

Cause No. D-1-GV-10-000454

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,  
and WENDY ROGERS,

Defendants,

and

KIESLING, PORTER, KIESLING,  
& FREE, P.C.,

Relief Defendant.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

126<sup>TH</sup> JUDICIAL DISTRICT

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR OBJECTION  
TO THE SECOND APPLICATION FOR FEES  
BY THE RECEIVER AND RECEIVER'S COUNSEL**

TO THE HONORABLE JUDGE PRESIDING:

RICHARD H. "DICK" GRAY and WENDY ROGERS submit this Memorandum in Support of their Objections to Second Application for Fees by the Receiver and Receiver's Counsel.

**I.**

**Argument**

This action was brought by the Attorney General of the State of Texas. The Attorney General asserts he has standing to pursue a broad range of equitable and legal remedies against Dick Gray and Wendy Rogers on behalf of Retirement Value's creditors. The Attorney General is, as of the date of this filing, the *only* plaintiff. The Court of course appointed Mr. Espinosa as Retirement Value's Receiver on May 5, 2010, but Mr. Espinosa has not sued the Defendants.

Although the Receiver is not the plaintiff, he and his counsel appear to have assumed much of the Attorney General's workload. The Receiver is spending enormous amounts – well over \$100,000 per month – much of which is for litigation. And much of that litigation is aimed at the Defendants. For example, Michael Napoli, the Receiver's counsel, took the lead at Mr. Gray's deposition on December 8, 2010. And, as the Receiver's initial report establishes, the Receiver has spent large amounts of money investigating potential claims against the Defendants.

The Attorney General filed this claim. The Attorney General accordingly should foot the bill. It is not prudent to use Retirement Value's funds to litigate claims filed by another. The purpose of receivership is "the preservation of property or the thing in controversy pending the litigation, in order that it may be subjected to such orders or decrees as the court may make or render." *Jackson v. The Praetorians*, 80 S.W.2d 322, 323 (Tex. Civ. App.--Dallas 1935, no writ); accord *Suntech Processing Sys., L.L.C. v. Sun Commc'ns, Inc.*, No. 05-98-00799-CV, 1998 WL 767672, at \*5 (Tex. App.--Dallas Nov. 5, 1998, no pet.) (not designated for publication) ("The purpose of a receivership, like a temporary injunction, is to preserve the subject matter of the suit pending a trial on the merits."). "A receiver is not appointed for the benefit of the applicant, but to receive and preserve the property for the benefit of all parties interested therein." *Readhimer v. Readhimer*, 728 S.W.2d 872, 873 (Tex. App.--Houston [1st Dist.] 1987, no writ). The Receiver is dissipating Retirement Value's assets rather than conserving them by doing work for Attorney General on Retirement Value's nickle.

Defendants have not identified specific time entries in the Receiver's applications relevant to this objection. But Defendants cannot readily identify which task is which. The burden of doing that should be on the Receiver; the Receiver is in the best position to determine what work benefitted whom. The Receiver should be ordered to do so.

## II.

### There Is No Waiver

Neither Defendants nor Intervenors lodged this particular objection to the Receiver's first application for fees. But they did not and could not thereby waive the Receiver's obligation to discharge his duty faithfully to Retirement Value and its investors. The Receiver is an agent of the Court. *See Spigener v. Wallis*, 80 S.W.3d 174, 183 (Tex. App.--Waco 2002, no pet.) ("The receiver is the agent of the trial court, not the owners."); *see also In re Walston*, No. 10-05-00193-CV, 2007 WL 1378512, at \*7 (Tex. App.--Waco May 9, 2007, pet. denied) (mem. op.); *Ex Parte Britton*, 92 S.W.2d 224, 226 (Tex. 1936) ("Generally speaking, a receiver is an arm of the court. He represents the court and all the parties interested in the litigation wherein he is appointed. Ordinarily, he is appointed to receive and preserve the property involved in the suit, subject to the orders of the court."). The Court appointed the Receiver. The Court granted the Receiver extensive powers through the Temporary Restraining Order and Agreed Temporary Injunction. The Court accordingly retains the plenary authority to police its agent. That authority is not the parties' to waive.

It is particularly important that the Court maintain its independent supervision of the Receiver here. The Receiver was appointed to act for the benefit of *all* of those with an interest in Retirement Value. Hundreds of individuals have a stake in Retirement Value's solvency; only a handful have a seat at the table. If the Court concludes at any time that the Receiver is not zealously preserving the assets of the estate, it should insist that the Receiver do so.

### III.

#### Relief Requested

For the foregoing reasons, Defendants request an order requiring that:

- (1) the Receiver identify each task performed by him or his counsel pursuing or investigating claims against Defendants; and
- (2) the Receiver be prohibited from seeking funds from Retirement Value for that work.

WHEREFORE, premises considered, defendants pray their Objection be heard and sustained, and that the Court enter appropriate orders.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANTS  
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## CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2010, a true and correct copy of the foregoing was been sent to the following electronically via eFiling for Courts and/or facsimile:

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