

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, a §
Texas Limited Liability Company, §
HILL COUNTRY FUNDING, a Nevada § TRAVIS COUNTY, TEXAS
Limited Liability Company, and §
WENDY ROGERS, §
Defendants, §
AND §
KIESLING, PORTER, KIESLING, & §
FREE, P.C., §
Relief Defendant. § 126th JUDICIAL DISTRICT

**RECEIVER’S FIRST AMENDED CROSS-CLAIM AGAINST
RICHARD H. “DICK” GRAY, CATHERINE GRAY AND WENDY ROGERS**

Eduardo S. Espinosa, in his capacity as Temporary Receiver of Retirement Value, LLC, files this cross-claim against Defendants Richard H. “Dick” Gray, Catherine Gray and Wendy Rogers.

DISCOVERY CONTROL PLAN

1. Discovery in this action is intended to be conducted under Level 2 OF TEX. R. CIV. P. 190.2. The Receiver may later move the Court to have the action conducted under Level 3.

REQUEST FOR DISCLOSURE

2. Pursuant to Texas Rule of Civil Procedure 194, the Receiver requests that Defendants disclose, within fifty (50) days after service of this pleading, the information or material described in Rule 194.2 (a) – (l).

THE PARTIES

3. Cross-Claimant Eduardo S. Espinosa (the “Receiver”) was appointed Receiver for Retirement Value, LLC, a Texas limited liability company. Retirement Value was placed in receivership by order of this Court. In the orders appointing him, the Court empowered the Receiver to file or defend any suit or claim that he, in his sole discretion, deems to be in the best interest of Retirement Value.

4. Cross-Claim Defendant Richard H. “Dick” Gray (“Gray”) is a former officer, former manager and current member of Retirement Value. He has appeared in this matter and no further service of process is required.

5. Cross-Claim Defendant Catherine Gray (“Mrs. Gray”) is a member of Retirement Value and the wife of Gray. She may be served with process at 3606 Comal Springs Drive, Canyon Lake, Texas 78133.

6. Cross-Claim Defendant Wendy Rogers (“Rogers”) is a former officer, former manager and current member of Retirement Value. She has appeared in this matter and no further service of process is required.

JURISDICTION AND VENUE

7. This court has subject-matter jurisdiction because the amount in controversy is in excess of the minimum jurisdictional level of this Court.

8. The court has personal jurisdiction over the Cross-Claim Defendants as each is a resident of the State of Texas.

9. Venue is proper in this county pursuant to §15.062 of the Texas Civil Practice & Remedies Code.

THE RECEIVERSHIP

10. Retirement Value was in the business of selling securities to the public based on life insurance policies (the “Resale Life Insurance Policy Program” or “RSLIPP”) that it purchased. On March 29, 2010, the Securities Commissioner of Texas issued Emergency Cease and Desist Order ENF-10-CDO-1686 against Retirement Value, Bruce Collins (the COO of Retirement Value), and Richard "Dick" Gray (the President and majority owner of Retirement Value) forbidding Retirement Value from continuing to sell securities through its Resale Life Insurance Policy Program. About a week later, on April 9, 2010, the Texas Commissioner of Insurance issued a cease and desist order forbidding Retirement Value from continuing to purchase policies.

11. On May 5, 2010, the State of Texas filed suit against Retirement Value, Dick Gray and Bruce Collins complaining that the defendants had violated the Texas securities laws and the Texas Deceptive Trade Practices Act by their sales of investments under the Resale Life Insurance Policy Program. Among other things, the State accuses Retirement Value of selling unregistered securities without an exemption from the registration provisions of the Texas Securities Act and committing fraud through various material misrepresentations and omissions in the sale of securities or investments under the Resale Life Insurance Policy Program. The 126th Judicial District Court entered a temporary restraining order against Retirement Value and its principals and appointed Eduardo Espinosa as receiver for Retirement Value’s business, assets and the proceeds derived therefrom. The Court has subsequently issued a temporary injunction against Retirement Value continuing the appointment of the Receiver.

FACTUAL BACKGROUND

12. Under the control of Gray and Rogers, Retirement Value's sold securities which were based on the proceeds of life insurance policies to be owned by Retirement Value. In the sale of these securities, Retirement Value made numerous misrepresentations as to the nature of the investment, the protections provided to the investors, the risks of non-payment and ultimate value of the investments. In addition, Retirement Value failed to disclose Dick Gray's checkered regulatory history. Through these misrepresentations, Retirement Value received approximately \$77 million from more than 900 investors promising to repay them approximately \$130 million. The proceeds of this debt was used to acquire insurance policies at a purchase price of approximately \$28 million and establish a premium reserve of approximately \$25 million; the balance was dissipated to Gray, Rogers, and other co-participants in Retirement Value's fraudulent scheme.

13. The fraudulent scheme perpetrated by Retirement Value, while subject to the control of Gray and Rogers, left Retirement Value chronically insolvent. Retirement Value's "business plan" left it straddled with approximately \$134 million of debt and less than \$54 million of total assets. On average, Retirement Value owed its investors \$16,944 for every \$10,000 invested. Despite its insolvency, Gray and Rogers caused Retirement Value to direct more than \$5 million to themselves and other insiders.

I. Organization of Retirement Value

14. Retirement Value was formed as a Texas limited liability company in January 2009. Its original members were Gray and Mrs. Gray, David and Elizabeth Gray and Rogers. Gray and Mrs. Gray owned 60% of the company, David and Elizabeth Gray owned 20% and Rogers owned 20%. In November 2009, Gray, Mrs. Gray and Rogers improperly caused Retirement Value to redeem the membership interest held by David and Elizabeth Gray.

Following the improper redemption of the interests of David and Elizabeth Gray, the members of Retirement Value were Dick Gray (55%); Catherine Gray (25%) and Wendy Rogers (20%).

15. At all relevant times, Gray and Rogers controlled the operations of Retirement Value. They jointly approved the marketing materials used to sell the investments. Each participated in training sessions and other meetings by which sales agents were recruited and taught how to sell the investment. All actions of Retirement Value alleged below were done either by, at the instructions or subject to the supervision of Gray and Rogers.

II. The Fraudulent Scheme

16. In selling these securities, Retirement Value violated the registration requirements of the Securities Act of 1933 as well as the registration requirements of the Blue Sky laws of Texas and the other states in which it sold investments. In addition, Retirement Value knowingly or recklessly made numerous material misrepresentations and omissions as to the nature of the investment, the protections provided to the investors, the risks of non-payment and ultimate value of the investments. In addition, Retirement Value failed to disclose Dick Gray's checkered regulatory history. Through these misrepresentations and omissions, Retirement Value borrowed approximately \$77 million from more than 900 investors, promising to pay them approximately \$130 million.

A. Sale of Unregistered Securities

17. Gray and Rogers caused Retirement Value to engage in the widespread sale of securities in violation of the registration requirements of the federal securities laws as well as of the blue sky laws of Texas and the numerous other states in which Retirement Value sold investments. The Re-Sale Life Insurance Policy Program is a security under federal law as well as the "blue sky" laws of Texas and other states. The RSLIPP was not, however, registered as

required by each of these laws. Nor did Retirement Value sell the RSLIPP pursuant to any known exemption to such registration requirements.

18. The Resale Life Insurance Policy Program is a security under both federal and Texas law. It is also a security under the laws of each of the states in which Retirement Value sold securities. An investment in the Resale Life Insurance Policy Program is an investment contract and, therefore, a security under the Texas Securities Act. It is a scheme involving an investment of money in a common enterprise with profits to come solely from the efforts of others. There was a substantial investment of money in a common enterprise. The investors invested in excess of \$77 million. Any gain by the investors depended upon Retirement Value's ability to pay.

19. Moreover, the investors are purely passive participants in the Resale Life Insurance Policy Program. Other than selecting which policy or policies out of the portfolio in which they chose to invest and tendering their funds, investors maintained a passive role in the investment and expected the profit to be derived solely from the efforts of Retirement Value. The structure of the program precluded the investors from having any managerial control over the investments. Each investor executed powers of attorney authorizing Retirement Value and the selling licensee to act on the investor's behalf with respect to all aspects of the investment. Retirement Value was the owner of the life insurance policies, and Kiesling, Porter, Kiesling & Free PC ("Kiesling Porter) was the beneficiary. Retirement Value made all the significant decisions impacting the investment program, including which life insurance policies to purchase, the amount to pay for a given policy and the amount and frequency of premium payments. In addition, Retirement Value performed all of the duties necessary to manage the policies including negotiating the purchase of the policy, purchasing the policy, negotiating the premium payments to be made on the life insurance policies, procuring the life expectancy of the insureds,

making the premium payments on the policies, setting up and managing premium reserves, determining whether additional premiums are necessary to keep the policies in force and making those premium calls on investors, pursuing, administering, negotiating and collecting claims upon maturity of a policy, reselling the investor's investment in the program in the event an investor is unwilling to make the additional premium payment, and paying administrative costs, including commissions to its licensees, fees payable to Kiesling Porter and funding its operations. These duties are the essential managerial efforts required to make the investment program a successful enterprise. Accordingly, the investments in the Retirement Value Resale Life Insurance Policy Program are investment contracts and, thus, securities under state and federal law.

20. In addition, the investments in the Resale Life Insurance Policy Program are notes or other evidence of indebtedness as defined under the state and federal securities laws. Retirement Value's investment contract for qualified funds is expressly called a "note" and contains the usual features of a note. The non-qualified investment contract is not denominated as a note but it calls for the investor to provide money to Retirement Value in exchange for a promise to repay that amount of money plus a fixed return. In its licensee training seminars, Retirement Value repeatedly referred to all investments as loans and generally disavowed the intent to sell a portion of an insurance policy. Its marketing materials described the use of funds as "allow[ing] Retirement Value to purchase and to own insurance policies." Moreover, the investment is structured such that neither legal nor beneficial ownership of either the policies or the death benefit was ever transferred from Retirement Value. The investors have no legal or beneficial interest in the policies and are entitled to repayment of their investment regardless of whether any individual policy remains in place or was even purchased by Retirement Value.

21. Each of the investments was structured as a loan where the investors provided funds to Retirement Value in exchange for Retirement Value's promise to pay a fixed sum of money at an undetermined date in the future. Retirement Value's purpose was to finance the investments in the life insurance policies, and the investors were interested primarily in the profit the note was expected to generate. The investments in the Resale Life Insurance Policy Program were offered to a broad segment of the public because they were advertised and sold throughout the state of Texas and other states, raising \$77 million from 900 investors in just over a 10-month period of time. Finally, there is no other regulatory system applicable to the investments sold by Retirement Value and the investments were neither insured nor collateralized. Thus, the investments in the Resale Life Insurance Policy Program are notes that are securities.

B. Fraud in the Sale of Investments

22. Gray and Rogers caused Retirement Value to commit fraud in the sale of the Resale Life Insurance Policy Program. This fraud covered most aspects of the program from the structure of the investment, to the protections offered to the investors, to the potential return and to the risks of the investment. Material misstatements and omissions were made to the investors regarding the Re-Sale Life Insurance Policy Program, denying them the opportunity to make an informed investment decision. Quite simply, the investors did not receive the investment described to them by Retirement Value.

1 The Investors Are Not Irrevocable Co-Beneficiaries

23. In its marketing materials and otherwise, Retirement Value represented that the investors would be "irrevocable co-beneficiaries" in the policies associated with their investments. This representation was blatantly false. No investor is or ever was listed as a beneficiary on any policy of insurance acquired by Retirement Value. Instead, Kiesling Porter was the only named beneficiary under the policies. It, however, owed no contractual duty to the

investors and was, itself, merely a revocable beneficiary. In short, the investors are not beneficiaries under the policies and have no contractual interest in any particular policy. Gray and Rogers were well aware that the investors would not become irrevocable beneficiaries under the insurance policies acquired by Retirement Value. Both were actively involved in an affiliated company, Hill Country Funding, LLC, that sold investments in which investors actually did become irrevocable beneficiaries under policies of life insurance.

2 Investor Funds Were Not Held in Escrow

24. Retirement Value represented that all investor funds would be deposited in “escrow accounts” that would be managed by Kiesling Porter in its role as an “independent escrow agent” and that Retirement Value would not receive or handle investor money. In addition, Retirement Value represented that funds would be placed in segregated sub-accounts dedicated to each policy owned by Retirement Value and that funds in such sub-accounts would be used solely for the policy to which it was tied. Retirement Value described Kiesling Porter’s role as “your Third Party Fiduciary,” which would assure the safe-keeping of investor money. Retirement Value made numerous comments about the role of Kiesling Porter as the “protector” of the investor’s funds. For example, at the July 2009 licensee meeting, Dick Gray described Kiesling Porter’s role as “representing the money and protecting the money and protecting you from us in a sense.”

25. These statements significantly misstate the role of Kiesling Porter and the nature of the premium reserve accounts. First, the funds loaned to Retirement Value by the investors were not held in escrow and Kiesling Porter did not act as an escrow agent.¹ An escrow

¹ This is not to say that Kiesling Porter did not, by its own words and conduct, affirmatively assume duties to the investors, but that the contracts and legal structure created by Gray and Rogers attempts to avoid and disavow such duties.

agreement requires at least three parties – the two parties to the transaction and the escrow agent. Further, to create an escrow, the depositor – in this case, Retirement Value – must make an irrevocable deposit with the escrow agent and cede all control over the escrowed funds to the escrow agent. The escrow agent owes fiduciary duties to both parties, to release the escrowed property only upon the occurrence of the conditions set forth in the escrow agreement.

26. The “Master Escrow Agreement” between Kiesling Porter and Retirement Value does not satisfy this test. The only parties to the agreement were Kiesling Porter and Retirement Value. Further, Kiesling Porter agreed to “disburse funds as directed by Retirement [Value]” and that its liability was limited to transferring funds into sub-accounts “as directed by Retirement [Value];” paying premiums “upon written instruction by Retirement [Value];” and “disbursement of re-sale life insurance proceeds upon death of insured in accordance with written instruction from Retirement [Value].” In other words, Kiesling Porter acted only as the agent of Retirement Value. And, far from acting as the investors’ “Third Party Fiduciary,” the written agreement between Retirement Value and Kiesling Porter expressly disavowed any duties to the investors.

This Agreement is solely between Retirement [Value] and Kiesling [Porter]. Neither Participants investing funds nor Licensees are intended to be nor shall they be a party to this Agreement or a third-party beneficiary of this Agreement. Kiesling [Porter] has no responsibility, obligations or duties to such Participants and will have no contact with Participants other than the receipt of funds and transfer of such funds as directed by Retirement [Value].

Master Escrow Agreement at ¶ 23 (emphasis added).

27. Second, Retirement Value (with the acquiescence of Kiesling Porter) repeatedly commingled the funds held in the sub-accounts. Retirement Value routinely 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 a second policy. As an example on March 25, 2010, Retirement

Value directed Kiesling Porter to pay \$552,384 towards the purchase of policy AVL180-030510-MR² but to take the funds from the sub-accounts for the following policies:

<u>From the account for policy</u>	<u>Amount</u>
AXA091-012110-PC	\$ 61,878
AXA335-022410-PS	\$ 54,235
AVL180-030510-MR	\$136,045
LFG735-030510-AS	\$ 53,300
LFG311-031210-HM	\$ 96,450
AXA036-031610-PC	\$ 26,817
JHL633-031210-CT	<u>\$123,659</u>
Total	\$552,384

Only \$136,045 of the payment for the AVL180-030510-MR policy came from the correct sub-account. The remaining \$416,339 came from accounts that were to be set aside solely to pay expenses related to other policies. Kiesling Porter followed these instructions, without comment. Retirement Value directed Kiesling Porter to commingle funds in this manner on numerous occasions from April 2009 through March 2010.

28. In short, investors were led to believe that Kiesling Porter had custody and control over their funds and that Retirement Value “never touched the money.” In reality, Retirement Value at all times maintained control over the funds.

3 Retirement Value Overstated the Likely Return from the Investments and Understated the Likely Risks

29. In connection with the sale of investments in the RSLIPP, Retirement Value made a number of misrepresentations as to the risks and rewards of the investments. First, Retirement Value misrepresented the likelihood that an insured would survive beyond LE+24. Second, it misrepresented the premium cost that each investor would be expected to incur if the insured

² To preserve the insureds’ privacy, we are using the policy codes used by Retirement Value to sell the investments.

survived beyond Third, Retirement Value misrepresented the risk to the investor if the insured survived beyond LE+24.

a. Life Expectancy Calculations

30. The insured's life expectancy is a key component of the value of a life insurance policy and of the likelihood of success in the Re-Sale Life Insurance Program. If the insured lives more than 24 months longer than his or her calculated life expectancy, then by Retirement Value's own calculations the premium reserves would be exhausted and the investors would be required to pay future premium costs.

31. Retirement Value significantly misrepresented the insureds' likelihood of outliving their calculated life expectancy. In its written materials, Retirement Value represented that "90% of policies mature at or before projected LE" and that "95% of policies mature at or before LE plus 12 months." In other materials, Retirement Value represented that Midwest Medical was "accurate 95% of the time to LE" and had "98.5% accuracy within 12 months after expected LE." In conversations with the undercover investigator for the State Securities Board, Dick Gray represented that 95% of the insureds would die within 24 months of the life expectancy calculated by Retirement Value. All in all, Retirement Value strove to and succeeded in creating an impression that there was a very low risk (1.5% to 5%) that the insureds would outlive the premium reserve.

32. Retirement Value's representations as to this risk are wholly false. The life expectancy calculation used by Retirement Value and presented to the investors was Midwest Medical's calculation of the insured's median life expectancy. It is the point at which Midwest forecasted that 50% of the people who are statistically similar to the insured are expected to have died and 50% are expected to remain alive. Thus, even if Midwest Medical was 100% accurate

in its calculations (which it was not), there was at best a 50% likelihood that the insured would die at or before his or her life expectancy.

33. Retirement Value did not disclose, and in fact hid, its use of a median life expectancy from the investors. As a general matter, Retirement Value did not provide investors with copies of the life expectancy certificates when the investors made their investment decisions. Instead, it simply stated a life expectancy without disclosing that it was a median or explaining what that meant. After the investor's 10-day free look period expired, Retirement Value purported to provide the life expectancy certificates for the policies in which an investor invested. However, in many cases, Retirement Value provided only the first two pages of the three-page life expectancy certificate provided by Midwest Medical. The first two pages contain a narrative of the insured's health and a statement of the life expectancy. On the third page (the page often hidden by Retirement Value), Midwest Medical provided its statistical analysis. This analysis discloses that the life expectancy shown on the first two pages was a median. It also discloses a life expectancy at an 85% confidence level (i.e., the point at which Midwest Medical forecasted that 85% of the people like the insured are expected to have died). On average Midwest Medical's 85% life expectancy was just over LE+30. In other words, Retirement Value's assertion that there was a 95%-98.5% probability that the insured would pass away within LE+24 is contradicted by the Midwest Medical life expectancy certificates in its possession, which estimate the probability of death prior to LE+30 at less than 85%.

34. Even if RV had not misrepresented them, Midwest Medical's life expectancy calculations are unreliable. Midwest Medical has a very poor reputation and a history of regulatory problems. Its owner, George Kindness, is a convicted felon. He and Midwest Medical's predecessor, AmScot Medical, were accused of falsifying life expectancy calculations as part of fraudulent schemes to sell life insurance policies to investors. Retirement Value was

aware of these issues with Midwest Medical and failed to disclose them to investors. Moreover, Retirement Value knew that Midwest Medical's life expectancy calculations were shorter than those provided by more reputable companies. Thus, there is a significant probability (more than 50%) that the insured will live beyond LE+24 and that the investors would have to cover significant premiums for many years beyond LE+24. Failure to do so is not only a default for that investor, but places at risk the other investors who participated in that policy.

35. In addition, the State obtained a report by HMH Consulting on Midwest Medical's performance as an estimator of life expectancies. This report showed that Midwest Medical's Actual to Expected Performance to be 42%. HMH reviewed 14,528 the life expectancy certificates issued by Midwest Medical. Based on Midwest Medical's predictions, HMH expected to observe that 3,319 subjects had died as of the study's effective date. Actually, only 1,395 people had died. As a general standard, a life expectancy underwriter's actual to expected performance should be between 90% (too short) and 110% (too long), with 100% considered perfect.

36. Both Rogers and Gray falsely claimed that the HMH study showed that Midwest Medical had an actual to expected performance of 92%. They made these representations even though they did not have the report in their possession and after receiving warnings that the descriptions of the report they had received were not reliable.

37. Further, Retirement Value misrepresented where it obtained life expectancy calculations and how it used them. When it became clear that investors who found out about George Kindness and the issues facing Midwest Medical, were refusing to invest in the RSLIPP Gray and Rogers decided to hide Midwest's involvement. They directed that Midwest Medical be removed from the marketing materials and caused the materials to refer instead to unnamed LE providers. From this point forward, Retirement Value represented in writing and in oral

communications with potential investors that it used the longest of three independent life expectancy calculations. Retirement Value did not in fact obtain any life expectancy calculation, but rather continued to rely exclusively on Midwest Medical's certificate which was provided by James Settlement Services. Contrary to its representations, Retirement Value did not obtain any life expectancy calculations and clearly did not use the longest of three calculations.

38. Moreover, Gray and Rogers knew that the investors considered the information regarding Kindness and Midwest Medical to be material to their investment decisions. As Kindness' regulatory issues were coming to light, an increasingly growing number of licensees were complaining that they were losing sales due to Midwest Medical's and Kindness' reputational issues. Gray and Rogers conspired to affirmatively conceal its use of Midwest Medical's life expectancy certificates, in the hopes that omission and ambiguity would avoid uncomfortable inquiries.

b. Premium Cost

39. Retirement Value disclosed that if the underlying insured survived LE+24, each investor would have to cover its pro rata portion of the premiums. However, as previously mentioned, Retirement Value falsely led investors to expect that there was only a 1.5%-5% chance that an insured would survive beyond LE+24. Moreover, Retirement Value also misrepresented the cost of maintaining the policy in force after the premium reserves expired at LE+24. In its projections to investors, Retirement Value represented that the premiums paid by the investors after the expiration of LE+24 would be the same as the premiums paid prior to LE+24. This representation was false. In a universal life policy, which is the only type of policy that Retirement Value purchased, the cost of insurance – the amount of money that must be paid each month to keep the policy in force – rises each year. As the underlying insured ages, this increase in cost of insurance increases dramatically.

40. When an insurance company sells a universal life policy, it typically sets a planned premium. The planned premium is substantially larger than the amount of money initially required to keep the policy in force. The excess cash is deposited with the insurance company and earns interest. In later years when the cost of insurance exceeds the planned premium, there should be sufficient cash value in the policy to pay the difference between the planned premium and the cost of maintaining the policy.

41. Retirement Value, like most life settlement companies, paid only the amount necessary to maintain the policy in force until the next premium payment was due. As a routine matter, Retirement Value engaged in premium optimization – working with the insurance company to determine the minimum payment need to keep the policy in force until the next premium is due. In this manner, the current amount required to maintain the policy is reduced at the expense of the cash value which would otherwise subsidize the cost of insurance in later years. As a result, the premiums needed to keep the policies in force after LE+24 would be substantially higher than those estimated at the time of investment.

c. Risk on Non-Payment by Other Investors

42. Retirement Value failed to disclose the risk of loss, if the other investors on a policy failed to pay their share of the post-LE+24 premiums. While Retirement Value's debt to any investor who defaulted on its portion of a post LE+24 premiums would be extinguished, Retirement Value remained liable to pay each investor who paid his or her share of the additional premiums. However, Retirement Value would be able to do so only if it were able to keep the policy in force. Thus, Retirement Value would have to: (i) solicit additional premiums from the non-defaulting investors; (ii) pay the premiums itself; or (iii) find a new investor to take over the defaulting investors positions. Retirement Value made no disclosures regarding its own credibility or ability to cover such post-LE+24 premium shortfalls. As of the date of the TRO,

Retirement Value had distributed substantially all available cash to its owners and retained no reserves to cover such a contingency. Further, Retirement Value had no other means of repaying the investors, except for the proceeds from the life insurance policies. In any case, the success of the investment turned on Retirement Value's success in raising money and selling investments. If Retirement Value could not raise the funds necessary to cover a premium shortfall, whether by selling new investments or from another source, then the respective policy would lapse and even those investors who complied with their obligation to pay premiums past LE + 24 would lose their entire investment.

43. Retirement Value did not disclose this risk to the investors. Nor did Retirement Value provide the investors with any information with which to make an informed decision as to Retirement Value's ability to pay additional premiums either from its own funds or by selling additional investments.

4 Retirement Value Failed to Disclose Dick Gray's Regulatory History and Involvement with Other Life Settlement Scams

44. In addition to its other misrepresentations, Retirement Value failed to disclose material information regarding the background of Dick Gray, the CEO and majority owner of Retirement Value. Undisclosed but highly material is Gray's history of regulatory trouble and his involvement with several notable life settlement scams. On January 25, 2007, the Texas Banking Commissioner issued an Emergency Order to Cease and Desist Activity against Dick Gray dba First Security Trust because the Texas Department of Banking had not authorized Gray to operate a trust company in Texas or to use the word "trust" in the name of his business, and Gray was not properly licensed to operate a trust company in Texas. In September 2008, Dick Gray, individually and in his capacity as Managing Member of Hill Country Funding, LLC, filed an Undertaking with the Texas State Securities Commissioner whereby Gray agreed to rescind

transactions made in connection with the fraudulent sale of bonded life settlement contracts purportedly secured by Provident Capital Indemnity, Ltd., and promised to comply with all provisions of the Texas Securities Act. Neither HCF nor Richard Gray fulfilled this undertaking. In June 2009, the Texas Department of Insurance filed a notice of hearing with the State Office of Administrative Hearings in Docket No. 454-09-4867C, which sought the revocation of Dick Gray's insurance license based in part on his conduct as a sales agent of Secure Investment Services, Inc. Moreover, Dick Gray sold life settlement investments on behalf of Secure Investment Services and American Settlement Associates. Both SIS and ASA were shut down by the SEC as Ponzi schemes. Upon information and belief, Elizabeth Gray also sold investments in SIS and ASA through her association with Hill Country Funding. Both David and Elizabeth Gray were aware of Dick Gray's regulatory history and background but participated in the decision not to disclose it.

III. Retirement Value Was Insolvent

45. 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. Retirement Value paid Kiesling Porter a fee equal to 1% of the face value of each policy and the licensees a commission of no less than 16% of the money invested. The fee to Kiesling Porter worked out to be about 2% of the money invested. In addition, Retirement Value used about 14% to fund its overhead (expenses other than purchasing policies, premiums and fees to licensees and Kiesling Porter). Approximately half of the money allocated to overhead was paid to the members of Retirement Value.

46. The only source that Retirement Value had for repaying the money owed to the investors was the proceeds of the policies that it purchased. Retirement Value significantly

overpaid for the policies it purchased and failed to reserve sufficient funds to keep the policies in force through maturity. Because Retirement Value sold investments based on the proceeds of individual policies, the proceeds of policies that matured early could not be used as a source of funds to maintain the remaining policies in force.

47. The reserves were inadequate to maintain the policies in force until their reasonably expected maturities. The amount of the premium reserve for a given policy was calculated by Retirement Value based on the median life expectancy of the insured plus 24 months and on a schedule of estimated premiums provided by the seller of the policies, James Settlement Services, LLC (“JSS”). The life expectancy calculations were provided by JSS and calculated by Midwest Medical Review, LLC. Because Retirement Value based its reserve calculation on the median life expectancy, there was a high probability that insureds would outlive the reserves even if Midwest Medical’s calculations were correct.

48. Midwest Medical’s calculations were not correct. They were unreasonably short. Retirement Value anticipated that life expectancy calculations by well known and reputable underwriters would be 180% longer than those by Midwest Medical. Comparison of calculations on the same insureds by Midwest Medical to those by reputable companies shows that the calculations by the reputable companies were in fact more than 180% longer. Retirement Value has and at all times had insufficient funds on hand to meet these obligations.

49. Retirement Value did have the ability to call on the investors to pay their share of the premiums if the insured lived beyond the reserves. However, Retirement Value promised the investors that any future premium calls would be based on the annual premium paid when the investment was made. Collecting premiums based on the annual premium paid when the investment was made would not generate sufficient funds to keep the policies in force. The policies are universal life policies – a key feature of which is that amount required to keep them

in force increases over time. The premiums necessary to keep the policies in force at the time premium call would be made are substantially higher than those the investors paid initially. Moreover, it is very probable that a number of investors would fail to make satisfy the premium call. If this happened, Retirement Value would have to make up the shortfall or lose the entire policy leaving it unable to pay. Retirement Value reserved no funds to meet either of these likely obligations.

50. The purchase price was set by JSS at an amount that exceeded the fair market value of the policies that Retirement Value purchased. Although the price was arguably based on the life expectancy calculated by Midwest Medical, Retirement Value was fully aware that the Midwest Medical calculations were unreasonably optimistic. Retirement Value agreed to overpay JSS to compensate JSS and its principal, Ron James, for their assistance in creating the fraudulent scheme.

51. Of the \$77 million that Retirement Value obtained as loans from investors, Retirement Value diverted \$5.4 million to its members and officers as follows:

Dick and Catherine Gray		Wendy Rogers	
Dividends (10/6/09 to 3/5/10)	\$2,139,000	Dividends (10/6/09 to 3/5/10)	\$688,000
2010 Tax Prepayment	599,200	2010 Tax Prepayment	149,800
Dick Gray salary (2009-10)	210,574	Wendy Rogers salary (2009-10)	133,693
C Gray (2009-10)	45,833	Wendy Rogers, Licensee	12,300
Dick Gray, Licensee	13,400		
Total	\$3,008,007	Total	\$983,793
Bruce Collins		David and Elizabeth Gray	
Honorarium as COO	\$75,000	Buyout Agreement (2010)	\$231,155
B Collins, Licensee	43,390	Dividends (2009)	579,307
Collins Marketing, Licensee	469,799		
Total	\$588,189	Total	\$810,462

52. In addition, Gray and Rogers caused Retirement Value to divert over \$1 million to HCF-TX, a company owned and controlled by Dick and Catherine Gray. In a series of transactions occurring in February and March of 2010, Retirement Value and HCF-TX transferred significant sums of money between them. The net result of these transactions was the transfer of \$1,150,000 from Retirement Value to HCF-TX.

53. On March 30, 2010 – the day that the Texas State Securities Board served its emergency cease and desist order on Retirement Value; Gray obtained a cashier’s check drawn on the HCF-TX account at First Commercial Bank in the amount of \$1,075,000 (all of which came from Retirement Value) and redirected another Retirement Value check in the amount of \$75,000 payable to HCF-TX, and Rogers withdrew all of the funds remaining in Retirement Value’s bank account (\$342,000). They deposited these funds into an account at JP Morgan Chase in the name of Special Acquisitions, Inc., a Texas corporation (“Special Acquisitions”). Special Acquisitions was formed on March 30, 2010 by Carie Morales, a part-time employee of Retirement Value and a long-time friend of Rogers. Carie Morales was Special Acquisitions’ sole owner, officer and director. The sole signatory on the Special Acquisitions account at JP Morgan Chase was Ms. Morales. Gray and Rogers intentionally created a corporation, in which the public record did not reflect them as having any interest in; to hide Retirement Value’s remaining assets from the State as it continued its investigation.

54. In November 2009, David and Elizabeth Gray entered into an agreement with Retirement Value (the “Membership Interest Transfer Agreement”) under which Retirement Value would redeem their 20% membership interest for \$1,200,000 payable over three years. At the time that the Membership Interest Transfer Agreement was executed, the membership interests held by Defendants were not reasonably worth \$1,200,000. In fact, they were largely

worthless. Retirement Value paid \$231,155 to David and Elizabeth Gray in partial satisfaction of this obligation.

55. During the entire time it was operational, Retirement Value was insolvent in that its debts always exceeded its assets.

CAUSES OF ACTION

I. Breach of Fiduciary Duty by Gray and Rogers

56. The allegations set forth in each and every preceding paragraph are incorporated herein by reference.

57. As members, managers and officers, Gray and Rogers owed fiduciary duties of loyalty, good faith and due care to Retirement Value. As alleged more fully above, they willfully and intentionally breached the duties of loyalty and good faith to Retirement Value in at least the following respects:

- a. Causing Retirement Value to conduct an unregistered sale of securities without an exemption from registration in violation of federal and state securities laws in Texas, Florida, California and elsewhere in order to increase sales so that more proceeds of the scheme could be diverted to themselves;
- b. Causing Retirement Value to sell securities by virtue of numerous false representations and omissions of material fact in violation of federal and state securities laws in Texas, Florida, California and elsewhere in order to increase sales so that more proceeds of the scheme could be diverted to themselves;
- c. Causing Retirement Value to commit a widespread fraudulent scheme in order to increase sales so that more proceeds of the scheme could be diverted to themselves;
- d. Causing Retirement Value to pay commissions to unregistered salespersons in furtherance of their fraudulent scheme;
- e. Causing Retirement Value to overpay for assets in furtherance of their fraudulent scheme;

- f. Diverting funds from Retirement Value to HCF and Special Acquisitions in order to hide those funds from the State and to prevent them from being available to satisfy likely claims by the State and investors:
- g. Causing Retirement Value to distribute the proceeds of the fraud to themselves and to David and Elizabeth Gray in violation of the Texas Business Organizations Code and without the adherence to any corporate formalities;
- h. Misappropriating corporate assets for the benefit of themselves and their relatives;
- i. Causing Retirement Value to maintain fraudulent and misleading financial records:
- j. Causing Retirement Value to undertake more debt than it could reasonably afford to repay so that more proceeds of the scheme could be diverted to themselves;
- k. Causing Retirement Value to instruct Kiesling Porter to misapply and mishandle investor funds so that the premium reserves that Retirement Value had promised to maintain were not maintained; and
- l. Causing Retirement Value to establish artificially low premium reserves based on life expectancy and cost of insurance estimates that were known not to be reliable, accurate or credible in furtherance of their fraudulent scheme.

As a result of these breaches of duty, Gray and Rogers proximately caused damages to Retirement Value in excess of the minimum jurisdictional limit of this Court including without limitation, substantial liabilities to investors and the State of Texas as well as the complete destruction of Retirement Value's business. Because of the willful nature of their misconduct, the Receiver seeks punitive and exemplary damages as allowed by law.

58. As alleged fully above, Gray and Rogers violated their duty of care to Retirement Value in at least the following respects:

- a. Causing Retirement Value to conduct an unregistered sale of securities without an exemption from registration in violation of federal and state securities laws in Texas, Florida, California and elsewhere;
- b. Causing Retirement Value to sell securities by virtue of numerous false representations and omissions of material fact in violation of federal and

state securities laws in Texas, Florida, California and elsewhere in order to increase sales;

- c. Causing Retirement Value to pay commissions to unlicensed salespersons in order to increase sales
- d. Causing Retirement Value to commit a widespread fraudulent scheme in order to increase sales;
- e. Causing Retirement Value to pay for assets amounts known or reasonably expected to be in excess of their fair market value;
- f. Failing to cause Retirement Value to engage in meaningful due diligence regarding the assets it was acquiring;
- g. Causing Retirement Value to undertake more debt than it could reasonably afford to repay;
- h. Causing Retirement Value to divert funds to HCF and Special Acquisitions in order to hide those funds from the State and to prevent them from being available to satisfy likely claims by the State and investors;
- i. Failing to ensure that Retirement Value's books and records fairly and accurately represented its financial affairs and results from operations;
- j. Causing Retirement Value to instruct Kiesling Porter to misapply and mishandle investor funds so that the premium reserves that Retirement Value had promised to maintain were not maintained; and
- k. Causing Retirement Value to establish artificially low premium reserves based on life expectancy and cost of insurance estimates that were known not to be reliable, accurate or credible.

As a result of these breaches of duty, Gray and Rogers proximately caused damages to Retirement Value in excess of the minimum jurisdictional limit of this Court including without limitation, substantial liabilities to investors and to the State of Texas as well as the complete destruction of Retirement Value's business.

59. All of the acts of Gray and Rogers complained of herein were committed by each in bad faith and not in the exercise of reasonable business judgment.

II. Refund of Distributions – Cash Payments as to Gray, Mrs. Gray and Rogers

60. The allegations set forth in each and every preceding paragraph are incorporated herein by reference.

61. Defendants received substantial sums in distributions from Retirement Value in 2009 and 2010. At the time that they received these distributions, Defendants were members of Retirement Value. At all relevant times, Retirement Value was insolvent in that its total liabilities exceeded its total assets. Pursuant to § 101.206 of the Texas Business Organizations Code, Retirement Value was prohibited from making these distributions.

62. Defendants knew that Retirement Value was insolvent when it made distributions to them. Retirement Value was member-managed such that each member had a role in the operation of the business and each was charged with its operation. Defendant Gray was a manager of Retirement Value and its CEO. Defendant Rogers was a manager of Retirement Value and an officer. Catherine Gray was the Secretary of Retirement Value and well informed as to its status. .

63. Retirement Value is entitled to a refund of the funds distributed to Defendants.

III. Fraudulent Transfer

64. The allegations set forth in each and every preceding paragraph are incorporated herein by reference.

65. At all relevant times, Defendants were “insiders” of Retirement Value. At all relevant times, Gray, Rogers and Mrs. Gray were owners and control persons of Retirement Value. David Gray is Gray’s brother and Defendant Elizabeth Gray is his sister-in-law. At all relevant times, Retirement Value was insolvent. The sum of its debts exceeded the fair value of all of its assets.

66. Neither the Defendants nor David or Elizabeth Gray provided any value in exchange for the funds they received as distributions from Retirement Value.

67. The membership interests exchanged by David and Elizabeth Gray for the Retirement Value's obligation to pay them \$1.2 million as set forth in the Membership Interest Transfer Agreement were worth far less than \$1.2 million.

68. The payment of distributions to the Defendants and to David and Elizabeth Gray was a violation of the Texas Uniform Fraudulent Transfer Act in that they were made by Retirement Value

- a. with actual intent to hinder, delay, or defraud the creditors of Retirement Value;
- b. without receiving a reasonably equivalent value in exchange for the transfer or obligation, and Retirement Value (1) was engaged or was about to engage in a business or a transaction for which its remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due; or
- c. without receiving a reasonably equivalent value in exchange for the transfer or obligation and Retirement Value was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

The Receiver is therefore entitled to avoid these transfers. The Receiver seeks the return of any dividend payments made to Defendants and for a constructive trust to be imposed on any property acquired by Defendants with the proceeds of the dividend payments. In addition, Gray and Rogers are jointly and severally liable for all payments and transfers to David and Elizabeth Gray.

69. The diversion of funds from Retirement Value to HCF and Special Acquisitions was a violation of the Texas Uniform Fraudulent Transfer Act in that they were made by Retirement Value

- a. with actual intent to hinder, delay, or defraud the creditors of Retirement Value;
- b. without receiving a reasonably equivalent value in exchange for the transfer or obligation, and Retirement Value (1) was engaged or was about to engage in a business or a transaction for which its remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due; or
- c. without receiving a reasonably equivalent value in exchange for the transfer or obligation and Retirement Value was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

The Receiver is therefore entitled to avoid these transfers. The Receiver seeks the return of any funds diverted to HCF or Special Acquisitions and for a constructive trust to be imposed on any property acquired by such entities with the proceeds of the dividend payments. In addition, Gray and Rogers are jointly and severally liable for all payments and transfers to HCF or Special Acquisitions.

70. Retirement Value's execution of the Membership Interest Transfer Agreement and all payments made under it violated the Texas Uniform Fraudulent Transfer Act in that they were made by Retirement Value

- a. with actual intent to hinder, delay, or defraud the creditors of Retirement Value;
- b. without receiving a reasonably equivalent value in exchange for the transfer or obligation, and Retirement Value (1) was engaged or was about to engage in a business or a transaction for which its remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due; or
- c. without receiving a reasonably equivalent value in exchange for the transfer or obligation and Retirement Value was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

The Receiver is therefore entitled to avoid the Membership Interest Transfer Agreement and any payments made under it. Gray and Rogers are jointly and severally liable for any damage caused to Retirement Value and to its creditors caused by the Membership Interest Transfer Agreement.

71. Even if the Membership Interest Transfer Agreement cannot be avoided, the payment by Retirement Value of \$231,155 pursuant to it should be avoided because the payment was to insiders for an antecedent debt, the Retirement Value was insolvent at that time, and the Defendants had reasonable cause to believe that Retirement Value was insolvent.

72. The Receiver has been required to hire the undersigned attorneys to bring this suit and to pay them a reasonable fee for which it is entitled to recover under the Texas Uniform Fraudulent Transfer Act.

WHEREFORE, the Receiver requests that the Cross-Claim Defendants be cited to appear and that they have judgment against Defendants for damages both general and special, exemplary damages, a constructive trust, attorneys' fees, costs of suit, prejudgment and post-judgment interest, and all other relief to which they may be entitled.

Respectfully submitted,



Michael D. Napoli
State Bar No. 14803400
michael.napoli@klgates.com

Kirstin D. Dietel
State Bar No. 24032019
kirstin.dietel@klgates.com
K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
214.939.5500
214.939.5849 (telecopy)

Mary Schaerdel Dietz
State Bar No. 03741500
K&L Gates LLP
111 Congress Ave., Suite 900
Austin, Texas 78701
512.482.6800
512.482.6859 (telecopy)
mary.dietz@klgates.com

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 14th day of February 2011:

Jack Hohengarten
Office of the Attorney General
Financial Litigation Division
300 W. 15th Street, Sixth Floor
PO Box 12548
Austin, Texas 78711-2548

Christopher B. Bradford
Clark, Thomas & Winters, P.C.
P. O. Box 1148
Austin, Texas 78767

Spencer C. Barasch
Matthew G. Nielsen
Andrews Kurth, LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201

Geoffrey D. Weisbart
Hance Scarborough, LLP
111 Congress Avenue, Suite 500
Austin, Texas 78701

Patrick S. Richter
Shannon, Gracey, Ratliff & Miller, LLP
98 San Jacinto Boulevard, Suite 300
Austin, Texas 78701

Alberto T. Garcia III
Garcia & Martinez, L.L.P.
5211 W, Mile 17 ½ Road
Edinburg, Texas 78541



Michael D. Napoli