AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between JANET MORTENSON, SPECIAL RECEIVER FOR RETIREMENT VALUE, L.L.C.,	§	
Claimant,	§	No. 70 148 Y 00197 12
v.	§	
WELLS FARGO BANK, N.A., WELLS FARGO ADVISORS, L.L.C., WELLS FARGO INVESTMENTS, L.L.C., AND WHITNEY GILES MARTIN,	§	
Respondents.	§	

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the parties' arbitration agreement and having been duly sworn and having duly heard the parties' allegations and the evidence, AWARD, as follows:

INTRODUCTION

Claimant Janet Mortenson, Special Receiver for Retirement Value, L.L.C., made her demand for arbitration on April 2, 2012. Respondents Wells Fargo Bank, N.A., Wells Fargo Advisors, L.L.C., Wells Fargo Investments, L.L.C., and Whitney Giles Martin (collectively, "Wells Fargo") then filed their answering statement and counterclaims. The arbitration proceedings were conducted in accordance with the parties' agreement and the AAA Commercial Rules and Procedures for Large, Complex Commercial Disputes. Pursuant to the same authority and rules, the American Arbitration Association appointed Steven A. Harr, James "Chris" Chrisman Phillips, and Deborah G. Hankinson to serve as the Arbitrators.

In accordance with the Agreed Scheduling Order dated September 13, 2012, the parties filed their amended statement of claims and answering statement and counterclaims. The Special Receiver asserted claims for fraud, conspiracy to breach a fiduciary duty and to commit fraud, aiding and abetting breaches of a fiduciary duty and fraud, negligence, and aiding and abetting violations of the Texas Securities Act under TEX. REV. CIV. STAT. art. 581-33F(2), and sought to recover for alleged damages to Retirement Value, L.L.C., and punitive damages, as well as attorneys' fees, interest, and costs. Wells Fargo answered, generally denying the allegations, and asserted its affirmative defenses and counterclaims for costs, expenses, and attorney's fees associated with compelling arbitration and defending this arbitration.[1]

On February 18, 2013, Wells Fargo filed its Motion for Summary Disposition on all the Special Receiver's Claims. The Arbitrators granted the motion on the Special Receiver's negligence claim, but denied the remainder of the motion.

The Arbitration began on July 15, 2013. Over eight days, the parties presented witness testimony, documentary evidence, and the argument of counsel. At the conclusion of the proceedings, the parties agreed on the record to a post-hearing briefing schedule that was later memorialized in communications between the Arbitrators, AAA, and the parties. In accordance with that agreed schedule and after receiving the parties' post-hearing submissions, the proceedings were declared closed as of September 30, 2013. Having considered all the evidence and the arguments of counsel, the Arbitrators render this binding Final Award that Janet Mortenson, Special Receiver for Retirement Value, L.L.C., take nothing from Wells Fargo Bank, N.A., Wells Fargo Advisors, L.L.C., Wells Fargo Investments, L.L.C., and Whitney Giles Martin

[1] Wells Fargo has apparently abandoned its counterclaims for attorney's fees and for costs and expenses associated with compelling arbitration. Wells Fargo did not submit any evidence in support of these claims, and there is no mention of these claims in Wells Fargo's post-hearing brief.

and that Wells Fargo Bank, N.A., Wells Fargo Advisors, L.L.C., Wells Fargo Investments, L.L.C., and Whitney Giles Martin take nothing from Janet Mortenson, Special Receiver for Retirement Value, L.L.C.

BACKGROUND

Retirement Value, L.L.C.

This case involves the secondary market for life insurance policies. In this market, most companies purchase life insurance policies from insureds or brokers for insureds and then sell fractionalized interests in these policies to investors. Michael Beste specializes in assisting institutional investors in acquiring such interests, which are known as life settlements. Beste came up with the idea of a retail life-settlement product that would target individual private investors as opposed to large institutional investors and approached Ron James with his idea. Ron James and his son, Don James, do business under the name of James Settlement Services, LLC, acquiring life insurance policies from insureds or brokers and selling them to others. Ron James then introduced Beste to Dick Gray, because Gray had retail experience and could market the product that Beste had devised. The Jameses and Beste worked with Gray to design and implement the new investment scheme. The company was named Retirement Value.

Retirement Value, L.L.C, was formed in January of 2009 to acquire life insurance policies with funds obtained from third persons investing in Retirement Value's Re-Sale Life Insurance Policy Program ("RSLIPP"). Its original members were Dick Gray and his wife, Dave and Elizabeth Gray (Gray'a brother and sister-in-law), and Wendy Rogers (Gray's long-time assistant). Dick Gray controlled Retirement Value and its operations.

Retirement Value sold its product through a group of agents that it called licensees. Most of the licensees had insurance licenses, and several of them had securities licenses. Retirement

Value used a pyramid sales structure through which licensees who recruited other licensees received a share of the commissions from those they recruited. A handful of master licensees were at the top of the pyramid. The top licensees received commissions of either 16% or 18% of the funds invested by their clients in Retirement Value; licensees lower on the pyramid received a 10% commission with the remaining commission (typically 6%) going to their upstream licensees as an override. Retirement Value eventually had about 1,200 licensees.

Retirement Value's Re-Sale Life Insurance Policy Program

Investors did not purchase life settlements from Retirement Value. Instead, an investment in the RSLIPP was arguably structured as an ordinary loan to Retirement Value with agreed restrictions on the use of the funds. In exchange for the loans, Retirement Value agreed to pay a return of 16.5% simple interest for a set term, typically three to five years depending on the insured's life expectancy. However, the payment of interest and return of principal would not be paid "until an undetermined date in the future" when the insured died. If the insured lived twenty-four months past the life expectancy, the investors would have the choice of contributing a proportionate amount to cover ongoing premiums or forfeiting their investment. As a result, life expectancy was the key variable in determining the success or failure of an RSLIPP investment.

Retirement Value purchased the life insurance policies for the program from James Settlements at prices that exceeded the value of the policies. The policies were purchased with money Retirement Value acquired from RSLIPP sales. Retirement Value attempted to maintain a rotating portfolio of ten insurance policies from which each investor was allowed to select one or more life insurance policies to match with his or her loan to Retirement Value. Retirement Value promised investors that they would become irrevocable co-beneficiaries on the life

insurance policies, but those designations were never made. As well, the investors did not receive any ownership interest In the insurance policies. Retirement Value was the sole owner of the policies. Retirement Value offered the RSLIPP to a broad segment of the public, raised over $77.6 million from over 900 investors in just over ten months, and promised them approximately $125 million In return.

Retirement Value was required to reserve sufficient funds to pay premiums for two years beyond the insured's life expectancy as calculated by a company it claimed to be a reputable and highly skilled life-expectancy underwriter, Midwest Medical Review. Retirement Value assured its investors that there was a 95% chance that the insured would die on or before the date calculated by Midwest Medical and a less than 2% chance that the insured would live more than twelve months beyond the Midwest Medical life expectancy.

The life expectancies calculated by Midwest Medical, however, were inaccurate. While Retirement Value was selling the RSLIPP, Midwest Medical was facing accusations by the SEC that it had participated in a Ponzi scheme by providing fraudulently short life-expectancy certificates. Midwest Medical was apparently an outlier in the life-expectancy business, and the life-expectancy estimates obtained by more reputable firms were generally 2.5 times longer than the Midwest Medical calculations used by Retirement Value. The materially Inaccurate shorter life-expectancy calculations by Midwest Medical negatively affected the value of the investment made by investors.

Wells Fargo

Wendy Giles Martin is a Wells Fargo bank officer in the New Braunfels branch where Gray and at least one of his businesses were customers. Martin met Gray early in the life of Retirement Value, and he regularly communicated with her about his progress in developing the

new business and its banking needs. Although Dick Gray inquired of Martin about Wells Fargo providing additional services beyond serving as a depository, Wells Fargo declined to provide those services.

When Retirement Value began selling the RSLIPP program, Wells Fargo became the depository for the investor funds. It provided checking accounts to Kiesling Porter Kiesling & Free, PC, the law-firm "escrow agent" used by Retirement Value. By contract, Kiesling Porter was the entity Retirement Value charged with administering the investor funds deposited at Wells Fargo. The agreements between Retirement Value and the investors also designated Kiesling Porter as "the escrow agent" and provided as well that Wells Fargo was to act as a depository for the investor funds.

Kiesling Porter, not Retirement Value, instructed Wells Fargo concerning transactions in the Kiesling Porter accounts. Martin never took any action with respect to the Kiesling Porter accounts at the direction of anyone other than authorized signers from Kiesling Porter. There is no complaint that Wells Fargo improperly handled the Kiesling Porter accounts.

Although Wells Fargo denied Retirement Value any access or control over the Kiesling Porter accounts, Retirement Value, pursuant to its agreement with Kiesling Porter, did direct Kiesling Porter on what to do with the money. Retirement Value paid big commissions to itself (and to Gray) and the licensees off the top from the investors' funds. It comingled funds between policies taking funds invested for one policy and using them to purchase or support entirely different policies. It also routinely distributed funds to James Settlement without requiring that the policies be delivered and funneled increasing amounts of money to James Settlement at the expense of funding premium reserves. Coupled with the excessive commission structure, the comingling and prepayment to James Settlement Service caused Retirement Value

to fail to reserve as much money as it had represented it would. In October 2009, Retirement Value discovered that it had underfunded the premium reserves by about $2.6 million. As of May 2010, the short fall measured against the promised reserves exceeded $3 million.

Receivership

On March 29, 2010, the Securities Commissioner of Texas issued an Emergency Cease and Desist Order against Retirement Value, Bruce Collins (Retirement Value's COO), and Gray forbidding Retirement Value from continuing to sell securities through its program. On April 9, 2010, the Texas Commissioner of Insurance issued a cease and desist order forbidding Retirement Value from continuing to purchase insurance policies. The underlying lawsuit was filed on May 5, 2010, in the name of the State of Texas by the Attorney General of Texas acting at the request of the Deputy Securities Commissioner of Texas and acting within the scope of his official duties and under the authority of the Texas Securities Act and the Texas Deceptive Trade Practices Act.

The Travis County District Court appointed the Receiver "to take sole control of and possession of, and to manage the company, money, property, and assets of Retirement Value." The court also granted the Receiver the power to "file, prosecute, or defend any suit or suits by or against" Retirement Value. The court order appointing the Special Receiver authorized her to pursue claims against Wells Fargo on behalf of Retirement Value. This arbitration followed.

SPECIAL RECEIVER'S CLAIMS

The Special Receiver alleges that Dick Oray, through a series of misrepresentations that he and others made to the public, caused Retirement Value to conduct a scheme that dissipated its assets and left it owing money to investors that it could never pay back. Her claims against Wells Fargo are grounded in allegations that Whitney Martin, acting on behalf of Wells Fargo

Bank and Wells Fargo Advisors, helped Gray breach his fiduciary duty to Retirement Value with knowledge that Gray's actions were wrongful.[2] The Special Receiver originally asserted causes of action for: fraud; conspiracy to breach a fiduciary duty and to commit fraud; aiding and abetting breaches of a fiduciary duty and fraud; negligence; and aiding and abetting violations of the Texas Securities Act under TEX. REV. CIV. STAT. art. 581-33F(2). We granted summary judgment for Wells Fargo on the negligence claim, and the Special Receiver has now abandoned the remainder of her claims, except her claim for conspiracy in connection with Gray's breach of his fiduciary duty to Retirement Value and her claim for aiding and abetting the same wrongful activity. According to the Special Receiver, these alleged wrongs resulted in damages to Retirement Value that alternatively can be measured as: $90 million that Retirement Value cannot pay back to investors; $43 million Retirement Value wasted on the illegal scheme; or $43 million in restitution that the court has ordered Retirement Value to pay. The Special Receiver seeks to recover judgment against Wells Fargo Bank, Wells Fargo Advisors, and Martin, jointly and severally, for actual damages, punitive damages, post-judgment interest, and costs.

FINDINGS AND CONCLUSIONS

Conspiracy

Relying on the Texas Pattern Jury Charge, the Special Receiver argues that we are required to answer three questions in order to decide the merits of her conspiracy claim: (1) whether Gray breached his fiduciary duty; (2) whether his breach proximately caused Retirement Value's damages; and (3) whether Martin conspired with Gray to breach his fiduciary duty. We disagree that these are the elements that Texas law prescribes for a conspiracy claim and look to Texas precedent instead to ascertain the applicable law.

[2] The Special Receiver has abandoned her claims against Wells Fargo Investments, L.L.C.

To prevail on her claim that Wells Fargo conspired to breach a fiduciary duty, under Texas law, the Special Receiver was required to prove: (1) a combination of two or more people; (2) an object to be accomplished (an unlawful purpose or a lawful purpose by unlawful means); (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts to further the object or course of action; and (5) damages as the proximate result. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998). Here, the alleged combination of people constitutes Gray (and others), Martin, and vicariously, Wells Fargo Bank and Wells Fargo Advisors because Martin worked for them. For Gray, the other alleged co-conspirators, and Wells Fargo to have a "meeting of the minds," there must have been an agreement among them and each must have agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means. *See ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 881 (Tex. 2010); *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719-20 (Tex. 1995) (clarifying that specific intent is required to impose liability for conspiracy). As an alleged co-conspirator, Wells Fargo must have had actual knowledge of the alleged object of the conspiracy – Gray's breach of the fiduciary duty that he owed Retirement Value. *See Triplex*, 900 S.W.2d at 720; *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 857 (Tex. 1968). Finally, Wells Fargo's acts in furtherance of the conspiracy must have a causal link to the alleged damages; that is, the alleged damages must have occurred as a proximate result of Well Fargo's involvement. *See Swinnea*, 318 S.W.3d at 881.

The Special Receiver contends that this case is about "whether Martin knew Gray was misleading investors when she helped him promote RV." In urging us to answer this question affirmatively, the Special Receiver argues that, because the evidence is contained in emails and a videotape, most of the facts relevant to the issue of Martin's knowledge are undisputed.

According to the Special Receiver, the emails Martin sent or received and a videotape of what Martin said and what was said in her presence at a July 2009 licensee meeting constitute compelling evidence that Martin helped Gray do something that Martin knew was wrong. More specifically, from this evidence, the Special Receiver argues that Martin knew, among other things, that Gray was: (1) misusing investor funds; (2) claiming investor funds as his company's funds and loans from investors as revenues; (3) offering unbelievably high returns while claiming the investments were safe and virtually guaranteed; (4) trying to hide his actions from regulators; and (5) taking money off the top to pay excessive commissions to licensees, Kiesling Porter, Retirement Value, and himself. The Special Receiver further cites to evidence that Martin had been cautioned by more senior bank officers that they did not like the sound of Retirement Value's business, that Wells Fargo should not provide certain services to Retirement Value which Gray had requested or inquired about, and that Gray was "after the bank's reputation."

According to the Special Receiver, despite knowing all these facts, Martin attended Retirement Value's July 2009 licensee meeting "where she made misrepresentations just like the other members of the panel did and played along with Gray in leading the audience to believe that Wells Fargo had a role in protecting the investors' money from Gray when, in truth, Wells Fargo did not have such a role." The Special Receiver also contends that Martin allowed Gray to use Wells Fargo's reputation to market the product despite receiving a warning from one of her Wells Fargo's co-workers about the risk of doing so. Finally, the Special Receiver urges us to find that Martin had a motive for joining the conspiracy and helping Gray breach his fiduciary duty because she stood to receive credit for bringing tens of millions of dollars in deposits into the small New Braunfels branch of Wells Fargo.

While we agree with the Special Receiver that the emails say what they say and the videotape shows what it shows, the content of the documents and the videotape do not alone establish that Martin knew about Gray's wrongful conduct. Rather, we would be required to infer from this evidence that Martin knowingly joined the alleged conspiracy. Having had the opportunity to judge the credibility of the witnesses, to review the evidence that the Special Receiver relies upon, and to consider that evidence in light of the totality of the evidence presented, for several reasons, we are not persuaded to draw those inferences.

First, the emails are consistent with communications about depository and other bank services that one would expect between a banker, her banking colleagues, and a customer who is starting a new business. Many of the emails the Special Receiver emphasizes that do not request banking services are for information purposes only, and largely suggest that Retirement Value is experiencing mounting success. Although several of the communications do indicate a fundamental disdain for Gray's new business enterprise (and perhaps for Gray himself), those communications support Wells Fargo's decisions to decline expanding Wells Fargo's services beyond depository services. They do not prove that Martin and her Wells Fargo colleagues actually knew of their customer's wrongful conduct or that Martin was participating in the alleged conspiracy. Whether Martin should have known from these emails of the wrongful conduct is immaterial. *See Schlumberger*, 435 S.W.2d at 857 (actual knowledge required to prove conspiracy). We are also not persuaded that there is anything in the emails or the testimony of the witnesses about the emails that would allow us to ascribe actual knowledge to Martin just because she is "an educated, trained, experienced, and multi-licensed professional," as contended by the Special Receiver.

Second, we agree with Wells Fargo that the emails and the videotape must be considered in light of the conduct of the parties, which is inconsistent with Martin's (and Wells Fargo's) knowing about Gray's wrongful conduct and with the alleged conspiracy itself. This conduct includes:

- Dick Gray's misrepresentations to Wells Fargo;
- Retirement Value's exclusion of Wells Fargo from discussions concerning life expectancies, premium shortfalls, the co-beneficiary status of investors, and payments to James Settlement;
- Wells Fargo's reasonable business decisions to decline services, including escrow agent services, and extensions of credit;
- Wells Fargo's receipt of minimal, customary fees for its services and the absence of any credible evidence that Martin received any extraordinary compensation or benefitted from opening the Retirement Value accounts in such a way as to give her a motive to conspire;
- Gray's repeated expressions of frustration with Wells Fargo and expressed desire for Retirement Value and Kiesling Porter to end their banking relationships with Wells Fargo in June 2009;
- Gray's decision to move all Wells Fargo accounts over which he had control to Frost Bank;
- Wells Fargo not making exceptions to its policies for Retirement Value, including policies concerning extensions of credit, funds availability, and the providing of account information to Gray;
- Retirement Value's unambiguous disclaimers of any Wells Fargo endorsement or guaranty of the RSLIPP;
- The absence of any evidence that Wells Fargo ever communicated with James Settlement or Michael Beste, the purported orchestrators and architects of the alleged conspiracy;
- Martin's setting up the accounts with Kiesling Porter, servicing those accounts, handling Gray's inquiries about additional Wells Fargo services, and servicing Gray's other accounts;
- Martin's attending a single session of a licensees meeting for which she was totally unprepared;

- The proximity of Gray's request for "anyone from Wells Fargo" to attend the lunch at the July 2009 licensee meeting to the actual event, demonstrating that it was not important for Martin, the alleged individual co-conspirator at Wells Fargo, to attend; and

- The fact that Gray provided Ms. Martin no meaningful information about Ms. Martin's attendance at the lunch beyond that it would involve general introductions. There was no planning of the lunch discussions, which were introduced as unscripted and unrehearsed.

Third, Martin did not know, nor would she have had reason to know, that by starting up and carrying out Retirement Value's sole business, Gray was somehow violating a duty to the company. The start-up of a new business, excitement about the attributes of a new product, the signing up of successful licensees, and conducting a well-attended licensee training meeting are all indications of Retirement Value's mounting success, not a breach of fiduciary duty owed to Retirement Value.

Fourth, both sides agree that the crux of the problem with Retirement Value's RSLIPP product concerned the use of the Midwest Medical Review life expectancies. The evidence shows that Wells Fargo knew nothing about any issues related to the life-expectancy certifications. The evidence further shows that Wells Fargo received the same representations concerning the accuracy of the life expectancies as the investors.

Finally, Wells Fargo had no access to the investor agreements, master escrow agreement, life-insurance-policy purchase agreements, life-expectancy certificates, documents concerning the policy price, premium invoices, premium-reserve calculations, balance sheets, or the financial books and records maintained by Retirement Value or Kiesling Porter. Wells Fargo had no basis to know the liabilities undertaken by Retirement Value in connection with the RSLIPP or the assets maintained by Retirement Value to satisfy those liabilities. Wells Fargo did not know about: (1) the prices Retirement Value paid to James Settlement for insurance

policies and the artificial spread between those prices and the value of the policies; (2) the shortfalls in the premium reserve accounts; (3) the alleged use of funds contrary to the investor agreements; (3) the failure to designate the investors as co-beneficiaries on the policies; or (4) the wrongful conduct of Retirement Value and persons associated with Retirement Value in connection with the sale of RSLIPP. Wells Fargo knew none of this – all of which the Receiver uncovered in her investigation of Retirement Value and which constitutes the wrongful conduct that caused the damages the Special Receiver seeks to recover.

Our finding that Martin and Wells Fargo did not know about the breach of fiduciary duty is not the only barrier to our deciding this claim in favor of the Special Receiver. Because Wells Fargo also did not agree with anyone to undertake a preconceived plan for Gray to breach his fiduciary duty to Retirement Value, we conclude that there is no evidence of a "meeting of the minds" among or between Wells Fargo and any other alleged co-conspirator.

We further conclude that there is no evidence of an overt act by Wells Fargo in furtherance of the alleged conspiracy. Wells Fargo's undisputedly lawful agreements and actions with respect to servicing a depository, abiding by customer agreements, and evaluating customer requests provide no basis for finding a conspiracy. Similarly, Martin's attendance at the lunch portion of the licensee meeting was not in and of itself an unlawful or conspiratorial act, and we do not agree with the Special Receiver that the evidence shows that she went to the meeting because "it is more likely that she was going to attract the deposits RV would make with investors' money."

Because the videotape allows us to evaluate the lunch program and the participants' words and actions for ourselves, as fact finders, we are uniquely situated to consider the import of Martin's attendance and participation. From the videotape, we observed Gray dominating

both the program and the conversation, and a clearly uncomfortable and nervous Martin, coping with unexpected circumstances and unprepared, given that Gray had previously advised Martin that the lunch would simply involve introductions and that she need not be prepared to discuss any topic. Martin did not speak to the potential risks, rewards, suitability, or any other aspect of the RSLIPP during the program. She simply made a general comment about Retirement Value – an unactionable statement of opinion concerning future opportunities.

Directly before Martin spoke, Brent Free, a Kiesling Porter named partner said that his firm was "the escrow agent" whose job was to "safeguard the money, and as the anti-drug campaign used to say 'just say no.'" He also explained that investor money came first to the Kiesling Porter offices and then "goes into the Wells Fargo escrow account." Although Martin referred to herself as the "officer" on the "escrow accounts," taken in the context of Free'a remarks and that all accounts in a bank have an officer assigned to them, we see nothing to persuade us that this statement was a misleading act in furtherance of a conspiracy.

As for Gray, when he traded on Wells Fargo's reputation at the meeting, he stressed the strength of Wells Fargo as a financial institution – an issue of importance given the state of the economy, the then recent and anticipated failures of other banks and financial institutions, and the uncertainties of the times. He never represented to the licensees that Wells Fargo was promoting Retirement Value's product. Gray further emphasized that he had no control over the bank accounts and that Wells Fargo had denied him any voice in the management of those accounts. There was nothing in his comments about Wells Fargo during the lunch program that should have prompted a disclaimer from Martin. Moreover, Retirement Value's brochures provided that Wells Fargo did not endorse the RSLIPP product, and the investor agreements made clear that Wells Fargo did not endorse the product.

Having considered all the evidence and for all these reasons, we find that Wells Fargo did not conspire with any alleged co-conspirator for Gray to breach his fiduciary duty to Retirement Value and that Wells Fargo's conduct did not cause damage to Retirement Value.

Aiding and Abetting Breach of Fiduciary Duty

To prove her claim of aiding and abetting, the Special Receiver contends that she must show: (1) Martin knew of Gray's fiduciary relationship with Retirement Value; and (2) Martin was aware of her participation in Gray's breach of fiduciary duty. *See Darocy v. Abildrup*, 345 S.W.3d 129, 138 (Tex. App. – Dallas 2011, no pet.). We disagree that these are the only elements of this cause of action or that the *Darocy* opinion can be read to say that they are. Although Texas law on aiding and abetting is not well developed, our review leads us to conclude that to establish her claim that Wells Fargo aided and abetted Gray to breach his fiduciary duty to Retirement Value, the Special Receiver must prove: (1) a fiduciary duty owed to Retirement Value; (2) Wells Fargo's actual knowledge of the duty and its breach; (3) substantial assistance of the breach; (4) causation; and (5) damages to Retirement Value. *See Juhl v. Airington*, 936 S.W.2d 640, 643-44 (Tex. 1996); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (1942); *Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 722 (Tex. App. – Austin 2001, pet denied).

The conspiracy and the aiding-and-abetting claims are both bottomed on the same underlying tort – Gray's breach of his fiduciary duty to Retirement Value. Moreover, several of the elements of the aiding-and-abetting claim mirror (or at least fundamentally overlap with) the elements of the conspiracy claim: knowledge, action (an overt act to further the conspiracy to breach as compared to substantially assisting the breach), causation, and damages. As a result,

our analysis of the evidence relevant to the conspiracy claim informs our decision on the aiding-and-abetting claim, and we need not repeat it here.

We have already found that Martin and Wells Fargo did not know about Gray's breach of the fiduciary duty that he owed Retirement Value (the object of the alleged conspiracy). That finding, and the reasons for it, apply to the knowledge element of the aiding-and-abetting claim and lead us to make the same finding again. *See Boty v. Protech Ins. Agency*, 63 S.W.3d 841, 863 (Tex. App. – Houston [14th Dist.] 2001, pet denied) (requiring knowing participation in the fiduciary's breach of duty) (citing *Kinzboch*, 160 S.W.2d at 514).

For the same reasons that we found Wells Fargo did not commit an overt act in furtherance of the alleged conspiracy to breach Gray's fiduciary duty, we find that Wells Fargo did not substantially assist Gray in breaching his fiduciary duty to Retirement Value. *See Juhl*, 936 S.W.2d at 643-44 (aiding and abetting liability requires that defendant have "an unlawful intent, i.e., knowledge that the other party is breaching a duty with the intent to assist that party's actions."); *Crescendo Invs., Inc. v. Brice*, 61 S.W.3d. 465, 473 (Tex. App. – San Antonio 2001, pet. denied) (legal test is not whether defendant substantially assisted wrongdoer in the abstract; the substantial assistance must go to "breach of duty" itself).

Having considered all of the evidence and for all these reasons, we find that the actions of Wells Fargo do not constitute aiding and abetting Gray's breach of fiduciary duty and did not cause damage to Retirement Value.

Remaining Issues

In their post-hearing briefs, the parties raised several other issues and defenses pertaining to the two claims made by the Special Receiver. We have not addressed the remaining issues, because our doing so is not necessary to the final disposition of this case.

AWARD

For the above-reasons, Claimant JANET MORTENSON, SPECIAL RECEIVER FOR RETIREMENT VALUE, L.L.C., shall take nothing from Respondents WELLS FARGO BANK, N.A., WELLS FARGO ADVISORS, L.L.C., WELLS FARGO INVESTMENTS, L.L.C., and WHITNEY GILES MARTIN, and WELLS FARGO BANK, N.A., WELLS FARGO ADVISORS, L.L.C., WELLS FARGO INVESTMENTS, L.L.C., and WHITNEY GILES MARTIN, shall take nothing from Claimant JANET MORTENSON, SPECIAL RECEIVER FOR RETIREMENT VALUE, L.L.C.

The administrative fees and expenses of the American Arbitration Association "(the Association)" totaling $29,550.00 and the compensation and the expenses of the Arbitrators totaling $188,353.74 shall be bome as incurred.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims and counterclaims not expressively granted are denied.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which will constitute together one in the same instrument.

DATED: October 29, 2013.

Deborah G. Hankinson

Deborah G. Hankinson, Arbitrator

Steven A. Harr, Arbitrator

James "Chris" Chrisman Phillips, Arbitrator

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DATED: _____, 2013.

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James "Chris" Chrisman Phillips, Arbitrator

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DATED: 10/29/13, 2013.

Deborah G. Hankinson, Arbitrator

Steven A. Harr, Arbitrator

James "Chris" Chrisman Phillips, Arbitrator