

CAUSE NO. C2010-1090D

EDUARDO S. ESPINOSA, in his capacity	§	IN THE DISTRICT COURT OF
as Temporary Receiver for	§	
RETIREMENT VALUE, LLC,	§	
	§	
Plaintiff,	§	
	§	COMAL COUNTY, TEXAS
vs.	§	
	§	
DAVID A. GRAY and ELIZABETH S.O.	§	
GRAY,	§	
Defendants.	§	433rd JUDICIAL DISTRICT

PLAINTIFF'S AMENDED ORIGINAL PETITION

Eduardo S. Espinosa, in his capacity as Temporary Receiver of Retirement Value, LLC ("Retirement Value"), files this suit against Defendants David A. Gray and Elizabeth S.O. Gray.

DISCOVERY CONTROL PLAN

1. Discovery in this action is intended to be conducted under Level 2 OF TEX. R.Civ.P. 190.2. Plaintiff 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, Plaintiff 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. Plaintiff Retirement Value is a Texas limited liability company. It was placed in receivership by order of the 126th Judicial District Court of Travis County, Texas at the request of the State of Texas. The Travis County court appointed Eduardo S. Espinosa as the temporary receiver of Retirement Value empowering him 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. Defendant David A. Gray is a former officer and former member of Retirement Value. David Gray does not have a designated agent for service of process. He may be served by serving the Texas Secretary of State who should forward process to 4559 E 107th Street, Tulsa, OK 74137-6853.

5. Defendant Elizabeth S. O. Gray is a former member of Retirement Value and the wife of Defendant David A. Gray. Elizabeth Gray does not have a designated agent for service of process. She may be served by serving the Texas Secretary of State who should forward process to 4559 E 107th Street, Tulsa, OK 74137-6853.

JURISDICTION AND VENUE

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

7. The court has personal jurisdiction over the Defendants as each has entered into a contract with a Texas resident that is performable in part in Texas. In addition, Defendants conduct business in the state of Texas. This suit arises out of the conduct of Defendants' business in Texas.

8. Venue is proper in this county because all or a substantial part of the events or omissions giving rise to the claims asserted occurred in Comal County. And, the principal place of business of Retirement Value, LLC is in Comal County.

THE RECEIVERSHIP

9. Retirement Value was in the business of selling securities to the public based on life insurance policies (the "Resale Life Insurance Policy Program") 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 unit holder 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.

10. 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 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 and assets. The Travis County court has subsequently issued a temporary injunction against Retirement Value continuing the appointment of Espinosa as the receiver for Retirement Value.

FACTUAL BACKGROUND

11. Retirement Value was formed as a Texas limited liability company in January 2009. Its original members were Dick and Catherine Gray, David and Elizabeth Gray and Wendy Rogers. Dick and Catherine Gray owned 60% of the company, David and Elizabeth Gray owned 20% and Wendy Rogers owned 20%. From its formation until November 2009, David Gray served as the Vice President – Finance, Chief Financial Officer, Treasurer and Comptroller of Retirement Value for which he was paid a salary of \$130,000 per year. Elizabeth Gray was the Compliance Officer for Retirement Value and was paid a salary \$75,000 per year.

12. Retirement Value's sole business was to operate a fraudulent investment scheme. It sold securities which were based on the proceeds of life insurance policies to be owned by Retirement Value. Each of the securities 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. The amount that Retirement Value agreed to pay was tied to the calculated life expectancy of insureds under a policy of life insurance allegedly owned by Retirement Value. In all instances, Retirement Value agreed to pay a return of 16.5% per year for the insured's calculated life expectancy. Thus, Retirement Value would pay \$18,800 on a \$10,000 investment in a policy where the insured had a calculated life expectancy of 64 months. The date on which the insured under the policy died set the date that the investment matured and Retirement Value would be required to repay the loan. The date that the loan matured did not affect the amount of money that Retirement Value was obligated to pay the investor except that investors were entitled to a return of unused premiums, if any. Each investor was allowed to select a life insurance policy or policies to which to tie his or her investment from a rotating portfolio of ten policies maintained by Retirement Value. On average, Retirement Value owed its investors \$16,944 for every \$10,000 invested.

13. 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 borrowed approximately \$77 million from more than 800 investors promising to pay them approximately \$130 million.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. Of the \$77 million that Retirement Value obtained as loans from investors, Retirement Value diverted \$5.4 million to its members and officers. David and Elizabeth Gray received \$810,462 exclusive of salary.

21. 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 Defendants in partial satisfaction of this obligation.¹

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

CAUSES OF ACTION

I. Declaratory Judgment -- Membership Interest Transfer Agreement Invalid

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

24. The Membership Interest Transfer Agreement constitutes a distribution in connection with their withdrawal as members of Retirement Value. Under the Texas Business Organizations Code, when a member withdraws from a Texas limited liability company, the company is allowed to distribute to the member no more than the fair value of the member's interest. In addition, the member is not entitled to any distribution if the company is insolvent at the time of withdrawal. Under the Membership Interest Transfer Agreement, Retirement Value agreed to pay \$1.2 million for Defendants' membership interest at a time when membership interests were essentially worthless. Moreover, Retirement Value was insolvent at the time the

¹ The \$231,155 does not include the salary paid to Defendants through the end of 2009 as required by the Membership Interest Transfer Agreement.

Membership Interest Transfer Agreement was executed. Accordingly, the Membership Interest Transfer Agreement violates the Texas Business Organizations Code.

25. The Receiver seeks a declaration from the Court that the Membership Interest Transfer Agreement is invalid and void and that all payments under it should be returned to Retirement Value.

26. 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 Declaratory Judgment Act.

II. Refund of Distributions – Cash Payments

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

28. Defendants received \$579,307 in distributions from Retirement Value in 2009. In addition, Defendants received \$231,155 in payments under the Membership Interest Transfer Agreement. 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.

29. 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 David Gray was the Chief Financial Officer of Retirement Value. Elizabeth Gray was also employed and actively engaged in the operation of the company.

30. Retirement Value is entitled to a refund of the \$810,462 that was distributed to Defendants.

III. Fraudulent Transfer

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

32. At all relevant times, Defendants were “insiders” of Retirement Value. At all relevant times, Dick Gray was an owner and control person of Retirement Value. Defendant David Gray is his brother and Defendant Elizabeth Gray is his sister-in-law. In addition, David Gray was an officer of Retirement Value throughout 2009 and both David and Elizabeth Gray were members and managers of Retirement Value.

33. At all relevant times, Retirement Value was insolvent. The sum of its debts exceeded the fair value of all of its assets.

34. Neither David Gray nor Elizabeth Gray provided any value in exchange for the \$579,307 they received as distributions from Retirement Value.

35. The membership interests exchanged by Defendants 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.

36. The payment of \$579,307 in distributions to the Defendants 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.

37. 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. The Receiver seeks the return of any payments made pursuant to the Membership Interest Transfer Agreement and for a constructive trust to be imposed on any property acquired by Defendants with the proceeds of the Membership Interest Transfer Agreement.

38. 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.

39. 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.

JURY DEMAND

40. Plaintiff requests a jury trial.

WHEREFORE, Plaintiff requests that the Defendants be cited to appear and that they have judgment against Defendants for 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,



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ATTORNEYS FOR THE COURT APPOINTED
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