UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
RETIREMENT VALUE, LLC,	§	**CASE NO. 11-35165**
	§	**INVOLUNTARY CHAPTER 11**
ALLEGED DEBTOR.	§	

TRINITY SETTLEMENT SERVICES, LLC'S AMICUS CURIAE BRIEF IN OPPOSITION TO THE MOTION TO ABSTAIN OR DISMISS FILED BY THE STATE COURT-APPOINTED RECEIVER AND THE JOINDER OF THE SAME BY THE TEXAS STATE SECURITIES BOARD

TO THE HONORABLE JUDGE OF THE ABOVE-NAMED COURT:

NOW COMES Trinity Settlement Services, LLC ("Trinity") and files this Amicus Curiae Brief in Opposition to the Motion to Abstain or Dismiss ("305 Motion") filed by Eduardo S. Espinosa (the "Receiver") and the Joinder ("Joinder") of the Texas State Securities Board ("TSSB") to the Same, and in support thereof would show the following:

I.
INTRODUCTION

1. Beginning on or about April 2009, and continuing through March 30, 2010, Retirement Value, LLC ("RV") marketed and sold fractional interests in the death benefits of life insurance policies. Such life insurance policies had previously been sold by their original owners in transactions known as "life settlements."

2. On May 5, 2010, the State of Texas (the "State"), acting by and through Greg Abbott, Attorney General of Texas, at the request of John Morgan, Deputy Securities Commissioner of the State of Texas ("Morgan"), filed suit, verified upon information and belief

by Morgan, against RV, Richard H. "Dick" Gray, and Bruce Collins, and the law firm of Kiesling, Porter, Kiesling & Free, P.C. under Cause No. D-1-GV-10-000454; styled *The State of Texas v. Retirement Value, LLC, et al.*; In the 126th Judicial District Court of Travis County, Texas (the "RV Receivership").

3. The RV Receivership was premised upon the TSSB's erroneous contention that the sale of a fractional interest a life insurance policy constitutes a "security" within the regulatory purview of the TSSB. As will be demonstrated *infra*, this contention runs contrary to both the established case law in Texas (*Griffits v. Life Partners, Inc.*, No. 10-01-00271-CV, 2004 WL 1178418, at *1 (Tex. App.—Waco May 26, 2004, no pet.) (mem. op.)) and the relevant statutory language.

4. Due to the fact that the RV Receivership is premised upon an erroneous statement of law, the 126th Judicial District Court of Travis County (the "State Court") handling the RV Receivership lacks proper jurisdiction to hear the matter. In contrast, the above-captioned matter is properly filed and this Court has the full legal authority and ability to decide all matters relating to discharging RV's outstanding liabilities.

5. This Court provides a more efficient mechanism for handling the RV estate, and should maintain this case for the protection of the RV creditors. The RV Receiver was appointed on May 28, 2010. From that date through May 31, 2011, the Receiver and his law firm have taken $1,467,209.54 in fees from the RV receivership estate. Further, the Receiver has proposed a plan of distribution that would last until all policies have reached their maturity dates, which the Receive estimates will take 124 months. Given the rate at which the Receiver has accumulated fees for himself and his firm, it defies reason to believe that RV's creditors would be best served by allowing the state receivership case to continue.

II.

SUMMARY OF ARGUMENT

6. The TSSB did not have the authority to institute the receivership against RV given the fact that the sale of fractional interests in life insurance policies are not securities under established Texas law. The State Court, in turn, lacks proper jurisdiction over the receivership. It would therefore be inappropriate to grant the 305 Motion.

7. The conservatorship and plan of reorganization of RV can be more appropriately and efficiently resolved in this bankruptcy proceeding, utilizing the well-established procedures under the United States Bankruptcy Code and the rules promulgated thereunder.

III.

ARGUMENT

A. UNDER ESTABLISHED TEXAS LAW, INTERESTS IN LIFE INSURANCE POLICIES ARE NOT SECURITIES

8. The RV Receivership instituted by the State of Texas was premised upon the State's erroneous contention that the sales of fractional interests in life insurance policies are securities.

> The investments in the Re-Sale Life Insurance Policy Program are securities in the form of "investment contracts." The Texas Securities Act ("TSA") provides that instruments that constitute "investment contracts" are securities. The Texas Supreme Court has defined the term "investment contracts" to be (1) investments of money or property into (2) a common enterprise with (3) the expectation of profit (4) to be derived from the essential managerial efforts of others. *See Searsy v. Commercial Trading Corp.,* 560 S.W.2d 637, 640 (Tex. 1978).

RV Receivership; State's Original Verified Petition at ¶ 45.

This premise was inappropriate due to the fact that it flies in the face of the established law in Texas regarding this type of transaction.

9. As reflected above, the State cites to *Searsy* 560 S.W.2d at 640 as support for its contention that the fractional interests in life insurance policies are securities. *Searsy*, however, dealt with commodity options, not fractional interests in life insurance policies, and the State misquoted the fourth prong of the *Searsy* test, which reads, "(4) solely from the efforts of others." *Searsy*, 560 S.W.2d at 640. More importantly, the State failed to inform the Court that under *Griffits*, 2004 WL 1178418, fractional interests in life insurance policies were determined *not* to be securities in the form of investment contracts because they failed to meet the fourth prong of the *Searsy* test.

10. In the *Griffits* case, an individual who purchased interests in life insurance policies brought an action against Life Partners, Inc., the seller, for rescission of the purchase, alleging that such sale violated the TSA. Both parties moved for summary judgment, and the trial court entered judgment for the seller. The buyer appealed, and the Waco Court of Appeals affirmed, holding that fractional interests in life insurance policies did not constitute securities under the TSA. *Id.* Because the Waco Court of Appeals found "that the trial court did not err in concluding that the Griffitts' interests in life insurance policies did not constitute securities," *Id.* at *4, it did not need to address the question of whether those interests fall within a specific exception from the statutory definition of securities.

Most importantly for purposes of this brief, the Waco Court of Appeals held "*the trial court did not err in concluding that Griffitts' interests in life insurance policies did not constitute investment contracts.*" *Id.* at *2 (emphasis added).[1] The Waco Court quoted directly from *Searsy* and other well-established federal and state case law on this issue:

'The test' for investment contracts 'is whether the scheme involves an

[1] The TSSB ignores the *Griffits* case as controlling law in Texas, as indicated by its position in the RV Receivership.

> investment of money in a common enterprise with profits to come solely from the efforts of others.' *Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637, 640 (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)). This test implicates two interrelated factors relevant in the instant cause. First, a "common enterprise is 'one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties.' " *First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, P.C.*, 648 S.W.2d 410, 416 (Tex. App.—1983, writ ref'd n.r.e.) (quoting *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 n.7 (9th Cir. 1973)); *see Searsy* at 640. The test, in turn, for whether profits 'come solely from the efforts of others' is 'whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise. *Searsy* at 641 (quoting *Glenn W. Turner Enters.*, 474 F.2d at 482)).

(*Griffitts*, at *1)

> Where a promoter merely holds an investment in anticipation of appreciation or maturity, no enterprise exists. *Wilson v. Lee*, 601 S.W.2d 483 (Tex. Civ. App.—Dallas 1980, no writ); *McConathy v. Dal Mac Commercial Real Estate, Inc.*, 545 S.W.2d 871, 875 (Tex. Civ. App.—Texarkana 1976, no writ); *SEC v. Life Partners, Inc.*, 87 F.3d 536, 545-48 (D.C. Cir. 1996)).

(*Griffitts*, at *2)

> Likewise, in the instant cause, the profitability of Griffitts' interests in life insurance policies is not determined by any managerial efforts on the part of Life Partners, but is determined by the mortality of the insureds. *See Life Partners, 87 F3d at 545-46.* ... And any ministerial post-purchase efforts on the part of Life Partners or the trust company could have no effect on the profitability of the policies, which was overwhelmingly determined by how long the insured lived. *Id.*

(*Griffitts, at* *2)

11. In addition, the plain language of the TSA indicates that fractional interests in life insurance policies are not securities. "Statutory construction is a question of law for the court to decide." *Texas Dept. of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). The primary objective of statutory construction "is to determine and give intent of the Legislature." *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). "[I]t is well settled that every

word in a statute is presumed to have been used for a purpose; and a cardinal rule of statutory construction is that each sentence, clause and word is to be given effect if reasonable and possible." *Texas Workers' Compensation Insurance Fund v. DEL Industrial, Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (citing *Perkins v. State*, 367 S.W.2d 140, 146) (Tex. 1963)). "If possible, we [the Supreme Court] must ascertain the Legislature's intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state." *Allen*, 15 S.W.3d at 527 (citing *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984).

The TSA's definition of "security" specifically *excludes* contracts such as those sold by RV, at TSA Art. 581-4(A), as follows:

> Provided, however, that this definition shall not apply to any insurance policy, endowment policy, annuity contract, optional annuity contract, or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Texas Department of Insurance when the form of such policy or contract has been duly filed with the Department as now or hereafter required by law.

12. Along with the above, the State's own filings call into question the very premise upon which the RV Receivership was instituted. As was pointed out in ¶ 8 *supra*, the State's Original Verified Petition requesting RV be placed into receivership was premised upon the false notion that fractional interests in life insurance policies are securities. However, on July 19, 2011, over one year after instituting the RV Receivership based upon the TSSB's faulty premise, the State filed a Motion for Partial Summary Judgment, seeking a declaration from the State Court that Retirement Value's product was a security. This motion was seeking a finding that "as a matter of law, the product offered and sold by [RV]...was a security subject to the [TSA]." This later filing, seeking a finding that the premise upon which the RV Receivership was based was sound, demonstrates that the RV Receivership was improperly instituted. If the issue of

whether fractional interests in life insurance policies should properly be considered securities subject to the TSA is an open legal question, then RV should not have been placed into Receivership based upon the presumption that fractional interests in life insurance policies are securities subject to both the TSA and the regulatory purview of the TSSB.

13. Given the above, the RV Receivership was improperly instituted. As it is premised upon a contention that is contrary to established Texas law, the State's motion in the State Court should not have been granted. Without a proper basis for instituting the receivership, the State Court lacks proper jurisdiction. For this reason, granting either the Receiver's 305 Motion or the TSSB's Joinder to the same would be improper.

14. As another example of the improper receivership, the Receiver continuously claims "fraud" as a basis for the State instituting the receivership action, but never adequately explains what constitutes such fraud. If RV and its principals had indeed engaged in fraud, there would be no insurance policies and no escrowed funds to pay premium. As the Receiver has discovered with the recent maturity, however, there are real insurance policies in the estate, and there were funds held in escrow to pay the premiums on such policies.

B. THIS MATTER CAN BE MORE EFFICIENTLY RESOLVED IN BANKRUPTCY COURT

14. 11 U.S.C. § 543 "contemplates that a state court appointed receiver would be forced out of possession and control of a debtor's property by ... an involuntary case commenced by its (a debtor's) creditors." *In re: Statepark Building Group, Ltd., et al., Debtors.*, No. 04-33916-HDH-11, 2005 WL 2589179, at *3 (Bankr. N.D. Tex. June 29, 2005).

> Thus, the Code provides for effective termination of a receivership upon commencement of the Chapter 11 case, except, however, in two limited circumstances. Section 543(d) states:

> "After notice and hearing, the bankruptcy court—
>
> > (1) may excuse compliance with subsections (a), (b) or (c) of this section, if the interests of creditors and, if the debtor is not insolvent, or equity security holders would be better served by permitting a custodian to continue in possession, custody or control of such property, and
> >
> > (2) shall excuse compliance with subsection (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice."
>
> Therefore, subsection (d) is an abstention policy which permits the custodianship to continue if the best interest of creditors and stockholders is served, or the property has been assigned by the Debtor for the benefit of creditors.

In re Sundance Corp., 83 B.R. 746, 747 (Bankr. D. Mont. 1988)

The Receiver in this matter has failed to show that allowing the RV Receivership to continue will serve the best interests of the creditors. On the contrary, based on the results of the RV Receivership to date, there is good reason to believe that returning this matter to the State Court will have a detrimental impact on the creditors of RV. Under 11 U.S.C. § 543, the Court has an obligation to retain this matter to protect the creditors of RV.

15. As was pointed out above in ¶ 5 and by the Receiver in his 305 Motion at ¶ 8, the Receiver has garnered $1.4 million in fees for himself and his firm. The Receiver argues that based on the total $ 14 million recovered, the $ 1.4 million expended represents a value to the receivership estate. This position, however, is based on a couple of distortions. The first is that the $ 1.4 million in fees is actually $ 1,467,209.54 and only represents those fees incurred and approved by the State Court through the end of May, 2011. Based on a 12-month period, the Receiver is expending funds of the receivership estate at a rate of $ 122,267.46 per month.

Given that rate, one would expect the actual 15-month bill, the last 3 months of which have yet to be charged, to come to $ 1,834,011.93. This is the lesser distortion; the greater distortion is the Receiver's claim that he was responsible for bringing in more than $ 14 million for the RV Receivership estate. The PLI140 policy, referenced by the Receiver in his 305 Motion, was a $10.1 million policy that matured due to the death of the insured. The Receiver was not responsible for the maturation of this policy. The Receiver merely collected those benefits which were due RV and would have been due to RV even in the absence of the receivership. If this amount is discounted, then to date, the Receiver has only recovered approximately $ 4 million at a cost to the receivership estate of approximately $ 1.8 million. Under this more accurate picture of the efficiency of the Receiver, the services of the Receiver look like much less of a bargain. A reasonable person could not conclude, based upon the above, that it is in the best interest of RV's creditors to return this action to the State Court and allow the RV Receivership to continue under the management of Receiver.

16. The inefficient management of the RV Receivership pointed out in ¶ 15 is compounded by the Receiver's proposed plan of distribution. Under the proposed plan, the Receiver will hold the assets of RV until all life insurance policies have matured, which the Receiver predicts will occur in 124 months. If the Receiver were to continue accruing fees at the rate or $122,267.46 per month, this would result in the administration of the RV Receivership costing $15,161,165.04. This result would not serve the creditors of RV. In order to protect RV's creditors from this result, the Court must deny both the Receiver's 305 Motion and the TSSB's Joinder of the same, and permit RV to be reorganized pursuant to the well-established procedures under the United States Bankruptcy Code and the rules promulgated thereunder.

17. The Receiver's interests appear to be counter to those of RV's creditors. Upon information and belief, a plan to purchase the life insurance policies from the RV estate was presented to the Receiver. If the policies were sold, the RV estate would consist solely of cash, the Receiver could have proceeded with his plan of making a pro-rata distribution to all creditors, and the receivership case could have been completed. Rather than giving this offer serious consideration, the Receiver rejected the offer, and accused the offeror of attempting to interfere with the receivership. The Receiver apparently wants to maintain continuing control over the RV estate for the full term of the life insurance policies held therein, to permit the Receiver and his law firm to continue to charge the exorbitant fees as outlined above.

IV.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Trinity Settlement Services, LLC, respectfully request that the Court Deny the Receiver Eduardo S. Espinosa's Motion to Abstain or Dismiss.

Respectfully submitted,

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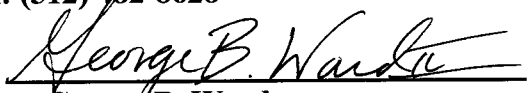
By: 
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