with the State Court on July 28, 2011—well after the deadline for intervention established in the Receivership Action.

[2] In his testimony, Dick Gray, the principal of the Alleged Debtor, described Beste as having "an intimate, direct hand to play in virtually everything Retirement Value did." Gray Dep. at p. 158. Beste was paid for his role in the scheme by the Alleged Debtor indirectly through its overpayment to James Settlement Services, its policy-supplier. Thus some portion of the $28 million that the Alleged Debtor paid for policies ended up in Beste's pocket. *Id.* at pp. 54-55.

[3] Qvest III was the single largest investor in the Alleged Debtor's scheme. Its claims are roughly 6% of the total investor claims. It is also the single largest investor in the PLI140 policy in which the Petitioners invested.

[4] Ladell Harrison and Gary Cain also invested in the PLI140 policy.

D. RESULTS ACHIEVED AND COSTS INCURRED IN THE RECEIVERSHIP ACTION THROUGH INVOLUNTARY FILING

12. During the Receiver's 15 months on the job pre-dating the Involuntary, he actively managed the affairs of the Alleged Debtor and discharged his State-Court imposed duties. At the Involuntary's filing, the end of the active phase of the Receivership Action was near. The Receiver had proposed a plan of distribution to repay investors between 80% and 120% ($62.5 million to $92.5 million) of their investment, including 10% or $7.7 million this year. By comparison, the bankruptcy trustee for a similar life-settlement scam filed a plan of reorganization on August 5, 2011, twenty-three (23) months after entering bankruptcy (53% longer than the Receivership Action), despite incurring far more in administrative expenses and projecting a smaller return for investors (only 8%).[5]

13. Getting to a potential 100¢ distribution required significant work over more than a year. Among other things, the Receiver:

- Assembled a team of professionals to assist him in the management of the Alleged Debtor's portfolio of life insurance policies, including: (i) a portfolio manager, responsible for death tracking, premium optimization (working with the insurers to reduce the cost of maintaining the policies in force), communication with insureds, and obtaining updated health information for the insureds; and (ii) actuaries to analyze the value of the portfolio, the premiums necessary to keep it in force, and the reserves the Receiver will require to meet these obligations.

- Maintained the Alleged Debtor's policy portfolio at the lowest possible cost.

- Investigated the fraudulent scheme perpetrated through the Alleged Debtor by its principals (including Mike Beste) through: (i) interviews with many of those involved; (ii) analysis of 236 gigabytes of data recovered from the Alleged Debtor's computers; (iii) searches of the Alleged Debtor's offices; and (iv) reviews of related records.[6]

[5] *See In re Life Fund 5.1, LLC*; Case No. 09-32672 (N.D. Ill.) [Docket No. 738].

[6] The relevant information discovered by the Receiver was produced to the parties in the Receivership Action.

- Prepared valid books and records for the Alleged Debtor (the Alleged Debtor's completely omitted its fraudulent scheme). The Receiver rebuilt the Alleged Debtor's books from scratch.

- Recovered substantial assets – approximately $4.7 million – for the benefit of the investors and other creditors, including:

  - $1.25 million secreted by the principals of the Alleged Debtor into Special Acquisitions, Inc.;

  - $560,000 and 8 policies of insurance worth about $1.4 million;

  - $124,000 in cash and $195,000 in debt-reduction from a settlement with Bruce Collins;

  - $710,000 in a settlement with Kiesling Porter. This settlement is conditioned upon a settlement with a class of investors led by Gary Cain and Barry Edelstein. That settlement requires approval by the State Court; and

  - $650,000 in cash and assets from a settlement with Dick and Catherine Gray. This settlement was due to be approved by the State Court on August 15 at a hearing that was postponed due to the filing of this case.

- Prosecuted a claim on the PLI140 policy, worth $10 million, against Pacific Life Insurance. After agreeing to pay on the policy in December 2010, Pacific Life reversed course and retained counsel to attempt to deny the claim. The Receiver and his counsel investigated the underlying transaction, proved up the chain of title, and convinced the family of the insured and Pacific Life that the Alleged Debtor was entitled to the proceeds of the policy. On March 15, 2011, Pacific Life paid the full death proceeds of $10 million, plus interest from the date of death totaling $117,534.25.

- Identified, investigated, and initiated litigation against various persons who breached duties to the Alleged Debtor or who received fraudulent transfers from it. The Receiver negotiated settlements of some of these actions pre-petition, while others remain pending.

14. It took substantial effort to bring more than $14 million into the Alleged Debtor's estate. The State Court found the related work performed by the Receiver and his professionals to be worth the approximately $1.4 million in related fees approved to date. Even as the State Court cut approximately $100,000 from those fees, it approved the remaining $1.4 million as proper and reasonable. These totals reflect the State Court's imposition of additional discounts

from the usual and customary fees charged by the Receiver and his firm—on average, the Receiver and his firm have discounted their billings in the Receivership Action by approximately 25%.

E. STAYED AUGUST 15TH HEARING AND FILING OF THE INVOLUNTARY

15. As described above, before the filing of this Involuntary by the Petitioners, the Receiver proposed a plan of distribution in the Receivership Action and provided notice of the procedures that plan would establish before the filing of this Involuntary by the Petitioners. The Receiver's actuaries determined that the plan has a 95% probability of returning between $62.5 million and $92.5 million (between 81% and 120% of the investors' aggregate investment); initial distributions of $7.7 million (10% of the amount invested) would be made this year with additional payments to come.

16. Two parties objected to the Receiver's plan. The Bejcek Intervenors sought to relitigate an issue already decided by the State Court in January 2011 (the State Court had also scheduled argument on a parallel reconsideration motion for the August 15, 2011 hearing). The HCF Receiver objected not to the Receiver's plan, but to the exclusion of his own receivership-estate from it (the HCF Receiver filed a related consolidation motion in the Receivership Action; that motion has not yet been set for hearing). The State Court had also set additional matters for consideration on August 15, 2011, including the $650,000.00 proposed settlement with the Grays and a status conference on how the Receiver would pursue the Alleged Debtor's causes of action after approval of the Receiver's plan.[7]

[7] Such causes of action are to be litigated by the Receiver's contingency-fee counsel at no further up-front cost to the Alleged Debtor's estate.

17. The State Court was set to consider the Receiver's plan on August 15, 2011. One business day before that hearing, on the afternoon of August 12, 2011, the Petitioners filed the Involuntary.

18. While the Petitioners knew of all these matters, they did not file an objection to the Receiver's plan with the State Court. This inaction was consistent with their pattern in the Receivership Action. After all, the Petitioners had missed the deadline to intervene in the Receivership Action, despite actual notice of the Receivership Action and the active involvement in the Receivership Action of other interveners, including investors in the same policies as the Petitioners. The Petitioners never objected to the Receiver's plan, never objected to the Receiver's fees in the Receivership Action, and never even bothered to attempt to intervene in the Receivership Action until July 28, 2011. Their motion to intervene was also set for the same State-Court hearing on August 15, 2011.

19. Instead of timely taking any of these actions in the Receivership Action, on the afternoon of August 12, 2011, the Petitioners filed the Involuntary at the last moment. But-for the filing of the Involuntary, the active phase of the Receivership Action would now be all but over. The work of reorganizing the Alleged Debtor would be complete. A plan would be in place determining who would be paid what and when. The methodology by which the Receiver would generate the assets necessary to pay them would have been established. The Receiver's plan called for an abbreviated proof of claims process that would allow claims not listed on the Receiver's schedule of claims to be added and any disputes as to amount, classification and status of claims to be resolved. The only other remaining steps would have been to resolve the Alleged Debtor's causes of action and to continue to manage the Alleged Debtor's insurance portfolio over time.

III. RELIEF REQUESTED

20. By this Motion, the Receiver respectfully requests this Court to exercise its discretion under Section 543(d) of the Bankruptcy Code and excuse the Receiver from its turnover obligations on an interim basis such that the status quo is maintained until the Court rules on the propriety of this bankruptcy proceeding. The Receiver further asks the Court to grant final relief under 543(d), excusing turnover on a final basis in the event that the Court declines to dismiss the Involuntary. Finally, and as an alternative, the Receiver requests an order abstaining from all proceedings in this Involuntary to permit the State Court to continue its administration of the Receivership Action.

IV. ARGUMENTS AND AUTHORITIES

A. THE COURT SHOULD PRESERVE THE STATUS QUO AND EXCUSE THE RECEIVER FROM TURNOVER

(i) This Court Should Exercise its Discretion Under Section 543(d)(1) and Excuse the Receiver from its Obligations Under Section 543(a), (b), and (c)

21. Section 543(d)(1) provides that:

> After notice and a hearing, the bankruptcy court may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, the interests of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property . . . .

11 U.S.C. § 543(d)(1). The Alleged Debtor is insolvent, so the interests of the equity holders are not implicated in the Involuntary. Thus, the Court should focus its Section 543(d) analysis solely on whether "the interests of creditors . . . would be better served" by excusing the Receiver from its Section 543 obligations, including turning over the Alleged Debtor's estate to a trustee.

22. Bankruptcy Code Section 543(d)(1) essentially requires the Court to determine whether continuation of the prepetition posture of the case with the Receiver—who is

knowledgeable of the case and has proven to be effective—should continue, or, whether turning over the assets to a trustee—who is completely unfamiliar with the case's complexities—would better serve the interests of the creditors. The Court should choose the former.

23. Section 543(d) cases are highly fact-intensive and decided on a case-by-case basis. *Dill v. Dime Savings Bank, FSB (In re Dill),* 163 B.R. 221, 225-27 (E.D.N.Y. 1994); *In re Uno Broadcasting Corp.*, 167 B.R. 189, 200 (Bankr. D. Ariz. 1994). In applying section 543(d)(1), courts have considered: "(1) whether reorganization is likely; (2) that funds are necessary for such reorganization; and (3) mismanagement." *Powers Aero Marine Servs., Inc. v. Merrill Stevens Dry Dock Co. (In re Powers Aero Marine Servs., Inc.),* 42 B.R. 540, 544 (Bankr. S.D. Tex. 1984); *In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 103 (Bankr. S.D.N.Y. 1991); *In re WPAS, Inc.*, 6 B.R. 40 (Bankr. M.D. Fla. 1980). "[A] bankruptcy court should also consider whether or not there are avoidance issues raised with respect to the property retained by the receiver, because a receiver does not possess avoiding powers for the benefit of the estate." *In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 103 (Bankr. S.D.N.Y. 1991). Other factors that may be considered include the existence of preference actions for a trustee that a state receiver could not implement, and overall effect of the Bankruptcy Code on the circumstances of the case. *In re Dill,* 163 B.R. 221, 225-27 (E.D.N.Y. 1994); *In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 103 (Bankr. S.D.N.Y. 1991).

(a) Reorganization Is Not Likely and, Therefore, Funds Are Not Necessary

24. Turnover of property from a state court receiver is not justified without an indication that the debtor has a realistic chance to reorganize. *In re Powers Aero Marine Servs., Inc.*, 42 B.R. at 546. In this case, not only does the Alleged Debtor lack a "realistic chance" to reorganize, it does not have any intention to do so. Moreover, the Alleged Debtor remains the

subject of the cease and desist orders entered by the Texas Department of Insurance and the Texas State Securities Board as well as the injunction issued in the Receivership Action. It simply cannot continue in business. The Alleged Debtor was nothing more than a fraudulent scheme based on a scam business. It never should have been a going concern and it has no prospect of becoming one again. Accordingly, this factor weighs in favor of excusing the Receiver from complying with Sections 543(a), (b), and (c).

(b) Mismanagement Is Not Present

25. This factor generally refers to the mismanagement of the debtor, if it were given an opportunity to control the administration of the estate. *In re Donato*, 170 B.R. 247, 257 (Bankr. D.N.J. 1994). There should be no disagreement among the parties that the Alleged Debtor was grossly mismanaged by the former control group in furtherance of its pervasive fraudulent scheme. Indeed, it was this gross mismanagement and fraud that prompted the State Court to appoint the Receiver in the first place. Moreover, in a case such as this where the debtor is no longer operating and does not have existing management, there is no practical choice but to maintain the status quo.

26. With respect to the management of the Receiver, the Petitioners sole complaint appears to involve the amount of legal fees generated by the Receiver. They never allege that the Receiver was ineffective, inefficient, unproductive, or that the Receiver mismanaged the estate. And based on the factual record, any such allegation would be frivolous. Presumably, even the Petitioners cannot deny the fact that the Receiver conducted an extensive analysis of the Alleged Debtor's assets and fraudulent transactions; prepared books and records to—for the first time—accurately reflect the Alleged Debtor's financial condition; recovered approximately $14.7 million, including the prosecution of a $10 million claim; initiated lawsuits against numerous

parties for the benefit of creditors; and formulated a plan of distribution whereby all investors are expected to recover 80-120 percent of the amount of their investment.

27. As the Court held in *Uno Broadcasting*, a receiver should be excused from complying with turnover requirements when he has "been proceeding expeditiously and professionally to manage the affairs . . . and has dealt with . . . seriously delinquent obligations . . ., has reorganized management, has implemented accounting controls, has contacted and dealt with numerous vendors, and has taken certain personnel actions." *In re Uno Broadcasting Corp.*, 167 B.R. 189, 201 (Bankr. D. Ariz. 1994). Similarly, the Receiver in the present case should be excused from the turnover requirements because of his success in administering the Alleged Debtor's estate.

(c) There Are No Avoidance Advantages in a Bankruptcy Proceeding

28. The Receiver has already brought avoidance actions against all of the Alleged Debtor's principals and former owners under state law. In addition, it has sued 59 additional parties seeking the return of money paid to them by the Alleged Debtor. There are some 200 additional parties against whom the Receiver may assert similar claims, pending the outcome of pre-suit demands. The State Court has already instructed the Receiver to bring all such claims before it so that they can be handled expeditiously and efficiently together.

29. A bankruptcy court would do no better. The one advantage bankruptcy law provides over state law is the ability to bring actions for return of preferential payments. This advantage is negated in this case because the Alleged Debtor has operated under court supervision for over a year, and all the payments made in the last 90 days have been ordinary-course administrative payments.

(d) The Bankruptcy Code Would Cause Complications and Interferes with the State of Texas's Regulatory Authority

30. At base, the Receivership Action represents an exercise by the State of Texas of its police power to regulate the sale of securities and to protect consumers from deceptive and fraudulent acts. There is much more to this case than just the bankruptcy of the debtors. The State has a definite regulatory and prudential interest in proceeding before its own courts to punish transgressions of its laws. This Involuntary has the effect of staying and limiting the State of Texas's regulatory action and, accordingly, threatens to interfere with the State of Texas's regulatory regime.

31. In addition, much of the action in the Receivership Action (or in this Involuntary, if it remains in bankruptcy) will necessarily happen in state court. The State of Texas's regulatory action against the Alleged Debtor and its remaining principals must continue in state court. Joined with the State of Texas's regulatory actions are actions by the Receiver against principals of the Alleged Debtor and against numerous others for breach of fiduciary duty, negligence, and for contractual indemnity. None of these matters can be brought in bankruptcy court, even if they were not already pending in state court. *See Stern v. Marshall*, ___ U.S. ___, 2011 U.S. LEXIS 4791 (2011); *In re Powers Aero Marine Servs., Inc.*, 42 B.R. at 546 (stating that ruling on pending lawsuit in bankruptcy forum "would only create further jurisdictional problems . . . which can be avoided").

(e) The Petitioners' Position Seeks Only to Benefit Themselves at the Expense of the Other Creditors

32. Through this Involuntary, the Petitioners seek to better their position at the expense of others. Their avowed goal is to collect in full on the false promises made by the Alleged Debtor instead of the pro rata share of the estate to which they are entitled. As the Alleged Debtor lacks sufficient funds to even repay all of the investments at this time, paying the

Petitioners the full promised amount they seek would necessarily come at the expense of the other creditors. Accepting the theoretical underpinnings of Petitioners' argument—we are entitled to trace our investments to particular assets and, thus, are entitled to their proceeds—would lead to grave disparities among investors. The clear and overwhelming weight of non-bankruptcy law forbids any group of creditors from bettering themselves at the expense of others. The universal result in cases such as the Receivership Action has been to require that all investors in a fraudulent scheme recover pro rata from the assets available. *SEC v. Forex Asset Management LLC*, 242 F.3d 325 (5th Cir.2001); *United States v. Durham*, 86 F.3d 70 (5th Cir. 1996); *SEC v. Tyler*, No. 3-02-CV-282-P, 2003 WL 21281646 (N.D. Tex. May 28, 2003). By this Involuntary, the Petitioners seek to avoid the application of a pro rata distribution to their personal benefit and to the detriment of the other creditors.

33. Furthermore, because there is no existing management or principal of the Alleged Debtor remaining to take over the administration of the estate, the alternative to the Receiver is to find yet another third party. As noted by the *Uno Broadcasting* Court, this result "would undoubtedly lead to substantial disruption, duplication, costs, and confusion arising out of another management change," especially one so late in the game. *In re Uno Broadcasting Corp.*, 167 B.R. 189, 201 (Bankr. D. Ariz. 1994). This result is particularly ironic given the fact that the Petitioning Creditors central complaint appears to be the amount of legal expenses incurred by the Receiver.

34. In this case, it is clear that the "interests of the creditors of the estate can only be served by having the custodian excused from strict compliance with the turnover provision of [section] 543." *See In re Powers Aero Marine Servs., Inc.*, 42 B.R. at 546. None of the factors addressed in the case law support turning over estate property to the Alleged Debtor or a trustee.

The facts support maintaining the status quo and excusing the Receiver from his Section 543 obligations. At the very least, the relief requested should be granted on an interim basis to maintain the status quo and avoid costly and unnecessary administrative hurdles until the issue of whether this case belongs in bankruptcy court is resolved.

(ii) This Court May Excuse the Receiver from Turning Over Property Under Section 543(d)(2)

35. Section 543(d)(2) provides that:

> After notice and a hearing, the bankruptcy court may excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

11 U.S.C. § 543(d)(2). Here, the Receiver has had possession of estate assets for nearly 15 months—well in excess of the 120-day requirement of Section 543(d)(2). Accordingly, the Court may exercise its discretion under Section 543(d)(3) and excuse the Receiver from its obligations under Sections 543(a) and (b)(1). *See In re Indian Motocycle Co.*, 266 B.R. 243, 261 n.13 (Bankr. D. Mass. 2001) (noting that the court "is afforded some measure of discretion under § 543(d)(2)").

B. ALTERNATIVELY, THE COURT SHOULD ABSTAIN FROM ADJUDICATING THIS CASE

36. Section 305(a)(1) provides that:

> The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceeding in a case under this title, at any time if the interests of creditors and the debtor would be better served by such dismissal or suspension . . . .

11 U.S.C. § 305(a)(1).

37. The relief requested under Section 543(d) is essentially a codification of the abstention provision under Section 305(a), except that Section 305(a) also considers the

"interests of the debtor" for purposes of abstention. *See* 11 U.S.C. §§ 305(a), 543(d); S. Rep. No. 95-989, 95th Cong. 2d Sess. 85, 1978 U.S.C.C.A.N. pp. 5787, 7871. Specifically, however, "Section 305(a)(1) requires the Court to consider not only the interests of a particular creditor, but the interests of *all creditors* and the Debtor." *In re Uno Broadcasting Corp.*, 167 B.R. 189, 200 (Bankr. D. Ariz. 1994) (emphasis original).

38. As stated above, there is no true debtor in the normal sense, so there will be no ongoing operation and there is no intent to reorganize. The principals and management are gone. After analyzing the Alleged Debtor's options, the Receiver adamantly disagrees that a fire-sale of the Alleged Debtor's assets under chapter 7 of the Bankruptcy Code—including all the additional costs and delay associated with transitioning the estate to a new party—would benefit anyone.[8]

39. Courts have generally abstained from adjudicating a bankruptcy case when the following elements are met: (1) the petition was filed by a few recalcitrant creditors and most creditors oppose the bankruptcy; (2) there is a pending state insolvency proceeding; and (3) dismissal is in the best interest of the debtor and all creditors. *GMAM Inv. Funds Trust I v. Globo Comunicacoes e Participacoes S.A. (In re Globo Comunicacoes e Participacoes S.A.)*, 317 B.R. 235, 254 (Bankr. S.D.N.Y. 2004); *In re Sherwood Enters., Inc.*, 112 B.R. 165, 168 (Bankr. S.D. Tex. 1989). Moreover, abstention or dismissal under Section 305 is appropriate where the matter is pending in another forum. *In re O'Neil Village Personal Care Corp.*, 88 B.R. 76, 80 (Bankr. W.D. Pa. 1988); *In re Michael S. Starbuck, Inc.*, 14 B.R. 134 (Bankr. S.D.N.Y. 1981). Some courts have additionally held that "economy and efficiency of the

[8] Liquidation would recover—at most—45 percent of the amount invested; whereas the Receiver has already proposed a plan that is expected to pay between 80-120 percent.

administration must be key considerations in the abstention decision." *In re O'Neil Village Personal Care Corp.*, 88 B.R. 76, 80 (Bankr. W.D. Pa. 1988) (citing cases).

40. Lastly, and perhaps most importantly, abstention is particularly appropriate "where considerations of comity with state and federal administrative proceedings would dictate that the Bankruptcy Court stay its hand in order to prevent undue interference or entanglement with state or federal administrative and regulatory schemes." *In re First Fin. Enters., Inc.*, 99 B.R. 751, 754 (Bankr. W.D. Tex. 1989); *see In re Michael S. Starbuck, Inc.*, 14 B.R. 134 (Bankr. S.D.N.Y. 1981) (abstaining of case that was administered in securities receivership); *In re O'Neil Village Personal Care Corp.*, 88 B.R. 76 (Bankr. W.D. Pa. 1988) (dismissing case involving receivership of personal care facility).

(i) This Case is the Prototypical Case for Abstention or Dismissal

41. The involuntary bankruptcy case of *Michael S. Starbuck, Inc.*, perhaps mostly closely resembles the case currently before the Court.[9] In that case, a receiver was appointed to administer the estate of two entities charged by the Securities and Exchange Commission (the "SEC") with violating federal securities law. *In re Michael S. Starbuck, Inc.*, 14 B.R. at 135. The receiver retained counsel and independent professionals to assist in the administration of the estate. In the course of administering the estate, the receiver, among other things, took possession of estate securities held by brokerage firms; sold assets to extinguish the large debit balance; assisted the New York Attorney General's office in their investigation; initiated lawsuits for the benefit of creditors; and oversaw the estate professionals in their pursuit for an orderly liquidation. *Id*. Not surprisingly, this effort cost the receiver and its counsel a lot of time and effort, and it consequently cost the estate money.

[9] *In re Michael S. Starbuck, Inc.* is perhaps the seminal case on abstention, and its reasoning has been applied in Texas bankruptcy courts. *See, e.g., In re Cent. Morg. & Trust, Inc.*, 50 B.R. 1010, 1021 (S.D. Tex. 1985); *In re First Fin. Enters., Inc.*, 99 B.R. 751, 754 (Bankr. W.D. Tex. 1989).

42. Nearly 15 months after the appointment of the receiver, a group of estate creditors filed involuntary petitions against the estate. *Id*. The question before the court was whether it should abstain or dismiss the involuntary bankruptcy petitions. From the outset, the court noted that "there is no need to invoke the machinery of the bankruptcy process if there is an alternative means of achieving the equitable distribution of assets." *Id*. Ultimately, the court held that it was in the best interests of the creditors and the debtors to dismiss the proceedings, but in so deciding, it stated that:

> Allowing this matter to continue as a debtor proceeding under the Bankruptcy Code would result in a terrible waste of time and resources. Many services, already rendered in the administration of the receivership estate, would have to be repeated at additional expense to the estate. No advantage would accrue to the creditors if this matter were to proceed in the bankruptcy court. Rather, their best interests will be served by the continued administration of the equity receivership.

In re Michael S. Starbuck, Inc., 14 B.R. at 135.

43. Before the Court is a receivership created by the State Court as a result of the exercise of the regulatory authority of the Texas State Securities Board and the Texas Attorney General. The Receiver has been successfully administering the estate for nearly 15 months and has recently set forth a plan of distribution, projecting upwards of 120 cents on the dollar. All the typical indicia of a bad faith filing and a case prime for abstention are present. The Involuntary was brought by a few disgruntled creditors involved in the Receivership Action, attempting to better their position at the expense of the other creditors. This is precisely the case Congress envisioned when it codified the abstention provision in Section 305. *See In re Nina Merchandise Corp.*, 5 B.R. 743, 747 (Bankr. S.D.N.Y. 1980) (stating that "it is evident that § 305 contemplates the instance where a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal

bankruptcy process."). The legislative history reveals that the law was designed to permit dismissal or suspension "where an arrangement is being worked out by creditors and the debtor out of court, there is no prejudice to the rights of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment." *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977).

(ii) Abstention Would Provide the Most Efficient Use of Estate Resources and Prevent an Unjustified Interference with the State's Regulatory Authority

44. In addition, it is abundantly clear that this proceeding will be more efficiently resolved in state court. The Receiver has already invested countless hours of time and effort into preparing for a plan of distribution. Pulling the case away from the State Court just hours before it adjudicated on the merits of the plan of distribution just so a trustee in bankruptcy can re-create the wheel is not an efficient use of time and estate resources.

45. Finally, the receivership before the Court involves fundamental issues of Texas law and this State's ability to administer and enforce its securities and insurance rules and regulations. As a result, this Court should seek to avoid any unnecessary imposition of federal bankruptcy law in order to prevent an "undue interference or entanglement with state . . . regulatory schemes." *See In re First Fin. Enters., Inc.*, 99 B.R. 751, 754 (Bankr. W.D. Tex. 1989). As stated above, the Receivership Action was ultimately caused by the Texas Attorney General and the Texas State Securities Board in the exercise of this State's authority to regulate the sale of securities and protect consumers from fraudulent acts. By continuing forward with this Involuntary, the Receivership Action will be stayed or significantly limited, effectively interfering with the State of Texas's ability to exercise its regulatory authority and police power.

46. Accordingly, abstention would best prevent any undue interference with the State of Texas's regulatory authority while preserving efficient use of estate resources.

V. CONCLUSION

WHEREFORE, the Receiver respectfully requests this Court to exercise its discretion under Section 543(d) of the Bankruptcy Code and excuse the Receiver from Section 524 obligations, including turnover of estate property (i) on an interim basis until such time that the Court determines the propriety of this Involuntary and (ii) on a final basis if the Court thereafter declines to dismiss the Involuntary. Alternatively, the Receiver respectfully requests that the Court abstain from adjudication pursuant to Section 305(a) of the Bankruptcy Code and avoid the unnecessary costs and complications involved if this receivership was in bankruptcy. The Receiver further requests that this Court grant any further and additional relief to which he may be entitled.

DATE: August 19, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 19, 2011, a true and correct copy of the attached Motion was served via email through the Bankruptcy Court's Electronic Case Filing System on those parties that have consented to such service and via first class U.S. Mail upon the parties listed below.

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