

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.	§	126 th JUDICIAL DISTRICT

**RECEIVER'S RESPONSE TO INTERVENORS'
MOTION TO RECONSIDER THEIR MOTION TO RELEASE FUNDS**

Eduardo S. Espinosa, in his capacity as the court-appointed Receiver of Retirement Value, LLC, files this Response to the Bejcek Intervenors' Motion to Reconsider their Motion to Release Funds (the "Motion to Reconsider").

SUMMARY

The Court denied the Bejcek Intervenors' Motion to Release funds by its order dated January 26, 2011. The Bejceks' Motion to Reconsider offers nothing new; it simply rehashes the same arguments made and already rejected by the Court. In short, the Bejceks ask the Court to change its mind. Ultimately, the Bejceks cannot overcome the fact that their rescission claim is fundamentally an equitable claim that is entitled to be treated the same as the claims of all the other defrauded Retirement Value investors.

ARGUMENT

The Bejceks sent money to Retirement Value (via its payment agent, Kiesling Porter) in order to invest in Retirement Value's RSLIP program. That the Bejceks were victims of fraud and acted in good faith reliance on numerous misrepresentations by Retirement Value and its licensees is undisputed. The money sent by the Bejceks was received by Retirement Value prior to the entry of the cease and desist order by the State Securities Board. And, it was held in an account that is indisputably part of the receivership.

The fact that the Bejceks gave their money to Retirement Value and the money was found in a receivership account makes it *prima facie* a receivership asset. The line distinguishing between what is and what is not a receivership asset must be drawn somewhere, and in this case that line was drawn at March 29, 2010 when the cease and desist order was issued. In *SEC v. Credit Bancorp, LTD.*, the Second Circuit rejected an investor's attempt to exclude shares of stock that had been transferred to a corporation that defrauded the investor from the corporation's receivership estate for purposes of a *pro rata* distribution to the defrauded victims. 290 F.3d 80, 83-83 (2d Cir. 2002). In doing so, the court distinguished cases that permitted the return of identifiable assets to particular investor victims "because the assets had somehow been segregated in the manner of true trust accounts and/or had never been placed in the defrauder's control." *Id.* at 90 (citing *Anderson v. Stephens*, 875 F.2d 76, 80 (4th Cir. 1989) (ordering return of assets that were deposited in defrauder's account after account had been frozen by the district court, on the ground that the asset freeze precluded the bank from conducting further transactions)). In this case, the Bejceks' investment was not segregated into true trust accounts or otherwise placed out of Retirement Value's control; Retirement Value exercised control over all the funds in the "escrow accounts" at all times for its own benefit. Because Retirement Value

had the Bejceks' money in an account it controlled on March 23, six days before the cease and desist order issued, it is a receivership asset.

In order to avoid this basic application of law, the Bejceks argue that Retirement Value somehow held their assets in a representative capacity, i.e., that the money in Retirement Value's accounts was not necessarily Retirement Value's money. The Bejceks re-urge their first and second points, making the same arguments as in their original Motion for Release of Funds. As fully briefed in the Receiver's Response to Bejcek Intervenors' Motion to Release Funds, the alleged escrow the Bejceks claim to have been promised simply did not exist. That the Bejceks were told that "Kiesling Porter would manage the funds . . . and that [Retirement Value] would **never** handle their money **at any stage of the program**" does not make it so. Motion to Reconsider at 4 (emphasis in original). Simply put, this representation was a lie. It was just one of the many misrepresentations made to the Bejceks and all other investor victims.

There was no escrow agreement for the benefit of the investor victims. The relationship between Kiesling Porter and Retirement Value was that of a payment agent. The "master escrow agreement" between Retirement Value and Kiesling Porter makes this perfectly clear. The only parties to the agreement were Kiesling Porter and Retirement Value. Master Escrow Agreement at ¶ 23. 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]." *Id.* at ¶¶ 6, 8. In other words, Kiesling Porter acted only as the agent of Retirement Value. Far from acting as the investors' "Third Party Fiduciary," Kiesling Porter expressly disavowed any duties to the investors. *Id.* at ¶ 23.

The Bejceks, like all the other defrauded investors, are creditors of Retirement Value. The Bejceks gave their money to Retirement Value, albeit on false pretenses. It does not matter whether the Bejceks' Policy Participation Agreement was executed by Retirement Value. It also does not matter that the Bejceks happen to be one of the last of the 900 investors defrauded by Retirement Value. Ultimately, the Bejceks rely on equitable principles in asserting that they are entitled to their money back. Each of the other 900 investors also has a legal or equitable right to his or her money back. None is superior to the other. Whatever the basis is for their claim to a return of their investment, the Bejceks should be treated no better and no worse than any of the other investor victims. As a creditor, the Bejceks must assert their claim in accordance with the plan of distribution to be adopted by the Court.

CONCLUSION

The Bejcek Intervenors ask this Court to change its mind but offer nothing new to support their request. The Bejceks provide no basis on which they should be granted preferential treatment over the 900 other investor victims. Accordingly, the Receiver respectfully requests that the Court deny the Intervenors' Motion to Reconsider their Motion to Release Funds.

Respectfully submitted,



Michael D. Napoli
State Bar No. 14803400
Kirstin D. Dietel
State Bar No. 24032019
K&L Gates LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
214.939.5500
214.939.5849 (telecopy)
michael.napoli@klgates.com
kirstin.dietel@klgates.com

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 e-mail and certified mail return receipt requested, on this the 11th day of August 2011:

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

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

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

Richard H. Gray
301 Main Plaza, #349
New Braunfels, Texas 78130
Pro se

Milton G. Hammond
Law Office of Milton G. Hammond
6406 La Manga Drive
Dallas, Texas 75248

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

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

Isabelle Antongiorgi
Taylor Dunham, L.L.P.
301 Congress Ave., Suite 1050
Austin, Texas 78701

Wendy Rogers
1312 Havenwood Blvd.
New Braunfels, Texas 78132
Pro se
Via e-mail and regular mail



Michael D. Napoli