

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

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
RETIREMENT VALUE, LLC, et al,	§	
	§	
Defendants.	§	126 th JUDICIAL DISTRICT

**TWENTY-NINTH APPLICATION FOR FEES
BY THE RECEIVER AND RECEIVER’S COUNSEL**

Eduardo S. Espinosa, court-appointed receiver for Retirement Value, LLC, files his Twenty-Ninth application for fees incurred by the Receiver and his counsel, Dykema Cox Smith (Dykema) for the months of April 2016 through August 2016.

BACKGROUND

To assist the Receiver in the performance of his duties, the Agreed TI¹ authorizes the Receiver to “to hire employees, contractors, consultants, accountants, attorneys, legal assistants, or other assistants under terms to be determined by the Receiver, whose services in the sole discretion of the Receiver, are necessary for an efficient and accurate administration of the receivership estate.” Agreed TI at 14, ¶8. To that end, the Receiver has retained Dykema to represent him in connection with this case, to assist him in the performance of his duties and to prosecute or defend litigation on behalf of Retirement Value.

¹ The “Agreed TI” is the Agreed Temporary Injunction Order against Defendants Retirement Value, LLC and Richard H. “Dick” Gray and the Relief Defendant and Order Appointing Receiver, entered by the Court on May 28, 2010.

By its Order Regarding the First Application for Fees by the Receiver and Receiver's Counsel entered on October 26, 2010 (Fees Order), the Court modified the basis by which the Receiver and his counsel are paid. Pursuant to the Fees Order, the Receiver shall charge an hourly rate of \$320 per hour and the Receiver's counsel shall discount its rates by 9.5% from its then current hourly rates in effect as of the time services are rendered, beginning on August 1, 2010. Fees Order at 2. Moreover, the Receiver and his counsel are to submit to the Court and to the parties of record their request for payment of fees. If no party of record files an objection to the request for payment within ten days from the filing of the request for payment, then the Receiver shall pay the amount of the request from funds he holds in the receivership estate. Any objection must state with specificity the particular items of the Receiver's request to which the objection is made. If an objection is made, the Receiver shall not pay the contested portion of the invoice until a hearing has been held on the objection, but the Receiver may pay the portions of the request to which no objection is made. *Id.*

APPLICATION FOR PROFESSIONAL FEES

By this Application, the Receiver seeks approval from the Court to pay from the assets of the Receivership the fees incurred by the Receiver and his counsel, Dykema, for services rendered from April 2016 through August 2016.

The Receiver has incurred fees of \$33,792.00 during the period covered by this Application. He has retained the legal services of Dykema which incurred fees for the periods covered by this Application of \$88,762.30. Affidavit of Eduardo S.

Espinosa (Espinosa Affid.) at ¶10 (attached as Exhibit 1). While substantial, these fees were both reasonable and necessary.

The fees charged by the Receiver and his counsel represent a 17.33% discount from the usual and customary fees charged by Dykema. As a general matter, the charge for the services provided by Dykema are determined by multiplying the total number of hours worked by each timekeeper by that timekeeper’s billing rate. *Id.* at ¶6. In this case, the billing rate of each timekeeper was discounted from the usual and customary rates charged by Dykema. The Receiver is charging \$320/hour, which represents a 33% discount from his usual and customary rate of \$475/hour for 2016. In addition, Dykema has discounted its rates by 9.5%. In the aggregate the discounts and write-offs associated with this Application amount to \$25,685.59. *Id.* The chart below summarizes the fees charged and the discounts applied.

Invoice Summary	
Services Rendered in:	Total
Fees Requested	
DCS	\$113,147.38
DCS- Ahlers Bankruptcy	\$9,406.92
Total	\$122,554.30
Receiver Incurred	\$50,160.00
Receiver Billed	\$33,792.00
Receiver adj	(\$16,368.00)
All other Tkpr Incurred	\$98,079.89
All other Tkpr Billed	\$88,762.30
(9.5%) adj.	(\$9,317.59)
Write-offs	
Total Adj	(\$25,685.59)

The Receiver certifies that the estate has sufficient cash reserves from which to pay this Application after taking into account the estate’s receipts and expenditures since the last actuarial analysis of the portfolio in January 2016. *Id.* at ¶ 12.

I. What have we accomplished during this period

During the period covered by this Application, the Receiver and his counsel devoted substantial attention to collecting amounts due the estate pursuant to judgments and settlements; defending the estate against claims brought by Michael McDermott and Wendy Rogers; managing the portfolio and responding to investor comments and inquiries. The significant tasks during this time period include, without limitation:

- Responding to numerous inquiries and resolving various issues regarding the investors' claims, their IRA's and their distributions;
- Maintaining investor communications, including responding to inquiries from investors, defendants and their respective counsel regarding this matter, the Plan of Distribution, value of the claims and alternative recovery efforts;
- Maintaining and periodically updating the estate's website with new information and current events;
- Attending to the preservation of the estates' assets, including coordination of various accounting matters, funds management, fielding acquisition inquiries, payment of premiums, & collecting death benefits;
- Enforcing the Estate's settlement agreements and judgments in order to maximize the Estate's recoveries;
- Preparing quarterly and annual reports;
- Analyzing the effect of recent increases in the cost of insurance on certain of the Estate's policies and determining the appropriate response; and
- Made a \$2.5 million distribution to the Investors raising the total amount distributed to \$11 million or 13.7%.

The Receiver initially undertook to investigate the business of Retirement Value, to collect the assets readily available to it and to put in place interim measures to protect the value of those assets. That work is complete. The Receiver is currently working to execute the court-approved plan for the portfolio of

insurance policies in order to maximize the policies' value and return to investor victims. Except for one appeal, the Receiver has completed the litigation against the licensees and other defendants. He is now engaged in collecting on the judgments against the licensees, including asserting the estate's claims in their bankruptcy proceedings. He also continues to respond to inquiries and suggestions from investors.

The primary work in this period related to (i) preparing the quarterly and annual reports to the Court and the investors; (ii) evaluating the effect of and responding to increases in the cost of insurance of certain of the Estate's policies and (iii) distributing an additional \$2.5 million to the investors. The Receiver has also objected to the attempts by certain licensees to discharge the judgments against them in bankruptcy.

II. What Work Remains to Be Done

While a substantial portion of the Receiver's work has been completed, work remains to be done. At this point, our work can be divided into three categories: (i) collection of judgments; (ii) resolution of new claims and/or litigation against the estate; and (iii) fulfillment of the plan of distribution.

The litigation of claims by the estate has been largely completed by the estate's contingency fee counsel. Negotiated settlements entered into pursuant to the estate's collection efforts afforded the estate the opportunity to make an interim distribution. The first interim distribution was funded entirely from amounts collected. The remaining claims against licensees have been resolved by judgments in the Receiver's favor totaling \$6.1 million. Many of the judgment debtors have

already entered into settlement agreements with the Receiver pursuant to which they have agreed to pay the estate over \$1.63 million. To the extent any of the licensees against whom a judgment has been secured file an appeal or otherwise seek to adversely affect the estate's judgments, the Receiver will seek to preserve and enforce the estate's legal rights.

The Receiver is currently engaged in two legal proceedings. One is the last remaining appeal of a judgment entered in his favor against licensees. This appeal is being handled by the Receiver's contingency fee counsel. The Receiver is also engaged in litigation in bankruptcy court in Texas with Michael Ahlers on the question of whether the Receiver's judgment against him may be discharged (i.e., eliminated) in his bankruptcy. Dykema is handling that matter.

The Plan of Distribution largely resolved the claims against the estate. Receiver received 44 proofs of claim (38 from investors and 6 from other claimants) disputing scheduled claim amounts or characterization. All disputes pertaining to the Class 2 –Investor claims have been resolved. Disputes regarding Class 3 General Creditor claims have largely been resolved. The Tracy Moss litigation ended with an agreed judgment against Retirement Value for \$150,000 and Wells Fargo dropped its \$50,000 claim against the estate. As it is unlikely that there will be funds to pay the Class 3 claims, the Receiver does not contemplate further efforts to resolve the remaining disputes over Class 3 claims at this time.

The Court's adoption of the Initial Plan substantially reduces, if not eliminates, the need for further expense or delay associated with evaluating

alternative asset management strategies. The proof of claim process has been concluded, each claimant's proportionate interests in the estate's assets have been established and the initial distribution remitted. The Receiver has since turned his attention to managing the liquid assets on hand without exposing them to undue risk, executing interim distributions, addressing investor inquiries and ministerial issues to ensure that the estate's records are updated and the estate is ready to execute the next distribution.

The Receiver published a report for the second quarter of 2016. He anticipates preparing and publishing a report for the third quarter of 2016 shortly.

ARGUMENT

The Receiver's administrative costs, including his fee and that of his counsel, are to be paid out of the funds and other assets of the estate. These costs are considered costs of court and have priority over all other claims against the estate. *Jordan v. Burbach*, 330 S.W.2d 249 (Tex. Civ. App. – El Paso 1959, writ ref'd n.r.e.); *also* TEX. CIV. PRAC. & REM. CODE §64.051. The Court should consider the reasonableness of the fees requested by both the Receiver and counsel.

In evaluating the reasonableness of the fees, the Court should consider the following factors: (1) the time and labor involved, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of

the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). These factors support the award of the requested fees.

Time, labor, skill & complexity. By its nature, a receivership proceeding is unique and complicated. As discussed above, this receivership is particularly complicated due to its size, the assets involved, the poor record keeping of Retirement Value and the sheer number of people involved (1,084 investors, 1,000 licensees, 18 insurance companies and several banks). To properly administer the estate requires a high degree of skill and diligence. Moreover, the Receiver and his counsel have had to devote significant time to this matter. The exact time expended and work performed by the Receiver and his counsel are shown on the invoices attached to the Espinosa Affidavit. In addition, the Receiver's reports of July 28, 2010, April 30, 2011, December 31, 2011, May 31, 2013, May 31, 2014, May 31, 2015 and December 31, 2015; and the fee applications previously filed with the Court summarize the work of the Receiver and his counsel.

Preclusion of other employment. Dykema has not had to decline any representation solely because of its services in this case.

Customary fees. An attorney's usual and customary fees are presumed to be reasonable. TEX. CIV. PRAC. & REM. CODE § 38.003. The fees charged by Dykema in this case are the usual and customary fees that they charge to and collect from their

clients for the services of the attorneys and other professionals working on this matter, except that: (i) the Receiver is charging 29% to 33% less than his usual and customary rate; and (ii) Dykema is charging 9.5% less than its usual and customary rates on all other timekeepers. Espinosa Affid. at ¶6. Further, the court may take judicial notice of customary fees and of the contents of the case file without further evidence. TEX. CIV. PRAC. & REM. CODE § 38.004.

Dykema undertakes annual analyses of the markets in which it operates in order to determine the appropriate fees to charge for their respective professionals based on the fees charged by their competitors and peer firms. The goal of this analysis is to set rates for each professional at the median rate for professionals at peer firms in similar practices areas and similar experience. Accordingly, the rates charged by Dykema in this matter are well within the norm for firms of its type in Texas. Espinosa Affid. at ¶8.

Amount involved and results obtained. The amount involved in this matter, measured either by the \$77 million invested by the investors or the over \$35 million of estate assets administered by the Receiver, is very large. During the Receiver's six-plus years on the job, the Receiver has actively managed the estate's affairs and discharged his court-imposed duties. All told, the Receiver has brought nearly \$29.9² million into the estate over the course of the Receivership Action. He has filed a plan of distribution and distributed approximately \$11.0 million.

² These recoveries include (i) \$1.25 million secreted by Retirement Value's principals into Special Acquisitions, Inc.; (ii) \$560,000 and 8 policies of insurance worth about \$1.1 million recovered from James Settlement Services; (iii) \$127,000 in cash and \$195,000 in debt-reduction from a settlement with Bruce Collins; (iv) \$710,000 in a settlement with Kiesling Porter; (v) \$623,000 in assets from a

Time limitations. Time is of the essence in a receivership. This is particularly true in the initial stages. The efforts undertaken in this case to recover assets, investigate the facts and preserve the portfolio of policies were conducted on an expedited basis.

The nature and length of the professional relationship. This factor cuts no particular way. However, neither the Receiver nor his counsel has any particular relationship with any of the parties involved in this matter. Nor is there any possibility of a future relationship with the estate. By their nature, receiverships are a one-time event. As a result, no discount would normally be appropriate. Nevertheless, this application reflects a substantial discount off of the fees that Dykema would normally charge for the work performed during this time period.

Experience, reputation, and ability of the professionals. Dykema is one of Texas' premier law firms. Founded as Cox Smith Matthews Incorporated in San Antonio over 80 years ago and recently merged with Dykema Gossett, it employs over 400 attorneys with diverse experience, across 15 offices, in a myriad of practice areas. Dykema's experience spans all of the key Texas markets, with growing offices in Austin, Dallas, El Paso and McAllen, as well as offices across the nation in Michigan, Illinois, Minnesota, California and Washington, D.C. Dykema represents leading global corporations, growth and middle-market companies,

settlement with Dick and Catherine Gray; (vi) \$176,000 in assets and \$7,000 in debt reduction from a settlement with Wendy Rogers; (vii) \$10,117,534 collected from Pacific Life on the PLI140 policy, which was initially disputed by Pacific Life; (viii) \$34,564 in recovered state franchise taxes; (ix) \$2,183,000 in approved settlements with licensees; (x) \$6,086,240 in judgments against licensees; (xi) \$5.5 million in approved settlements with the James Defendants; and (xii) \$1,257,000 in setoffs.

capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals.

Whether the fee is fixed or contingent. The fees of the Receiver and his counsel are based on upon their hourly rates with a substantial discount. However, the payment of fees depends upon the approval of the court and the availability of assets in the estate – something which could not be known at the time the engagement was accepted and which remain uncertain.

Based on the size and complexity of the estate, the difficulties of administering it, the efforts expended and the results obtained, the fees requested by the Receiver and his counsel are reasonable and necessary.

ACCORDINGLY, the Receiver requests that this Application be granted in its entirety and that he be authorized to pay the fees requested by him and his counsel from the funds available to the estate.

Respectfully submitted,

By: /s/ Michael D. Napoli

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**Counsel for Eduardo S. Espinosa,
Receiver**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record listed below, through the electronic filing manager if that counsel's e-mail address is on file or via e-mail, if not, on this 27th day of September, 2016.

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