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

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<tr><td>STATE OF TEXAS
Plaintiff

v.

RETIREMENT VALUE LLC,
RICHARD H. “DICK” GRAY,
HILL COUNTRY FUNDING, LLC
a Texas Limited Liability Company,
HILL COUNTRY FUNDING,
a Nevada Limited Liability Company,
WENDY ROGERS, and
CATHERINE H. GRAY
Defendants

AND

KEISLING, PORTER, KEISLING
& FREE PC
Relief Defendants</td><td>§
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§</td><td>IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

126th JUDICIAL DISTRICT</td></tr>
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MOTION TO CONSOLIDATE THE HCF AND RV RECEIVERSHIPS

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TO THE HONORABLE GISELA D. TRIANA-DOYAL,

Mr. Donald R. Taylor ("HCF Receiver"), in his capacity as receiver for Hill Country Funding LLC (Texas) and Hill Country Funding LLC (Nevada) (collectively "HCF"), and on behalf of the same, moves the Court to consolidate the HCF receivership with that of Retirement Value, LLC ("RV").

I. FACTS

A. Defendants Propagated the Same Fraud Through Various Entities

1. This case is about the fraudulent sale of securities by Defendants Richard H "Dick" Gray and Wendy Rogers to HCF and RV investors. However, HCF and RV are just the last two entities through which the Defendants perpetrated this fraud. As the State so aptly put it:

> The[Defendants] have established a definite *modus operandi*: reap lucrative profits from fraudulent schemes involving the sale of securities until regulators either intervene or shut down the underlying brokerage. Once the brokerage is unable to continue its operations, Defendants Richard Gray and Rogers return to selling illegal securities on behalf of a new or different firm.

Pl.'s 3d Am. Pet. ¶ 25.

2. The journey begins in 2005. Richard Gray was working at Barnard-Donegan Insurance ("BDI") when Chris Allmendinger and Brent Oncale—the "A" and "O" of the criminal enterprise A&O Resources Management ("A&O")[1]—made a presentation about the sale of bonded life settlements to Richard Gray and handful of other agents at BDI (including Mr. Reid Thorburn, a licensee of RV and marketer of HCF policies).

3. While Richard Gray was very interested in viaticals as an investment product, A&O was associated with ABC Viaticals, which was then facing scrutiny from regulatory agencies. Thus, Richard Gray located a company called Secure Investment Services ("SIS") out of Redding

[1] Both Chris Allmendinger and Brent Oncale were convicted for, *inter alia*, securities fraud, in connection with this viaticals business.

California, who also sold investments in bonded life settlements. It was through SIS that Defendant Gray began selling purportedly bonded security interests in viaticals.

4. In January of 2007, Defendant Gray operated as an entity called First Security Trust. In September of 2007, Defendant Rogers joined Richard Gray in the viaticals business and they operated as First Security and Texas Funding Associates. With Defendant Rogers's assistance, Defendant Gray sold bonded life settlement interests for an entity called American Settlement Associates, LLC ("ASA"), which had previously done business as Secure Investment Services in Houston ("SIS-Houston").

5. HCF-Texas was formed on February 7, 2008 by Richard Gray and his wife, Defendant Catherine Gray. On February 21, 2008 Richard and Catherine Gray formed HCF-Nevada. Through HCF, Defendant Richard Gray, with the assistance of Wendy Rogers, sold investments in purportedly bonded life settlements owned by HCF itself and others owned by ASA a/k/a SIS-Houston.

6. In 2009, Defendants Richard and Catherine Gray and Wendy Rogers, along with David and Elizabeth Gray (Richard's brother and sister-in-law), formed RV and began selling investments in life settlements through it.

B. The RV and HCF Business Models Are Very Similar

7. The RV and HCF business models are very similar, as are the models that were employed by the Defendants when operating through the other entities mentioned above.

8. Defendant Richard Gray would purchase settled life insurance policies from James Settlement Services in California. Defendants Richard Gray and Wendy Rogers, and other "licensees," then sold these investments to RV and HCF investors.[2]

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[2] The misconduct of Richard and Catherine Gray and Wendy Rogers is detailed in Paragraphs 2-35 of Hill Country Funding's Cross-Claims Against Wendy Rogers, Richard H. Gray, and Catherine Gray and Paragraphs 21-

9. Both HCF and RV investors were fraudulently induced to invest with significantly inaccurate Midwest Medical Review, LLC ("MMR") Life Expectancy Certificates, that consistently underestimated the likely death dates of the insureds, i.e. maturity dates of the investments.

10. Both HCF and RV investors were told that their money would be used to purchase specific life insurance policies and to pay the premiums of those specific policies as they became due. Despite these assurances, RV and HCF investor funds were used for other purposes. Indeed, currently, HCF's funds are insufficient to pay its premiums through the fall.

11. Both HCF and RV investors were told that this was a safe investment because their funds would not be handled by those marketing the investment. Both HCF and RV investors were told that the invested funds would be preserved because an escrow agent, acting as a general third-party fiduciary, would be handling and controlling said funds. Both HCF and RV investors were told that the third-party fiduciary would be receiving and distributing all client funds to purchase and pay premiums on the policies through a specified escrow account.

12. HCF's model differed from RV's in that HCF was a smaller operation and sold what purported to be interests in bonded life settlements, as opposed to interest in RV's non-bonded life settlements. The HCF investors were told that if the insured lived past the life expectancy in the Midwest Medical Review, LLC Life Expectancy Certificate, plus a certain number of months, the relevant bonding company would pay out. HCF Investors were thus promised either (1) a portion of proceeds from the death benefits upon the death of the insured; (2) a portion of the sums recovered from the bonding company in the event the insured lived past the life

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83 of Plaintiff's Third Amended Verified Petition and Application for Injunctive Relief, Restitution, Disgorgement of Economic Benefits, and Other Equitable Relief Against Wendy Rogers, and Application for Special Receiver which the HCF Receiver incorporates by reference as if fully set forth herein. HCF Cross-Claims Against Wendy Rogers, Richard H. "Dick" Gray, and Catherin Gray; Pl.'s 3rd Am. Pet.

expectancy plus a certain number of months; or (3) specified monthly interest payments and the return of their principal to be paid at the death of the insured or the maturity of the bond.

13. Collectively, HCF's 81 participants invested approximately $5.5 million in HCF and were promised a return of $7 million. HCF began with 7 policies and now holds 5.

14. RV investors were only promised a return from the proceeds of the policy upon the death of the insured. If an RV-insured lived past the life expectancy plus twenty-four months, the investors would be required to contribute additional capital. RV has over 800 investors who collectively invested $77 million. RV has 57 distinct investment pools.

15. As a practical matter, the HCF bonds are worthless. One bonding company is now insolvent and its control person has been convicted of mail and wire fraud.[3] The other bonding companies have failed to provide assurances of performance, despite written requests. Thus, although theoretically the bond element distinguishes the HCF investments, in reality the investments are not bonded.

16. The only real difference between HCF and RV is that, while both HCF and RV investors were told that they would be made irrevocable beneficiaries, it appears that only HCF accomplished this, for at least some investors on some policies.

17. There are significant issues with these HCF designations. For one policy, HCF remains the designated beneficiary. On three of the policies, the percentages provided to the insurance company do not match the records in the HCF Receiver's possession.

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[3] The HCF investments were marketed as "A 'Secure Money' Idea" and were purportedly secured by bonds issued by Provident Capital Indemnity, Ltd. of Costa Rica ("Provident Capital"); Internazionale SpA out of Genoa, Italy; Union Credit Finazaria SpA out of Torino, Italy; and Condor Guaranty, Inc. out of Freeport, Grand Bahamas. At the time the HCF investments were sold, Dick Gray and Wendy Rogers knew or had significant reason to know that the bonds were not reliable. Indeed, in November of 2006 the Insurance Commissioner of Texas had entered a cease and desist order against Provident Capital, an entity whose control person Harold Maridon had already been convicted of mail and wire fraud. This was followed in January of 2008, by the entry of such an order by the Securities Commissioner.

C. HCF and RV's Assets and Cash Were Commingled

18. RV was really just an outgrowth of HCF; the same fraud on a larger scale. RV and HCF shared offices and personnel. The files and records of both HCF and RV were maintained at the RV-owned office at 707 N. Walnut Avenue in New Braunfels, Texas. When the RV Receiver took possession and control of RV's assets and property, he simultaneously took possession and control of HCF's books, records, bank accounts, and assets.

19. More importantly for purposes of this Motion, RV and HCF's assets were commingled from the moment RV was created in 2009 and throughout 2010. Between February of 2009 and April of 2010, just under $2 million in cash was shared between RV and HCF accounts. Such transactions occurred one or two times a month. The transactions varied from the relatively miniscule payment of the other's printing bills to inexplicable transfers of $20,000, $300,000, $600,000, and $1,000,000.

D. HCF's Dire Predicament and RV's Plan

20. HCF's investments are not at all secure. Although this suit was filed on May 5, 2010 and the RV Receiver appointed on May 28, 2010, no receiver was appointed for HCF until April 25, 2011.

21. When the HCF Receiver took over the administration of HCF policies, HCF had a total of $165,442.77 in its bank accounts. HCF's annual premium payments are currently scheduled at $305,119.55 per year. At this time, HCF does not have the funds necessary to pay its premiums through the end of the year.

22. On February 24, 2011—well before HCF had any effective representation in this matter—the RV Receiver, certain intervenors, and Richard and Catherine Gray entered into a mediated settlement agreement. Therein, Richard and Catherine Gray agreed to turn over a CD

valued at approximately $51,000 and real property valued at approximately $600,000.

23. There is no provision for HCF's recovery in the mediated settlement agreement. On information and belief, if enforced, the mediated settlement agreement will consume the majority if not all of Richard and Catherine Gray's assets that would be subject to execution.

24. The RV Receiver has suggested that the best strategy for managing RV's portfolio is to permit each investor to share *pro rata* in the proceeds of all RV policies, that is to pool RV's 57 investment pools. According to the RV Receiver's Motion to Approve Plan of Distribution, "[r]estructuring the [RV] portfolio and holding the policies until maturity is expected to yield $77.9 million with a 95% probability that the return will be between $62.5 million and $92.5 million, with $7.7 million paid out this year." RV Receiver's Mot. to Approve Plan of Distribution p. 2.

> As currently stands, [RV's] investors are slotted into 57 different investment pools. Each pool is matched to a specific investment policy. The existing structure is inequitable, unworkable and inefficient. Equity demands that the interests of Retirement Value's investors be changed . . . [to] maximize the value of the estate to for the benefit of all investors.

RV Receiver's Mot. to Approve Plan of Distribution p. 2.

25. Upon consolidation, RV investors might not only recover their basis, but could make up to a 20% profit. RV Receiver's Mot. to Approve Plan of Distribution p. 35.

II. ARGUMENT AND AUTHORITIES

26. By consolidating the investment pools, the RV Receiver will be able to use proceeds from policies that mature earlier to pay the proceeds of later-maturing policies, thereby diminishing the risk that any policy will lapse or that funds will be insufficient to maintain the policies to full maturity.

27. The HCF Receiver agrees with this general strategy. However, the following considerations counsel in favor of including HCF's assets and investors in the consolidated receivership:

(a) both HCF and RV investors are victims of the same fraud;

(b) RV and HCF's assets and cash were commingled such that the specific funds cannot be traced to RV; and

(c) if HCF is excluded from the consolidated pool, it is highly likely that its investors will recover far less than RV's investors, simply because they had the misfortune to encounter Defendant Richard Gray in 2008 instead of 2009.

28. "To throw the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary." *Ruddle v. Moore*, 411 F.2d 718, 719 (D.C. Cir. 1969).

29. Herein, the HCF Receiver will not repeat what the RV Receiver has already adequately briefed regarding *pro rata* distribution and the suspension of tracing principles when innocent victims of fraud are similarly situated. *See generally* RV Receiver's Mot. to Approve Plan of Distribution pp. 41-46.

30. Rather, the HCF Receiver focuses on why HCF should be included in the consolidated receivership, regardless of the fact that RV and HCF were theoretically distinct operations with separate policies and investors. *See S.E.C. v. Elliot*, 953 F.2d 1560, 1566 n.1 (11th Cir. 1992) (pooling assets of four companies and one individual for purposes of the receivership); *SEC v. Tyler*, No. 3-02-CV-282-P, 2003 WL 21281646, at * 5 (N.D. Tex. May 28, 2003) (viaticals

receivership pooled for *pro rata* distribution even though insurance policies were owned by two different entities)*; CMTC v. Eustace*, Civil Action No. 05-2973, 2008 WL 471574, at * 7 (E.D. Penn. Feb. 19, 2008) ("The government and parties' interest in judicial efficiency underlie the use of a single receivership proceeding.") (approving receiver's plan to distribute settlement proceeds on a collective basis to five separate but related entities in massive commodity futures fraud case).

31. The law imposes no obligation on this Court to permit RV investors "to benefit merely because the defendants spent the other victims' funds first." *U.S. v. Durham,* 86 F.3d 70, 73 (5th Cir. 1996). In fact, its equitable function requires just the opposite. *See Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990) ("[T]he rules of equity govern all matters relating to the appointment, powers, duties, and liabilities of a receiver and to the powers of a court regarding a receiver.") (citing TEX. CIV. PRAC. & REM. CODE §64.004).

32. "Sitting in equity, the district court is a 'court of conscience.'" *Durham*, 86 F.3d at 73; *see also Elliot*, 953 F.2d at 1566 ("The district court has broad powers and wide discretion to determine relief in an equity receivership. . . . This discretion derives from the inherent powers of an equity court to fashion relief.").

33. There is no equitable reason as to why HCF investors should not recover to the same extent as RV investors, and certainly no reason for the RV investors to enjoy a return of 20% when HCF investors' bases might not be refunded.

34. Rather, the "equities demand that all of the victims of the fraud be treated equally. . . . [T]his is a case where 'equality is equity.'" *United States v. Real Property Located at 13328 and 13324 State Highway 75 North, Blaine County, Idaho*, 89 F.3d 551, 553 (9th Cir. 1996)

(hereinafter *"PDRA"*); *see also Cunningham v. Brown*, 265 U.S. 1, 13 (1924)[4] ("[T]he victims of Ponzi were not be divided into two classes, those who rescinded for fraud and those who were

[4] "Although it did not involve a receivership, *Cunningham* is instructive in that the Supreme Court refused to compel the use of tracing methods to distribute monies to victims of a Ponzi scheme." *Eustace*, 2008 WL 471574 at * 7. The term "Ponzi scheme" owes its existence to the case of *Cunningham*, a consolidated proceeding of multiple suits against the bankruptcy estate of Mr. Charles Ponzi, who in December of 1919 with $150 began borrowing significant sums on credit from a great many innocent investors.

> He spread the false tale that on his own account he was engaged in buying international postal coupons in foreign countries and selling them in other countries at 100 per cent. profit, and that this was made possible by the excessive differences in the rates of exchange following the war. . . . By a written promise [to,] in 90 days . . . pay his investors $150 for every $100 loaned, he induced thousands to lend to him. He stimulated their avidity by paying his 90-day notes in full at the end of 45 days. . . . Within eight months he took in $9,582,000, for which he issued his notes for $14,374,000. he paid his agents a commission of 10 per cent. With the 50 percent promised to lenders, every loan paid in full with the profit would cost him 60 per cent. He was always insolvent, and became daily more so, the more his business model succeeded. . . . By July 1st, Ponzi was taking in about $1,000,000 a week.

See Cunningham, 265 U.S. at 7-8 (J. Taft).

By late July the authorities were investigating and on August 2, 1920, news of the scheme was widely publicized by one Boston newspaper. *Id.* at 8, 11. As one can imagine, hoards of investors descended upon Mr. Ponzi demanding payment. *Id.* The *Cunningham* defendants were certain parties who had happened to invest in late July just before the gig was up. *Id.* Getting early word of the imminent crash, the *Cunningham* defendants requested refunds and Mr. Ponzi obliged. *Id.* at 9. The bankruptcy trustee sought to avoid these transfers as preferences. The First Circuit and trial court had both held that the *Cunningham* defendants were entitled to rescission of the contracts. A unanimous Supreme Court reversed:

> To say that as between equally innocent victims, the wrongdoer, having defeasible title to the whole fund, must be presumed to have distinguished in advance between the money of those who were about to rescind and those who were not, would be carrying the fiction to a fantastic conclusion. . . . It is a case the circumstances of which call strongly for the principle that equality is equity, and this is the spirit of the bankrupt law. Those who were successful in the race of diligence violated not only its spirit, but its letter, and secured an unlawful preference.

Id. at 10.

Charles Ponzi (August 1920)

relying on his contract to pay them. They were all of one class, actuated by the same purpose to save themselves of the effect of Ponzi's insolvency.").

35. The principles of equity that support RV's consolidation of its 57 investment pools and the subsequent *pro rata* distribution amongst all defrauded investors, equally support HCF's participation in that receivership. *S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331-32 (5th Cir. 2001); *Tyler II*, 2003 WL 21281646 at * 5-6 ("All of the investors who purchased interests in insurance policies from AFS are in essentially a similar situation as victims of fraud. . . . Under such circumstances the property and assets of AFS, Larry W. Tyler and the relief defendants should be pooled for the benefit of all AFS investors."); *Brown v. Goldstein (In re Johnson)*, 80 B.R. 791, 799 (Bankr. E.D. Va. 1987) ("[T]hese plaintiffs seek not to prefer some fraud victims over others, but to preserve funds acquired by fraud for pro rata distribution to the victims of that fraud. Even *Cunningham* acknowledged that the tracing requirement was imposed to promote equality among defrauded parties and could be disregarded if equal treatment of the victims would result otherwise.").

36. Even if RV could reasonably trace specific monies, equity requires a *pro rata* distribution amongst all investors, including HCF investors. *Forex Asset Mgmt. LLC*, 242 F.3d at 331-32 ("[T]he Whitbecks claim that *Durham* is inapplicable because it involved tracing, whereas the present case does not involve tracing because the funds were not commingled; this is a distinction without a difference. . . . While it may have been permissible in *Durham* for the district court to have traced the funds, and while it may have been permissible in the present case for the district court to have allocated all of the segregated funds to the Whitbecks, in neither case was the district court required to choose the equitable remedy requested by Claremont or the Whitbecks. . . . [T]he district court, acting as a court of equity, was afforded the discretion to

determine the most equitable remedy."); *Durham,* 86 F.3d at 73 ("[T]he court, in exercising its discretionary authority in equity, was not obliged to apply tracing. . . . The lower court in this case chose not to impose a constructive trust in Claremont's favor because it seemed inequitable to allow Claremont to benefit merely because the defendants spent the other victims' funds first."); *U.S. v. Vanguard Inv. Co.*, 6 F. 3d 222, 226 (4th Cir. 1993) ("[E]ven if entitlement under state law could be established, that wouldn't end the matter in this federal receivership. Given its equitable nature and purposes, a district court supervising such a receivership had the discretionary power to deny these equitable remedies as inimical to receivership purposes even though they are or might be warranted under controlling law."); *Eustace*, 2008 WL 471574 at * 7 ("For purposes of equity tracing principles can be suspended.").

A. The Commingling of HCF and RV's Funds Makes it Impossible to Trace Any Specific Monies to a Particular Account or Entity

37. As noted above, numerous exchanges of funds between HCF and RV occurred throughout 2009 and 2010. Additionally, HCF and RV shared resources and at times paid the other's debts. This is sufficient to establish commingling for the purposes of pooling receivership assets. *Cf. Eustace*, 2008 WL 471574, at * 7 ("Eustace's commingling was not necessarily systematic, but the instancing of commingling indeed reflect Eustace's blurring of the distinction between the Receivership Funds. For example, Eustace took $607,000 from an Option Capital account and effectively deposited the money in the Offshore Fund, without any disclosure to investors. . . . An additional $2,097,665.85 of LP Fund money was invested into the Feeder Fund . . . without any disclosure to investors.").

38. Although RV may be able to approximate the net sums exchanged between RV and HCF, this is not sufficient to trace particular funds as properly belonging to RV. *See Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 456 (Tex. App.—Eastland 2006, pet. denied) ("Money is

subject to conversion only when it can be identified as a specific chattel and not where an indebtedness may be discharged by the payment of money generally.”).

39. Money is fungible. When HCF deposited cash into RV’s accounts and *vice versa*, other HCF and RV transactions were being consummated out of those same accounts. (Otherwise, why would one transfer the cash in the first place?) Consequently, it is impossible to trace with any certainty the specific funds of RV and HCF after the commingling occurred. *see Hodge v. N. Trust Bank of Texas, N.A.*, 54 S.W.3d 518, 522 (Tex. App.—Eastland 2001, pet. denied) (“[A] general deposit of money with a bank creates a creditor-debtor relationship between the depositor and the bank. Title to the money passes to the bank, subject to the depositor's demand for payment. . . . A ‘special deposit’ creates a bailor-bailee relationship whereby the bank keeps or transmits identical property or funds entrusted to it. The bank receives no title to money deposited for a special purpose but instead becomes responsible for the safekeeping, return, or disbursement of the money in question. . . . Because a general deposit becomes the property of the bank, the depositor has no action for conversion when the bank wrongfully pays out the deposit.”).

B. Even if RV Could Trace and Segregate HCF and RV’s Cash and Assets, Equity Demand Suspension of Such Tracing Rules.

40. The Fifth’s Circuit’s *Forex* opinion establishes that regardless of any alleged tracing or segregation, the HCF and RV receivership should be consolidated and the distributions subsequently made on a *pro rata* basis for the benefit of all HCF and RV investors. In *Forex* the funds were not even commingled but adequately segregated. Nonetheless, the Court ordered a consolidation of assets and pro rata distribution amongst all fraud victims. *Forex Asset Mgmt. LLC*, 242 F.3d at 331-32 (5th Cir. 2001) (“[T]he Whitbecks claim that *Durham* is inapplicable because it involved tracing, whereas the present case does not involve tracing because the funds

were not commingled; this is a distinction without a difference. . . . While it may have been permissible in *Durham* for the district court to have traced the funds, and while it may have been permissible in the present case for the district court to have allocated all of the segregated funds to the Whitbecks, in neither case was the district court required to choose the equitable remedy requested by Claremont or the Whitbecks. . . . [T]he district court, acting as a court of equity, was afforded the discretion to determine the most equitable remedy.").

41. The Ninth Circuit's opinion in *United States v. Real Property Located at 13328 and 13324 State Highway 75 North, Blaine County, Idaho*, is also instructive. 89 F.3d 551 (9th Cir. 1996) (hereinafter *"PDRA"*). In that case, Mr. Steven D. Wymer had defrauded many innocent parties, included the Palm Desert Redevelopment Agency ("PDRA"), which had invested approximately $5,170,000 with one Wymer company. *Id.* at 552. As part of Mr. Wymer's guilty plea . . . he "agreed to disgorge most of his assets, which would be sold and their proceeds placed into a fund to be distributed according to a plan by the SEC." *Id.* at 552-53.

42. Purporting to trace specific funds through various transactions of several bank accounts, PDRA claimed that it could trace the purchase of certain property in Blaine, Idaho to funds invested by PDRA and that therefore it should be the sole recipient of the $1 million in proceeds from the sale of said property. *Id.* at 552.

43. The district court held that even if PDRA could actually trace the funds used to purchase the property and identify them as the funds invested by PDRA, "it would be inequitable to allow the PDRA to use tracing fictions to enhance its claim to restitution at the expense of equally innocent fraud victims." *Id.* at 553 (quoting Memoranda of Decision and Order of September 13, 1994, *U.S. v. Real Property Located at 13328 and 13324 State Highway 75 North, Blaine*

County, Idaho Cause No. CV-92-0100 RJK, in United States District Court for the Central District of California (Sept. 13, 1994)).

44. The Ninth Circuit Court of appeals resoundingly affirmed the district court's decision:

> To allow the PDRA to succeed with this claim would frustrate equity. . . . "[W]here, as here, the struggle over the *res* derived from fraudulent conduct is between innocent parties, tracing should not and will not apply. . . . PDRA seeks to isolate a series of transactions executed in admittedly commingled accounts and to recover the full amount of proceeds . . . to the detriment of all other defrauded customers. This inequitable distribution of funds . . . is neither warranted nor justified. Instead of engaging in a tracing fiction, the equities demand that all Wymer's defrauded customers share equally in the fund of pooled assets.

Id. Here, RV's protest is substantively identical to that of PDRA and it should likewise be rejected in favor of equal treatment of all fraud victims.

C. The HCF Investors Should Be Included Even if RV Investors Might Be Diluted

45. Counsel for the RV Receiver has expressed a reluctance to consolidate the receiverships, arguing that if the HCF policies were added to the RV portfolio, RV investors would be diluted and citing the ratios for the value of claims/face value of policies, i.e. HCF's 78% ($5.5 M/$7 M) and RV's 57% ($77/$125).

46. However, this disparity only appears if one aggregates RV's 57 investment pools. Of RV's numerous policies, surely some have approximately the same claim/face-value ratio as HCF. Furthermore, given that the size of HCF's total investment is less than 10% of RV's entire portfolio, the dilution effect, if any, would be minimal.

47. More importantly, even if it were the case that consolidation with HCF would result in a dilution to some RV investors, it is the disparities in potential returns that motivate this equitable

remedy and give force to the RV Receiver's own arguments for the pooling and consolidation of RV's 57 investment pools.

> As currently structured, investors who invested the same amount of money could potentially recover widely varying amounts. . . . [I]nvestors who were fortunate enough to be allocated to PLI140 will recover more than investors unfortunate enough to be allocated to different policies. Treating similarly situated investors differently is inequitable and contrary to the purposes of the Receivership.

RV Receiver's Mot. to Approve Plan of Distribution pp. 40-41; *see also Elliot*, 953 F.2d at 1569-70 ("To allow any individual to elevate his position over that of other investors similarly 'victimized' by asserting claims for . . . reclamation of specific assets . . . would create inequitable results, in that certain investors would recoup 100% of their investment while others would receive substantially less. In the context of this receivership the remedy of restitution to various investors seeking to trace and reclaim specific assets as originating with them is disallowed as an inappropriate equitable remedy. . . . As all of the former securities owners occupied the same legal position, it would not be equitable to give some of them preferential treatment in equity. In fact, the equities weigh against allowing some to benefit from the fortuity that Elliot had not sold all of the securities").

D. The HCF Investors Should Be Permitted an Opportunity to Rectify the Inaccurate Irrevocable-Beneficiary Statuses of HCF Investors on Some of the Policies

48. Finally, the RV Receiver argues that RV investors and HCF investors are not similarly situated because of communications with the insurers purportedly making HCF investors irrevocable beneficiaries on certain HCF policies.

49. At the very least, HCF investors should be given the opportunity to remedy this obstacle so that they might participate in a consolidated receivership. The HCF Receiver is persuaded

that consolidation with the RV receivership is in the best interest of the HCF investors, such that they would consent to a re-designation of the irrevocable beneficiary status.

50. Additionally, there are issues with designations such that some alteration or adjustment will be required anyways. For the policies in which the irrevocable beneficiaries were designated, the percentages on record with the insurance companies do not appear to match our records of the investments.

51. For one of the policies, HCF remains the designated beneficiary. If irrevocable-beneficiary status issue is the only obstacle to consolidation, at least this one should be joined.

III. PRAYER

52. For the foregoing reasons, the HCF respectfully requests that HCF and RV receiverships be consolidated, that all assets and proceeds of the consolidated pool be distributed to HCF and RV investors on a pro rata bases, and that the Court award such other and further relief to which HCF might show itself entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served on the following attorneys and pro se individuals by delivering a true and correct copy as indicated by the Court's electronic service system, and first class mail on this the 12th day of August, 2011, as follows:

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