

CAUSE NO. D-1-GV-10-000454

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|---------------------------------|---|-------------------------------------|
| STATE OF TEXAS, | § | IN THE DISTRICT COURT OF |
| | § | |
| <i>Plaintiff,</i> | § | |
| | § | |
| v. | § | |
| | § | |
| RETIREMENT VALUE, LLC, | § | TRAVIS COUNTY, TEXAS |
| ET AL., | § | |
| | § | |
| <i>Defendants,</i> | § | |
| | § | |
| AND | § | |
| | § | |
| JAMES SETTLEMENT SERVICES, LLC, | § | |
| ET. AL. | § | |
| | § | |
| <i>Third-Party Defendants</i> | § | 126 th JUDICIAL DISTRICT |

SPECIAL RECEIVER JANET MORTENSON'S
SECOND AMENDED PETITION

COMES NOW Janet Mortenson in her capacity as Special Receiver of Retirement Value, LLC (“Retirement Value”) files this her Second Amended Petition against Third-Party Defendants Wells Fargo Advisors, LLC, Wells Fargo Investments, LLC, Wells Fargo Bank, National Association, and Whitney Giles (collectively “Wells Fargo”) and in support thereof would respectfully show the Court as follows:

DISCOVERY CONTROL PLAN

1. Discovery in this action is intended to be conducted under Level 3. TEX. R. CIV. PROC. 190.2.

THE PARTIES

2. Janet Mortenson sues in her capacity as the court-appointed Special Receiver for Retirement Value. Retirement Value was placed in receivership by order of this Court at the request of the State of Texas. This Court appointed Janet Mortenson as the Special Receiver of Retirement Value empowering her to “file, prosecute or settle any lawsuits the Special Receiver

deems necessary to carry out her duties regarding claims or potential claims against Wells Fargo” to aid in her obligation to “dispose, for the benefit of investors, of property, funds or assets resulting from the settlement, prosecution [or] other dispositions of claims or potential claims against Wells Fargo.”¹

3. Third Party Defendant Wells Fargo Advisors, LLC, is a Delaware Limited Liability Company licensed to do business in Texas. It may be served with process through its registered agent for service of process, Corporation Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218. Wells Fargo Advisors, LLC, has appeared in this cause.

4. Third Party Defendant Wells Fargo Investments, LLC, is a Delaware limited liability company licensed to do business in Texas. It may be served with process through its registered agent for service of process, Corporation Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218. Wells Fargo Investments, LLC, has appeared in this cause.

5. Third Party Defendant Wells Fargo Bank, National Association, is a foreign financial institution licensed to do business in Texas. It may be served with process through its registered agent for service of process, Corporation Service Company dba CSC - Lawyers Incorporating Service Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218. Wells Fargo Bank, N.A., has appeared in this cause.

6. Whitney Giles is an individual residing in New Braunfels, Texas who may be served with process at 1000 North Walnut Ave., New Braunfels, Texas 78130. Ms. Giles has appeared in this cause.

¹ Order Appointing Special Receiver Janet E. Mortenson, Nov. 3, 2011, pp. 2, 4.

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. In addition to that, the receivership order provides that this Court shall have exclusive jurisdiction over all matters involving the Receiver and the Receivership Estate. This action meets both of those requirements, as it is an action brought by the Receiver to recover assets for the Receivership Estate.

8. This Court has personal jurisdiction over Wells Fargo as it is licensed to do business in Texas. It has jurisdiction over Whitney Giles because she is a Texas resident. This court also has personal jurisdiction over Wells Fargo because it committed the torts described below in whole or in part in Texas. Wells Fargo has enough minimum contacts with Texas such that maintenance of the suit here does not offend traditional notions of fair play and substantial justice. Wells Fargo purposely directed its activities toward Texas or purposely availed itself of the privileges of conducting activities in Texas; and, the controversy arises out of or is related to Wells Fargo's contacts with Texas. At minimum, Wells Fargo should certainly have foreseen its actions would cause an injury in Texas. Wells Fargo is also subject to the general jurisdiction on Texas courts because it has continuing and systematic contacts in Texas.

9. Venue is proper in Travis County. Venue is proper in Travis County pursuant to the terms of the receivership order that provides for exclusive jurisdiction in this court. In addition to that, Licensee Defendants W. Justin Title, David Rice, James William Rash, and David Mata are all residents of Travis County, Texas and all or a substantial part of the events or omissions giving rise to the claims against them occurred in Travis County. Thus, venue in Travis County is proper with respect to those Defendants pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.002. Venue in Travis County is proper against the remaining Defendants,

including Wells Fargo, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.005 as the claims against them arise out of the same transaction, occurrence, or series of transactions or occurrences as those against W. Justin Title, David Rice, James William Rash, and David Mata. Venue is also proper in this court pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 15.062 and § 15.003.

FACTUAL BACKGROUND

10. Special Receiver Mortenson hereby incorporates by reference all of the allegations in Receiver Espinosa's most recent amended Cross-Claim and Third-Party Claim. This case against Wells Fargo is brought to discharge the Special Receiver's court-ordered duty to collect funds in order to repay investor-victims. Wells Fargo helped the Defendants cheat the investor-victims out of tens of millions of dollars, using Retirement Value as a tool to do so and breaching duties owed to Retirement Value in the process.

11. This 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 authority of the Texas Securities Act and the Texas Deceptive Trade Practices Act. The Court issued a Temporary Restraining Order and appointed Eduardo S. Espinosa as Receiver on May 5, 2010. On May 28, 2010, the Court entered a temporary injunction, upon finding that the State of Texas would probably prevail upon final hearing of the action in proving that Defendants Retirement Value and Gray violated the Texas Securities Act by selling unregistered securities to the public, selling securities through unregistered securities dealers, salesmen, and agents, and committing fraud and fraudulent practices in connection with the sale of securities. The Court also found that the State of Texas would likely prevail on its claim that Defendants Retirement Value and Grey had engaged in

false or misleading or deceptive acts or practices in the conduct of trade or commerce in violation of the Texas Deceptive Trade Practices Act (“DTPA”). The Court determined that it was necessary to appoint a receiver “to conduct the affairs of Retirement Value, LLC ... for the benefit of investors should restitution and disgorgement be granted” under the Texas Securities Act or the DTPA. The order enjoined Defendant Retirement Value, LLC and its representatives from, among other things, dissipating assets, destroying records, selling securities, or communicating with investors and customers..

12. On November 3, 2011, the Court appointed the Special Receiver to, in part, “file, prosecute or settle any lawsuits the Special Receiver deems necessary to carry out her duties regarding claims or potential claims against Wells Fargo” and to “dispose, for the benefit of investors, of property, funds or assets resulting from the settlement, prosecution [or] other dispositions of claims or potential claims against Wells Fargo.”² The order makes clear that the Special Receiver is charged with pursuing claims against Wells Fargo, and using any recovery from those claims to pay the investor-victims. Every dime that the Special Receiver recovers from Wells Fargo, after expenses, will be used to pay investor-victims.

13. Like the Receiver, one of the Special Receiver’s primary obligations is “[t]o assist the State Securities Board and the Attorney General in their investigation of Defendants’ violations of the Securities Act.”³ The Special Receiver is an agent of this Court and is uniquely empowered and obligated to assist the State of Texas in its investigation of the fraudulent securities scheme perpetrated by Grey and the other Defendants, and aided and abetted by Wells Fargo.

² *Id.*, pp. 2, 4.

³ *Id.*, p. 3.

14. Wells Fargo gladly lent the credibility of its name to the investment scheme devised by Gray and the James Defendants described in the Receiver's most recently amended Cross-Claim and Third-Party Claim. Wells Fargo was aware that the marketing materials prominently featured its name in a manner that was clearly designed to increase the credibility of the scheme to the investor-victims.

15. Wells Fargo officers also played a direct and personal role in recruiting and promoting the scheme to Licensees. Wells Fargo's officer, Whitney Giles, attended meetings where the program was marketed. She was there when the Licensees and others were led to believe that Wells Fargo had a hand in designing the program to make it safer. Ms. Giles said nothing to disavow these representations. On the contrary, she said: "I can not tell you how interested I have become in the development of this company and how exciting it is to be here and actually see it all in play. The opportunities in front of you all are just wonderful and thank you for letting us come and participate."

16. Wells Fargo knew that the investor-victims were promised that all of their funds would be deposited in "escrow accounts" at Wells Fargo 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. Retirement Value and Defendants described Kiesling Porter's role as "your Third Party Fiduciary," which would assure the safekeeping of investor money. Retirement Value and Defendants made numerous representations about the role of Kiesling Porter as the "protector" of investor's funds. Wells Fargo knew these representations were being made about the escrow account and knew that the investors would view this escrow account as an important safety feature of the product.

17. These representations were false. The funds purportedly loaned to Retirement Value by the investors were not held in escrow and Kiesling Porter did not act as an escrow agent. An escrow 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. 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 the written instructions 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.

18. Wells Fargo must have had and read a copy of that “Master Escrow Agreement”. If it did not, Wells Fargo violated its obligation to become informed of its contents based on its holding of the escrow funds. Wells Fargo, therefore, knew or should have known of the misrepresentations concerning the nature of the accounts at its bank. Yet, Wells Fargo not only failed to do anything to stop the misrepresentations but also actively helped Retirement Value promote and market the program.

19. Those misrepresentations concerning the safety of the money in the “escrow” accounts were at the very heart of the scam. In short, Wells Fargo led investors to believe that Kiesling Porter and Wells Fargo had custody and control over their funds and Retirement Value “never touched the money.” In reality, Retirement Value at all times maintained control over the funds and Wells Fargo knew it or should have known it.

20. The investor-victims were also told their funds in the escrow account at Wells Fargo would only be used to purchase the policy they choose and to pay the premiums on that policy. In actuality, those funds were misappropriated and used for other purposes and Wells Fargo knew it. Wells Fargo knew that the money in the escrow accounts it was holding was supposed to be used to purchase policies and hold reserves for paying premiums on the policies up to life expectancy plus 24 months. Yet, Wells Fargo said and did nothing when the escrow accounts were drained to a level far below that sufficient for these reserves within days of their being opened.

21. Retirement Value (with the acquiescence of Kiesling Porter and Wells Fargo) repeatedly commingled the funds held in the sub-accounts. Whenever Retirement Value needed money to pay an expense related to a policy, it pulled funds from whatever account it could find them regardless of their intended use. As an example on March 25, 2010, Retirement Value directed Kiesling Porter to pay \$552,384 towards the purchase of policy AVL180-030510-MR 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 reserve accounts for other policies. This example is typical of Retirement Value's handling of the reserve accounts at Wells Fargo. The Receiver has documented at least 84 instances where Retirement Value instructed Kiesling Porter to pay for a policy using funds reserved for other policies. Dick Gray testified that commingling of this sort was a routine practice "from the very beginning."

22. Whitney Giles was also present at sales meetings where the past regulatory problems of Dick Gray and George Kindness were discussed. Those problems are detailed more fully in the Receiver's most recently amended Cross-Claim and Third-Party Claim. She certainly should have investigated those problems on behalf of Wells Fargo and have insured that they were disclosed to the investors who would need to know that information in order to make an informed judgment on whether to do business with Retirement Value. The importance of these types of disclosures is at the heart of FINRA's public disclosure policy which is designed to help people to determine whether they should conduct business with certain brokers, and doubly important with respect to unregistered individuals like Dick Gray and George Kindness.

23. The Financial Industry Regulatory Authority ("FINRA") is the national regulatory authority for securities broker-dealers. Prior to 2007 FINRA was known as the National Association of Securities Dealers ("NASD"). Whitney Giles was licensed as a broker-dealer representative with FINRA and an investment advisor representative with the Texas State Securities Board. She knew, or certainly should have known, better than to promote what was so obviously an illegal investment scam. She was, or certainly should have been, well aware that

the investments being offered by Retirement Value were securities and that they were being illegally sold without the proper registrations.

24. Dick Gray and the other officials of Retirement Value, oddly enough, made all of the Defendants, including Wells Fargo, aware that the investment would be viewed as a security. This issue was openly discussed at the regular Licensee meetings. Dick Gray told those attending one meeting that no attorney or regulator would agree that the product was not a security. He told them that Retirement Value knew from the beginning that the regulators would challenge the product as being a security and that it was just a question of “when,” not “if.”

They were told by a Retirement Value consultant at one such meeting that:

Effective 2010, FINRA has declared anything having to do with a Life Settlement Policy where you are commingling someone’s money is a security. The state of Texas, there is a definition, and you can try to skirt around it, but now that FINRA has taken that position, the state regulators will likely follow suit.

The Licensees were told they would have to “fly under the radar,” “hide behind fig leaves,” and engage in “legal double-talk” in order to try and avoid drawing the attention of the SEC and state securities regulators. They were actually told not to use the word “investment” and that: “Nobody in RV is ‘selling’ anything and the investors are not ‘buying’ anything. What RV is doing is inviting people to loan money in exchange for a rate of return so that RV can buy the policies.” These meetings were used to talk about what would happen when the investigations came and if cease and desist orders were issued. Dick Gray even told Wells Fargo and the other Defendants at these meetings that his plan was to admit the product was a security when the investigations came and then work to salvage what they could of the business operation.

25. Wells Fargo was willing to turn a blind eye to the illegalities in order to garner the huge deposits flowing from the scam, and was actually trying to wedge itself into an even more prominent role. Other would-be conspirators raised questions and concerns about the scam, but

not Wells Fargo. Nick Cicero from Freestone Capital who was approached about being a Licensee wrote: "Retirement Value is very shady. At best, it's less than fair. At worst, it's a Ponzi scheme/outright fraud. I'm surprised someone felt confident enough to approach a firm of our stature and integrity with such a clearly deceitful offering." Glenn Williams with Prime America, sent an email to Licensee Art Williams questioning how the program could guarantee "double market returns on an ongoing basis" and "double market compensation," and noting that if that were possible Ronald James "would be the rock star of Wall Street in this environment." Another potential conspirator also raised concerns and went so far as to say certain statements used by Defendants in marketing the program were "misleading" and contained a "typical phrase I have seen used with Ponzi schemes and such. A phrase that put a lot of people in jail." Another potential conspirator said he had "grave concerns" after speaking to Dick Gray about Retirement Value, among which were concerns about the life expectancy numbers provided by Midwest Medical, the lack of separation and oversight between the James Defendants and Retirement Value, and the possibility that the entire program could be shut down by the regulators. These same concerns should certainly have occurred to Wells Fargo as a licensed broker/dealer.

26. NASD had, already sounded the alarm on life settlements to their members – which included Wells Fargo – long before the Retirement Value scam came around. NASD issued Notice to Members 06-38 in August of 2006. Among other things, it noted:

NASD is concerned that aggressive marketing tactics, fueled by high commissions, may lead to inappropriate sales practices in connection with these transactions. . . . NASD is concerned that some of the marketing materials prepared by life settlement companies to encourage financial service providers, including broker-dealers, to recommend life settlements to their customers do not present a fair and balanced view of life settlements, and may encourage broker-dealers to recommend unsuitable transactions.

The NASD also reminded broker-dealers at that time of their obligations to do due diligence on the investment programs they were selling, to establish appropriate training and supervision to ensure compliance with all applicable State, Federal and NASD rules, and that it was inappropriate for any associated person to accept any compensation from anyone other than the member with which the person is associated. While Notice to Members 06-38 was primarily aimed at the situation where customers were being solicited to sell an existing life insurance policy, the Notice also said

NASD is also concerned about the involvement of NASD members and associated persons in the subsequent marketing and sale of interests in life insurance policies for investment purposes. NASD notes that, depending on the circumstances, entities participating in the sale of marketing of interests in life insurance policies, variable or not, for investment purposes may trigger broker-dealer registration requirements under the Securities Exchange Act of 1934.

27. FINRA was even more forceful in July of 2009 with the issuance of Regulatory Notice 09-42 to Wells Fargo. The Notice was a “reminder” of the obligations broker-dealers already had. That Notice specifically applied to investments in life settlements, such as the ones involved in the Retirement Value scam. That Notice stated, in part:

The sale of investment products that are derivative of or based on life settlements – “related products” – is also likely to increase. For the purposes of this *Notice*, “related products” are defined as a security that is an interest in a single life policy, or a group or a pool of such policies, whether variable or not, such as an asset-backed security backed by life insurance policies, or a security where the obligation to pay interest or principal to the holder is contingent or partially contingent upon the death of one or more insured persons under life insurance policies, or a bonded or a guaranteed life settlement security based on one or more policies. Transactions in related products are also securities transactions that are subject to the federal securities laws and all applicable FINRA rules. FINRA is also concerned about investors who purchase these related products, as investors may not fully understand the risks of such investments. Retail investors may be attracted to related products that pay a higher yield than conventional investments or, in some cases, guarantee a return by a specific date, without being aware that generally, related products are illiquid investments and an investor may be unable to sell the investment, or may be forced to sell at a steep discount, if the investor needs the funds prior to maturity. Also, the yield on a related product may be adversely affected by the parties structuring the related product – by an inexperienced or incomplete actuarial analysis or an incomplete

assessment of the medical conditions of any insured(s) covered by any policy in which an investor has an interest, or by a failure to follow applicable law regarding life settlements that may result in legal challenges at the time a death benefit is payable.

The Notice reminded broker-dealers that “some investors may be unduly influenced by communications that are overly aggressive, not fair or balanced, or lack important information or disclosures” and that “NASD Rule 2210 prohibits firms from making any false, exaggerated, unwarranted or misleading statement or claim in any communication with the public.” The Notice further reminded the broker-dealers that they must file advertisements and sales literature concerning life settlements, that NASD Rule 2210’s internal approval and record-keeping provisions applied to activities concerning life settlements – including the requirement that a registered principal approve all advertisements and sales literature prior to use, in writing. The Notice further stated “FINRA is concerned” that the customers were being charged excessive commissions on life settlement transactions and reiterated “its concern that the lure of very high commissions might lead firms and their associated persons to aggressively market such transactions and engage in other inappropriate sales practices” that it had previously issued in Notice 06-38. The Notice said inquiries to FINRA concerning life settlements

often . . . reflect a firm’s intention to charge commissions that exceeded, by 100 percent or more, any commission that FINRA historically has considered fair and reasonable. Firms are reminded that although the commission rules do not state specific commission amounts for a variable life settlement or any other security, most securities products are sold for commissions considerably less than five percent and those in excess of five percent are subject to heightened scrutiny.

The Notice concluded with the admonition that life settlement transactions “raise a number of unique regulatory and compliance issues” and that “among other things, firms must carefully and thoroughly address these issues and other relevant compliance matters in their policies and procedures, and supervision of such transactions and associated persons engaged in such

transactions.” All of these warnings were certainly prophetic with respect to Retirement Value. Unfortunately, Wells Fargo ignored them.

28. The facts outlined above show that Wells Fargo aided, abetted and conspired with the Licensees and other Defendants to violate state securities laws and cause those with fiduciary duties to Retirement Value to breach those duties. At all relevant times, Whitney Giles was acting as the agent for Wells Fargo Advisors, LLC, Wells Fargo Investments, LLC, and Wells Fargo Bank, N.A.

CAUSES OF ACTION AGAINST WELLS FARGO

I. Conspiracy to Breach Fiduciary Duties

29. Gray and Rogers and the other officers and employees of Retirement Value owed Retirement Value a fiduciary duty. The Licensees, as agents, for Retirement Value owed Retirement Value a fiduciary duty. The James Defendants and Beste owed Retirement Value a fiduciary duty by virtue of their special relationship with Retirement Value. As fiduciaries, they owed Retirement Value the duties of loyalty, good faith and due care. They were supposed to put the interests of Retirement Value above their own.

30. Wells Fargo and all of the other Defendants entered into an agreement to cause those mentioned above to breach their fiduciary duties to Retirement Value. In fact, the breach of those duties was at the heart of the reason Ronald James talked Dick Gray into setting up Retirement Value. The conspiracy started when Ronald James first talked to Dick Gray about setting up the scheme and continued at least until Retirement Value was put in receivership. The Defendants conspired to use Retirement Value as a tool to fleece the investor-victims of tens of millions of dollars. Ronald James and Dick Gray planned all along to pin the liabilities on Retirement Value while they, Wells Fargo and the other Defendants enriched themselves by taking commissions, fees and other payments out on the front end.

31. Ronald James and Dick Gray, with the help and agreement of Wells Fargo and the other Defendants, engaged in a general scheme to defraud the investor-victims and others by making false and misleading statements to investors and others, knowing the statements that were made were false. They also illegally sold unregistered securities to the investor victims and engaged in the other improper acts described in the Receiver's most recently amended Cross-Claim and Third-Party Claim. Those actions were in breach of the fiduciary duties that were owed to Retirement Value.

32. Wells Fargo engaged in affirmative acts to further the goals of the conspiracy. Wells Fargo, therefore, is jointly and severally liable for all losses that were proximately caused by any member of the conspiracy as well as losses incurred after Defendants left the conspiracy – assuming such withdrawal from the conspiracy actually occurred. Wells Fargo is liable for the actions of the other conspirators regardless of whether Wells Fargo was aware of those actions or not, because those actions were taken in furtherance of the conspiracy.

33. Wells Fargo's participation in this conspiracy to breach fiduciary duties was the proximate cause of damages to Retirement Value. Retirement Value is now liable to the investor victims for damages, attorneys' fees and for having to return to them all of the money they invested in Retirement Value. Wells Fargo is thus jointly and severally liable for all of those damages, without regard to whether Wells Fargo participated in all aspects of the conspiracy with regard to every person or entity that was harmed in the case. Retirement Value, through the Receiver, is entitled to indemnity from Wells Fargo for the harm caused by its conspiracy to breach fiduciary duties.

II. Negligence

34. Wells Fargo owed Retirement Value a duty to use reasonable care in the performance of its duties and not to use Retirement Value as a tool to defraud investors. Wells

Fargo breached its duties by virtue of the acts and omissions described above and in the Receiver's most recently amended Cross Claim and Third Party Claim and by failing to do sufficient due diligence to determine the program could not work as promised.

35. The failure to use reasonable care was the proximate cause of both actual and consequential damages to the Receivership Estate.

III. Fraud

36. Wells Fargo conspired with James, Beste, Gray, and Rogers to use Retirement Value as a tool to commit fraud on the investor-victims, and aided and abetted the Defendants' fraud. In this case, the Special Receiver is empowered to "file, prosecute or settle any lawsuits the Special Receiver deems necessary to carry out her duties regarding claims or potential claims against Wells Fargo" to aid in her obligation to "dispose, for the benefit of investors, of property, funds or assets resulting from the settlement, prosecution [or] other dispositions of claims or potential claims against Wells Fargo."⁴ The receiver for an insolvent entity such as Retirement Value has a right to maintain a suit that is necessary to preserve the company's assets and to recover assets of which the company has been wrongfully deprived through fraud. The Special Receiver is entitled to bring such a suit on behalf of the Receivership Estate, and to use the funds recovered to fulfill her obligation to pay the investor-victims. The Receiver also sues Wells Fargo for all fees or other payments Retirement Value made to it.

37. The Receiver brings this action against Wells Fargo to recover the sums the Receivership Estate owes the investor victims by virtue of their common claim for rescission. This is a general claim against all members of the fraudulent conspiracy for the loss and liability the conspiracy created and to recover those sums so that claims of creditors and others may be

⁴ Order Appointing Special Receiver Janet E. Mortenson, Nov. 3, 2011, p. 4.

satisfied, as opposed to individual claims for each investor concerning their specific circumstances. The actions of Wells Fargo harmed the Receivership Estate on a dollar-for-dollar basis with respect to all the investor money they brought in. Each dollar brought in represented a dollar Retirement Value was required to return as rescission for Defendants' actions in selling unregistered securities.

IV. Damages

38. This Court has ordered the Special Receiver to bring suit against Wells Fargo and to use any funds recovered to pay the investor-victims. As a result of the Wells Fargo's conduct, Retirement Value has suffered direct and consequential damages detailed herein in an amount in excess of the minimum jurisdictional limits of this court. Those damages include the responsibility to return each dollar received from investor-victims as rescission for Defendants' actions in selling unregistered securities. Those sales totaled \$77 million.

39. Wells Fargo demonstrated a willingness to participate actively in the sale of unregistered securities, the commission of securities fraud, gross negligence, the breaching of fiduciary duties by making material misrepresentations and omissions, and aiding and abetting in such actions. That grossly negligent, malicious, and fraudulent conduct makes an award of punitive damages appropriate.

40. Wells Fargo's conduct was such that it violated Tex. Penal Code Ann. § 32.46 (securing execution of document by deception). Thus, the statutory caps on exemplary damages do not apply in this case.

CONDITIONS PRECEDENT

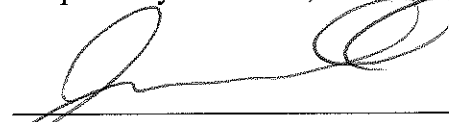
41. All conditions precedent have been performed or have occurred.

NO FEDERAL CLAIMS

42. Nothing herein is intended to assert any claim under a federal statute, regulation, or common law.

WHEREFORE, The Special Receiver requests that Wells Fargo be cited to appear and that she have judgment against Wells Fargo for actual damages, consequential damages, punitive damage, attorneys' fees, costs of suit, prejudgment and post-judgment interest, and all other relief to which he may be entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March, 2012, the foregoing document was electronically filed with the Clerk of Court using the Texas Online E-file system, and a true and correct copy was served on the following counsel and parties as indicated below in accordance with the Texas Rules of Civil Procedure:

| | |
|---|---|
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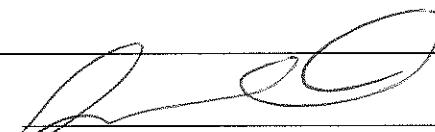
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