Michael D. Napoli
Texas Bar No. 14803400
James H. Billingsley
Texas State Bar No. 00787084
Daniel I. Morenoff
Texas State Bar No. 24032760
Artoush Varshosaz
Texas Bar No. 24066234
K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
Telecopy: (214) 939-5849

COUNSEL FOR THE RECEIVER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**Case No. 11-35165-7**
	§	
RETIREMENT VALUE, LLC,	§	**Involuntary Chapter 7**
	§	
DEBTOR.	§	

RECEIVER'S OBJECTION TO EMERGENCY MOTION
FOR APPOINTMENT OF CHAPTER 7 INTERIM TRUSTEE

Eduardo S. Espinosa, in his capacity as the State Court Receiver (the "Receiver") for Retirement Value, LLC (the "Alleged Debtor") appointed by the District Court of Travis County, Texas for the 126th Judicial District (the "State Court") in *Texas v. Retirement Value, LLC, Richard H. "Dick Gray, and Bruce Collins, and Keisling, Porter & Free, P.,C., Relief Defendant*, Cause No. D-1-GV-10-000454 (the "Receivership Action") objects to Emergency Motion for Appointment of Chapter 7 Interim Trustee [Docket No. 2] (the "Trustee Motion") filed by Richard Stafford, Frank Marlow, Yvonne Staley, and Hugh Dunn (together, the "Petitioners"). In support of his objection (the "Objection"), the Receiver states the following:

I. SUMMARY OF ARGUMENT

1. The Petitioners filed this involuntary bankruptcy case (the "Involuntary") and the Trustee Motion on August 12, 2011, the last business day before a State Court hearing in the

Receivership Action that would have brought the active portion of the Receivership Action to a close. They did so despite failing to intervene in the Receivership Action until the eleventh hour, without having participated in any of its contested elements, and without ever expressing any substantive objections to either the work the Receiver has done or the proposed plan of distribution that the State Court was set to consider on August 15, 2011.

2. Instead, they ran to this Court and filed the Involuntary, so preventing the conclusion of the active portion of the Receivership Action and imposing additional costs on the Receiver, the Alleged Debtor's estate, and the other interested parties in the Receivership Action. In due time, the Receiver will argue that the Involuntary must be dismissed, for at least the following reasons: (i) it was filed in bad-faith to delay the State Court from resolving the Receivership Action; (ii) the Alleged Debtor has more than 900 creditors, but only one of the Petitioners holds a claim against the Alleged Debtor; (iii) that Petitioner's claim is subject to a bona fide dispute as to its amount; and (iv) abstention is proper under Bankruptcy Code § 305 ,given the advanced state of the Receivership Action.[1]

3. The Petitioners filed the Involuntary despite the fact that the Receiver has been timely paying the administrative debts of the Receivership Action and while the Receiver actively sought authority from the State Court to pay the rest of the receivership's creditors (state law forbids the payment of receivership claims until the State Court grants such authority). The Petitions filed the Involuntary as both an impermissible, collateral attack on the State Court's earlier decisions in the Receivership Action and as an attempted end-run around the State of Texas's enforcement of its securities laws.

[1] This list is inclusive and, at the appropriate time, the Receiver will assert additional reasons as well. The Receiver does not concede at this time that venue is proper in the Court and expressly reserves his right to contest the propriety of venue in this Court at a later date.

4. The Petitioners now ask the Court to replace the Receiver, who has served at the pleasure and with the supervision of the State Court for more than 15 months, with an interim Chapter 7 trustee. They claim that this is necessary to preserve the Alleged Debtor's property and to prevent losses from affecting the Alleged Debtor's estate.

5. But the Petitioners have suggested no threat to the Alleged Debtor's estate whatsoever. They point to the need to monitor the Alleged Debtor's assets. But that is exactly what the State Court appointed the Receiver to accomplish and what has been happening in the Receivership Action. They complain about alleged "waste" through legal fees, despite the facts that: (i) the Receiver's administrative expenses of approximately $1.4 million have allowed the Receiver to increase the value of the Alleged Debtor's assets by more than $14 million – a 10:1 yield is far from "waste;" (ii) there is no risk of wasteful fees arising during the Involuntary and burdening the Alleged Debtor's estate – all fees of the Receiver's professionals are payable only after approval by the State Court (should the Involuntary be dismissed) or by this Court (should a bankruptcy follow) and neither court would approve the payment of wasteful fees from the Alleged Debtor's assets; (iii) all fees paid so far have been approved by the State Court as reasonable and serving the best-interest of the Alleged Debtor's estate and creditors; and (iv) the appointment of a Chapter 7 Trustee – with no knowledge of the Alleged Debtor's assets or operations and a new team of professionals – would undoubtedly increase the costs of administering the Alleged Debtor's estate.

6. The Petitioners have entirely failed to meet their burden under Bankruptcy Code

§ 303(g), and the Trustee Motion must be denied.[2]

II. BACKGROUND

A. THE ALLEGED DEBTOR'S FRAUDULENT ENTERPRISE

7. The Alleged Debtor's sole business was to perpetrate a securities fraud on the general public. It was extraordinarily successful. Using false claims, the Alleged Debtor stole approximately $77.6 million from more than 900 investors who it promised approximately $125 million in return. The proceeds of this scam were used to acquire insurance policies at a grossly inflated purchase price of approximately $28 million from a co-conspirator and to establish a premium reserve of approximately $25 million; the balance was dissipated to the Alleged Debtor's principals and to other co-participants in its fraud.

B. ORIGINS OF THE RECEIVERSHIP ACTION

8. Upon learning of the scheme, the Texas State Securities Board issued a cease and desist order on March 29, 2010. The Texas Department of Insurance followed shortly with a cease and desist order of its own. The State of Texas filed the Receivership Action against the Alleged Debtor and two of its principals on May 5, 2010, alleging that the defendants had perpetrated a massive fraud on the investing public through the sale of "participations" in policies of life insurance to be purchased by the Alleged Debtors.

9. At the request of the State, the State Court appointed the Receiver. The State Court directed the Receiver to: (a) collect and preserve the receivership assets; (b) notify the investor-victims of the Receivership Action; (c) attempt to effect fair restitution to the investor-

[2] By contemporaneously filed, separate motion, the Receiver has explained why it is in the best interest of the Alleged Debtor's creditors for the Court to excuse compliance with Bankruptcy Code § 543(a) through (c), as the Court is authorized to do by Bankruptcy Code § 543(d), asked to Court to exercise that authority, and asked the Court to abstain from hearing either the Involuntary or the Trustee Motion.

victims based on a plan to be approved by the State Court; and (d) assist the State in its investigation of the Alleged Debtor, its principals, and those who dealt with them. On May 28, 2010, the State Court continued the Receiver's appointment indefinitely.

C. EXPANSIONS OF THE RECEIVERSHIP ACTION

10. The Receivership Action significantly expanded after initial filing. In June 2010, the State added another principal of the Alleged Debtor as a defendant and sought additional receiverships for two of the Alleged Debtor's affiliates: Hill Country Funding, LLC, a Texas limited liability company ("HCF-TX"), and Hill Country Funding, LLC, a Nevada limited liability company ("HCF-NV"). The State Court established the requested additional receiverships and appointed Don Taylor (the "HCF Receiver") as the receiver for HCF-TX and HCF-NV. By the time the Involuntary was filed, the Receiver had asserted cross-claims against 59 additional persons and entities (including Mike Beste, the Petitioners' witness)[3] seeking to recover amounts paid to them by the Alleged Debtor, as well as damages for breaches of their fiduciary duties and indemnity under their contracts with the Alleged Debtor.

11. The State Court established a deadline of May 9, 2011 for parties like investors to intervene in the Receivership Action. Three groups did, asserting their rights and participating throughout the Receivership Action, in some cases for more than a year. Gary Cain, Barry Edelstein and Qvest III Master Fund, LLC intervened on July 30, 2010;[4] Grant W. Bejcek and Opal E. Bejcek intervened on October 25, 2010; and Ladell Harrison, on behalf of Matthew C.

---

[3] In his testimony, Dick Gray, the principal of the Alleged Debtor, described Beste as having "an intimate, direct hand to play in virtually everything Retirement Value did." Gray Dep. at p. 158. Beste was paid for his role in the scheme by the Alleged Debtor indirectly through its overpayment to James Settlement Services, its policy-supplier. Thus some portion of the $28 million that the Alleged Debtor paid for policies ended up in Beste's pocket. *Id.* at pp. 54-55.

[4] Qvest III was the single largest investor in the Alleged Debtor's scheme. Its claims are roughly 6% of the total investor claims. It is also the single largest investor in the PLI140 policy in which the Petitioners invested.

Allen, Jr., Teddie J. Allen and the Matthew and Teddie Allen Charitable Remainder Annuity Trust intervened on January 21, 2011.[5]

12. The Petitioners received the same notice of the Receivership Action as these interveners. Unlike them, the Petitioners only attempted to intervene in the Receivership Action through a motion filed with the State Court on July 28, 2011 – well after the deadline for intervention established in the Receivership Action.

D. RESULTS ACHIEVED AND COSTS INCURRED IN THE RECEIVERSHIP ACTION THROUGH INVOLUNTARY FILING

13. During the Receiver's 15 months on the job pre-dating the Involuntary, he actively managed the affairs of the Alleged Debtor and discharged his State-Court imposed duties. At the Involuntary's filing, the end of the active phase of the Receivership Action was near. The Receiver had proposed a plan of distribution to repay investors between 80% and 120% ($62.5 million to $92.5 million) of their investment, including 10% or $7.7 million this year. By comparison, the bankruptcy trustee for a similar life-settlement scam filed a plan of reorganization on August 5, 2011, twenty-three (23) months after entering bankruptcy (53% longer than the Receivership Action), despite incurring far more in administrative expenses and projecting a smaller return for investors (only 8%).[6]

14. Getting to a potential 100¢ distribution required significant work over more than a year. Among other things, the Receiver:

- Assembled a team of professionals to assist him in the management of the Alleged Debtor's portfolio of life insurance policies, including: (i) a portfolio manager, responsible for death tracking, premium optimization (working with the insurers to reduce the cost of maintaining the policies in force), communication with insureds, and obtaining updated health information for the insureds; and

[5] Ladell Harrison and Gary Cain also invested in the PLI140 policy.

[6] *In re Life Fund 5.1, LLC*; Case No. 09-32672 (N.D. Ill.) [Docket No. 738].

(ii) actuaries to analyze the value of the portfolio, the premiums necessary to keep it in force, and the reserves the Receiver will require to meet these obligations.

- Maintained the Alleged Debtor's policy portfolio at the lowest possible cost.

- Investigated the fraudulent scheme perpetrated through the Alleged Debtor by its principals (including Mike Beste) through: (i) interviews with many of those involved; (ii) analysis of 236 gigabytes of data recovered from the Alleged Debtor's computers; (iii) searches of the Alleged Debtor's offices; and (iv) reviews of related records.[7]

- Prepared valid books and records for the Alleged Debtor (the Alleged Debtor's completely omitted its fraudulent scheme). The Receiver rebuilt the Alleged Debtor's books from scratch.

- Recovered substantial assets – approximately $4.7 million – for the benefit of the investors and other creditors, including:

    - $1.25 million secreted by the principals of the Alleged Debtor into Special Acquisitions, Inc.;

    - $560,000 and 8 policies of insurance worth about $1.4 million;

    - $124,000 in cash and $195,000 in debt-reduction from a settlement with Bruce Collins;

    - $710,000 in a settlement with Kiesling Porter. This settlement is conditioned upon a settlement with a class of investors led by Gary Cain and Barry Edelstein. That settlement requires approval by the State Court; and

    - $650,000 in cash and assets from a settlement with Dick and Catherine Gray. This settlement was due to be approved by the State Court on August 15 at a hearing that was postponed due to the filing of this case.

- Prosecuted a claim on the PLI140 policy, worth $10 million, against Pacific Life Insurance. After agreeing to pay on the policy in December 2010, Pacific Life reversed course and retained counsel to attempt to deny the claim. The Receiver and his counsel investigated the underlying transaction, proved up the chain of title, and convinced the family of the insured and Pacific Life that the Alleged Debtor was entitled to the proceeds of the policy. On March 15, 2011, Pacific Life paid the full death proceeds of $10 million, plus interest from the date of death totaling $117,534.25.

---

[7] The relevant information discovered by the Receiver was produced to the parties in the Receivership Action.

- Identified, investigated, and initiated litigation against various persons who breached duties to the Alleged Debtor or who received fraudulent transfers from it (including Mike Beste). The Receiver negotiated settlements of some of these actions pre-petition, while others remain pending.

15. It took substantial effort to bring more than $14 million into the Alleged Debtor's estate. The State Court found the related work performed by the Receiver and his professionals to be worth the approximately $1.4 million in related fees approved to date. Even as the State Court cut approximately $100,000 from those fees, it approved the remaining $1.4 million as proper and reasonable. These totals reflect the State Court's imposition of additional discounts from the usual and customary fees charged by the Receiver and his firm – on average, the Receiver and his firm have discounted their billings in the Receivership Action by approximately 25%.

E. STAYED AUGUST 15TH HEARING AND FILING OF THE INVOLUNTARY

16. As described above, before the filing of this Involuntary by the Petitioners, the Receiver proposed a plan of distribution in the Receivership Action and provided notice of the procedures that plan would establish. The Receiver's actuaries determined that the plan has a 95% probability of returning between $62.5 million and $92.5 million (between 81% and 120% of the investors' aggregate investment); initial distributions of $7.7 million (10% of the amount invested) would be made this year with additional payments to come.

17. Two parties objected to the Receiver's plan. The Bejcek Intervenors sought to relitigate an issue already decided by the State Court in January 2011 (the State Court had scheduled argument on a parallel reconsideration motion for the August 15, 2011 hearing). The HCF Receiver objected not to the Receiver's plan, but to the exclusion of his own receivership-estate from it (the HCF Receiver filed a related consolidation motion in the Receivership Action; that motion has not yet been set for hearing). The State Court had also set additional matters for

consideration on August 15, 2011, including the $650,000.00 proposed settlement with the Grays and a status conference on how the Receiver would pursue the Alleged Debtor's causes of action after approval of the Receiver's plan.[8]

18. The State Court was also set to consider the Receiver's plan on August 15, 2011, when the Petitioners filed the Involuntary on the afternoon of August 12, 2011.

19. While the Petitioners knew of all these matters, they did not file an objection to the Receiver's plan with the State Court. This inaction was consistent with their pattern in the Receivership Action. After all, the Petitioners had missed the deadline to intervene in the Receivership Action, despite actual notice of the Receivership Action and the active involvement in the Receivership Action of other interveners, including investors in the same policies as the Petitioners. The Petitioners never objected to the Receiver's plan, never objected to the Receiver's fees in the Receivership Action, and never even bothered to attempt to intervene in the Receivership Action until July 28, 2011. Their motion to intervene was set for the same State-Court hearing on August 15, 2011.

20. Instead of taking any of these actions in the Receivership Action, on the afternoon of August 12, 2011, the Petitioners filed the Involuntary. But-for the filing of the Involuntary, the active phase of the Receivership Action would now be all but over. A plan would be in place determining who would be paid what and when. The methodology by which the Receiver would generate the assets necessary to pay them would have been established. The Receiver's plan called for an abbreviated proof of claims process that would allow claims not listed on the Receiver's schedule of claims to be added and any disputes as to amount, classification and

[8] Such causes of action are to be litigated by the Receiver's contingency-fee counsel at no further up-front cost to the Alleged Debtor's estate.

status of claims to be resolved. The only other remaining steps would have been to resolve the Alleged Debtor's causes of action and to continue to manage the Alleged Debtor's insurance portfolio over time.

F. THE TRUSTEE MOTION

21. Contemporaneously with their filing of the Involuntary, the Petitioners filed the Trustee Motion and obtained an emergency setting. In the Trustee Motion, they argue that it is "necessary to preserve the property of the [Alleged Debtor's] estate or to prevent loss to the estate [for the Court to] order the United States trustee to appoint an interim trustee" for the Alleged Debtor.

22. They contend that a trustee is needed "to monitor the numerous life insurance policies that [the Alleged Debtor] owns, ensure that premiums are timely paid so that the policies do not lapse prior to maturity, and promptly file a claim with the policy provider once a policy has matured." They maintain a trustee is needed to "immediately stop the Receiver from wasting estate assets by incurring additional legal fees at the shocking pace he has already established in the receivership proceedings." These arguments, and a contention that the Bankruptcy Code requires a custodian such as a state-court receiver to transfer control of the estate to a trustee, are the only arguments advanced by the Petitioners in favor of the appointment of an interim trustee.

III. OBJECTION

23. The Trustee Motion is pure forum shopping in an attempt to thwart a legitimate State-Court receivership. The allegations in the Trustee Motion are a baseless attempt to relitigate the Receivership Action in a different forum, and it should be denied.

24. The Petitioners failed to participate in the Receivership Action, despite notice and an opportunity to be heard. They missed the deadline to intervene in the Receivership Action,

never objected to any of the Receiver's professionals' fees in the Receivership Action, never raised concerns with the State Court concerning the Receiver's diligence in pursuing his State-Court-imposed obligations, and never objected to the proposed plan in the Receivership Action. Rather than availing themselves of the opportunity to be heard in the Receivership Action, they ran to this Court on the eve of the conclusion of the substantive portion of the Receivership Action, seeking to start completely over a process that has been going on for more than a year.

25. In order to prevail on the Trustee Motion, the Petitioners would first need to overcome the threshold matter of demonstrating "a reasonable likelihood, or probability, that this Debtor will eventually found to be a proper involuntary debtor under 11 U.S.C. § 303 and that an order for relief will enter."[9] They cannot.

26. Even if they could, the Trustee Motion does not meet the Bankruptcy Code's requirements for displacing the Receiver in favor of a bankruptcy trustee. No necessity exists. The Alleged Debtor's estate is in no danger and needs no intervention to preserve property from preventable loss. Indeed, Bankruptcy Code § 543(a) authorizes the Receiver to take "such action as is necessary to preserve [the Alleged Debtor's] estate" post-petition, until and unless a trustee is appointed; furthermore, because the Alleged Debtor's creditors' interests would be better served by retaining the Receiver in place and continuing the Receivership Action to its close, by separate motion under Bankruptcy Code § 543(d), the Receiver has asked the Court to excuse compliance with the turnover provisions of Bankruptcy Code § 543(b) and to abstain from considering either the Involuntary or the Trustee Motion.

27. When "no facts are alleged showing a necessity for appointment" and "in absence

[9] *In re Prof. Accountants Referral Servs., Inc.*, 142 B.R. 424, 429 (Bankr. D. Colo. 1992) ("In the absence of such a finding, this Court believes that the appointment of a trustee during the gap period would be more tenuous, probably improper, and likely an abuse of discretion.").

of an exceptionally strong need for doing so" the Court must deny the Trustee Motion.[10]

A. LEGAL STANDARD

28. Bankruptcy Code § 303(g) authorizes the Court to appoint an interim trustee in the Involuntary only "if necessary to preserve the property of the estate or to prevent loss to the estate."

B. LIKELY DISMISSAL OF INVOLUNTARY

29. Case law requires the Petitioners to show that they are reasonably likely to prevail in forcing the Alleged Debtor into bankruptcy in order for the Court to even consider appointing an interim trustee during the "gap" period.[11] The Petitioners have not even tried to meet this threshold requirement and cannot do so (as the Receiver will more fully argue in a motion to dismiss the Involuntary). Until and unless the Petitioners demonstrate that they are reasonably likely to avoid dismissal, they cannot prevail in seeking the interim appointment of a trustee.

30. The Involuntary must be dismissed because it constitutes a bad-faith filing. The Petitioners' bad-faith is readily apparent from the timing of the Involuntary's filing. The Petitioners filed the Involuntary on the last possible day to do so before the State Court would consider the Receiver's proposed plan, a plan that drew no substantive objections from the parties who participated in the Receivership Action and no objection *even from the Petitioners*. They did so after choosing not to participate in the Receivership Action for a full fourteen (14) months after its initiation. Simply put, there is no good-faith story the Petitioners can (or have) told to explain why they chose to file the Involuntary now, so late in the game.

31. Furthermore, bad faith is apparent from the basis on which the Trustee Motion is

---

[10] *In re Levin*, 2011 WL 1469004, *2 (Bankr. S.D. Fla. 2011) (citing *In re Reed*, 11 B.R. 755, 757 (Bankr. S.D.W.Va. 1981) and *In re R.S. Grist Co.*, 16 B.R. 872, 873 (S.D. Fla. 1982), respectively).

[11] *In re Prof. Accountants Referral Servs., Inc.*, 142 B.R. at 429.

nominally sought. The Petitioners rely in the Trustee Motion on allegedly wasteful fees incurred by the Receiver in the Receivership Action. All of those fees have been ruled by the State Court to have been reasonable. The Petitioners essentially ask the Court to sit as a de facto appellate court and to reject the fact finding of the State Court as clearly erroneous. This is the kind of analysis the *Rooker-Feldmen* doctrine clearly forbids. In addition to this attack on the comity between the federal government and the State of Texas, the Petitioners' action in filing the Involuntary appears to interfere with the State of Texas's enforcement of its securities laws through the Receivership Action. That, too, is an unwarranted use of the federal courts at odds with the values of comity preserved by federal statutes.[12]

32. The Involuntary must also be dismissed because the Petitioners do not meet the Bankruptcy Code's requirements for filing an involuntary case. The Petitioners admit that the Alleged Debtor has more than 900 creditors,[13] so the Bankruptcy Code requires the Involuntary to be filed by at least three (3) creditors of the Alleged Debtor, each of whom must hold a claim "that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount[.]"[14]

33. But only one of the Petitioners, Frank Marlowe, actually holds a claim against the Alleged Debtor. Hugh Dunn and Richard Stafford are beneficiaries of an IRA that invested in the Alleged Debtor's scheme, but are not creditors themselves.[15] Yvonne Staley is neither a creditor, nor a beneficiary of an IRA that invested in the Alleged Debtors. She appears to be the

[12] See, for example, 28 U.S.C. § 1334(c)(1).

[13] Trustee Motion, ¶ 4.

[14] 11 U.S.C. § 303(b)(1).

[15] *In re Endeavor Highrise, LP*, 432 BR 583 (Bankr. S.D. Tex. 2010) (holding that a custodian for an IRA holds and can assert claims relating to its holdings, not the beneficiary, unless the custodian is documented to be unable or unwilling to assert such a claim).

spouse of a beneficiary of an IRA that invested in the Alleged Debtor's scheme. These indirect relationships are insufficient to make Dunn, Stafford, or Staley creditors of the Alleged Debtor.[16]

34. And not even Frank Marlowe's claim satisfies the other requirements of Bankruptcy Code § 303(b)(1), as his claim (like those of the other Petitioners) is subject to a bona fide dispute as to its amount. Marlowe (like the other Petitioners) claim an entitlement to both his share of "the amounts due upon the [post-Receivership Action] maturity of the PLI140 Policy and … any remaining premium reserves related to the PLI140 Policy."[17] As a matter of law, the Petitioners are not entitled to their share of a particular policy's proceeds, especially not one that matured during the Receivership Action. Even if they were, the intermingling of the Alleged Debtor's premium reserves were such that the amount, if any, of such reserves attributable to the Petitioners would be unliquidated and a trial would be necessary to determine what funds, if any, they have the right to recover on that basis.

35. For at least these reasons, and there are others, it appears that the Involuntary must be dismissed. Without the Petitioners showing that they are likely to prevail in the Involuntary, the Trustee Motion must be denied.

C. LACK OF NECESSITY OF INTERIM TRUSTEE

i. Monitoring of Alleged Debtor's Assets

36. The Petitioners claim that an interim trustee is needed while it is determined whether the Involuntary should go forward. They say this interim appointment is needed "to monitor the numerous life insurance policies that [the Alleged Debtor] owns, ensure that premiums are timely paid so that the policies do not lapse prior to maturity, and promptly file a

16 *Id.*

17 Trustee Motion, ¶ 12.

claim with the policy provider once a policy has matured."

37. The State Court ordered the Receiver to collect and preserve the receivership assets and to operate the Alleged Debtor's business. These responsibilities are the same responsibilities the Petitioners claim require the appointment of an interim trustee. No party has complained of the Receiver's performance of these responsibilities in the Receivership Action. And the Bankruptcy Code already authorizes the Receiver to continue to take such actions until and unless a trustee is appointed to whom the Receiver must turnover the Alleged Debtor's assets, assuming the Court orders such turnover.[18]

38. Furthermore, the Bankruptcy Code provides an alternative to the appointment of an interim trustee either "if the interests of creditors … would be better served by permitting a custodian to continue in possession, custody, or control of such property[,]"[19] or "if the custodian … was appointed or took possession more than 120 days before the date of the filing of the petition."[20] As set out in more depth in the Receiver's contemporaneously filed § 543(d) motion, the first clearly applies to the Involuntary and the second appears to apply.

39. Accordingly, the need to monitor and preserve assets does not necessitate the appointment of an interim trustee for the Alleged Debtor in the Involuntary.

ii. Incoherence and Inaccuracy of Petitioners' "Waste" through Fees <u>Argument</u>

40. The Petitioners also contend that an interim trustee is needed to "immediately stop the Receiver from wasting estate assets by incurring additional legal fees at the shocking pace he

---

[18] 11 U.S.C. § 543(a) ("A custodian with knowledge of the commencement of a case … may not make any disbursement from … property of the debtor …, *except such action as is necessary to preserve such property*") (emphasis added).

[19] 11 U.S.C. § 543(d)(1).

[20] 11 U.S.C. § 543(d)(2).

has already established."

41. This contention is wrong, logically and factually. It implies that the wastefulness of an expense can be determined without reference to the coinciding benefit obtained. It ignores both this Court's and the State Court's role in the allowance of administrative expenses in cases before them. It ignores the structural safeguards the State Court has imposed on the Receiver's fees and the active role the State Court has historically played in determining which of the Receiver's fees should be allowed. And it ignores the far greater costs the Alleged Debtor's estate would be forced to bear if the Trustee Motion were actually granted.

(A) Reasonableness of Costs Turns on Benefits, not Just Costs

42. It is difficult to imagine a more prompt, reasonably priced administration of the Alleged Debtor's estate.

43. Over the 15 months since his appointment, the Receiver has brought more than $14 million into the Alleged Debtor's estate, while incurring approximately $1.4 million in State-Court-approved fees. He has prepared and filed a plan of distribution that promises the opportunity for investors in a massive fraud to recover up to 100% of their investments over time (including a recovery of the first ten percent (10%) of their investment within less then two (2) years of his appointment) that drew no opposition on the merits, save a me-to objection from the receiver for an affiliated fraud and an already-rejected legal argument from one set of intervenors.

44. It bears repeating that a parallel fraud in Chicago dealt with in a bankruptcy court there has yielded more in administrative costs, a longer delay to distributions, and a smaller projected recovery.[21]

---

[21] *In re Life Fund 5.1, LLC*; Case No. 09-32672 (N.D. Ill.) [Docket No. 738].

45. Were the Court to use the guidelines used by bankruptcy courts to consider the allowance of post-petition fee applications as a yard-stick to gauge the alleged "wastefulness" of the Receiver's costs of administration, the Court could only conclude that the Receiver's fees have actually benefited the estate and should be allowed.[22]

(B) Fee Allowance Procedures

46. Furthermore, the Petitioners argument that the immediate appointment of an interim trustee is needed to prevent "waste" of the estate during the involuntary phase of this case through the Receiver's fees makes no sense.

47. Assuming the Petitioners succeed in keeping the Involuntary in bankruptcy, the Receiver's post-petition expenses could only be allowed as administrative expenses of the Alleged Debtor's estate if allowed by the Court as "actual, necessary expenses."[23] If the Involuntary is dismissed, these expenses could still only burden the Alleged Debtor to the extent allowed as reasonable after the fact by the State Court.

48. Either way, no fees could be paid without notice and a hearing in front of a court of competent jurisdiction. There is simply no way that "waste[ful]" fees could possibly cause loss to the estate or require the Court's immediate insertion of a trustee to protect the estate before the propriety of the Involuntary is decided.

(C) State Court's Historic Vigilance in Enforcing Reasonableness

49. Additionally, it is worth considering that, at the State Court's prompting, the Receiver has substantially discounted his fees (by approximately 25%) and that, above and beyond this front-end discount, which remains in place, the State Court has demonstrated

---

[22] *Andrews & Kurth, L.L.P. v. Family Snacks, Inc.* (*In re Pro-Snax Distributors, Inc.*), 157 F.3d 414 (5th Cir. 1998); *In re Henry S. Miller Commercial, LLC*, 2010 WL 4638882, *6 (Bankr. N.D. Tex. 2010)

[23] 11 U.S.C. § 503(b)(3)(E).

attentiveness to the reasonableness of the Receiver's administrative costs by reducing them by over $100,000.00 over the course of the Receivership Action, to date.

50. These reductions demonstrate that the $1.4 million in allowed administrative costs to date have been actively considered and deemed reasonable. There is no basis for doubting this finding by the State Court, even if the *Rooker-Feldman* doctrine did not apply (which it does) and forbid this Court from reconsidering the State Court's finding.

(D) Greater Costs to Alleged Debtor's Estate of an Interim Trustee

51. Finally, even if there were reason and an appropriate forum to question the Receiver's fees (there are neither) and even if his post-petition fees could be viewed as a threat to the Alleged Debtor's estate (which they can not), it would not follow that the Alleged Debtor would be better served by the insertion of an interim trustee.

52. Necessarily, if an interim trustee were appointed, the interim trustee would have no relationship with the insurers from the Alleged Debtor's portfolio and no knowledge of the timing of the Alleged Debtor's payment obligations under the policies in that portfolio. The interim trustee would be required to bring himself (and whatever professionals he retains to assist him) up to speed on all the issues with which the Receiver and his professionals are already familiar. Mounting this learning curve would threaten the Alleged Debtor's estate (as deadlines may be missed in the meantime) and impose significant costs and delays that are entirely unnecessary and avoidable simply by keeping the Receiver in place as the custodian for the Alleged Debtor's estate, with his existing team.

IV. CONCLUSION

The Petitioners have not met their burden in advancing the Trustee Motion. Therefore, the Receiver asks the Court to deny the Trustee Motion in its entirety and grant the Receiver any further and additional relief to which he may be entitled.

DATE: August 19, 2011

Respectfully submitted,

By: *__/s/ Daniel I. Morenoff__*
Michael D. Napoli
Texas Bar No. 14803400
James H. Billingsley
Texas Bar No. 00787084
Daniel I. Morenoff
Texas Bar No. 24032760
Artoush Varshosaz
Texas Bar No. 24066234

K&L GATES LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
(214) 939-5500
(214) 939-5849 (Telecopier)
Michael.Napoli@klgates.com
James.Billingsley@klgates.com
Dan.Morenoff@klgates.com
Artoush.Varshosaz@klgates.com

COUNSEL FOR THE RECEIVER

CERTIFICATE OF SERVICE

I certify that on August 19, 2011, this Objection was served on the Petitioners, through counsel, via the email through the Court's ECF system.

By: *__/s/ Daniel I. Morenoff__*
Daniel I. Morenoff