No. 17-3048.

H. THAYNE DAVIS, Plaintiff,

H. THOMAS MORAN, II, Receiver-Appellee,

JOHNNIE C. IVY, III, ET AL., Intervenors-Appellants,

v.

LIFETIME CAPITAL, INC., ET AL., Defendants.

United States Court of Appeals, Sixth Circuit.

June 27, 2018.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

OPINION

BERNICE BOUIE DONALD, *Circuit Judge*.

Intervenor-Appellants Johnnie C. Ivy, III, et al. ("Appellants") appeal the district court's grant of summary judgment to Receiver-Appellee H. Thomas Moran, II ("Receiver") and its rejection of Appellants' claims to the proceeds of two matured life insurance policies. LifeTime Capital, Inc. ("LifeTime") had purchased the policies at a discount from an insured, then sold financial interests in those policies to numerous investors, including Appellants. But LifeTime turned out to be at the center of a massive scheme of fraud, leading to the company's imminent

collapse and the district court's appointment of a receiver. Appellants allege that Receiver converted portions of the policies' proceeds, and that Appellants were deprived of those proceeds without due process. Receiver argued, and the district court agreed, that his disposition of the proceeds was lawful and made pursuant to the district court's order of appointment, that Appellants received due process, and that Receiver enjoys quasi-judicial immunity. Receiver also argued that Appellants' claims are time-barred; the district court did not reach that issue. For the following reasons, we AFFIRM the district court's grant of summary judgment to Receiver.

I

This case concerns viatical settlements, where terminally ill or elderly beneficiaries known as "viators" sell their life insurance policies to companies at discount, thus obtaining the cash proceeds of the sale for use during their remaining lifetime; the companies then sell financial interests in those policies to investors, who are assigned a beneficial interest in the policy and seek to realize their desired rate of return when the viator dies and the insurance benefit is paid to the investor. *See Black's Law Dict.* 1582 (10th ed. 2014). Such an arrangement is a "viatical settlement" or "life settlement." LifeTime solicited prospective investors so as to obtain funds needed to purchase policies. A company like LifeTime is expected "to establish and fund an insurance premium escrow account from which premiums on the settlement contracts are paid until the death of the insured," i.e., the policy's maturity. A viatical investor is speculating on how long the insured will live: "[I]nvestors risk a reduction of their return or

a complete loss if the viator does not die within the time projected because the investor must continue to pay the premiums on the policy as they accrue or the policy will lapse." *Davis v. LifeTime Capital, Inc.*, No. 3:04cv00059, 2016 WL 1222409 (S.D. Ohio Mar. 29, 2016) (quoting *United States v. Svete*, No. 3:04cr10/MCR, 2014 WL 941448, at *4 (N.D. Fla. Mar. 11, 2014)).

This appeal arises from the district court's Decision and Order of March 29, 2016 granting summary judgment in favor of the district court-appointed Receiver-Appellee and denying Appellants' Motions to file amended complaints. *Davis v. LifeTime Capital, Inc.*, No. 3:04cv00059, 2016 WL 1222409 (S.D. Ohio Mar. 29, 2016). The district court entered final judgment for Receiver on December 16, 2016. *Davis v. LifeTime Capital, Inc.*, No. 3:04-cv-00059, 2016 WL 9404926 (S.D. Ohio, Dec. 16, 2016). At issue are two life insurance policies purchased by LifeTime from James Jordan ("Jordan") on March 19, 1999 ("Jordan Policies" or "Policies"). LifeTime sold interests in the Policies to numerous investors ("Jordan Investors").[1] The face value of the policies was $3 million each. Each policy was transferred to a separate life insurance trust, with a third party serving as trustee and LifeTime designated as the beneficiary. Appellants were "matched" with the Jordan Policies approximately one to eight months after remitting their investment funds. LifeTime then sent Appellants a partial release of beneficiary rights, assigning LifeTime's beneficial interest in the life insurance trust. This left the trustee as owner and beneficiary of the Jordan Policies under the life insurance contracts.

Jordan Investors were among some four thousand people who, starting in 1997 and continuing for about six years, invested in LifeTime, which seemed

at the time to be a legitimate viatical settlement company. *Davis*, 2016 WL 1222409, at *1. Unfortunately for its investors, LifeTime was part of a massive scheme of fraud masterminded by company founder David A. Svete ("Svete"). *Id.* Svete was convicted in 2005 of mail fraud, conspiracy to engage in money laundering, money laundering, and interstate transportation of money obtained by fraud. *Id.* A key part of the scheme was the creation of a sham underwriting company, Medical Underwriting, Inc. ("MUI"), intended "to appear [falsely] to be an independent and reliable entity" to review insureds' medical records to determine life expectancy; on that basis, Svete's partners in fraud "prepared inaccurate and fraudulent life expectancies." *See Svete*, 2014 WL 941448, at *5. By misleading investors as to insureds' life expectancies, LifeTime induced investors to invest in viatical settlements that may not have been sound investments. *Id.*; *see Davis*, 2016 WL 1222409, at *1. Svete also created a false "independent investment servicing company," which investors were told "maintained a premium reserve account . . . [to] underwrit[e] the policies." *Svete,* 2014 WL 941448, at *5. But the company "lacked sufficient funds to pay [policy] premiums . . . when the viators lived longer than expected." *Id.* Investors were thus forced to make additional premium payments to avoid the total loss of their investment. *Id.*

By February 2004, the house of cards devised by Svete was on the brink of collapse. *Davis*, 2016 WL 1222409, at *1. On February 19, 2004, faced with LifeTime's imminent insolvency, investor H. Thayne Davis ("Davis") sued LifeTime for fraud and breach of contract. The Complaint placed "in excess of $150 [million]" the total maturity value of LifeTime's

aggregate viatical portfolio ("LifeTime Portfolio" or "Portfolio").

Among his claims for relief, Davis sought appointment of a receiver "to take control and to administer the assets of LifeTime for the benefit of Plaintiff and others similarly situated." Davis contended that the need for "an officer of the Court" to conserve the policies was urgent "as there are believed to be policies in imminent danger of lapsing within the next seven to ten days"; without a receiver, there was a high probability of "irreparable harm[]" to Plaintiff and others because "premiums [would] not be paid[,] policies . . . [would] be cancelled, and any value thereof lost forever." Davis urged the court to vest "such powers [in the receiver] as may be necessary to preserve, maintain, and administer the Receivership Assets."

The district court ordered the creation of the receivership ("Receivership") and appointed Receiver on February 20, 2004. The court noted that a receivership was "necessary and appropriate . . . to prevent waste and dissipation of the assets of Defendant to the detriment of investors, including the receivership estate of LifeTime." LifeTime consented to the appointment of a receiver, and specifically "to the appointment of Tom Moran as Receiver." In its appointment order, the district court granted the receiver the authority "to take and have possession of the Receivership Assets, the title to which shall vest by operation of law in the Receiver until further order of the Court." The district court further ordered that the Receivership Assets

> shall include, but not be limited to, property of whatsoever nature, whether real or personal, tangible or intangible, which has been acquired

> with or through funds or proceeds of LifeTime. The Receivership Assets specifically include, without limitation, all viatical or life settlement contracts with respect to which LifeTime or its affiliates are a party thereto, and all life insurance policies related thereto (collectively, the LifeTime Portfolio).

The receiver was authorized to "receive notice of the death of viators/insureds, file . . . death claims, and collect proceeds on the policies within the LifeTime Portfolio as they mature . . . and to retain or disburse same subject to the order of the Court," to "exercise all rights and privileges attendant with ownership of the policies within the LifeTime Portfolio, whether beneficial or otherwise, including policy claims," and to take "[a]ll other steps necessary to protect the interests of the beneficial owners."

The court order stated that the receiver "shall not be liable to anyone for [his] own good faith compliance with any order, rule, law, judgment or decree . . . [or] . . . for [his] good faith compliance with [his] duties and responsibilities as Receiver." The receiver would only be liable if the court determined he "acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties."

On February 20, 2004, LifeTime and Receiver learned that Jordan had died of a heart attack on February 4, 2004. Receiver contacted the insurer, Prudential, informed it of his terms of appointment, and consented to the payment of the policy proceeds to the then-current trustee, U.S. Bank, N.A., and himself as Receiver for LifeTime. On May 14, 2004, Prudential issued two checks for $3 million each, jointly payable to

the trustee and Receiver, for the death benefits of each policy, and issued two additional checks for $24,393.00 each for a "claim interest." The total of the four checks, $6,048,786.00, represents the total matured proceeds of the Jordan Policies. Receiver deposited the checks from Prudential into interest-bearing accounts.

Upon Receiver's receipt of these payments, a dispute arose as to whether the Jordan Policies' proceeds properly belonged to the Receivership or to the 200-plus Jordan Investors. *Davis*, 2016 WL 1222409, at *2. In September 2004, Receiver filed a motion for clarification of the status of the Policies' proceeds. In November 2004, Receiver moved to pool the viaticals; the district court granted the motion. However, the court stated that Policies No. 9904060001 and 9904060002, which were "the subject of the Receiver's Motion for Order Clarifying the Status of Matured Policy Proceeds As Receivership Assets . . . shall not be subject to the provisions of this Order pending the ruling of the Court on the Motion or further Order of this Court."

In September 2005, the court requested a second round of briefing in light of this Court's then-recent decisions in *Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377 (6th Cir. 2005), and *Liberte Capital Group, LLC v. Capwill*, 148 F. App'x 426 (6th Cir. 2005). March 2006, following extensive briefing of the ownership issues, the court ordered voluntary mediation regarding the Jordan Policies' proceeds, to be held before a different judge. The court welcomed, but did not require, the Jordan Investors to attend the mediation. The mediation was held on March 28, 2006. The mediation participants reached a settlement, as a result of which the district court overruled all pending motions in relation to the Jordan Proceeds. Among the

motions overruled was Receiver's initial motion to clarify, "subject to renewal in the event that the settlement agreement is not approved." Under the settlement, any participating Jordan Investor would be paid 62.5% of the total amount the Investor had originally invested, in return for the Investor releasing all claims against Receiver and Receivership. "Non-Jordan" investors would receive 16.6392% of their original investment. The district court granted Receiver's motion to approve the settlement, set a deadline to submit objections to Receiver's counsel, and set a fairness hearing for April 13, 2006, where the court would hear from all interested attending. No one testified or objected to approval of the settlement; Appellants did not attend. *Davis*, 2016 WL 1222409, at *2. Following the hearing, the district court approved the settlement agreement.

In June 2006, the district court authorized Receiver's sale of the LifeTime Portfolio, finding that the sale was "in the best interests of the Investors[,] . . . allow[ing] them to recover a portion of their investment as soon as is possible without further risk under the circumstances."

By March 2010, all but thirteen of the 200-plus Jordan Investors had returned a claim form against the settlement, or submitted a release; those thirteen included Plaintiffs. *Id.* at *3. With the court's authorization, and following two hearings, Receiver sent a final notice giving remaining Jordan Investors thirty days to submit claim forms, after which time Receiver would file a motion to disallow claims of such Investors as had not submitted a claim. *Id.* Certain additional Jordan Investors responded within the thirty days, leaving five remaining Jordan Investors—Appellants here. *Id.* Receiver then filed motions to

disallow any further claims from the Jordan Investors who had not submitted a claim form or release. The district court set a fairness hearing for August 23, 2010, in "recogni[tion] [of] the impact upon property interests" of disallowing further claims on the settlement.[2] Appellants did not attend the hearing in person or by telephone. Prior to the fairness hearing, the remaining Jordan Investors (now Appellants) submitted letters to the district court stating that they did not accept the settlement agreement, and continuing to assert claims to the entirety of their Jordan Policies benefits. Subsequent letters followed, including second letters from particular Jordan Investor Appellants. Following the fairness hearing, in November 2011, the district court granted Receiver's motion to disallow further claims, but granted Appellants an *additional* thirty days in which to file their claims. The district court clarified that the order granting the motion to disallow neither required Appellants to take part in the settlement, nor foreclosed their "right . . . to pursue any independent legal action that may be available to them should they decide not to participate." Appellants opted not to join the settlement. *Davis*, 2016 WL 1222409, at *3.

A number of Appellants appealed the district court's disallowance order; in September 2012, this Court affirmed the disallowance order.[3] This Court held that the district court did not abuse its discretion in crafting equitable relief in the receivership proceeding, and that Appellants were given the process they were due. In March 2014, Appellants filed motions to intervene, which the court granted, In October 2014, Plaintiffs were granted leave to file pleadings under Federal Rule of Civil Procedure 24(a), and they subsequently filed complaints alleging "wrongful

exercise of dominion and control over the [Policies] proceeds," asserting a claim of conversion against Receiver, and claiming personal liability toward them on the part of Receiver. Receiver then moved for summary judgment on Plaintiffs' conversion claim. Plaintiffs moved for leave to amend their complaints to add a thing-in-action claim under Oklahoma law.

The district court first declined to address the conflicting arguments regarding which state law, Ohio's (where the district court sits) or Oklahoma's (because Receiver is an Oklahoma citizen), applied, finding the arguments incompletely pleaded. *Davis*, 2016 WL 1222409, at *5. Rather, the court addressed Plaintiffs' (now Appellants') conversion (Ohio or Oklahoma) and thing-in-action (Oklahoma) claims. The court rejected the Oklahoma conversion claim because under that state's law, the tort of conversion applies only to tangible personal property, rather than to a claim for an amount of money, as here.

The district court held that Plaintiffs' conversion claims failed (as would a thing-in-action claim) because Plaintiffs failed to show that Receiver *wrongfully* exercised dominion and control over the Jordan Policies' proceeds, but rather made a merely conclusory allegation that he did so; because the remedy fashioned by the district court was equitable under the circumstances; and because the "Receiver acted within his court-appointed authority." *Id.* at *5-7. The court granted summary judgment to Receiver and denied Plaintiffs' motion to amend as futile. *Id.* at *7.

II

This Court reviews a district court's grant of a motion for summary judgment de novo. *Sjöstrand v.*

Ohio State Univ., 750 F.3d 596, 599 (6th Cir. 2014). Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding the appropriateness of summary judgment, this Court must view the facts and make all reasonable inferences therefrom in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, we neither weigh evidence nor assess credibility of witnesses, tasks which are the province of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The key issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. A court's crafting and imposition of an equitable remedy is reviewed for abuse of discretion. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 602 (6th Cir. 2018) (citing *Anchor v. O'Toole*, 94 F.3d 1014, 1021 (6th Cir. 1996)); *see also Serricchio v. Wachovia Sec. LLC*, 658 F.3d 169 (2d Cir. 2011). "Sitting in equity, the district court is a `court of conscience.'" *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (citing *Wilson v. Wall*, 73 U.S. 83, 90 (1867)).

III
A

The heart of Appellants' argument is that the Receiver's exercise of dominion over the Jordan Policies proceeds was wrongful because Appellants' ownership interest in the Policies proceeds fully vested

upon Jordan's death on February 4, 2004, some two weeks before the district court appointed Receiver; therefore, "[t]he death benefits from the Jordan Policies, having already vested with Jordan Investors," (Appellant's Br. at 6-7), "were not assets of LifeTime when the Receivership began," (*id.* at 17). The district court found that Plaintiffs (now Appellants) "fail[ed] to allege facts sufficient to raise an inference that the Receiver acted wrongfully by receiving, managing, and distributing the Jordan-policy benefits as ordered by the Court. 2016 WL 1222409, at *7. As a result, their allegation that the Receiver acted wrongfully and thus converted the Jordan-policy benefits [was] conclusory." *Id.*

In their complaints, Appellants assert that "the Court's Order [appointing Receiver] authorized [Receiver] to administer only the property belonging to LifeTime as of the date of his appointment." Though included under the section of the complaints labelled as "Facts," this statement amounts to a legal conclusion clothed in factual garb. Certainly it is neither directly or indirectly a quotation from the order. Rather, the district court's order set forth that:

> Receivership Assets shall include, but not be limited to, all property of whatsoever nature . . . which has been acquired with or through funds or proceeds of LifeTime. The Receivership Assets specifically include, without limitation, all viatical or life settlement contracts with respect to which LifeTime or its affiliates are a party thereto, and all life insurance policies related thereto (collectively, the LifeTime Portfolio).

In presiding over an equity receivership proceeding, a district court has "broad powers and wide discretion." *SEC v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001) (quoting *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992)). In one of the cases decided by this Court as part of the Liberte Litigation, *Liberte*, 148 F. App'x 426, we applied the abuse of discretion standard in a manner instructive for the present case. The district court had found that the preferential method of distribution sought by a group of investors, based on the alleged traceability of the assets they claimed, "was inequitable because it ignored the fact that there would be no death benefits but for the effort of the [entire] class [of] investors in preserving the premiums on the . . . policy [in question]." *Id.* at 434. This Court found that the district court did not err in fashioning an equitable remedy based on a pro rata method, because "[t]he funds used to pay premiums were borrowed from a pool of funds that belonged to all Liberte investors. Thus, . . . but for the use of the Liberte investor funds," the premiums on the policy in question would not have been paid and the policy would have lapsed." *Id.* at 434-35. While Appellants' argument here is not based specifically on the traceability of the assets at issue, the latter holding underscores a district court's equitable discretion in receivership proceedings generally and the equitable implications of commingling of funds to cover policy premiums in particular. *Davis*, 2016 WL 1222409, at *6. Here, LifeTime lacked sufficient funds to pay policy premiums when viators lived longer than investors had been led to believe—requiring transfers of funds from other accounts. *Id.*

Appellants contend that the district court initially failed to address the ownership issue, but

subsequently "recognize[d] that Appellants have a[] `contractual right [that] vested before the Receivership was created. . . .'" (Appellant's Br. at 18 (quoting *Davis*, 2016 WL 9404926, at *2)). Appellants rely heavily on *Liberte*, 421 F.3d 377 in support of their argument that Appellants' ownership interest(s) in the Jordan Policies vested fully upon Jordan's death, on February 4, 2004:

> The District Court's belated admission is consistent with established law. Liberte, [421 F.3d at 381-82] ([i]nsured died before receiver was appointed; assignee of death benefits had sole legal title and entitled to proceeds in full). It is the appropriate starting point for the assessment of the District Court's ultimate conclusion to the contrary that Appellants nevertheless are not entitled to their ownership interests.

(Appellant's Br. at 18). However, Appellants misstate the holding in *Liberte*. There, the Court did *not* hold that the appellant was "entitled to proceeds in full"; rather, the Court made the narrower finding that the appellant "had a legal interest" in the policy proceeds in question, *Liberte*, 421 F.3d at 383-84, and was not given a hearing "adequate to protect [her] interests," *id.* at 385. Moreover, in *Liberte* the investor in question had been assigned beneficiary interest in a single, entire viatical policy, *id.* at 383, whereas here hundreds of investors had partial beneficiary interests in the Jordan Policies.

The district court also found that Plaintiffs "overly focuse[d] on the matured status of the Jordan policies," overlooking "the fact that some lifetime investors rescued, albeit temporarily, LifeTime from

financial collapse." *Davis*, 2016 WL 1222409, at *6. The court also found that LifeTime commingled investors' funds "so extensively that it eventually became impossible to sort out which particular Investors had staved off LifeTime's collapse for the benefit of all investors, including the Jordan Investors." *Id.* Among the court's findings was that "premiums due for one group of life insurance policies would be made with money taken from sub-accounts dedicated to another group of policies." *Id.* The court concluded that "without the help of some Investors, LifeTime would have collapsed or faced imminent collapse before Mr. Jordan died,"; which would have caused the Policies "[to] lapse[] and the Jordan Investors [to] los[e] their entire investments." *Id.*

Appellants contend that, regardless of the precise structuring of the viatical settlements in this case, "Mr. Jordan's death on February 4, 2004 meant that the benefits vested with the investors." (Appellant's Br. at 4). However, Appellants mischaracterize the record in citing to the district court's decision and order of March 29, 2016, *Davis*, 2016 WL 1222409, at *5-6, and the court's order of December 16, 2016, *Davis*, 2016 WL 9404926, at *2-3, denying miscellaneous relief and entering final judgment against Appellants. *Id.* at *4. The language of the cited orders fails to support the reading urged by Appellants. Rather, the district court noted *Appellants*' assertion "that they obtained ownership interest in the Jordan-policy proceeds upon the death of Mr. Jordan two weeks before the Receivership was created," *Davis*, 2016 WL 1222409, at *2, and went on to find that "[t]he issue of who owned the Receivership . . . was effectively resolved in April 2006 by the Jordan settlement, after a fairness hearing. By approving the

Jordan settlement, the Court and the parties to the settlement effectively recognized the ownership interests of all the Jordan Investors," *id.* at *6. In its December 16, 2016 order, the district court similarly pointed to Appellants' "focus[] on vested contractual rights they held under the terms of their contracts with LifeTime" on the date of Jordan's death, consigning to "irrelevan[ce] and insignifican[ce] . . . LifeTime's precarious financial position . . . in February 2004." *Davis*, 2016 WL 9404926, at *2. The court further underscored Appellants' "refus[al] to acknowledge that but for the payments made by other LifeTime investors, the Jordan Policies would have lapsed." *Id.*

Moreover, according to the life insurance trust agreements pertaining to the Jordan Policies, executed on April 28, 1999, the designated beneficiary of the trusts was LifeTime. Therefore, LifeTime's beneficiary interest in the death benefits on the Policies vested upon Jordan's death, entitling Receiver to obtain and exercise control over those benefits as part of the LifeTime Portfolio.

As Receiver argued in his supplemental brief in support of his motion for order clarifying the status of matured policy proceeds as receivership assets:

> [T]he Receiver, acting as this Court's agent, has the duty to take possession of the proceeds of the Jordan Policies for the benefit of all of the parties who may have an interest in LifeTime's assets including the Investor Class and creditors—not just the Jordan Investors. Pursuant to the Receiver's plan, all Investors, including the Jordan Investors, will receive a share of the Jordan Policies Proceeds. This is the most equitable result given that the Jordan

> Policies were purchased and the PRA accounts were funded long before most Jordan Investors made their investments, and the Jordan Investors suffered the same fraud as every other Investor. Contrary to the Jordan Investors' claims, the Receiver has not failed to meet his fiduciary duty by advocating equal treatment for all similarly situated Investors.

Receiver argues further, and more pointedly, that "there was not enough money in the Jordan [premium reserve account] sub-accounts to pay the two premiums due immediately prior to Mr. Jordan's death. The approximately 3200 non-Jordan Investors whose funds purchased and administrated the policies should not be penalized because of the `luck of the draw.'"

In their response to Receiver's motion for summary judgment, Appellants maintained that the district court's order overruling Receiver's motion to clarify the status of the Jordan Policies' proceeds, in "overrul[ing] the Receiver's motion, thereby den[ied] the Receiver's claim to the policy proceeds." However, the order overruled Receiver's motion in a specific context: the mediation that had just been conducted "regarding the issues surrounding the matured policy proceeds" and the pending motions. Because a settlement was reached by the interested parties, the district court went on, "the pending motion[] [is] overruled subject to renewal in the event that the settlement agreement is not approved." Terming the district court's order a "denial" of "Receiver's claim to the policy proceeds" is a misconstrual of the import of the order; rather, as this Court held in 2012, "the district court overruled the Receiver's motion for clarification of the status of the proceeds as a result of

the settlement" and, following a fairness hearing, approved the settlement agreement in April 2006.

Accordingly, we conclude that the grant of summary judgment to Receiver was proper.

B

Receiver argues, in the alternative, that he is immune from legal action by Appellants for conversion of the Policy proceeds by virtue of the quasi-judicial immunity applicable to a receiver. (Appellee's Br. at 32-34). Appellants do not address quasi-judicial immunity directly, instead asserting that a receiver acting outside of the duties of his office by "tak[ing] possession of property belonging to another . . . act[ed] *ultra vires*" and therefore the person whose property was wrongfully taken "may bring suit therefor against [the receiver] personally as a matter of right." (Appellant's Br. at 31 (citing *Barton v. Barbour*, 104 U.S. 126, 134 (1881)).

However, Receiver did not raise the immunity affirmative defense in its motion for summary judgment, and presents it to this Court for the first time on appeal. Normally, that would forfeit review. *See, e.g., Brown v. Crowley*, 312 F.3d 782, 787-88 (6th Cir. 2002). Nonetheless, "where a purely legal issue provides alternative grounds to uphold the judgment of the district court," we may reach the issue as long as "the record permits its resolution as a matter of law." *Hutcherson v. Lauderdale Cty., Tennessee*, 326 F.3d 747, 756 (6th Cir. 2003).

A receiver acts as an "arm of the court" and thus enjoys quasi-judicial immunity. *See W. Cong. St., Partners, LLC v. Wayne Cty.*, No. 16-10482, 2017 U.S. Dist. LEXIS 114747, at *4 (E.D. Mich. July 24, 2017).

Those persons "performing tasks . . . integral [to] or intertwined with the judicial process" are accorded quasi-judicial immunity. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). A receiver is such a person, "stand[ing] as a ministerial officer of the court[,] . . . obtaining his authority by the act of the court alone." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 626 (6th Cir. 2003) (citation omitted). We have held that "a court appointed receiver who did not act outside of his authority under court order or maliciously or corruptly was entitled to judicial immunity." *Plassman v. City of Wauseon*, 1996 U.S. App. LEXIS 14496 (6th Cir. 1996) (citing *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976)); *see also Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 373 (5th Cir. 1995).

Here, Receiver acted as an officer of the court; the district court found that "Receiver has and continues to attempt to discharge his duties and responsibilities consistent with the authority granted to the Receiver in the Order of Appointment" of February 20, 2004. Therefore, even if Appellants had a valid cause of action for conversion with respect to the Jordan Policies' proceeds, Receiver would be entitled to quasi-judicial immunity against such claims.

C

Appellants also argue that they were deprived of due process when the district court authorized Receiver to dispose of the Jordan Policies' proceeds. (Appellant's Br. at 18-22). Receiver argues that the district court provided them notice, an opportunity to present written objections, and an opportunity to participate in hearings before the court as to the disposition of the proceeds at issue. The key question is

what process Plaintiffs were due with respect to Receiver's disposition of the Jordan Policies' proceeds under the direction of the district court.

Even in exercising its "broad powers and wide discretion" in an equity receivership proceeding, *Basic*, 273 F.3d at 668, "the court `must still provide the claimants with due process.'" *Liberte*, 421 F.3d at 382 (6th Cir. 2005) (quoting *Basic*, 273 F.3d at 668). This Court reviews de novo whether the procedures employed by the district court violated the due process clause. *See id.* (citing *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 381 (6th Cir. 2001)). Abuse of discretion occurs when a court relies on clearly erroneous findings of fact, improperly applies the law, or employs an incorrect legal standard. *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005) (citation omitted). Our procedural due process inquiry has two steps: first, in relevant part, we "ask[] whether there exists a . . . property interest which has been interfered with by the State," *Liberte*, 421 F.3d at 383 (quoting *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)); second, we "examine[] whether the procedures attendant upon that deprivation were constitutionally sufficient," *id.* (quoting *Thompson*, 490 U.S. at 460).

With regard to the first step, property interests are not created by the Constitution, but rather "stem[] from `an independent source such as state-law rules.'" *Albrecht v. Treon*, 617 F.3d 890, 896 (6th Cir. 2010) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). "[E]xplicitly mandatory language" is required to create such an interest. *Thompson*, 490 U.S. at 463. "A property interest `can be created by a state statute, a formal contract, or a contract implied from the circumstances.'" *Liberte*, 421 F.3d at 382 (quoting *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555,

565 (6th Cir. 2004)). Here, the ownership interest asserted by Appellants, as with their tort claims, arise by operation of contract. *Davis*, 2016 WL 1222409, at *5.

As to the second step, the Supreme Court has underscored that "[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount." *Roth*, 408 U.S. at 569-70; *see also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."). The Supreme Court has held that "the only meaningful opportunity" to be heard "is likely to be before" the decision-maker's adverse action takes effect. *See Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 543 (1985).

As with Receiver's allegedly wrongful exercise of dominion over the Jordan Policies' proceeds, on the due process issue Plaintiffs rely heavily on this Court's holding in *Liberte*, 421 F.3d 377. Appellants argue that *Liberte* stands, in pertinent part, for the proposition that "`fairness hearings' on the proper distribution of assets, priorities, pro rata distributions, etc., are not adequate to address third party ownership claims." (*See* Appellant's Br. at 20-21). Appellant's contention misstates this Court's holding in *Liberte*, which was *not* that proceedings called "fairness hearings" generally fail to pass due-process muster, but rather to urge careful attention to "the actual substance, not the name or form, of the procedure" in making a due-process determination. *Liberte*, 421 F.3d at 384 (quoting *SEC v. Elliot*, 953 F.2d 1560, 1567 (11th Cir. 1992)).

Appellants argue that the fairness hearings held by the district court on April 13, 2006 and August 23, 2010 were "functionally identical to the deficient hearings in *Liberte*," (Appellant's Br. at 22), and that the court's explanations of the Appellants' presumed "opportunity to be heard" were actually "brazenly misstated comparisons [with] this Court's decision in *Liberte*," (*id.* at 21, citing *Liberte*, 421 F.3d at 384-85). Appellants contend that the district court was correct in identifying the court's failure in *Liberte* as "not provid[ing] the claimant with a hearing on the seizure of proceeds issue," but that the district court "just won't admit it did the same here." (*Id.*).

However, *Liberte* is distinguishable from the present case. There, the district court denied an investor's request for a hearing regarding ownership of the proceeds of the insurance policy in question. *Liberte*, 421 F.3d at 384. No such denial occurred here. Moreover, though a fairness hearing as was the case here, the court there "made clear that the hearing was limited to the issue of determining proper disbursement of the receivership estate." *Id.*

Appellants' response to Receiver's motion for summary judgment included the statement that, in response to the request of certain Appellants to participate by telephone in the August 23, 2010 fairness hearing, "[t]he Court would not agree to participation by telephone." Appellants included no citation to the record. The minutes of the August 23, 2010 fairness hearing contain a reference to a person having written down notes "as she talked to [unspecified] Investors over the phone," and a later notation, "None of the 5 Jordan Investors are present." There is no indication that the district court refused any of Appellants permission to participate in the hearing by phone.

Here, Appellants were given notice and repeated opportunities to be heard, particularly at the April 13, 2006 and August 23, 2010 fairness hearings. Indeed, in affirming the district court's order disallowing Appellants' claims to the settlement, this Court underscored that Appellants "fail[ed] to intervene or otherwise timely assert their interest in the Jordan proceeds." In addition, this Court found that there was no denial of due process because the district court "provided [the Investors] with proper notice and an opportunity to be heard throughout the receivership proceedings."

In *Liberte*, this Court held that where "the matter of ownership is in doubt, then the party claiming the property should ask to be allowed to intervene in the receivership case and present his claim to the property. The court should afford such claim a proper hearing and all parties in interest should be heard." 421 F.3d at 384 (quoting 3 Clark on Receivers, § 664 (3d ed. 1959)). Appellants here failed to timely "intervene or otherwise attempt to protect" their asserted interests in the Jordan Policies' proceeds; nevertheless, they were still given an opportunity to be heard.

Because Appellants were given notice and multiple opportunities to be heard regarding their objections to the proposed settlement, they were not denied due process.

D

Receiver also contends that Appellants' claims were barred by the statute of limitations, whether the applicable statute is the two-year limitation under Oklahoma law or the four-year limitation under Ohio law, because Appellants "learn[ed] of the alleged

conversion in 2004, [but] . . . did not participate in any way until 2010, did not intervene until 2013, and did not commence their action until 2014. Any of these dates are well beyond either . . . statute of limitations." (Appellee's Br. at 35). Indeed, Appellants themselves averred in their 2014 complaints that "[Receiver] has exercised dominion and control over these proceeds ever since Prudential paid them to him [on May 14, 2004]." This Court has recognized that "factual assertions in pleadings . . ., unless amended, are considered judicial admissions conclusively binding on the party who made them." *Kay v. Minacs Group (USA), Inc.*, 580 F. App'x 327, 331 (6th Cir. 2014).

Appellants argue that Receiver did not raise the statute of limitations below, and therefore should be barred from doing so on appeal. (Reply Br. at 19). It is true that Receiver opposed Appellants' motions to intervene on timeliness grounds under Federal Rule of Civil Procedure 24, rather than on statute of limitations grounds. However, the motions to intervene did not assert conversion or any other specific cause of action, but rather announced a general intention to "intervene to assert [Appellants'] legal interest in the Jordan policies." Therefore, a statute of limitations argument would have been inapposite. On the other hand, when Appellants pled their conversion claim after having received the district court's permission to intervene, Receiver duly raised the statute of limitations defense in his answers to the complaints and in his motion for summary judgment.

Nevertheless, the district court declined to reach the statute of limitations issue, instead electing to consider Appellants' claims on the merits. *Davis*, 2016 WL 1222409, at *5. Because we conclude that the district court properly granted summary judgment to

Receiver, *see supra* III.A, we likewise decline to reach the question of the statute of limitations.

IV

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment to Receiver.

FootNotes

1. In September 2004, Receiver estimated the number of investors in Policy No. 9904060001 at 109, and total investment of $1,651,076.88. Of those 109 Investors, forty-two (42) had the entirety of their LifeTime investment placed on the policy, while the remaining sixty-seven (67) Investors had only a portion of their LifeTime investment placed on the policy. As to Policy No. 9904060002, Receiver estimated the number of Investors at 116, with total investment of $1,657,230.44 placed on that policy. Fifty-one (51) of the 116 Investors had the entirety of their LifeTime investment placed on the policy, while the remaining sixty-five (65) had only a portion of their LifeTime investment placed on the policy.

2. The order mistakenly gives a date of August 29, 2010 for the hearing, rather than August 23, 2010.

3. The district court's decision and order mistakenly dates the panel orders in September 2014, not 2012. *Davis*, 2016 WL 1222409, at *3.

United States District Court, S.D. Ohio, Western Division, at Dayton.

H. Thayne DAVIS, Plaintiff,
v.
LIFETIME CAPITAL, INC., Defendant.

Case No. 3:04-cv-00059
Signed 12/16/2016

Attorneys and Law Firms

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Lifetime Capital Inc., Oklahoma City, OK, pro se.

ORDER

Sharon L. Ovington, Chief United States Magistrate Judge

I. Introduction

On March 29, 2016, this Court granted the Receiver's Motion for Summary Judgment on the remaining Plaintiffs/Intervenors' claims against the Receiver and the Receivership. This effectively

dismissed the claims of conversion and "thing-in-action" brought by Plaintiffs/Intervenors Johnnie C. Ivy, Nena Ellison, Ernest Storms, Jacquelyn Storms, Jane C. Ivy-Stevens, and Robert Burgess ("Intervenors"). (Doc. #1508).

The case is presently pending upon Intervenors' *pro se* Motions To Amend And/Or Make Additional Findings, And Alter Or Amend The Court's Order, And/Or Objection To Court's Decision And Order And Motions To Vacate And Memoranda In Support (Doc. #s 1509-1513), the Receiver's Memorandum In Reply (Doc. #1514), and the record as a whole.

II. Rules 52 and 59

Intervenors seek relief under Fed. R. Civ. P. 52 from the Court's Decision and Order granting summary judgment in favor of the Receivership.

Rule 52(a) requires district courts "to find the facts specifically and state its conclusions of law separately...." This Rule applies "[i]n an action tried on the facts without a jury or with an advisory jury...." Fed. R. Civ. P. 52(a). Intervenors' claims of conversion and thing-in-action were not tried to the bench or to an advisory jury but were dismissed on summary judgment under Fed. R. Civ. P. 56. Consequently, Rule 52(a) does not apply to the Decision and Order that Intervenors presently challenge. Rule 52(a)(3), moreover, specifies: "The court is not required to state findings or conclusions when ruling on a motion under Rule ... 56 or, unless these rules provide otherwise." Intervenors do not point to a Rule that "provide[s] otherwise" and, therefore, Rule 52(a)(3) does not support their present Motions.

Intervenors further contend, "The Court's Decision contains assertions in the factual discussion that Plaintiff disputes. Rule 52(b) authorizes the Court to amend its findings or make additional findings on a party's Motion, and Rule 59(e) allows a party to move to alter or amend a judgment." (Doc. #1509, *PageID*# 15556).[1]

Rule 52(b) provides: "On a party's motion ..., the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59." Rule 52(b) by itself fails to provide Intervenors with an avenue of relief from the Court's Decision and Order granting summary judgment in the Receiver's favor. *See* *Trentadue v. Integrity Committee*, 501 F.3d 1215, 1237 (10th Cir. 2007); *see also* *Wideman v. Colorado*, No. 09–cv–00095, 2010 WL 749835, at *2 (D. Colo. 2010) ("Rule 52(b) applies to findings of fact and conclusions of law entered after a non-jury trial and this rule is inapplicable to judgments entered under [Rule] 56."). Yet, some cases liberally construe a *pro se* party's Rule 52(b) motion as a Motion to Alter or Amend Judgment under Rule 59(e). *See, e.g.*, *Stanberry v. Allen*, 2012 WL 5469190, at *1 (S.D. Ala. 2012) (citing *Silva v. Potter*, 2006 WL 3219232, *2 (S. D. Fla. 2006)). This liberal construction of Intervenors' Rule 52(b) Motion is warranted here in light of their *pro se* status and because they also seek relief under Rule 59(e). *See* *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed' ...." (internal citation omitted)).

A Motion to Alter or Amend Judgment under Rule 59(e) "may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice."

Besser v. Sepanak, 478 Fed.Appx. 1001, 1001 (6th Cir. 2012); *see Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012).

III. Discussion

Intervenors ask the Court to alter or amend the Order granting the Receiver's Motion for Summary Judgment in eight main ways to conclude or find the following:

> 1. Jordan policy proceeds were not assets of the Receivership; Jordan Investors did not have claims against the Receivership assets.
> 2. The Court did not order any Jordan Investors to participate in a mediation or accept a settlement with the Receiver;
> 3. The Court's Ruling did not disallow the Intervenors' claims of ownership of the Jordan policy proceeds or decide the Jordan policy ownership claims.
> 4. Intervenors' Complaint alleges facts sufficient to establish the Receiver's wrongful dominion over Intervenors' property ownership interests.
> 5. The Court's statements concerning the financial operation of LifeTime are unsupported and irrelevant.
> 6. The facts establish that [the] Receiver did not distribute the disallowed Jordan-policy proceeds to the Jordan Investors who participated in the settlement.
> 7. Intervenor[s] object to the Court's broad statements supporting the Receiver's conduct.

> 8. The Court's Order should be altered to withdraw the grant of Receiver's Motion and denial of Intervenors' Motion.

(Doc. #1509).

Intervenors' proposed amendments do not show the presence of a clear error of law in the Order granting summary judgment in the Receiver's favor. Through their present proposed amendments and arguments, they again assert that the proceeds to Mr. Jordan's life-insurance policies were not assets—indeed, have never been assets—of the LifeTime Receivership. This is incorrect. The Jordan policies proceeds became assets of the Receivership by Court-approved actions taken by the Receiver. *See* Doc. #s 23, 1079. This occurred even though Mr. Jordan died approximately two weeks before the LifeTime Receivership was created by Order of this Court.

Intervenors' view of their situation on the date Mr. Jordan died focuses on vested contractual rights they held under the terms of their contracts with LifeTime. The problem they find irrelevant and insignificant is that LifeTime's precarious financial position on the date Mr. Jordan died and later in February 2004 placed LifeTime and its investors in a sinking financial boat. Intervenors do not think they were in that sinking boat because their contractual right to receive the returns on their investments with LifeTime vested before the Receivership was created. Intervenors refuse to acknowledge that but for the payments made by other LifeTime investors, the Jordan Policies would have lapsed. And, accepting Intervenors' position as correct—that upon Mr. Jordan's death, before the Receivership was created, Intervenors held a contractual right to receive from

LifeTime the returns on their investments—does not advance their claims of conversion and thing-in-action. This is so because the Receiver and Receivership lawfully received, maintained, and distributed the proceeds from Mr. Jordan's life insurance policies pursuant to the Receiver's Court-appointed authority and under the terms of the Court-approved settlement agreement. *See* Doc. #416; Doc. #1304; Doc. #1508, *PageID*#s 15552-53.

Intervenors' proposed alterations or amendments do not show clear error in this or any other aspect of the Order granting summary judgment in the Receiver's favor.

Intervenors argue that the Court's Order is contrary to Sixth Circuit law addressed in *Liberte Capital Group, LLC v. Capwill*, 421 F.3d 377, 384-85 (6th Cir. 2005), "which demonstrates that equity receiverships are subject to the same standards of conduct when handling non Receivership property as the law applies to conversion claims." (Doc. #1509, *PageID*# 15568). Intervenors also provide a list of tenets from *Liberte Capital* that they find directly applicable to the present case. *Id.* at 15568-69.

Liberte Capital stands for the proposition that a claimant who asserts ownership interests in assets seized by a receiver must be given notice and an opportunity to be heard concerning their ownership assertions. *Liberte Capital*, 421 F.3d at 384-85; *see* Doc. #1304, *PageID*# 139894. In the present case, the United States Court of Appeals for the Sixth Circuit held in 2012 that Intervenors Robert Burgess, Jacquelyn Storms, and Ernest Storms were "provided with proper notice and an opportunity to be heard throughout the receivership proceedings." (Doc. #1304, *PageID*# 13894; Doc. #1305, *PageID*# 13901).

Intervenors argue that under *Liberte Capital*, " 'fairness hearings' on the proper distribution of assets, priorities, pro rata distributions, etc., are not adequate to address third party ownership claims...." (Doc. #1509, *PageID*# 15569 (citing Liberte Capital, 421 F.3d at 384)). *Liberte Capital* does not extend this far. Instead, the Court of Appeals explained, "We 'must look at the actual substance, not the name or form, of the procedure to see if the claimants' interests were adequately safeguarded.' " 421 F.3d at 384 (quoting *SEC v. Elliot*, 953 F.3d 1560, 1567 (11th Cir. 1992)). The Court of Appeals then examined the particular proceedings provided to the claims in *Liberte Capital* and found them wanting because the hearing was limited to and did not actually provide the claimant with a hearing relative to the seizure of proceeds issue. *Id.* at 384-85. *Liberte Capital* is readily distinguished from the present case. Unlike the claimant in *Liberte*, whose interests were not adequately protected because the claimant was not offered an opportunity to be heard, Intervenors were "provided with proper notice and an opportunity to be heard throughout the receivership proceedings." (Doc. # 1304, *PageID*# 13894; 1305, *PageID*# 13901).

Intervenors maintain that the Order granting the Receiver's Motion for Summary Judgment contains errors of law and fact. In support of this contention, they cite several cases: *Childs v. Unified Life Ins. Co.*, 781 F.Supp.2d 1240, 1249, 1252 (N.D. Okla. 2011); *Sport Chassis, LLC v. Broward Motorsports of Palm Beach, LLC*, Case No. CIV-10-1035-HE, 2011 WL 5429404 (W.D. Okla., Nov. 9, 2011); *Clabough v. Grant*, 347 P.3d 1044 (Okla. App. June 20, 2014). Although each of these cases involves conversion claims under Oklahoma law, none of them involve a receivership or a receiver's

retention and distribution of property under court order. Consequently, these cases are both distinguished from the present case and do not support Intervenors' conversion or thing-in-action claims against the Receiver.

Intervenors rely, in part, on certain statements in a legal treatise concerning receiverships. *See* Doc. #1509, *PageID*# 15569 (and materials quoted therein). Such secondary sources, however, are neither precedential nor binding nor persuasive in the context of this case where Intervenors have been afforded due process and where their claims of conversion and thing-in-action lack the critical element of wrongful conduct by the Receiver.

Intervenors also contend that the Order granting summary judgment in the Receiver's favor ran afoul of Fed. R. Civ. P. 56(f) by resting on a ground not raised by the Receiver' Motion without giving them notice of this ground and an opportunity to respond. Rule 56(f) provides:

> After giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Applying Rule 56(f) to the Order granting the Receiver's Motion for Summary Judgment does not assist Intervenors because no prejudice befell them as a result of a lack of notice or opportunity to respond. "[E]ven in circumstances where the procedure implemented by the district court did not provide

adequate notice to the party against whom summary judgment was granted, this Court [the Sixth Circuit Court of Appeals] has upheld the judgment of the district court where the losing party could not demonstrate prejudice; that is, where remanding the case to the district court would merely entail an empty formality with no appreciable possibility of altering the judgment." *Excel Energy, Inc. v. Cannelton Sales Co.*, 246 Fed.Appx. 953, 960 (6th Cir. 2007) (citing *United Rentals (N. Am.), Inc. v. Keizer*, 355 F.3d 399, 411 (6th Cir. 2004) (other citations omitted)). No prejudice arises because Intervenors cannot demonstrate that the Receiver acted wrongfully. This is so because the record of this case conclusively establishes that the Receiver acted pursuant to his Court-appointed authority and a Court-approved settlement agreement. Accordingly, for all the above reasons, Intervenors are not entitled to relief under Rules 52 or 59 from the Court's Order granting the Receiver's Motion for Summary Judgment.

IT IS THEREFORE ORDERED THAT:

1. Intervenors Jane C. Ivy-Stevens' Motion To Amend And/Or Make Additional Findings, And Alter Or Amend The Court's Order (Doc. # 1509) is DENIED;
2. Intervenors Nena Ellison's Motion To Amend And/Or Make Additional Findings, And Alter Or Amend The Court's Order (Doc. # 1510) is DENIED;
3. Intervenors Johnnie C. Ivy's Motion To Amend And/Or Make Additional Findings, And Alter Or Amend The Court's Order (Doc. # 1511) is DENIED;
4. Intervenors Robert Burgess's Motion To Amend And/Or Make Additional Findings, And Alter Or Amend The Court's Order (Doc. # 1512) is DENIED;

5. Intervenors Ernst Storms's Motion To Amend And/Or Make Additional Findings, And Alter Or Amend The Court's Order (Doc. # 1513) is DENIED; and

6. Final Judgment to be entered as to Intervenors Jane C. Ivy-Stevens, Nena Ellison, Johnnie C. Ivy, Robert Burgess, and Ernst Storms.

Footnotes

1Citations to each Intervenor's Motion is unnecessary here and throughout this Order because their Motions are identical.

S.D. Ohio, Western Division.

H. Thayne Davis, Plaintiff,
v.
LifeTime Capital, Inc., Defendant.

Case No. 3:04cv00059

Signed 03/29/2016

DECISION AND ORDER

Sharon L. Ovington, Chief United States Magistrate Judge

I. Background

Starting in 1997 and continuing for about six years, 4,000 or so people invested in LifeTime Capital, Inc. At the time of the investments, LifeTime appeared to be in the legitimate business of selling financial interests in viatical settlements – life insurance policies sold by terminally ill beneficiaries (viators) for tax-free cash. Investors' goal was to obtain large financial gain from their investments in a relatively short amount of time. Realization of this goal depended on viators dying within the specific time periods projected by LifeTime, which exposed LifeTime investors to large financial risk. "[I]nvestors [in viatical settlements] risk a reduction of their return or a complete loss if the viator does not die within the time projected because the investor must continue to pay the premiums on the policy as they accrue or the policy will lapse." *United States v. Svete*, No. 3:04CR10/MCR, 2014 WL 941448, at *4 (N.D. Fla. Mar. 11, 2014).

This receivership case arose mainly as a result of the misdeeds of David A. Svete, a fraudster later convicted (along with others) of numerous federal criminal offenses.[1] His criminal activities involved LifeTime and other businesses he incorporated to offer "financial, office, marketing, and viatical services. [His] control of these corporations was secreted, thus misleading investors and providing an avenue to launder money taken by fraud." *Svete*, 2014 WL 941448, at *2. Svete an others scammed millions of dollars from investors. He is presently in federal custody, serving a 200-month sentence.

In February 2004, near the time Svete was indicted, LifeTime faced imminent financial collapse. Its investors faced the very real danger that they would never see even a penny of the money they had invested. This dire situation necessitated judicial intervention, creation of the LifeTime Receivership, and appointment of a Receiver and an Examiner.

The purpose of the LifeTime Receivership was to obtain the best possible recovery for LifeTime's investors, many of whom were characterized during Svete's sentencing proceedings as "vulnerable victims," *id.* at *1, more than one-third of whom were over age 65. *Id.* at *5. Once the Receivership began, years of work followed to locate LifeTime investors and secure the assets of LifeTime to prevent waste of the assets and to find and recover money Svete and others laundered through LifeTime and its related businesses. Although the Receiver recovered millions of dollars, LifeTime investors faced a harsh reality thanks to Svete and others: The money the Receiver found was nowhere near enough to return to each investor the total amount he or she had invested in LifeTime.

Today, all but six of the approximately 4,000 LifeTime investors have either waived their claims or agreed to settle their claims with the Receiver and thereby obtain a partial pro rata return on their original investment in LifeTime. The six remaining investors had multiple opportunities to join a settlement of their claims. They chose not to.

In March 2014, the six remaining investors were permitted to intervene and they have since have filed Complaints against the Receiver and the Receivership raising a claim of conversion. (Doc. #s 1439-1443). Their Complaints are presently pending along with the Receiver's Motion for Summary Judgment (Doc. #1486), the six remaining investor/Plaintiffs' (Plaintiffs') Responses (Doc. #s 1489, 1491, 1493, 1495), the Receiver's Reply (Doc. #1497), Plaintiffs' Motions for Leave to Amend Complaint (Doc. #s 1488, 1490, 1492, 1494), the Receiver's Memorandum in Opposition (Doc. # 1498), and the record as a whole.

II. The Jordan Policies and Plaintiffs' Claims

Plaintiffs are Johnnie C. Ivy, Nena Ellison, Ernest Storms, Jacquelyn Storms, Jane Ivy-Stevens, and Robert Burgess.[2] Their conversion claims concern the Receiver and the Receivership's handling of death benefits from life-insurance policies from LifeTime viator, Mr. Jordan.

Plaintiffs state in their Complaints that they obtained their interests in the proceeds of Mr. Jordan's life insurance policies while Mr. Jordan was still alive. Mr. Jordan died on February 4, 2004, about two weeks before the Lifetime Receivership was created. On the date Mr. Jordan died, LifeTime owned two $3,000,000.00 life insurance policies concerning Mr.

Jordan. (Doc. #1112, *PageID* #12231). Plaintiffs were among the LifeTime investors whose investments were allocated to the Jordan policies.

Due to the imminent financial collapse LifeTime in February 2004, this Court took exclusive jurisdiction and possession of LifeTime's assets, "including, without limitation, all viatical and life settlement insurance policies, including beneficial interests therein and proceeds thereof...." (Doc. #5). LifeTime's assets thus became Receivership assets in February 2004. The Receiver at this time was authorized, in part, "to receive and collect any and all sums of money due and/or owing to LifeTime, whether the same are now due or shall hereafter become due and payable, and is authorized to incur such expenses and make such disbursements as are necessary and proper for the collection, preservation, maintenance and operation of the Receivership Assets." (Doc. #6, ¶11).

In May 2004, Mr. Jordan's life insurance company paid the Receivership the benefits from his life insurance policies, equaling $6,048,786.00. Because of this, and because Mr. Jordan died before the Receivership was created, a dispute arose in the Receivership action over who was entitled to the proceeds from Mr. Jordan's policies. Did the proceeds belong to the more than 200 investors – including Plaintiffs – whose investments with LifeTime were allocated to the Jordan policies? Or, did the proceeds belong to the Receivership (subject to later distribution)?

After extensive briefing of the ownership issues, the Jordan Investors' claims proceeded to mediation in March 2006, which resulted in a settlement agreement between nearly all of the Jordan Investors and the Receiver. Under the agreement, the Receiver would

pay 62.5% of the total amount each Jordan Investor originally invested in LifeTime that was allocated to the Jordan policies.[3] The Jordan Investors would, in return, release their claims against the Receivership concerning their original LifeTime investment and the Jordan-policy proceeds. After a fairness hearing, which Plaintiffs did not attend (Doc. #1207, *PageID*# 12948), the Court approved the settlement (Doc. #543).

Nearly all of the Jordan Investors returned a claim form or a release concerning their respective portions of the Jordan-settlement proceeds. As of March 2010, only thirteen Jordan Investors, including Plaintiffs, had not. The Receiver therefore filed a motion for instructions, asking for leave to send a final notice to the remaining Jordan Investors informing them that if they did not return a completed claim form within 30 days, the Receiver would file a motion to disallow their claims. After two separate hearings, the Receiver's motion was granted.

The final notice then issued and additional Jordan Investors responded. As explained and anticipated by the final notice, the Receiver filed a motion to disallow the claims of the remaining Jordan Investors who did not return a claim or release. The matter was set for a fairness hearing on August 23, 2010. (Doc. #1139).

Before the fairness hearing, the Court received letters (which were docketed in the case record) from the remaining investors, now Plaintiffs. They explained that they did not accept the Jordan settlement agreement, and they continued to claim their full share of the Jordan-policy benefits. (Doc. #1141, *PageID* at 12460; Doc. #1142, *PageID* at 12462; Doc. #1143, *PageID* 12465). Additional similar letters from Plaintiffs followed (and were docketed). (Doc. #s 1147-56).

After the fairness hearing, and consideration of Plaintiffs' letters, this Court granted the Receiver's Motion to Disallow their claims. Because Plaintiffs apparently received bad advice from a non-party and because they faced losing the percentage they were entitled to under the Jordan settlement –and, thus, all of their original investment – the Court provided them another opportunity to join, within thirty days, the Jordan settlement. (Doc. #1207; Doc. #1304, *PageID* at 13892). The Order proving this further opportunity to Plaintiffs further directed that after the thirty-day period expired (plus reasonable mailing time), "the Receiver shall disallow the participation or claim of any remaining Jordan Investor in the settlement agreement approved by the Court on April 4, 2006." (Doc. #1207, 12958-59). This Court also explained, "nothing in this Order is intended to either require their participation in the Jordan settlement or limit the right of any remaining Jordan Investor to pursue any independent legal action that may be available to them should they decide not to participate." *Id.* at 12956. Plaintiffs chose not to participate in the Jordan settlement.

Several remaining Jordan Investors appealed the Court's disallowance Order without success. In September 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the disallowance Order, finding no abuse of discretion and no denial of due process. (Doc. #s 1304, 1305).

In March 2014, this Court granted Plaintiffs' Motion to Intervene. (Doc. #1384). In October 2014, Plaintiffs were granted leave to file pleadings in compliance with Fed. R. Civ. P. 24(a). (Doc. #1430). Those pleadings are Plaintiffs' presently pending Complaints. Plaintiffs allege in support of their conversion claim:

> 18. The funds [the Receiver] and/ the LifeTime Receiverhip did not belong to LifeTime or the receivership created as of February 20, 2004. The Jordan policy proceeds were not assets of LifeTime. Accordingly, [the Receiver's] possession, dominion and control of the Jordan policy proceeds was without valid legal basis and wrongful.
>
> 19. [The Receiver's] and/or the LifeTime Receivership's use and dissipation of the Jordan policy proceeds constitutes the unauthorized and wrongful assumption and exercise of dominion and control over the proceeds, which are the personal property of [Plaintiffs].
>
> 20. As a result of the wrongful assumption and exercise of dominion and control over the Jordan policy proceeds, [Plaintiffs have] sustained damages, for which [they are] entitled to recover from...the Receiver and/or the LifeTime Receivership. LifeTime and [the Receiver] are each liable to [Plaintiffs].

(Doc. #s 1439-1443). Plaintiffs assert that the Receiver is personally liable to them for compensatory and exemplary damages.

The Receiver and Receivership seek summary judgment in their favor on Plaintiffs' conversion claim.

III. Motions for Summary Judgment

A party is entitled to summary judgment if there is no genuine dispute over any material fact and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see* *Celotex Corp. v. Catrett*, 477

U.S. 317, 322 (1986); *see also* *Barker v. Goodrich*, 649 F.3d 428, 432 (6th Cir. 2011).

To resolve whether a genuine issue of material fact exists, the Court draws all reasonable inferences in the light most favorable to the non-moving party. *Richland Bookmart, Inc. v. Knox County, Tenn.*, 555 F.3d 512, 520 (6th Cir. 2009) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)). With these reasonable inferences in the forefront, "[t]he central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' +" *Jones v. Potter*, 488 F.3d 397, 402-03 (6th Cir. 2007) (quoting, in part, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) and citing *Matsushita*, 475 U.S. at 587). "Accordingly, '[e]ntry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' +" *Whitfield v. Tennessee*, 639 F.3d 253, 258 (6th Cir. 2011) (citations omitted).

IV. Discussion

Plaintiffs' pro se Complaints assert jurisdiction under 28 U.S.C. § 1332 based on diversity of citizenship. Plaintiffs do not identify or cite to a particular state's law in support of their conversion claim.

The Receiver contends that summary judgment is warranted on Plaintiffs' conversion claim because their claim is time barred under the applicable Oklahoma two-year statute of limitations. The Receiver notes that each Plaintiff is a citizen of Texas, and he,

the Receiver, is a citizen of Oklahoma. He correctly relies on the principle that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits, Ohio in this case. *See* *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Muncie Power Products, Inc. v. United Techs. Auto., Inc.*, 328 F.3d 870, 873 (6th Cir. 2003). He then journeys through Ohio's choice-of-law rules to arrive in Oklahoma and apply its two-year statute of limitations to find Plaintiffs' conversion claim time barred. Plaintiffs further contend that Oklahoma's law does not recognize a cause of action for conversion of money.

Plaintiffs counter (in part) that the Receiver has failed to show that Oklahoma law applies and has not specified when the Jordan Investors' conversion claim accrued. Plaintiffs contend that Ohio law applies and that their conversion claim is timely under Ohio's four-year statute of limitations. Returning to Oklahoma law, Plaintiffs argue that even if there can be no conversion of money under Oklahoma law, another cause of action under Oklahoma law – namely, a "thing in action" – supports their claim to recover money. They thus seek to amend their Complaints to add a "thing in action" claim. With this added claim, they conclude that their Complaints state a claim upon which relief can be granted.

The parties' first present their choice-of-law contentions followed by their focus on Plaintiffs' conversion and thing-in-action claims. In some cases, the better course of action, is to first determine which state's law apply rather than addressing claims on their merits under different state law. *E.g.*, *Maxum Indem. Co. v. Drive W. Ins. Servs., Inc.*, No. 15-3199, 2015 WL 7292722, at *4 (6th Cir. Nov. 18, 2015). In the instant case, however, there are overwhelming reasons to

address Plaintiffs' conversion and thing-in-action claims on the merits. First, the parties' appear to overlook that the LifeTime Receivership was created in Ohio and that the Orders appointing the Receiver and granting the Receiver with power to protect LifeTime's assets for the benefit of investors were issued by this Court in Ohio. The Receivership, moreover, remains subject to this Court's Orders in Ohio. Because the parties have not addressed these central facts in their choice-of-law contentions, further briefing would be required to determine where the alleged conversion occurred and to otherwise promote a thorough consideration of which state's law applies to Plaintiffs' conversion claim.

Second, the parties do not address whether any choice-of-law provisions exist in the contracts Plaintiffs entered with LifeTime or its agents or related businesses concerning their investments with LifeTime and in the Jordan viatical settlement. While this might not be pertinent to the choice-of-law analysis because Plaintiffs raise tort claims, rather than a breach-of-contract claim, Plaintiffs' tort claims arise from their asserted ownership interest to the Jordan-policy benefits, which arises by operation of contract. Given this complication, which the parties have not addressed, any present determination of which state's law applies would not be well informed.

Third, Plaintiffs' conversion and thing-in-action claims are so lacking in legal basis that it is more practical and efficient, and better case management, to address them now in substance rather than order further briefing on choice-of-law issues and imposing additional delay and expense upon Plaintiffs and the Receivership.

Turning to Plaintiffs' conversion claim, the Receiver is correct that under Oklahoma law, conversion is not generally based on a monetary loss and, instead, is based on converted "tangible personal property." *See* Shebester v. Triple Crown Insurers, 826 P.2d 603, 608 (Okla. 1992). Oklahoma law considers conversion based on monetary loss to involve "intangible personal property." *Id.* Plaintiffs seek to recover such intangible personal property, money from their ownership interests in the Jordan-policy benefits. Because conversion under Oklahoma law is in general based on tangible, rather than intangible, personal property, Plaintiffs' conversion claim fails as a matter of Oklahoma conversion law. *See id.* at 608 and n.16 (quoting 60 O.S. 1981 § 312 ("A thing in action is a right to recover money or other personal property, by judicial proceedings.")) (other citations omitted); *see also* Childs v. Unified Life Ins. Co., 781 F. Supp.2d 1240, 1249 (N.D. Okla. 2011) (and cases cited therein).

Additionally, Oklahoma law requires proof of ownership to establish both conversion and thing-in-action claims. *See Brown v. Oklahoma State Bank & Trust Co. of Vinita*, 960 P.2d 230, 233 and n. 4 (Okla. 1993) ('For simplicity...,' characterizing a chose-in-action to recover money as a conversion claim); *see also* United States v. Lowrance, 2002 WL 31689525 at *2 (N.D. Okla., Oct. 17, 2002). In Oklahoma, "Before the issue of conversion can be decided, ownership must be established." *Brown*, 960 P.2d at 233. Similarly, in Ohio, "[u]nder Ohio law, conversion is 'the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.' +" McCaughey v. Garlyn Shelton, Inc., 208 F. App'x 427, 435 (6th Cir. 2006) (quoting, in part, Joyce v. Gen.

Motors Corp., 49 Ohio St.3d 93, 551 N.E.2d 172, 175 (1990)).

Plaintiffs assert that they obtained ownership interest in the Jordan-policy proceeds upon the death of Mr. Jordan two weeks before the Receivership was created. The issue of who owned the Receivership, however, was effectively resolved in April 2006 by the Jordan settlement, after a fairness hearing. By approving the Jordan settlement, the Court and the parties to the settlement effectively recognized the ownership interests of all the Jordan Investors. That is why so much care was taken to notify the Jordan investors that they could participate in, or challenge the fairness of, the Jordan settlement agreement. During the years after the Court approved the Jordan settlement agreement, persons with ownership claims to the Jordan-policy proceeds were given repeated and ample notice of the Jordan settlement and a lengthy amount of time to submit a claim and thus establish their ownership interests in the Jordan settlement. Plaintiffs did not do so. They instead held fast to their conclusion that they were entitled to receive the entire amount of their ownership interests in the Jordan-policy proceeds.

Their conclusion, however, overly focuses on the matured status of the Jordan policies and blindly dismisses the fact that some LifeTime investors rescued, albeit temporarily, LifeTime from financial collapse. Again, the culprit was Svete and others. The district court in Svete's criminal case explained:

> [LifeTime] Investors were...told that an independent investment servicing company maintained a premium reserve account for the

> purpose of underwriting the policies. This company was created and controlled by Defendant and lacked sufficient funds to pay premiums on purchased policies as they came due when the viators lived longer than expected. Investors were thus obligated to make additional premium payments in order to avoid a total loss of their investment.

United States v. Svete, 2014 WL 941448, at *5 (N.D. Fla. Mar. 11, 2014). Com-mingling of funds set aside for servicing the life insurance policies also occurred. For example, premiums due for one group of life insurance policies would be made with money taken from sub-accounts dedicated to another group of policies. Svete and others thus robbed Peter to pay Paul, a strategy designed for failure once LifeTime stopped soliciting new investors and new cash stopped propping up LifeTime's rickety financial structure. *See* Doc. #82, *PageID* 1009. The commingling occurred so extensively that it eventually became impossible to sort out which particular Investors had staved off LifeTime's collapse for the benefit of all Investors, including the Jordan Investors. What can be sorted out is the fact that without the help of some Investors, LifeTime would have collapsed or faced imminent collapse before Mr. Jordan died. If that had occurred, the Jordan Policies would have lapsed and the Jordan Investors would have lost their entire investments.[4]

These aspects of the fraud and resulting financial condition of LifeTime made it equitable for the Receivership to distribute assets to remaining Investors on a pro rata basis. *See* *Liberte Capital Group, LLC v. Capwill*, 148 F. App'x 426 (6th Cir. 2005). This was accomplished by Court approval of

various settlement agreements between the Receiver and nearly all Investors. Those Investors who joined the settlement agreement regarding the Jordan Policies obtained a pro rata distribution of 62.5% of their original investments. This was about three times more than the return Investors in non-matured policies received. No Investor received more than their respective pro rata distribution because of how massively unfunded LifeTime was at the start of the Receivership. In this way, the LifeTime Receivership is similar to typical receiverships. *See* *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 552 (6th Cir. 2006) ("The inability of a receivership estate to meet all of its obligations is typically the *sine qua non*[5] of the receivership.").

Despite these realities, Plaintiffs held fast to their belief that they were due the original amount of their investment in the matured Jordan policies. The Court's Order on November 11, 2011 (Doc. #1207) disallowed Plaintiffs' claims to the Jordan settlement, after giving Plaintiffs another thirty days to join the settlement. By granting the Receiver's Motion to Disallow, the Court granted the Receiver's request to allocate the remaining Jordan-policy proceeds " +'among the Investors whose claims have been previously confirmed and approved by the Court.' +" (Doc. #1207, *PageID* 12958). The effect of this was the distribution of the remaining Jordan-policy proceeds to the Jordan Investors who participated in the settlement. Although Plaintiffs chose not to join the Jordan settlement, neither this Court nor the Court of Appeals limited their right "to pursue any independent legal action that may be available to them...." (Doc. #1207, *PageID*# 12956; Doc. #1304, *PageID*# 13894).

Plaintiffs' present Complaints and claims of conversion and thing-in-action have generated a "independent legal action." But, is it one "that may be available to them" to recover their entire ownership interest in the Jordan-policy proceeds? In other words, is there a legal basis for Plaintiffs' conversion and thing-in-action claims?

"In Ohio, a conversion claim requires a plaintiff to demonstrate not only that the defendant dispossessed the plaintiff of its property and caused the plaintiff damage, but also that the defendant's interference with the plaintiff's property rights was 'wrongful.' +" *Kehoe Component Sales Inc. v. Best Lighting Products, Inc.*, 796 F.3d 576, 592 (6th Cir. 2015) (citing *Dice v. White Family Cos.*, 173 Ohio App.3d 472, 878 N.E.2d 1105, 1109 (2007)). Oklahoma law requires similar wrongful conduct control of another's personal property. *See Courtney v. Oklahoma ex rel., Dep't of Pub. Safety*, 722 F.3d 1216, 1228 (10th Cir. 2013) (quoting, in part, *Welty v. Martinaire of Okla., Inc.*, 867 P.2d 1273, 1275 (Okla. 1994)). Under both states' law, Plaintiffs' conversion/thing-in-action claims fail as matter of law because neither the Receiver or the Receivership wrongfully exercised dominion over Plaintiffs' ownership interest in the Jordan-policy proceeds. Upon his appointment, the Receiver became an officer of the Court. *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006). His power to receive and secure the Jordan-policy benefits as the LifeTime Receiver was established by the Court Orders appointing him to be the Receiver. (Doc. #s 6, 23). He managed the Jordan-policy proceeds and settled the ownership dispute in his role as Receiver and with Court approval. Plaintiff's Complaints and proposed Amended Complaints fail to

allege facts sufficient to raise an inference that the Receiver acted wrongfully by receiving, managing, and distributing the Jordan-policy benefits as ordered by the Court. As a result, their allegation that the Receiver acted wrongfully and thus converted the Jordan-policy benefits is conclusory. *See* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (labels and conclusion insufficient to raise a plausible claim for relief). Given this, and because the Receiver acted within his court-appointed authority, Plaintiffs' allegations do not support plausible claims of conversion under Ohio or Oklahoma law or thing-in-action under Oklahoma law. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678-(2009) (considering allegations in context, a Complaint must raise non-speculative, plausible claim to relief).

Lastly, without a plausible claim for a thing-in-action, Plaintiffs' proposed amended Complaints are futile. Their Motions for Leave to Amend therefore lack merit. *See* *Miller v. Calhoun Cty.*, 408 F.3d 803, 817 (6th Cir. 2005).

IT IS THEREFORE ORDERED THAT:

1. The Receiver's Motion for Summary Judgment (Doc. #1486) is GRANTED, and the Clerk of Court is directed to enter Judgment in favor of the Receiver; and
2. Plaintiffs/Intervenors' Motion for Leave to Amend Complaint (Doc. #s 1488, 1490, 1492) are DENIED.

Footnotes

1Svete's crimes included multiple counts of mail fraud, conspiracy to engage in money laundering, money laundering, and interstate transportation of money obtained by fraud. *Id* 2014 WL 941448, at *2-*3.

2The Complaints also assert identical claims of negligence against the Examiner. The Court previously found those claims legally insufficient and struck them from the record. (Doc. #1444, *PageID* #s 15070-71; Doc. #1449). As a result, Plaintiffs' proposed Amended Complaints do not contain negligence claims against the Examiner.

3"In comparison, general investors in LifeTime were only to receive 16.6392% of their original investment." (Doc. #1207, *PageID* at 12948).

4Plaintiffs' original investments ranged from $3,000 to $7,500. (Doc. #878, Exhibit 8 at 7-8).

5*Sine qua non* ("without which not") refers to "an indispensable condition or thing; something on which something else necessarily depends." *Sine qua non*, Black's Law Dictionary (8th ed. 2004).

Case No. 3:04cv00059.

H. THAYNE DAVIS, Plaintiff,
v.
LIFETIME CAPITAL, INC., Defendant.

United States District Court, S.D. Ohio, Western Division at Dayton.

March 27, 2014.

ORDER

SHARON L. OVINGTON, Chief Magistrate Judge.

This case is presently before the Court upon five Motions to Intervene by individuals claiming a financial interest in Lifetime Capital, Inc. (Doc. #s 1333, 1335, 1336, 1337, 1339). The Receiver opposes their intervention on the ground that they do not satisfy the requirements for intervention set forth in Fed. R. Civ. P. 24. (Doc. #s 1338, 1340).

Previously, resolution of these Motions was stayed because the legal standards applicable to intervention were at issue in Natlis Capital, LLC's appeal of the denial of its Motion to Intervene. (Doc. #1307). The Sixth Circuit Court of Appeals recently resolved that appeal by permitting Natlis Capital to intervene under Rule 24(a). (Doc. #1383).

Although counsel for the Receiver has detailed why the pending Motions to Intervene should be denied, only brief discussion is necessary in light of the Court of Appeals' recent decision.

Rule 24(a) of the Federal Rules of Civil Procedure applies to intervention as of right. The rule

"require[s] an applicant to show that: 1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (internal citation omitted). "Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention . . . ." *Id.* To resolve whether a proposed intervenor has satisfied Rule 24(a)'s four-part test, "the factual circumstances considered under Rule 24(a) should be `broadly construed in favor of potential intervenors. Close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" (Doc. #1383, PageID at 14622) (*Davis v. Lifetime Capital LLC*, *Natlis Capital LLC Intervenor-Appellant*, App. No. 11-4442 (6th Cir. March 15, 2014)).

Beginning with the timeliness of the pending Motions to Intervene, the majority of applicable timeliness factors, *see Blount-Hill*, 636 F.3d at 284, weigh in favor of permitting intervention. As to the first factor, although this case has progressed very far, "[r]eceiverships proceed in a non-linear fashion and are indefinite in duration. As such, they do not fit within the limited circumstances under which . . . [intervention is denied] on the basis of substantial progress." (Doc. #1383, PageID at 14624) (citations omitted). As to the second factor, the Proposed Intervenors have alleged a sufficiently important interest in protecting their claimed financial interests. Accordingly, these factors weigh in favor of intervention.

As to the third factor, the Proposed Intervenors have doubtlessly known, or should have known, about

their claimed financial interest for some time. The issue of ownership regarding proceeds from the Jordan policies - the financial interest the Proposed Intervenors currently seek to protect - arose in 2004 when the Receiver filed a Motion for Order Clarifying the Status of Matured Policy Proceeds as Receivership Assets and Brief in Support (Doc. #82). The issue was also the subject of a settlement agreement approved by this Court on April 4, 2006. (Doc. #416). Proposed Intervenors therefore knew or should have known about their claimed financial interest in the Jordan policies no later than around the time the settlement agreement was reached and approved in 2006. It was not until they sent letters to the Court in 2010 that the record indicates they expressed even the slightest interest in ownership of the Jordan policies. Even construing this factor in favor of the Proposed Intervenors, their delay in filing the respective motions after they knew or should have known of their claimed interest in the Jordan policies provides some weight against the timeliness of their motions.

Proceeding to the fourth factor, prejudice to the original parties - the "most important" timeliness consideration, *id.*, PageID at 14628 - the Proposed Intervenors were previously informed that the Court had not disallowed any legal interest each might have in proceeds from the Jordan policies and that they were not precluded from pursuing independent action. (Doc. #s 1207, 1262, 1304, 1305). The Proposed Intervenors' present motions are consistent with that prior information they received from this Court. (Doc. # 1207). Not permitting them to presently intervene based even in part on prejudice to the Receiver would conflict with the Court's previous conclusion that they were not precluded from pursuing independent action.

Cf. Doc. #1383, PageID at 14628 ("A court cannot squeeze a proposed intervenor from both ends by first ruling a motion to intervene premature and then ruling a second motion to intervene too late.")(citation omitted). Additionally, "[t]he proper metric is the incremental prejudice the parties have suffered from allowing [intervention] . . . ." *Id.*, PageID at 1384. At present, it is not manifest on the face of the record that anything more than incidental "incremental prejudice" will befall the Receiver or the Receivership. The Receiver argues otherwise by pointing out that allowing intervention now would result in yet more expense and delay to the Receivership Estate . . . ." (Doc. #1338, PageID at 14118). But this will almost always be true when there has been a delay in filing a motion to intervene. Without more specific information showing incremental prejudice to the Receiver and the Receivership, this factor does not defeat the Proposed Intervenors' present effort to intervene. *Cf.* Doc. #1383, PageID at 14629; *see also id.*, PageID at 14626 ("When competing inferences may be drawn from the same facts, this court is required to construe the facts in favor of the would-be intervenor.")(citation omitted).

After weighing the factors discussed above, the Court finds the Proposed Intervenors' motions to be timely filed. *See Blount-Hill*, 636 F.3d at 284 ("No one factor is dispositive, but rather the `determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.'" *Id.* at 283 (citing *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472-73 (6th Cir. 2011)).

Lastly, turning to the remaining Rule 24(a)(2) intervention factors, *supra,* p. 2, the Proposed Intervenors seek to recover a claimed financial interest from the Receivership. This is a property interest

sufficient to demonstrate their legal interest in the Receivership. (Doc. #1383, PageID at 14631). The remaining two factors in Rule 24(a)(2) favor intervention as they did for Natlis Capital. *See id.*, PageID at 14632-33.

IT THEREFORE ORDERED THAT:

The presently pending five Motions to Intervene (Doc. #s 1333, 1335, 1336, 1337, 1339) are GRANTED.

9/12/12

No. 11-4445

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

H. THAYNE DAVIS,
Plaintiff,
and
H. THOMAS MORAN, II,
Receiver - Appellee,

ROBERT G. BURGESS,
Interested Party - Appellant,
v.
LIFETIME CAPITAL, INC., et al.,
Defendants.

O R D E R

Before: SILER, MOORE, and McKEAGUE, Circuit Judges.

Robert G. Burgess, appellant and interested party in a receivership action, appeals the order of the district court disallowing his claims to a settlement agreement. This case has been referred to a panel of the court pursuant to Federal Rule of Appellate Procedure 34(a)(2)(C). Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2004, H. Thayne Davis, an investor in LifeTime Capital, Inc. ("LifeTime"), filed suit against LifeTime, alleging fraud and breach of contract. LifeTime purchased life insurance policies from terminally-ill policyholders–"viators"–for discounted

up-front lump sum payments and assigned the benefits of the policies to LifeTime's investors. Davis alleged that LifeTime misrepresented the life expectancies of the viators and that LifeTime's owners embezzled millions of dollars from the company. Davis requested that a receiver be appointed to take control of LifeTime's assets and to administer them to Davis and similarly-situated investors.

The district court subsequently appointed H. Thomas Moran, II, as Receiver of LifeTime's assets. Approximately two weeks before the appointment, one of LifeTime's viators, Mr. Jordan, died. After Moran was appointed, Jordan's insurance company paid the receivership $6,048,786 in proceeds from Jordan's life insurance policies. Because Jordan's policies matured prior to the receivership, a dispute arose between the Receiver and the investors whose investments had been allocated to the Jordan policies–one of whom was Burgess–as to who was entitled to the proceeds: the receivership or the investors. The Receiver filed a motion seeking clarification of the status of the proceeds. Numerous interested parties filed responses to the motion; Burgess did not respond.

The district court ultimately ordered the parties to participate in mediation to determine the status of the proceeds of the Jordan policies. Mediation took place on March 28, 2006, and the parties reached a settlement which provided that the Receiver would pay each participating Jordan investor 62.5% of the total amount the investor originally invested in LifeTime and that was allocated to the Jordan policies. In return, the Jordan investors would release all claims against the Receiver with respect to their original investment and to the Jordan policy proceeds. The district court overruled the Receiver's motion for clarification of the

proceeds, subject to a fairness hearing regarding the settlement. Following the fairness hearing, the district court approved the settlement and a release that would be executed by the participating Jordan investors.

As of March 2010, only thirteen investors had failed to either return a claim form or execute a release. The Receiver filed a motion for instructions, seeking authorization from the district court to send a letter to each of the remaining investors notifying them that if they did not return a completed claim form within thirty days, the Receiver would move for disallowance of those investors' claims in the settlement agreement. Following two separate hearings on the motion for instructions, the district court granted the motion.

After the issuance of the final notice, the remaining unresolved claims were reduced to five, one of which belonged to Burgess. The Receiver filed a motion to disallow the remaining Jordan investors from participating in the settlement agreement for their failure to comply with the district court's order. The district court scheduled a fairness hearing on the motion for August 23, 2010. In response to the Receiver's motion to disallow and the notice of hearing, Burgess sent two letters to the court objecting to the settlement agreement, arguing that the Receiver was forcing him to accept the settlement agreement or forfeit his claim. Burgess argued that the court should determine the rights of the remaining Jordan investors before ruling on any more disbursements, pursuant to Liberte Capital Grp., LLC v. Capwill, 421 F.3d 377 (6th Cir. 2005).

Following the fairness hearing, which Burgess did not attend, the district court concluded that Burgess's circumstances were distinguishable from those of the interested parties in Liberte because the

interested parties in Liberte intervened in the receivership case by filing suit against the Receiver; in this case, the five remaining Jordan investors never moved to be intervening plaintiffs, never filed a motion disputing ownership of the Jordan policies, and never filed objections to the settlement agreement. The court noted that the five remaining Jordan investors did not have to participate in the settlement agreement, but were free to pursue the legal remedies that remained available to them; however, it would be improper to revisit the issue of the ownership of the Jordan policies that was "effectively resolved after the Court held a hearing and approved the Jordan Settlement," given that they had not intervened in the receivership action. The district court further determined that the five remaining Jordan investors were afforded due process. The district court allowed Burgess and the four other remaining investors thirty days from the date of the order to complete the necessary paperwork and participate in the settlement agreement, should they choose to do so. After the expiration of the thirty days, the Receiver's motion to disallow claims in the settlement agreement of any remaining Jordan investor who failed to complete the required forms would be granted.

Burgess filed a timely notice of appeal from the district court's order, choosing not to participate in the settlement agreement. On appeal, he asserts that the district court erred in determining that he must intervene in the receivership action to assert his interest in the proceeds of the Jordan policies. He also claims that the district court violated his right to due process.

In a receivership proceeding, the district court has "broad powers and wide discretion" to craft relief.

S.E.C. v. Basic Energy & Affiliated Res., Inc., 273 F.3d 657, 668 (6th Cir. 2001). The court "must still provide the claimants with due process," however. Id. We review a district court's decision relating to a receivership's distribution plan for an abuse of discretion. Quilling v. Trade Partners, Inc., 572 F.3d 293, 298 (6th Cir. 2009) (citations omitted). Whether procedures used by a district court violate due process is reviewed de novo. See Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374, 381 (6th Cir. 2001).

The district court did not abuse its discretion in disallowing Burgess's claim to the settlement for his failure to intervene or otherwise timely assert his interest in the Jordan proceeds. We have explained:

> If the matter of ownership [of property] is in doubt, then the party claiming the property should ask to be allowed to intervene in the receivership case and present his claim to the property. The court should accord such claim a proper hearing and all parties in interest should be heard. The third party claiming such property may present his claim by filing with leave of court a dependent or independent suit against the receiver. If the court finds that the property does belong to a third party it may make an order directing the receiver to turn over such property.

Liberte, 421 F.3d at 384-85.

The issue of the ownership of the Jordan proceeds arose in 2004 and the Receiver filed a motion for clarification of the ownership of the proceeds. Although numerous investors responded to that motion, Burgess was not one of them. Following

extensive briefing, hearings, and court-ordered mediation, the district court overruled the Receiver's motion for clarification of the status of the proceeds as the result of the settlement reached. On April 4, 2006, following a fairness hearing, the court approved the settlement agreement. Over the next four years, more than two hundred claims to the proceeds of the Jordan policies were distributed. When only thirteen unresolved claims remained, the Receiver sought authorization from the district court to send a letter to each of the remaining investors notifying them that if they failed to complete a claim form within thirty days, the Receiver would move for disallowance of those investors' claims in the settlement agreement. Two more hearings were held and the district court granted the motion. After the requisite thirty days had passed, the Receiver filed a motion to disallow the five claims that remained. Burgess did not express an interest in the ownership of the Jordan proceeds until he filed letters to the district court in July and August 2010, challenging the settlement agreement and opposing the Receiver's motion to disallow claims. By that time, more than four years had passed since the district court approved the settlement agreement, and the period for objecting to the agreement or appealing the district court's decision had long expired. Because Burgess did not intervene or otherwise attempt to protect his interest in the Jordan proceeds in a timely manner, the district court did not abuse its discretion in disallowing Burgess's claim to the settlement agreement.

Nor did the district court deny Burgess due process. The record demonstrates that Burgess was provided with proper notice and an opportunity to be heard throughout the receivership proceedings. See Leary v. Daeschner, 228 F.3d 729, 742 (6th Cir. 2000)

("When a plaintiff has a protected property interest, a predeprivation hearing of some sort is generally required to satisfy the dictates of due process."). Further, even though Burgess's objections to the settlement agreement were filed several years after the agreement was approved, the district court considered the objections prior to granting the Receiver's motion to disallow claims. The record demonstrates that Burgess was apprised of the receivership proceedings, he was notified of the multiple hearings held on the Jordan proceeds, and he was allowed to make objections which were considered by the district court. Accordingly, he received all the process he was due.

Finally, the district court's decision did not disallow any legal interest Burgess had in the proceeds from the Jordan policies, as he appears to believe. The district court disallowed only Burgess's claim to the settlement agreement. The district court's order states that, in the event the remaining five investors chose not to participate in the settlement agreement after the thirty-day period allowed by the final order, "the Receiver shall disallow the participation or claim of any remaining Jordan Investor in the settlement agreement approved by this Court on April 4, 2006." The district court also noted that its decision would not limit Burgess's right to pursue any independent legal action available to him. Accordingly, Burgess was not denied due process by the court's alleged denial of his interest in the Jordan proceeds.

United States District Court, S.D. Ohio, Western Division, at Dayton.

H. Thayne DAVIS, Plaintiff,
v.
LIFETIME CAPITAL, INC., Defendant.
Case No. 3:04cv00059
Signed 11/10/2011

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Lifetime Capital Inc., Oklahoma City, OK, pro se.

ORDER

Sharon L. Ovington, United States Magistrate Judge

I. INTRODUCTION

LifeTime Capital, Inc. was a Nevada corporation with its principal place of business in Miamisburg, Ohio. (Doc. #1 at 1). The primary business purpose of LifeTime was to purchase life insurance policies from terminally ill policyholders – known as "viators"– for an up-front lump sum payment (at a

discounted rate), and assign the beneficial interests in these policies to Lifetime's investors. (*Id.* at 3). The investors were promised high returns in comparison to other, more traditional, investment options.

On February 19, 2004, Plaintiff H. Thayne Davis, a LifeTime investor, filed this case against LifeTime Capital, Inc. alleging fraud and breach of contract as well as requesting a Receiver be appointed to take control and administer the assets of LifeTime for the benefit of Plaintiff Davis and others similarly situated. (*Id.* at 8). Essentially, Davis alleged that LifeTime misrepresented the life expectancies of viators and its owners embezzled millions of dollars over the years. (*Id.* at 6).

This case is presently before the Court upon the Receiver's Motion to Disallow Claims (Doc. #1111), the Receiver's Motion to Disallow Claims of Certain Jordan Investors (Doc. #1112), Response in Opposition to Receiver's Motion to Disallow Claims of Certain Jordan Investors by Claimant Rudy Sotelo (Doc. #1117), Receiver's Reply to Claimant Sotelo's Response in Opposition (Doc. #1122), letters from various Jordan Investors (Doc. #s 1141-44, 1147-56), the record of the Fairness Hearing held on August 23, 2010, and the record of the case as a whole.

II. FACTUAL BACKGROUND

Shortly after this case was filed, the Court appointed H. Thomas Moran, II as Receiver of the assets of LifeTime and "authorized and empowered [him] to take any and all actions ... necessary or prudent for the preservation, maintenance, and administration of the LifeTime Portfolio comprised of viatical and life settlement policies and beneficial interests therein ...."

(Doc. #6 at 3). In addition, due to the large number of LifeTime investors involved in this case – approximately 4,000 – this Court appointed Andrew C. Storar as Examiner and ordered that he "shall serve as a liaison between all LifeTime investors who are unrepresented by legal counsel and the Receiver." (Doc. #40 at 2). The Order Appointing Andrew C. Storar as Examiner (Doc. #40) also expressly provided that "nothing in this Order shall be deemed to preclude any LifeTime investor from retaining counsel of his, her or its own choosing." (*Id.*).

Shortly thereafter, in June 2004, the Receiver requested from this Court "an Order pooling the assets of LifeTime for the benefit of all of its investors." (Doc. #53 at 1). The Examiner, Mr. Storar, was ordered to provide notice of the Receiver's Request to Pool Viaticals to all LifeTime investors of record by certified mail-return receipt requested, and to publish notice in a regional and national newspaper. (Doc. #51). Pursuant to the procedures approved by this Court, "the approved Legal Notice of the Motion to Pool Viaticals and the scheduled hearing date for the Motion was published in *U.S.A. Today* on Friday, August 6, 2004 and again on Monday, August 9, 2004." (Doc. #66 at 2). Notice was also published several times in the Dayton Daily News – on Wednesday, August 4, 2004, on Sunday, August 8, 2004, and on Wednesday, August 11, 2004. (*Id.*).

Thereafter, on September 21, 2004, the Receiver filed a Motion for Order Clarifying the Status of Matured Policy Proceeds as Receivership Assets and Brief in Support. (Doc. #82). The Receiver explained that two of the life insurance policies (Policy No. 9904060002 and 9904060001)[1] had matured on February 4, 2004, due to the death of the viator, Mr. Jordan. (*Id.*

at 11). This occurred approximately two weeks before the Receiver's appointment (on February 20, 2004). (*Id.*). However, "[t]he Matured Policy Investors were *not* named either as beneficiaries of the Policies or beneficiaries of the Life Insurance Trusts in which Policies were held." (*Id.* at 17). As such, the total amount of proceeds from the Jordan policies (approximately $6,000,000) was paid by the insurance company to the Receivership in May 2004. Recognizing that a dispute might arise over these funds, the Receiver asked

> this Court to clarify that the Matured Policy Proceeds are Receivership Assets and, in accordance with the relief requested in the Motion to Pool Viaticals (Doc. No. 53), that the interests of the Matured Policy Investors be pooled with the interests of the other LifeTime Investors and that the Matured Policy Investors, along with all other LifeTime Investors with valid claims, be granted a *pro rata* interest in the Portfolio as a whole.

(Doc. #82 at 37).

Next, as previously scheduled, a hearing was held regarding the Receiver's Request to Pool Viaticals. (Doc. #53). At the hearing, the Receiver testified as to his findings; investors' questions were answered by attorneys and this Court (Doc. #88); and the motion was taken under advisement. (*Id.*). Thereafter, "having reviewed the Motion to Pool, heard argument[s] and received evidence in this matter," this Court found that "the pooling of investor interests in LifeTime's portfolio of life insurance policies (Viaticals) is in the best interest of those who invested funds with

LifeTime and, therefore, that the Motion should be granted." (Doc. #134 at 2). Nonetheless, recognizing the need to further consider the issue of the Jordan Policies, this Court specifically provided:

> the interests of the Receiver and investors in the Matured Policies designated by LifeTime as Policy No. 9904060001 and Policy No. 9904060002, which are the subject of the Receiver's Motion for Order Clarifying the Status of Matured Policy Proceeds As Receivership Assets (Doc. #82), filed on September 21, 2004, shall not be subject to the provisions of this Order pending the ruling of the Court on the Motion or further Order of this Court.

(*Id.* at 2). In furtherance of this Court's effort to determine how the Jordan Policies should be treated, the Court scheduled a hearing for January 24, 2005, and continued to receive and review objections from interested parties during the time leading up to this the hearing, as well as after.

Subsequently, this Court ordered mediation to take place between parties regarding the issue of the Jordan Policy proceeds. (Doc. #400). The mediation was voluntary and any LifeTime investor, or their attorney, was permitted to attend. (*Id.*). As a result of the mediation, a settlement agreement was reached and approved by this Court, whereby investors in the Jordan Policies[2] (Jordan Investors) who decided to accept the offer would receive 62.5% of the amount they originally invested in these policies. (Doc. #416). In comparison, general investors in LifeTime were only to receive 16.6392% of their original investment. As such,

participants in the Jordan Investors' settlement (the Jordan Settlement) would receive almost four times as much of their original investment than the "non-Jordan" LifeTime Investors would receive. The Court held a fairness hearing on April 13, 2006 regarding the proposed Jordan Settlement. (Doc. #439). At this hearing, no one testified or objected to the approval of the settlement. (*Id.*).

Over the next few years, nearly all of the 200+ Jordan Investors opted to participate in the settlement by executing the release form. They have since received their shares of the funds. Five Jordan Investors, however, decided not to participate in the settlement agreement, and they oppose the Receiver's Motion to Disallow Claims of Certain Jordan Investors (Doc. #s 1112, 1117). They have also sent letters to this Court stating their objections to the Jordan Settlement. Underlying the five remaining Jordan Investors' position is their collective belief that this Court must issue an order regarding their ownership rights in the Jordan Policies. (Doc. #s 1141-44, 1147-56). They argue that without such an order they should not have to decide whether to participate in the settlement. As discussed below, however, the issue regarding the Jordan Policy proceeds has been previously resolved in this case and need not be considered further. In addition, all LifeTime Investors – including Jordan Investors – have been afforded due process consistent with their constitutional rights.

III. APPLICABLE LAW AND ANALYSIS

A. The Jordan Investors' Claims

"In a receivership proceeding, the district court has 'broad powers and wide discretion' in crafting

relief." *Quilling v. Trade Partners, Inc.*, 572 F.3d 293, 298 (6th Cir. 2009) (quoting *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 668 (6th Cir. 2001)). In this case, the remaining Jordan Investors argue, based on *Liberte Capital Group, LLC. v. Capwill*, 421 F.3d 377 (6th Cir. 2005), that this Court must determine whether the proceeds from the Jordan Policy should be considered part of the Receivership, as the policies matured prior to the appointment of the Receiver. (Doc. #s 1141-44, 1147-56). While the facts of *Liberte* share some similarities with this litigation, the remaining Jordan Investors' reliance on it is misplaced. In *Liberte*, Intervening-Plaintiff Janet E. Mohnkern invested $100,000 with Intervening-Plaintiff Alpha Capital Management Group, LLC. *Liberte*, 421 F.3d at 380. The funds Mohnkern invested were held in escrow until Alpha located a terminally ill policyholder who would convey his or her interest to Mohnkern. *Id.* Eventually Alpha obtained the rights to a life insurance policy from Broderick J. Blacknell, and he assigned the rights to the policy benefits directly to Mohnkern. *Id.*

In April 1999, after the Blacknell Policy was assigned to Mohnkern but before Blacknell died, Alpha and another business in the viatical settlement industry, Liberte Capital Group, LLC, brought an action against their escrow agent, James A. Capwill, and his companies. *Id.* Due to allegations that Capwill misappropriated funds, the district court appointed a Receiver in order to administer claims of creditors, investors, and all other parties. *Id.* From February 2000 to November 8, 2000, the Receiver "disbursed proceeds of life insurance policies of deceased insured to matched investor-beneficiaries." *Id.* at 381.

On November 14, 2000 Blacknell died. Due to delays in obtaining the death certificate, the escrow

agent did not forward the required documentation to process the policy proceeds until October 1, 2001. Subsequently, on October 12, 2001, Mohnkern sent the paperwork required to process her claim. A short time later, the district court appointed another Receiver in the case. The second Receiver (Receiver #2) was specifically tasked with protecting the interests of the Alpha investors, and accordingly requested the court provide direction regarding disbursement of the Blacknell funds to Mohnkern. *Id.* Despite acknowledging that Mohnkern was entitled to the benefits of the Blacknell policy, Receiver #2 asked the court to replace Mohnkern's asserted contractual right with an equitable claim to the remainder of funds left in the Receivership upon conclusion of the case. *Id.* Without a hearing or an opportunity to be heard, the district court granted Receiver #2's motion and ordered that proceeds from the Blacknell Policy be provided to the Alpha receivership.

Mohnkern intervened in the case and requested a hearing regarding ownership of the Blacknell Policy proceeds. *Id.* The district court allowed Mohnkern to intervene, but only regarding the issue of disbursement. *Id.* The district court denied her motion to determine ownership of the Blacknell Policy proceeds. *Id.* Mohnkern filed a number of additional motions in an attempt to get the district court to consider the ownership issue of the Blacknell policy, but the district court denied these motions and ordered a *pro rata* distribution of the receivership assets, including the Blacknell Policy proceeds. *Id.*

Mohnkern appealed the district court's decision asserting, in-part, that her constitutional right to due process was violated because she was denied notice and an opportunity to be heard regarding the ownership of

the Blacknell Policy proceeds. *Id.* at 382. The United States Court of Appeals for the Sixth Circuit agreed with Mohnkern. It reversed the decision of the district court relating to its denial of Mohnkern's motion for release and distribution, and it remanded the case "for a hearing as to the ownership of the Blacknell Policy proceeds, consistent with Mohnkern's due process rights." *Id.* at 385. In so ruling, the Sixth Circuit found that "the final hearing on disbursement was not adequate to protect Mohnkern's interests," and that "[a]t a minimum, once Mohnkern challenged the ownership of the proceeds, the court should have deferred until a proper hearing had enabled the court to determine ownership." *Id.* The Court of Appeals explained:

> If the matter of ownership is in doubt, then the party claiming the property should ask to be allowed to intervene in the receivership case and present his claim to the property. The court should accord such claim a proper hearing and all parties in interest should be heard. The third party claiming such property may present his claim by filing with leave of court a dependent or independent suit against the receiver. If the court finds that the property does belong to a third party it may make an order directing the receiver to turn over such property. The question of priorities and pro rata distributions, of course, does not enter into the problem when such an order is properly made.

Id. at 384 (quoting 3 Clark on Receivers, § 664 (3d ed. 1959)).

In the instant case, the five remaining Jordan Investors argue that under *Liberte*, this Court must again address the ownership issues related to the Jordan Policies. However, these investors overlook that they are not, nor have they ever attempted to be, intervening plaintiffs in this case. As is clear from *Liberte*, if a party desires to challenge ownership of property seized by a receivership, then that party must intervene in the case by filing a dependent or independent suit against the receiver. *Id.* Federal Rule of Civil Procedure 24(c) further provides that "[a] motion to intervene must be served on the parties as provided in Rule 5," and "[t]he motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Not one of the remaining Jordan Investors has intervened, and there are no motions pending before this Court from any party disputing ownership of the Jordan Policies.

This Court understands that the remaining Jordan Investors object to the settlement agreement. This is evident from their multiple letters to this Court. But there is nothing requiring them to join the Jordan Settlement. Participation in the settlement agreement has been – and still remains – purely voluntary. Should the remaining Jordan Investors ultimately decide not to participate, nothing in this Order should be construed to prohibit them from pursuing whatever legal remedies might remain available. However, because the remaining Jordan Investors have not intervened in this case, it would not be proper to revisit an issue that was effectively resolved after the Court held a hearing and approved the Jordan Settlement (in 2006), along with all related motions.

The remaining Jordan Investors, of course, have a constitutional right to due process. *See Liberte*, 421

F.3d at 834. Cognizant of this, the Court has continually ensured, from the onset of this litigation, that all claimants receive adequate notice of proceedings and opportunities to be heard. In furtherance of this objective, the Court also appointed Andrew C. Storar as Examiner and ordered him to act as a liaison between LifeTime investors and the Receiver. At the same time, it was made clear that Mr. Storar's appointment as Examiner would not act to prevent any LifeTime investor from retaining independent legal counsel. (Doc. #40 at 2).

In his capacity as Examiner, Mr. Storar continually notified investors about updates in the case, and likewise kept the Court apprised of investors' views throughout the pendency of this action. After the settlement agreement was reached as a result of mediation that took place on March 28, 2006, this Court held a fairness hearing on the issue on April 13, 2006 (at which time no one testified regarding the matter). (Doc. #439). Thereafter, investors began submitting claims pursuant to procedures established by this Court, and the Receiver processed and paid the claims accordingly. More recently, the Receiver explains that he has received claims and "executed copies of the Mutual and Reciprocal Release (the "Release") from 204 of the Jordan Investors" and that "checks totaling $2,034,488.28 have been mailed to those Jordan Investors." (Doc. #1112 at 5). In addition, the Receiver indicates that five remaining Jordan Investors, all of whom are eligible to participate in the settlement, have failed to file the required release form.[3] Accordingly, the Receiver has not paid out $33,203.00 in claims to these investors and requests "an order of the Court directing that the proceeds attributable to any disallowed claims, which have been previously

escrowed in accordance with the Court's prior Orders pertaining to partial distributions to Investors, be reallocated among the Investors whose claims have previously been confirmed and approved by the Court." (Doc. #1112 at 5, 9). Furthermore, this Motion comes after the Receiver has already mailed a final notice to the remaining Jordan Investors notifying them that failure to timely file the required Release form would result in forfeiture of their ability to recover funds as part of the settlement agreement.

Due to the impact such a decision may have on the right of the remaining Jordan Investors to receive funds under the settlement agreement, the Receiver requested a hearing. (*Id.*). Notice of the fairness hearing was given to the remaining Jordan Investors, and the fairness hearing took place on August 23, 2010. (Doc. #1162). In response, the five remaining Jordan Investors sent letters to this Court stating their views on the issue. (Doc. #s 1142-44, 1147-56). Accordingly, as the remaining Jordan Investors were provided with notice of the hearing and a meaningful opportunity to be heard, no violation of their right to due process has occurred. This Court has considered their objections to the Jordan Settlement. Yet the Court previously approved the Jordan Settlement and continues to find the terms fair. Furthermore, "no federal rules prescribe a particular standard for approving settlements in the context of an equity receivership; instead, a district court has wide discretion to determine what relief is appropriate." *Gordon v. Dadante*, 336 Fed. Appx. 540, 549 (6th Cir. 2009) (citing *Liberte Capital Group, LLC*, 462 F.3d at 551).

Although this Court recognizes the Receiver has raised legitimate arguments to disallow the claims of the remaining Jordan Investors at this time, the Court

also understands the remaining Jordan Investors may have received incorrect advice from a non-party to this case. Accordingly, rather than disallowing the remaining Jordan Investors' claims at this time, the Court will provide any remaining Jordan Investor with thirty (30) days from the date of this Order to participate in the settlement agreement, provided they complete all required claim procedures (including execution of the required release) within this thirty-day period. Finally, nothing in this Order is intended to either require their participation in the Jordan Settlement or limit the right of any remaining Jordan Investor to pursue any independent legal action that may be available to them should they decide not to participate.

B. Disallowance of LifeTime Investors' Claims

The Receiver has also filed a Motion to Disallow Claims (Doc. #1111), which relates to the general investors in LifeTime (LifeTime Investors) who have not filed a claim or otherwise responded.

The Receiver began mailing claim-form packets to LifeTime Investors beginning on February 17, 2005 and ended mailing them on March 15, 2005. (Doc. #1111 at 4). As a result of this first round of mailing, "the Receiver received approximately 2,224 claim forms from or on behalf of Investors." (*Id.*). In September 2005, the Receiver began mailing notices to Lifetime Investors who had not returned a claim form. This second mailing netted approximately 243 additional claim forms from or on behalf of individuals who had invested in LifeTime.

A third notice followed in March 2007. (Doc. #1111 at 5). By then, there were approximately 450

Investors who had not yet returned claim forms to the Receiver. *Id.* After the third notice was sent out, the Receiver's staff continued to attempt to reach Investors. *Id.* As a result of these efforts, another 260 claim forms were received. Due to further efforts by the Receiver and his staff, the number of investors who had neither submitted claims nor had claims submitted on their behalf decreased again to 126. (Doc. #1080 at 2). Of these 126 investors, 37 are deceased.

Also, despite the Receiver's best efforts, only 1 living investor, and the beneficiaries or next of kin for 7 of the deceased investors, could not be located.

Thereafter, having reviewed the Receiver's Motion for Instructions Regarding LifeTime Investors Who Have Not Submitted a Claim (Doc. #835); the Receiver's Supplement to Motion for Instructions (Doc. #1066); "having considered any objections to the relief requested in the Motion and Supplement; [and] having heard arguments and considered evidence at hearings on January 22, 2008, and October 27, 2009" (Doc. #1080 at 1), the Court ordered that, "in the best interests of the receivership estate," the Receiver was authorized to send final notice to each of the LifeTime Investors for whom no claim form had yet been received. *Id.* at 2. The Court further provided that, "if an investor does not return a completed claim form to the Receiver within thirty (30) days of the date on which the final notice is delivered to the investor, the Receiver shall be allowed to file one or more motion(s) seeking disallowance of investors' claims due to any investor's failure to participate in and/or comply with the claims process and the Court's Orders related to the same." (Doc. #1080 at 2). Such information was also posted and is still available on the Internet at www.lifetimereceiver.com.

In accordance with the Order for Instructions, "the Receiver prepared and issued final written notices to Investors or next-of-kin for whom no claim form had been submitted or with respect to which claim forms remained deficient as to either information or compliance with the Court's claims orders." (Doc. #1111 at 6). As a result of this effort, the total number of unresolved claims decreased again and now stands at 60. (*Id.* at 7). Accordingly, "the Receiver now seeks [an] order[ ] ... disallowing the claims for which compliance with the Court's prior Order has still not been achieved." (*Id.* at 7). The Receiver also seeks an order "directing that the proceeds attributable to any disallowed claims ... be reallocated among the Investors whose claims have previously been confirmed and approved by the Court." (*Id.* at 7). Recognizing the impact upon property interests, the Court held a fairness hearing on August 29, 2010. (Doc. #1162).

Accordingly, in consideration of the steps taken and circumstances discussed above, this Court finds it appropriate to grant the Receiver's Motion to Disallow (Doc. #1111), and hereby disallows the claims of any LifeTime investor (with exception of the five remaining Jordan Investors) who has not filed a claim as of the date of this Order.

IT IS THEREFORE ORDERED THAT:

1. The Receiver's Motion to Disallow Claims (Doc. #1111) is GRANTED, and the claim of any LifeTime Investor (excluding the five remaining Jordan Investors) is hereby disallowed;
2. The Receiver's Motion to Disallow Claims of Certain Jordan Investors (Doc. #1112) is GRANTED as it relates to any remaining Jordan Investor who does not

deliver the completed claim materials to the Receiver within thirty (30) calendar days from the date of this Order. Claim materials not received by the Receiver within thirty (30) calendar days from the date of this Order will nonetheless be considered timely if mailed and postmarked on or before the thirtieth (30) calendar day after the date of this Order. All materials mailed to the Receiver should be mailed via certified mail, return receipt requested. After the thirtieth calendar day from the date of this Order, and providing for a reasonable time thereafter to ensure delivery of all mailed correspondence, the Receiver shall disallow the participation or claim of any remaining Jordan Investor in the settlement agreement approved by this Court on April 4, 2006 (Doc. #416);

3. Not sooner than forty-five (45) calendar days from the date of this Order, the Receiver shall pool all unclaimed funds (including unclaimed funds attributed to any remaining Jordan Investor described above), and take all steps necessary and proper to reallocate and distribute these unclaimed funds to those LifeTime Investors whose claims have previously been confirmed and approved by this Court;

4. The Receiver shall mail a copy of this Order, within five (5) business days, to all five remaining Jordan Investors who currently are not parties in the Jordan Settlement Agreement, via certified mail, return receipt requested. As soon as practicable, the Receiver shall also post this Order on its website, www.lifetimereceiver.com;

5. The Receiver is hereby authorized to take all steps necessary and proper to effectuate this Order and to wind up the affairs of the receivership estate. The Receiver is ordered to file a final report on or before January 23, 2012; and,

6. The Receiver's Supplement to Motion for Instructions Regarding the Claims of Certain Jordan Investors (Doc. #1069), and Motion to Shorten Time to File Objections to Receiver's Motion to Approve Compromise and Settlement (Doc. #870) are DENIED as moot.

Footnotes

1Policy No. 9904060002 had a total of 116 investors – 51 of which have all the funds they invested with LifeTime placed on this policy. Policy No. 9904060001 had a total of 109 investors – 42 of which have all the funds they invested with LifeTime placed on this policy. (Doc. #82 at 17).

2The "Jordan Policies" refer to the life insurance policies (Policy No. 9904060001 and Policy No. 9904060002) of the viator, Mr. Jordan.

3As part of this case, "[a]ll Jordan Investors [must] ... execute the Release and Settlement Agreement as a condition of the receipt of their distribution pursuant to the Compromise." (Doc. # 543 at 2). "Receivership courts have broad authority in establishing claims procedures." *United States of America v. Capital Across America, L.P.*, 369 Fed. Appx. 674, 680 (6th Cir. 2010) (citing *Liberte*, 462 F.3d at 552).

Filed: 03/29/06

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

H. THAYNE DAVIS,
Plaintiff,
v.
LIFE TIME CAPITAL, INC.,

Case No. 3:04 CV 0059

Magistrate Judge Sharon L. Ovington (By Consent of the Parties)

DECISION AND ORDER OVERRULING RECEIVER'S MOTION TO CLARIFY STATUS OF MATURED POLICY PROCEEDS (DOC. # 82) AND SUPPLEMENTAL MOTION TO CLARIFY STATUS OF MATURED POLICY PROCEEDS (DOC. # 174); ORDER OVERRULING MOTION FOR RULING (DOC. # 206)

This matter is before the Court upon motion of H. Thomas Moran II, the court-appointed Receiver of the assets of LifeTime, for an Order Clarifying the Status of Matured Policy Proceeds as Receivership Assets. (Doc. # 82), and Supplemental Motion to Clarify the Status of Matured Policy Proceeds (Doc. # 174). Also before the Court are various responses of Interested Non-Parties which respond to the Receiver's Motion to Clarify (Doc. # 147, # 148, # 149, # 150, # 151, # 152, # 154, # 173, # 298), the Receiver's Reply to Objections, (Doc. # 163,# 174, # 293), and the

record as a whole. Finally, pending before the Court is the motion of Interested Party Shirley Cox Banks for Ruling. (Doc. # 206).

On March 28, 2006, Chief Magistrate Judge Merz conducted a mediation regarding the issues surrounding the matured policy proceeds and the aforementioned motions. As a result of that mediation the interested parties reached a proposed settlement agreement, the terms of which were entered into the record in open Court. Accordingly, the pending motions are overruled subject to renewal in the event that the settlement agreement is not approved. A fairness hearing on the proposed settlement agreement is hereby set for April 13, 2006 at 9:30 a.m. in Courtroom Number 4, 5th Floor, Federal Building and Courthouse, 200 W. Second St., Dayton, Ohio.

March 29, 2006
s/ Sharon L. Ovington Sharon L. Ovington
United States Magistrate Judge

Filed: 03/16/06

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

H. THAYNE DAVIS,
Plaintiff,
v.
LIFETIME CAPITAL, INC.,
and
DAVID W. SVETE,
Defendants.

MEDIATION ORDER

Case No. 3:04CV059

Magistrate Judge Sharon L. Ovington (By Consent of the Parties)

With his consent, the above-captioned action is hereby transferred to Chief Magistrate Judge Michael R. Merz solely for the purpose of conducting a mediation concerning the issue of the Jordan Policy Proceeds. Chief Magistrate Judge Merz shall have full authority to conduct the mediation and shall report whether or not it has resulted in settlement.

The above-captioned action is hereby set for mediation at 9:00 a.m. on Tuesday, March 28, 2006, at the United States Courthouse and Federal Building, 200 West Second Street, Room 501, Dayton, Ohio 45402. Mediation is a purely voluntary process. Therefore, any LifeTime Investor, including Jordan Investors, may attend the mediation but are not required to do so.

March 16, 2006 s/ Sharon L. Ovington Sharon L. Ovington United States Magistrate Judge

Filed 9/6/2018

No. 17-3048.

H. THAYNE DAVIS, Plaintiff,

H. THOMAS MORAN, II, Receiver-Appellee,

JOHNNIE C. IVY, III, ET AL., Intervenors-Appellants,

v.

LIFETIME CAPITAL, INC., ET AL., Defendants.

United States Court of Appeals, Sixth Circuit.

ORDER

BEFORE: MERRITT, GRIFFIN and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No: 17-3048

Filed: September 17, 2018

H. THAYNE DAVIS
Plaintiff

and

H. THOMAS MORAN, II
Receiver - Appellee

JOHNNIE C IVY, III, successor to Johnnie C. Ivy, deceased; NENA ELLISON; ERNEST STORMS; JACQUELYN STORMS; JANE C. IVY-STEVENS; ROBERT G. BURGESS Intervenors - Appellants

v.

LIFETIME CAPITAL, INC.
Defendant

MANDATE

Pursuant to the court's disposition that was filed 06/27/2018 the mandate for this case hereby issues today.

COSTS: None

Via Certified Mail: 7010 0290 0000 3527 4527

June 25, 2010

Office of the Clerk
United States District Court
For the Southern District of Ohio

Federal Building, Room 712

200 West Second St.

Dayton, Ohio 45402

Re: Case No. 3:04-CV-0059;
Davis v. Lifetime Capital, Inc.
Attention: Magistrate Judge Sharon L. Ovington

Dear Judge Ovington:

We are writing about the Fairness Hearing the Court recently scheduled for August 23, 2010 in the above case. Our mother, Irene F. Ivy, as the Trustee for the Johnnie C and Irene F. Ivy RLT; who recently passed away, was an investor in the Jordan life insurance policies whose rights to the proceeds of the policies are still being challenged by the Receiver. The Trust's rights to those proceeds have been disputed since the Lifetime Capital receivership began. Even though we did not receive notice from the Court, we request the opportunity to participate and be heard at the Fairness Hearing on her rights to the Jordan policy proceeds and any related matters.

As the Court knows, the Trust's rights to the policy proceeds vested before the Court appointed the

Receiver. The Receiver continues to argue that the investor's are not entitled to them. The Court took the issue under advisement on January 24, 2005, and ordered the Receiver to mediate the dispute with consenting parties. The Examiner, Mr. Andrew Storar, informed the investors on March 22, 2006 that the investors had no obligation to accept any settlement. Some Jordan investors did agree to mediate and agreed to a settlement of their claims. As the Trustee to the Trust, our mother did not agree to mediate and did not accept the proposed settlement.

On December 19, 2009, the Receiver notified Jordan investors who had not agreed to settle that they would forfeit their claims unless they responded and accepted the proposed settlement. The Receiver's letter was the first time any one claimed they could force the remaining investors· to accept the settlement. Our mother informed the Receiver and the Court that she did not accept the settlement and that she continued to claim my full share of the policy proceeds. The Receiver then filed a Motion to Disallow on March 30, 2010. In that Motion, Receiver argued that claimants should forfeit any claim basically because they did not accept a settlement they did not agree to. What the

Receiver really means is that the investors were required to accept the settlement offered, even though Mr. Storar told the investors the opposite four years earlier. Our mother informed the Court that she opposed the motion by letter dated April 19, 2010.

We understand that the Court held a hearing on April 29, 2010 and took the matter under advisement again after directing the Receiver to conduct an investigation and report back within 90 days, by July

27, 2010. We have received no information about the Receiver's investigation.

The Receiver's Motion relies on nothing more than failed attempts to coerce our mother into accepting a compromise she was not obligated to accept, and should be denied. The decision in *Liberte Capital Group, Inc., LLC v. Capwill*, 421 F. 3d 377 (6th Cir., 2005) requires the Court to determine our rights before there are any rulings on distribution of proceeds. Accordingly, the Court cannot ignore that determination or the investor's rights simply for the Receiver's argument of convenience.

Until the Court decides that threshold issue, as the Trustees to the Johnnie C. and Irene F. Ivy RLT we object to any disbursements to either the Receiver or other investors with Lifetime Capital. As the Court knows, the Receiver has not safeguarded the Jordan policy proceeds pending a determination of the Johnnie C. and Irene F. Ivy RLT claims or the claims of other remaining Jordan investors, using nearly $4 million dollars of the original $6 million dollars of the Jordan policy proceeds for unspecified expenses. While the Receiver claims to have developed contingency plans to repay these proceeds, there should be no more disbursements until the outstanding Jordan investors claims are properly determined and paid.

Thank you.

Very truly yours,

_____

Johnnie C. Ivy Trustee

_____

Nena Ellison Trustee

Jane Ivy Stevens Trustee

716 Linares St.
San Antonio, Texas 78225

Cc: Joseph C. Oehlers
400 National City Center
6N Main Street
Dayton, Ohio 45402

The Life Time Capital, Inc. Irrevocable Life Insurance Trust
9904060002

THIS IRREVOCABLE LIFE INSURANCE TRUST AGREEMENT is made this twenty-eighth day of April, 1999, by and between Life Time Capital, Inc., a Nevada Corporation, and Paul E. Schwarz, a resident of the State of Ohio. ("Trustee").

WITNESSETH:

The Grantor is the owner of a certain policy of insurance on the life of ***Confidential***, a description of which is set forth in Schedule A attached hereto and made a part hereof by reference, and has assigned all rights and interest in the policy or policies to the Trust as owner and/or beneficiary of the policy; and by this Agreement, Grantor wishes to irrevocably establish the Trust and irrevocably set forth the powers and duties granted to the Trustee hereunder.

ARTICLE I

Payment of Premiums

The Trustee shall be under the obligation to pay the premiums, or arrange for the payment of such premiums, which may become due-and payable, under the provisions of such policy of insurance, and to make certain that such premiums are paid. The Trustee shall be responsible in the event such premiums are not paid as required.

Nothing in this provision shall be construed as limiting the rights of the Trustee, at the Trustee's sole discretion, to affect such premium payments and/or

reinstatement of the policy cancelled, for nonpayment of premiums, on behalf of the Trust and the beneficiary(ies).

ARTICLE II
Safekeeping of Policy Documents

The Trustee shall be under an obligation and duty with respect to the safekeeping of such-policy of insurance and to receive such sums as may be paid pursuant to the policy, in accordance with the requirements of this Trust, and to hold and disburse such proceeds subject to the terms of this Agreement.

ARTICLE III
Collection of Policy Proceeds

On the death of Insured, Trustee shall take all necessary steps to collect the proceeds of any and all insurance policies in the Trust. In order to facilitate prompt collection of those sums, Trustee shall furnish the necessary proof of death to the respective insurance company and is authorized and empowered to do any and all things that in Trustee's discretion are necessary to collect the proceeds, including, but not limited to, the powers to execute and deliver releases, receipts, death certificate(s) which include cause of death, and all other necessary papers; the power to compromise or adjust any disputed claim in such manner as seems just; and the power to bring suit on any policy, the payment of which is contested by the insurer, and to pay the expenses of any such suit, including attorneys fees, from the principal of the Trust or from any other insurance proceeds, provided that the Trustee shall be under no obligation to bring suit unless it is advisable in

the opinion of Trustee's counsel and unless Trustee shall have either adequate funds with which to pay the expenses of the suit or indemnification to Trustee's satisfaction against any laws, liability, or expenses that may be incurred in bringing the suit.

On the collection of the proceeds of any insurance policy in the Trust, Trustee shall add such proceeds to the Trust and shall hold, manage, invest, and reinvest the proceeds, collect the income, and pay and distribute the income and the principal in the manner provided for and consistent with this Trust agreement, and any corresponding beneficiary release, irrevocable or not, to the Trust.

ARTICLE IV
Rights and Powers Granted to the Trustee

The Trustee shall be granted the following powers and limitations:

1. Under no circumstance shall the Trustee sell, assign, or convey the corpus or its income, in whole or in part, or to exchange it for other property.

2. Under no circumstance shall the Trustee deduct, retain, expend, and pay out of any money belonging to the Trust any unnecessary or improper expenses in connection with the operation and conduct of the Trust.

3. At the sole discretion of the Trustee, to compromise, settle, arbitrate, or defend any claim or demand in favor of or against the Trust.

4. To incur and pay the ordinary and necessary expenses of administration, including (but not by way of limitation) reasonable attorney fees, accountant fees, investment counsel fees, excess premium payments, and the like.

5. To act through an agent or attorney-in-fact, by and under power of attorney duly executed by the Trustee, in carrying out any of the Trustee's authorized powers and duties.

6. To borrow money or incur debt for any purpose of the Trust, without or upon his bond, or to secure repayment by mortgaging, creating a security interest in, or pledging or otherwise encumbering any or all of the property of the Trust.

7. Under no circumstance shall the Trustee lend money to any person or entity.

8. To freely act under all and any of the powers of this Agreement given to him in all matters concerning the Trust, after forming his judgement based upon all the circumstances of any particular situation as to the wisest and best course to pursue in the interest of the Trust and the beneficiary(ies) thereto, without the necessity of obtaining the consent or permission of any interested person, or the consent or approval of any court.

9. Under no circumstance shall the Trustee engage in business with the property of the Trust as sole proprietor, or as a general or limited partner, or hold an undivided interest in any property as tenant in common or as tenant in partnership.

10. The power to seek the advice, approval, or consent of the court upon any question without subjecting the entire Trust to court control.

11. To invest only in bank certificate of deposits ("CDs",) government backed bonds and securities, or exercise a policy's increase benefit options.

The Trustee's powers shall be exercised in whole or in part, from time to time, and shall be deemed to be

supplementary to and not exclusive of the general powers of trustees pursuant to law, and shall include all powers necessary to carry them into effect.

The Trustee shall not be liable for any mistake or error of judgment in the administration of the Trust, except for willful misconduct, so long as he should continue to exercise his duties and powers in a fiduciary capacity primarily in the interest of the beneficiary(ies)

The Trustee shall not be required to make or file an inventory or accounting to any Court, or to give Bond.

ARTICLE V
Beneficiaries to the Trust

The Trustee shall hold the entire property of the Trust in trust for the benefit of Life Time Capital, Inc.

Any Beneficiary may, at his/her sole discretion, and upon written notice duly executed and delivered to the Trustee, relinquish his/her rights as beneficiary in favor of, but not limited to, any other person or persons, company, corporation, firm, organization, or entity. Upon such written notice, the Trustee shall immediately comply with the change of beneficiary.

ARTICLE VI
Payment of Trust

During the administration of any Trust hereunder, the Trustee many make any part or all of the payments directly to a beneficiary. The Trustee shall distribute any life insurance proceeds upon policy maturity and receipt thereof from the insurance carrier.

ARTICLE VII

Additions to the Trust

The Grantor, or any other person, shall have the right, at any time, or from time hereafter, to convey, transfer, assign, deliver, or by Will to give, devise or bequeath to the Trustee additional insurance policies or property, real or personal, to become subject to provisions of this Trust; provided however, that such additional property shall be of a kind acceptable to the Trustee. Upon the acceptance thereof by the Trustee, such additional property shall be identified by an additional schedule attached hereto and shall become subject to and be held in trust under the terms hereof and shall be managed, controlled, handled, and disposed of by the Trustee, subject to all of the terms, conditions, provisions and limitations herein mentioned, and, upon any termination hereof, shall be transferred in the same manner and to the same persons as herein provided as though it constituted a part of the original Trust assets.

Notwithstanding anything contained to the contrary, no powers enumerated or accorded to trustees generally pursuant to law shall be construed to enable the Grantor, the Trustee or either of them, or any other person, to sell, exchange, or otherwise deal with or dispose of all or any part of the corpus or income of the Trust.

The Trustee shall have the power to determine the allocation of receipts between corpus and income and to apportion extraordinary and share dividends between corpus and income.

ARTICLE VIII
Trustee's Authority and Third Parties

No person dealing with the Trust or with the

Trustee shall be required to inquire into the authority of the Trustee to enter into any transaction, or to account for the application of any money paid to the Trustee on any account.

ARTICLE IX
Liability of the Trust

The provisions of this Trust in favor of all beneficiaries shall not be subject to attachment or be liable to be taken over for his, her or their debts by any legal process whatever. The Trustee shall take all reasonable actions to ensure that the beneficiaries receive his, her or their stated portion of the trust.

ARTICLE X
Appointment of the Trustee

The Trustee shall be Paul E. Schwarz, a resident of the State of Ohio. In the event he shall, at any time, be unable or unwilling to serve as Trustee hereunder, he shall appoint a successor Trustee who, upon written acceptance of this Trust, shall become the Trustee hereunder. In the event that the Trustee is unable, for any reason, to appoint a successor Trustee, Firstar Bank, Columbus, Ohio shall appoint a Trustee to serve for the remainder of the Trust, or until such time as Mr. Schwarz may be able to resume his duties as Trustee.

Any individual serving as Trustee may resign as Trustee hereunder upon thirty days written notice by delivering a written resignation to his successor as Trustee and to Grantor, if Grantor is living. Any successor Trustee shall have, from and after appointment or succession to office, all title interest, duties, and rights and powers, including discretionary

rights and powers that are granted to the Trustee named in the provisions of this agreement. A successor Trustee shall not be responsible for the acts of a prior Trustee, shall serve without bond, and shall not have any duty to review the accounts of any predecessor Trustees.

ARTICLE XI
Venue

This Trust Agreement shall be construed and regulated in all respects in accordance with the laws of the State of Ohio.

ARTICLE XII
Change of Situs

Recognizing that the needs and circumstances of the Trust beneficiary(ies) may change or vary, the Grantor expressly authorizes the Trustee and each successor Trustee to change the situs of this Trust for any reason deemed sufficient by the Trustee, including, but not limited to, ease of administration, adverse tax treatment of the Trust in its present situs, or convenience for either the Trustee or the beneficiary(ies).

The actions taken pursuant to the provisions of this article shall be final and binding on all persons interested and shall not be subject to judicial review.

ARTICLE XIII
Irrevocability of Trust

The Trust shall be irrevocable in whole or in part. The Grantor expressly waives all rights and

powers, whether alone or in conjunction with others, and regardless of when or from what source he may have acquired such rights or powers, to alter, amend, revoke, or terminate the Trust, or any of the terms of this Agreement, in whole or in part. By this instrument the Grantor relinquishes absolutely and forever all his possession or enjoyment of, or right to the property and/or income from, the Trust, and all his right and power, whether alone or in conjunction with others, to designate the persons who shall possess or enjoy the Trust, or the income thereof.

ARTICLE XIV
Acceptance of Trustee

The Trustee hereby accepts the Trust herein created.

ARTICLE XV
Headings, Gender and Number

Headings at the beginning of each numbered section shall not be referred to in determining what this Trust means. Masculine words include feminine and neuter meanings. Singular words include plural meaning and plural words include singular meaning.

IN WITNESS WHEREOF, he parties hereto have executed this instrument in duplicate originals the day and year first above written.

_____(SEAL)
Lifetime Capital, Inc., Grantor

_____ (State), _____COUNTY

I, a Notary Public for said County and State, do hereby certify that _____, Grantor, personally appeared before me this day and acknowledged the due execution of the foregoing and attached Life Insurance Trust.

WITNESS my hand and notarial seal, this the 10th day of May, 1999.

My Commission Expires:_____
Notary Public

_____
Paul E. Schwarz, Trustee

_____ (State), _____ COUNTY

I, a Notary Public for said County and State, do hereby certify that _____, Trustee, personally appeared before me this day and acknowledged the due execution of the foregoing and attached Life Insurance Trust.

WITNESS my hand and notarial seal, this the 10th day of May, 1999.

My Commission Expires:_____
Notary Public
_____

The Life Time Capital, Inc. Irrevocable Life Insurance Trust
9904060002

Schedule A

Insurance Company:	The Prudential
Insured's Name:	CONFIDENTIAL
Policy number:	CONFIDENTIAL
Face Amount:	$3,000,000.00

EXHIBIT "C"
TO
RECEIVER'S MOTION TO
DISALLOW CLAIMS OF CERTAIN JORDAN INVESTORS

COMPLAINT LETTERS

(See attached)

Certified Mail

H. Thomas Moran, II
Receiver for Lifetime Capital Inc.
PO Box 16338
Oklahoma City, Oklahoma 73113

January 6, 2010

Re: Lifetime Capital: ownership rights to the Jordan policy

To: H. Thomas Moran,

In response to your December 16, 2009 letter, I am Jacquelyn Storms, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060002, one of the Jordan policies since June 2, 2000. On October 5, 2004 I received a letter from Mr. Andrew C. Storar confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and "*Under those circumstances, it is required that the Court determine those funds are Receivership assets or whether they should be distributed directly to you*", however, I have not received any notice from Mr. Storar or the Court of any determination on this issue. Instead, on December 16, 2009, you sent me a request to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or a just outcome to a legitimate question of my ownership rights to the Jordan proceeds. Because Jordan died prior to your appointment as Lifetime's Receiver, I do

not believe my rights have been adequately protected nor have I been given due process. I am asking the Court for an Order releasing and paying to me the full death benefit proceeds from the Jordan Policy that are due to me as one of the rightful beneficiaries, plus interest, because the Jordan policy matured on time and prior to the appointment of the receivership. Enclosed is a copy of my request to the court.

Sincerely yours,

Jacquelyn Storms
121 Frontier Tr.
Wimberley, TX 78676

Certified Mail

Office of the Clerk
Federal Building, Room 712
200 West Second St.
Dayton, Ohio 45402

January 6, 2010

Re: Lifetime Capital 3:04 CV 0059: ownership rights to the Jordan policy

To the Honorable Judge of this Court,

I am Jacquelyn Storms, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060002, one of the Jordan policies. In October 2004 I received a letter from Mr. Andrew C. Storar the Examiner confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and ***"Under those circumstances, it is required that the Court determine those funds are Receivership assets or whether they should be distributed directly to you"***, however, to date I have not received any notice from Mr. Storar or the Court of any determination on this issue. Instead, the receiver for Lifetime Capital, H. Thomas Moran sent me a request on December 16, 2009, to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or just outcome to a legitimate question of my ownership rights to the Jordan proceeds. I received a letter and a call once before from the receiver's office and I was told

that the court ordered a settlement. It is now clear the receiver did not have any right to take the Jordan proceeds because Jordan died prior to the appointment of the receiver. I do not believe my rights have been adequately protected nor have I been given due process.

Since Mr. Storar the Examiner informed me that under the circumstances that it is ***required*** that the Court determine ownership of assets at the time of Jordan's death. I am asking the Court to determine ownership of the Jordan proceeds. It is dear I was one of the rightful owners at the time of Jordan's death. Therefore the Court should issue an Order releasing and paying me the full death benefit proceeds from the Jordan Policy due to me as a beneficiary, plus interest, because the Jordan policy matured on time and prior to the appointment of the receiver.

The Receiver claims the court entered certain Orders regarding a compromise and settlement of claims by investors to the proceeds of the Jordan Polices (the Jordan Settlement) releasing their beneficiary claims. However, I was not included in that process nor represented by the attorneys representing the other investors. The Receiver's letter states the agreement was reached after the court ordered mediation on March 2006 even though the Sixth Court of Appeals had already issued an opinion, which was applicable to my issues of ownership. *(No. 04-3101 421 F3d 377 Liberte Capital Group Llc Llc v. A Capwill E 421 F.3d 377)*

If the court finds the Receiver had no legal rights to the Jordan proceeds at the time of Jordan's death, then Receiver has no legal right to any of remaining Jordan proceeds. The foil amount should be divided equally among any remaining beneficiaries of

the Jordan policies to which they are assigned or the Court should Order the receiver to pay the foil amount legally assigned to me with interest.

Sincerely yours,

Jacquelyn Storms
121 Frontier Tr.
Wimberley, TX 78676

Certified Mail

H. Thomas Moran, II
Receiver for Lifetime Capital Inc.
PO Box 16338
Oklahoma City, Oklahoma 73113

January 6, 2010

Re: Lifetime Capital: ownership rights to the Jordan policy

To: H. Thomas Moran,

In response to your December 16, 2009 letter, I am Ernest Storms, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060001, one of the Jordan policies since June 2, 2000. On October 5, 2004 I received a letter from Mr. Andrew C. Storar confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and "***Under those circumstances, it is required that the Court determine those funds are Receivership assets or whether they should be distributed directly to you",*** however, I have not received any notice from Mr. Storar or the Court of any determination on this issue. Instead, on December 16, 2009, you sent me a request to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or a just outcome to a legitimate question of my ownership rights to the Jordan proceeds. Because Jordan died prior to your appointment as Lifetime's Receiver, I do

not believe my rights have been adequately protected nor have I been given due process. I am asking the Court for an Order releasing and paying to me the full death benefit proceeds from the Jordan Policy that are due to me as one of the rightful beneficiaries, plus interest, because the Jordan policy matured on time and prior to the appointment of the receivership. Enclosed is a copy of my request to the court.

Sincerely yours,

Ernest Storms
121 Frontier Tr.
Wimberley, TX 78676

Certified Mail

Office of the Clerk
Federal Building, Room 712
200 West Second St.
Dayton, Ohio 45402

January 6, 2010

Re: Lifetime Capital 3:04 CV 0059: ownership rights to the Jordan policy

To the Honorable Judge of this Court,

I am Ernest Storms, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060001, one of the Jordan policies. In October 2004 1 received a letter from Mr. Andrew C. Storar the Examiner confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and "***Under those circumstances, it is required that the Court determine those funds are Receivership assets or whether they should he distributed directly to you*** **",** however, to date I have not received any notice from Mr. Storar or the Court of any determination on this issue, instead, the receiver for Lifetime Capital, H. Thomas Moran sent me a request on December 16, 2009, to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or just outcome to a legitimate question of my ownership rights to the Jordan proceeds. I received a letter and a call once before from the receiver's office and I was told

that the court ordered a settlement. It is now clear the receiver did not have any right to take the Jordan proceeds because Jordan died prior to the appointment of the receiver. I do not believe my rights have been adequately protected nor have I been given due process.

Since Mr. Storar the Examiner informed me that under the circumstances that it is *required* that the Court determine ownership of assets at the time of Jordan's death. I am asking the Court to determine ownership of the Jordan proceeds. It is clear I was one of the rightful owners at the time of Jordan's death. Therefore the Court should issue an Order releasing and paying me the full death benefit proceeds from the Jordan Policy due to me as a beneficiary, plus interest, because the Jordan policy matured on time and prior to the appointment of the receiver.

The Receiver claims the court entered certain Orders regarding a compromise and settlement of claims by investors to the proceeds of the Jordan Polices (the Jordan Settlement) releasing their beneficiary claims. However, I was not included in that process nor represented by the attorneys representing the other investors. The Receiver's letter states the agreement was reached after the court ordered mediation on March 2006 even though the Sixth Court of Appeals had already issued an opinion, which was applicable to my issues of ownership. *(No. 04-3101 421 F3d 377 Liberte Capital Group Llc Llc v. A Capwill E 421F. 3d 377)*

If the court finds the Receiver had no legal rights to the Jordan proceeds at the time of Jordan s death, then Receiver has no legal right to any of remaining Jordan proceeds. The full amount should be divided equally among any remaining beneficiaries of

the Jordan policies to which they are assigned or the Court should Order the receiver to pay the full amount legally assigned to me with interest.

Sincerely yours,

Ernest Storms
121 Frontier Tr.
Wimberley, TX 78676

Lifetime Receiver Information System
Welcome, Patty Kositzky

Investors Reports New Investor Prem. Billing Distributions

Name: Mr. Rudy V. Sotelo
Company/Trust:
Contact/Trustee:
Title:
SSN | TIN: 465-68-2543
DOB-DOD: 6/12/1943
Address: 3647 Minthill Dr, San Antonio, TX 78230
Phone 1: (210) 699-9795
Phone 2:
Phone 3:
Fax:
Email:
Spouse:
Accts:1
Prem Claim:

Update Investor Investments Inv. Notes Claims Acct. Notes TPA Priority Add Account Billing

New Notes

Past Notes

12/16/2009 1:12:56 PM
Patty Kositzky
Final notice was mailed regarding the Jordan Release - PK

8/8/2007 3:27:00 PM
Patty Kositzky
Spoke to Mr. Sotelo, he was asking questions about the Jordan settlement that I could not answer. I had Tom Moran call him. They spoke at length, Ernest Bustos sold him the viaticals, he talked about seeing an attorney to challenge the Court approved settlement, etc. Not sure if he will return Release - PK

8/2/2007 2:04:16 PM
Patty Kositzky
I called Mr. Sotelo yesterday to remind him about the Jordan Release, I had to leave a voice message, he called me back, and I was away from my desk. I have tried a couple of times to call him back, will keep trying - PK

8/1/2007 8:44:10 AM
Patty Kositzky
Per review, as of this date, the address for this investor is the same as on record, and he is living at this time, per IRB - PK

2/27/2007 10:53:00 AM
Patty Kositzky
Mr. Sotelo called me back. He is still in possession of Release and will review it again and decide if he wants to send it back. - PK

2/26/2007 11:47:57 AM
Patty Kositzky
Left message for Mr. Sotelo regarding the Mutual and Reciprocal Agreement for the Jordan policy. He has not returned it yet, so I am following up. This was a good phone number, as he identified himself on the

recording. - PK
1/1/190012:00:00 AM
12/27/99: sent Adoption & transfer to Sterling, & NSA to A/C. 01/04/00 - STC sent transfer form to Municipal Retirement on 12/30/99. 01/10/00 - STC sent transfer form to Texas Municipal Retirement on 12/30/99 01/25/00 - Waiting on funds. PJS. 1/31 No Funds recvd. yet-BPL. 2/7 Waiting on funds-BPL 02/14/00 - waiting on funds. SKS. 2/22 Waiting on funds.-BPL. 2/29 Sterling is waiting on funds.-BPL 3/7 Sterling is still waiting on funds.-BPL. 3/14 No funds VMD 03/15/00 - Sent new Transfer Form to STC In place of the first one that was originally sent. Called STC and they are aware of this. Spoke to Judith and she said to send a letter with the Transfer Form explaining this situation. PJS. 3/23 Sterling sent new Transfer request on 3/16.-BPL. 3/31 Sterling is still waiting on funds.-BPL. 4/7 Charles Schwab said check was mailed on 4/5 for 50K, Sterling should receive funds soon.-BPL. 4/11 Sent Originals to Sterling and Firstar for processing.-BPL. 4/24 Returned original Asset Purchase Agreement to Sterling for holding.-BPL. 7-28-04 Changed address per IRB. JS

Certified Mail 7007 2680 0001 7195 8458

H. Thomas Moran, II
Receiver for Lifetime Capital Inc.
PO Box 16338
Oklahoma City, Oklahoma 73113

January 4, 2010

Re: Lifetime Capital: ownership rights to the Jordan policy

To: H. Thomas Moran,

In response to your December 16, 2009 letter, I am Rudy Sotelo, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060001, one of the Jordan policies since June 2, 2000. On October 5, 2004 I received a letter from Mr. Andrew C. Storar confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and ***"Under those circumstances, it is required that the Court determine those funds are Receivership assets or whether they should be distributed directly to you",*** however, I have not received any notice from Mr. Storar or the Court of any determination on this issue. Instead, on December 16, 2009, you sent me a request to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or a just outcome to a legitimate question of my ownership rights to the Jordan proceeds. Because Jordan died

prior to your appointment as Lifetime's Receiver, I do not believe my rights have been adequately protected nor have I been given due process. I am asking the Court for an Order releasing and paying to me the full death benefit proceeds from the Jordan Policy that are due to me as one of the rightful beneficiaries, plus interest, because the Jordan policy matured on time and prior to the appointment of the receivership. Enclosed is a copy of my request to the court.

Sincerely yours,

Rudy Sotelo
3647 Minthill Drive
San Antonio, TX 78230
210-699-9795

Certified Mail 7007 2680 0001 7195 8441

Office of the Clerk
Federal Building, Room 712
200 West Second St.
Dayton, Ohio 45402

January 4, 2010

Re: Lifetime Capital 3:04 CV 0059: ownership rights to the Jordan policy

To the Honorable Judge of this Court,

I am Rudy Sotelo, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060001, one of the Jordan policies since June 2, 2000. On October 2004 I received a letter from Mr. Andrew C. Storar confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and "*Under those circumstances, it is required that the Court determine those funds are Receivership assets or whether they should be distributed directly to you*", however, I have not received any notice from Mr. Storar or the Court of any determination on this issue. Instead, on December 16, 2009, the receiver for Lifetime Capital, H. Thomas Moran sent me a request to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or just outcome to a legitimate question of my ownership rights. I received a letter and a call once before from

the receiver's office and was told that the court ordered a settlement. However, I told the woman who called me that I was waiting for the court to make its determination and I wanted the full amount owed to me. She stated that there was no more money that could be paid to me; however, it is now clear the receiver did not have any right to take the Jordan proceeds because Jordan died prior to the appointment of the receiver. I do not believe my rights have been adequately protected nor have I been given due process. I am asking the Court for an Order releasing and paying to me the full death benefit proceeds from the Jordan Policy that are due to me as one of the rightful beneficiaries, plus interest, because the Jordan policy matured on time and prior to the appointment of the receiver.

There are reasons why I am entitled to have the Jordan death benefit proceeds paid to me in full and not the amount to which the receiver claims I am entitled. First, the Receiver claims that others who settled their claim entered into an agreement and the court entered certain Orders regarding a compromise and settlement of claims by investors to the proceeds of the Jordan Polices (the Jordan Settlement) releasing their beneficiary claims. However, I was not included in that process nor represented by the attorneys representing the other investors. In reading the Receiver's letter it states the agreement was reached after the court ordered mediation on March 2006, however, while under advisement the Sixth Court of Appeals issued several opinions which were applicable to my issues.

On August 19, 2005, the Sixth Court of Appeals decided ***(No. 04-3101 421 F3d 377 Liberte Capital Group Llc Llc v. A Capwill E 421 F.3d 377)***, the appellate court stated that before the Liberte Receiver

could lay claim to the death proceeds the court needed to resolve what ownership rights existed at the time of the death of the viator. However, before the court ruled on the rightful entitlement to the Blacknell proceeds seized by the receiver, the receiver agreed to pay the full amount to the investor on December 2005 admitting that Mohnkem, the investor, was entitled to the full amount. In view of the Liberte case, it would be a violation of my due process rights to force me into a settlement without a ruling as to ownership rights to the proceeds.

I have patiently waited for a determination from the Court since Mr. Storar's 2004 letter; however, this court has not made any ruling on the ownership of the Jordan death benefits. I am now requesting a ruling by this court over the ownership of the Jordan Beneficiary rights at the time of the Mr. Jordan's death. In support to my request, the Sixth Court of Appeals stated:

"Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A property interest "can be created by a state statute, a formal contract, or a contract implied from the circumstances." *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 565 (6th Cir.2004); *see also Leary v. Daeschner*, 228 F.3d 729, 741 (6th Cir.2000). In this case, Mohnkern had a legal interest in the Blacknell Policy proceeds at the time the proceeds were seized by Receiver # 2. To recapitulate: Mohnkern initially invested $100,000.00 with Alpha. It later "matched" her investment with the policy of Blacknell. Blacknell formally assigned that

policy to her on March 9, 1999. As Receiver # 2 concedes, *see* Appellee Br. at 27, that assignment vested in Mohnkern all "privileges, rights, title and interest" in the Blacknell Policy and "[t]he sole right to collect from the insurer the net proceeds of the Policy when it [became] a claim by death or maturity." *In re Fin, Federated Title and Trust, Inc.*, 347 F.3d 880, 882 n. 1 (11th Cir.2003) ("A viatical settlement is an investment through which a terminally ill person (the "Viator") sells his life insurance policy and, when the Viator dies, the investor collects death benefits."). Thus, Mohnkern has a dearly defined property interest in the Blacknell Policy proceeds, sufficient to trigger the second prong of the due process analysis with respect to the seizure by Receiver # 2 of the proceeds and inclusion of them in the receivership estate. "When a plaintiff has a protected property interest, a predeprivation hearing of some sort is generally required to satisfy the dictates of due process." *Leary*, 228 F.3d at 742; *see also Roth*, 408 U.S. at 569-70, 92 S.Ct. 2701 ("When protected interests are implicated, the right to some kind of prior hearing is paramount."); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (noting that if government action will deprive an individual of a significant property interest, that individual is entitled to an opportunity to be heard). The amount of process required, however, depends, in part, on the importance of the interests at stake. *See Leary*, 228 F.3d at 742, Thus, we must balance the strength of the private interest, the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the government interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail." *Mathews v.*

Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Here, the final hearing on disbursement was not adequate to protect Mohnkern's interests. *See Elliott*, 953 F.2d at 1567-68 (holding that the district court in a receivership proceeding violated the due process rights of two claimants when it denied them a hearing or opportunity to address the court directly on a receiver's entitlement to assets transferred to the claimants two weeks before the institution of the receivership). At a minimum, once Mohnkern challenged the ownership of the proceeds, the court should have deferred until a proper hearing had enabled the court to determine ownership. *See Basic Energy & Affiliated Resources, Inc.*, 273 F.3d at 668; *SEC v. Wencke*, 783 F.2d 829, 836-38 (9th Cir.1986) (holding that for the claims of nonparties to property claimed by receivers, summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard). For the foregoing reasons, the judgment of the district court denying Mohnkern's motion for release and distribution [Dkt. No. 1825] is REVERSED. The case is remanded to the district court for a hearing as to the ownership of the Blacknell Policy proceeds, consistent with Mohnkern's due process rights." However, the court did not rule on Mrs. Mohnkern's rights, she was paid in full once the Receiver knew he could not defend his claim to death proceeds.

If the court finds the Receiver had no legal rights to the Jordan proceeds at the time of Jordan death, then the Receiver has no legal right to any of remaining Jordan proceeds. The full amount should be divided equally among any remaining beneficiaries of the Jordan policies which they are assinded. In alternative, the full amount legally assigned to me

should be paid with interest.

Sincerely yours,

Rudy Sotelo
3647 Minthill Drive
San Antonio, TX 78230
210-699-9795

PICKREL, SCHAEFFER AND EBELING
A LEGAL PROFESSIONAL ASSOCIATION
2700 LETTERING TOWER
40 NORTH MAIN STREET
DAYTON, OHIO 45423-2700
937/225-1130
FACSIMILE 937/223-0333
xxxx

October 5, 2004

Dear Life Time Capital Investor:

You have been identified as one of the investors matched to one of the, Prudential policies that have matured.

As I have been advising for several months, the policies matured just prior to the appointment of the Receiver but notice and the claim, and consequently receipt of the funds, did not occur until after the Receiver's appointment. Under those circumstances, it is required that the Court determine whether those funds are Receivership assets or whether they should be distributed directly to you.

You should have received certified mail notice and a copy of the motion that the Receiver has filed regarding those funds. After that motion was .filed, I filed a motion with the Court to obtain permission to send the investor list, including mailing addresses, of those individuals who are matched to the Prudential policies to each of you. I believe that it would be prudent for you to be able to identify the other investors involved, consult with them and hopefully coordinate a strategy.

As to policy number 9904060002, there are 116

investors who have been matched to the policy. Of those 116, 51 have all of the funds they invested with LifeTime placed on this policy, while the remaining 65 had only a portion of their investment with LifeTime on this policy.

Likewise, regarding policy number 9904060001, there are 109 investors matched and of those, 42 have all of the funds they invested with LifeTime placed on that policy, while the remaining 67 have only a portion of their investment on this policy.

That difference may well make for some differing opinions among the investors as to what should be done with these policy proceeds. While those who have their entire investment placed on one of these policies, will probably want distribution directly to them, it is certainly possible that those that only have a portion placed on those policies will want the monies to be treated as Receivership assets in order to protect the remainder of their investment by giving the Receiver the ability to pay premiums on the balance of the portfolio.

The Court has granted my motion and enclosed herein is a copy of the mailing list of investors placed on these two matured policies, as well as a copy of the Court's order. The Court has ordered that you use this solely for coordinating your strategy and response and that it not be forwarded to anyone else or disseminated further in any way. This is to protect the privacy of the investors to the extent possible.

As there are good arguments on both sides of the issue presented by these policies, 1 plan to remain neutral and act as an information source for all investors and the Court. If you wish to hire counsel you may or if you wish to appear on your own that is fine as well. The notice that you previously received indicates

that all written objections should be submitted to the Court on or before November 23, 2004, by filing it with the Court, or forwarding it to my attention and I'll see that it is filed. I have received one written objection to date.

As you saw in the notice, the matter is scheduled for hearing before Magistrate Judge Sharon Ovington on **Monday, January 24, 2005 at 9:00 a.m.**

Should you have any questions or desire any further information, please don't hesitate to call or e-mail me.

Very truly yours,

PICKREL, SCHAEFFER
& EBELING

Andrew C. Storar
Examiner

ACS/djv
Enclosures
cc: Magistrate Judge Sharon Ovington
Joseph C. Oehlers, Esq.

LifeTime Capital, Inc.'s Partial Release of Beneficiary Rights of The *9904060001* Irrevocable Life Insurance Trust

Name of the Insurance Company:
The Prudential

Settlement Number:
9904060001

Present Beneficiary:
LifeTime Capital, Inc.

New Partial Beneficiary:
Rudy Sotelo

Amount:
$43,000.00

FOR VALUE RECEIVED, and good and valuable consideration, LifeTime Capital, Inc. hereby consents and forever relinquishes irrevocably its rights as Beneficiary to receive $43,000.00 from the 9904060001 Irrevocable Life Insurance Trust in favor of Rudy Sotelo as partial irrevocable beneficiary and payee thereof, and hereby waives, releases, and forever discharges any and all claims of damages, demands, rights, and actions of whatsoever kind or nature arising out of the relinquishment of the $43,000.00 of LifeTime Capital, Inc.'s rights in and to the 9904060001 Irrevocable Life Insurance Trust, including the right to receive $43,000,00 from the 9904060001 Irrevocable Life Insurance Trust. LifeTime Capital, Inc. further agrees to execute any additional or further releases which may

be necessary in order to more fully vest all right, tide, and interest to the $43,000.00 in the 9904060001 Irrevocable Life Insurance Trust to Rudy Sotelo.

IN WITNESS THEREOF, LifeTime Capital, Inc. has hereunto affixed its name and corporate seal on the_____ day of _____, 2000.

LifeTime Capital, Inc.

By:_____
Its: Asst. Secretary

_____
Witness

Pursuant to State and Federal laws and regulations, an insured's identity shall not be disclosed to any investor for privacy reasons and concerns. The settlement number utilized is not the insurance contract policy number. The insured's name has been replaced with a code number. These numbers are utilized as a means of confidentially in compliance with State and Federal laws and regulations regarding confidential information.

Certified Mail 707 2680 0001 7195 8472

H. Thomas Moran, II
Receiver for Lifetime Capital Inc.
PO Box 16338
Oklahoma City, Oklahoma 73113

January 4, 2010

Re: Lifetime Capital: ownership rights to the Jordan policy

To: H. Thomas Moran,

In response to your December 16, 2009 letter, I am Irene Ivy, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060001, one of the Jordan policies. On October 2004 I received a letter from Mr. Andrew C. Storar confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and "*Under those circumstances it is required that the Court determine those funds are Receivership assets or whether they should be distributed directly to you*", however, I have not received any notice from Mr. Storar or the Court of any determination on this issue. Instead, on December 16, 2009, you sent me a request to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or a just outcome to a legitimate question of my ownership rights to the Jordan proceeds. Because Jordan died prior to your

appointment as Lifetime's Receiver, I do not believe my rights have been adequately protected nor have I been given due process. I am asking the Court for an Order releasing and paying to me the full death benefit proceeds from the Jordan Policy that are due to me as one of the rightful beneficiaries, plus interest, because the Jordan policy matured on time and prior to the appointment of the receivership. Enclosed is a copy of my request to the court.

Sincerely yours,

Irene F. Ivy
716 Linares St.
San Antonio, Texas 78225

Certified Mail 707 2680 0001 7195 865

Office of the Clerk
Federal Building: Room 712
200 West Second St.
Dayton. Ohio 45402

January 4, 2010

Re: Lifetime Capital 3:04 CV 0059: ownership rights to the Jordan policy

To the Honorable Judge of this Court.

I am Irene F. Ivy the custodian of the Johnnie C. Ivy Sr. and Irene F. Ivy Revocable Living Trust, a Lifetime investor, and have been assigned beneficiary rights to the proceeds of policy # 9904060001, one of the Jordan policies. In October 2004 I received a letter from Mr. Andrew C. Storar confirming I was identified as one of the investors matched to one of the Prudential policies that had matured. He stated the Jordan polices matured prior to the appointment of the receiver and "*Under those circumstances, it is required that the Court determine those finds are Receivership assets or whether they should be distributed directly to you*", however, I have not received any notice from Mr. Storar or the Court of and determination on this issue. Instead, on December 16, 2009, the receiver for Lifetime Capital, H. Thomas Moran sent me a request to sign a release of all my rights to the death benefits of the Jordan policy to which I was assigned or I would lose all of my money. This would not be a fair or just outcome to a legitimate question of my ownership

rights to the Jordan proceeds. I received a letter and a call once before from the receivers office and was told that the court ordered a settlement. It is now clear the receiver did not have any right to take the Jordan proceeds because Jordan died prior to the appointment of the receiver. I do not believe my rights have been adequately protected nor have I been given due process. I am asking the Court for an Order releasing and paying to me the full death benefit proceeds from the Jordan Policy that are due to me as one of the rightful beneficiaries, plus interest, because the Jordan policy matured on time and prior to the appointment of the receiver.

I am entitled to have the Jordan death benefit proceeds paid to me in full, however, the Receiver claims that others settled their claim and entered into an agreement. The Receiver also claims the court entered certain Orders regarding a compromise and settlement of claims by investors to the proceeds of the Jordan Polices (the Jordan Settlement) releasing their beneficiary claims. However, I was not included in that process nor represented by the attorneys representing the other investors. The Receiver's letter states the agreement was reached after the court ordered mediation on March 2006 even though the Sixth Court of Appeals had already issued an opinion, winch was applicable to my issues of ownership. *(No. 04-3101 421 F3d 377 Liberte Capital Group Llc Llc v. A Capwill E 421 F.3d 377)*

If the court finds the Receiver had no legal rights to the Jordan proceeds at the time of Jordan's death, the Receiver has no legal right to any of remaining Jordan proceeds. The full amount should be divided equally among any remaining beneficiaries of the Jordan policies to which they are assigned or Order

the receiver to pay the full amount legally assigned to me with interest.

Sincerely yours,

Irene F. Ivy
716 Linares St.
San Antonio, Texas 78225

Certified Mail 7010 0290 0000 3527 4510

Office of the Clerk
Federal Building, Room 712
200 West Second St.
Dayton, Ohio 45402

April 19. 2010

Re: Lifetime Capital 3:04 CV 0059: ownership rights to the Jordan policy

To the Honorable Judge of this Court,

In response to the receiver's motion to disallow my claim to a vested contract specifically; my legally assigned beneficiary rights to the proceeds of policy # 9904060001 since June 2, 2000, The receiver's motion claims that this court in its appointment gave exclusive jurisdiction and possession of Lifetime's assets to the receiver, however, the Jordan proceeds were not a Lifetime asset at the time of the appointment of the receiver and the appoint did not include the proceeds from Jordan's proceeds because the beneficiary rights were vested before the appointment of the receiver.

The receiver's motion does not address my response on January 4, 2010 in which I brought to the Court's attention the letter sent by the Mr. Storar the court appointed examiner, which stated:

The Jordan polices matured prior to the appointment of the receiver and "Under those circumstances, ***it is required*** *that the Court determine those funds are Receivership assets or whether they should be distributed directly to you"*

Mr. Storar's knows as does the receiver that **it is required** for the court to determine what ownership rights exited at the time of Jordan's death. Mr. Storar was one of the attorneys of record in the ***Liberte Capital Group Llc Llc v. A Capwill*** and are aware that on August 19, 2005, the Sixth Court of Appeals decided ***(No. 04-3101 421 F3d 377 Liberte Capital Group Llc Llc v. A Capwill E 421 F.3d 377)***, the appellate court stated that before the Liberte Receiver could lay claim to the death proceeds the court needed to resolve what ownership rights existed at the time of the death of the viator. However, before the court ruled on the rightful entitlement to the Blacknell proceeds seized by the receiver, the receiver agreed to pay the full amount to the investor on December 2005 admitting that Mohnkern, the investor, was entitled to the full amount.

The Sixth Court of Appeals stated

"Property interests are" created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A property interest "can be created by a state statute, a formal contract, or a contract implied from the circumstances." Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 565 (6th Cir. 2004); see also Leary v. Daeschner, 228 F.3d 729, 741 (6th Cir. 2000). In this case, Mohnkern had a legal interest in the Blacknell Policy proceeds at the time the proceeds were seized by Receiver #2. To recapitulate Mohnkern initially

invested $100,000.00 with Alpha. It later "matched" her investment with the policy of Blacknell. Blacknell formally assigned that policy to her on March 9, 1999. As Receiver # 2 concedes, see Appellee Br. at 27, that assignment vested in Mohnkern all "privileges, rights, title and interest" in the Blacknell Policy and "[t]he sole right to collect from the insurer the net proceeds of the Policy when it [became] a claim by death or maturity." In re Fin. Federated Title and Trust, Inc., 347 F.3d 880, 882 n. 1 (11th Cir. 2003) ("A viatical settlement is an investment through which a terminally ill person (the "Viator") sells his life insurance policy and when the Viator dies, the investor collects death benefits."). Thus, Mohnkern has a clearly defined property interest in the Blacknell Policy proceeds, sufficient to trigger the second prong of the due process analysis with respect to the seizure by Receiver #2 of the proceeds and inclusion of them in the receivership estate. "When a plaintiff has a protected property interest, a predeprivation hearing of some sort is generally required to satisfy the dictates of due process." Leary, 228 F.3d at 742; see also Roth, 408 U.S. at 569-70, 92 S.Ct. 2701 ("When protected interests are implicated, the right to some kind of prior hearing is paramount."); Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed 2d 113 (1971) (noting that if government action will deprive an individual of a significant property interest, that individual is entitled to an opportunity to be heard). The amount of process required, however, depends, in part, on the importance of the interests at stake. See Leary, 228 F.3d at 742. Thus, we must balance the strength of the private interest, the risk of erroneous deprivation, the probable value of additional or substitute safeguards, and the government interest, "including the function involved

and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail." Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Here, the final hearing on disbursement was not adequate to protect Mohankern's interests. She Elliott, 953 F.2d at 1567-68 (holding that the district court in a receivership proceeding violated the due process rights of two claimants when it denied them a hearing or opportunity to address the court directly on a receiver's entitlement to assets transferred to the claimants two weeks before the institution of the receivership). At a minimum, once Mohnkern challenged the ownership of the proceeds, the court should have deferred until a proper hearing had enabled the court to determine ownership. See Basic Energy & Affiliated Resources, Inc., 273 F.3d at 668; SEC v. Wencke. 783 F.2d 829, 836-38 (9th Cir. 1986) (holding that for the claims of nonparties to property claimed by receivers summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard). For the foregoing reasons, the judgment of the district court denying Mohnkern's motion for release and distribution [Dkt. No. 1825] is REVERSED.

The case is remanded to the district court for a hearing as to the ownership of the Blacknell Policy proceeds, consistent with Mohnkern's due process rights." However, the court did not rule on Mrs. Mohnkern' s rights, she was paid in full once the Receiver knew he could not defend his claim to death proceeds.

In view of the Liberte case, it would be a violation of my due process rights to force me into a take it or leave it settlement because it lacks due process. The court has not made any ruling on the

ownership of the Jordan death benefits and should ignore not request for a ruling of what ownership rights existed at the time of the Mr. Jordan's death.

I am requesting the court deny the receiver's request to disallow my claim 10 Jordan proceeds and find the Receiver had no legal rights to the Jordan proceeds at the time of Jordan death and order the receiver to pay the full amount to remaining beneficiaries of the Jordan policies to which they are assinded. In alternative, the full amount legally assigned to me should be paid with interest.

Sincerely yours.

Rudy Sotelo
3647 Minthill Drive
San Antonio, TX 78230
210-699-9795

cc:
Joseph C. Oehlers
400 National City Center
6 N. Main Street
Dayton, OH 45402

Via Certified Mail:
_____, 2010
Office of the Clerk
United States District Court
For the Southern District of Ohio
Federal Building, Room 712
200 West Second St.
Dayton, Ohio 45402

Re: Case No. 3:04-CV-0059
Davis v. Lifetime Capital, Inc.

Attention: Magistrate Judge Sharon L. Ovington

Dear Judge Ovington:

I am writing about the Fairness Hearing scheduled for August 23, 2010 in the above case. I am one of those whose rights to the proceeds of the Jordan policies are still being challenged by the Receiver. I recently received a letter from the Receiver requesting my attendance in the hearings in Dayton. It appears that the Receiver is suggesting that I will forfeit my objections to his Motion to Disallow if I do not attend.

I have objected to the Receiver's attempt to have my claim disallowed by writing to him and the Court several times, most recently in my June 25, 2010 letter to you. I believed that the Court now has been considering my objections, so I do not understand how the Court would disregard my objections if I don't travel to Dayton for the hearing.

I am interested in knowing what the Court will do with my objections, so I would like to participate in the hearing by telephone.

I also would like a copy of anything the Receiver files with the Court about the hearing or his Motion to Disallow, including the report of the investigation you ordered in April. It was due no later than July 27, 2010

Thank You.

Very truly yours,

_____
Robert Burgess

Cc: Joseph C. Oehlers
400 National City Center
6 N. Main Street
Dayton, Ohio 45402

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

H. THAYNE DAVIS, Plaintiff, vs. LIFETME CAPITAL, INC., and DAVID W. SVETE Defendants.	: : : : : : :	 Case No. 3:04 CV 0059 (Magistrate Judge Sharon L. Ovington) **RECEIVER'S MOTION TO APPROVE COMPROMISE AND SETTLEMENT PERTAINING TO CERTAIN POLICY PROCEEDS**

H. Thomas ("Tom") Moran II, as Receiver for

LifeTime Capital, Inc. (the "Receiver"), respectfully submits his Motion to Approve Compromise and Settlement Pertaining to Certain Policy Proceeds and states to the Court as follows:

I. INTRODUCTION

On February 19, 2004, H. Thayne Davis ("Davis"), a holder of certain viatical contracts, filed a lawsuit for fraud and breach of contract against LifeTime Capital, Inc. ("LifeTime") later amending his complaint to sue David Svete ("Svete"), LifeTime's principal. Davis also sought the appointment of a receiver for LifeTime. On February 20, 2004, the Court issued an Order ("Order of Appointment") appointing Tom Moran, as Receiver for the assets of LifeTime.[1] *See* Order of Appointment, Doc. No. 6. The Court authorized the Receiver, in pertinent part, to:

> 2. "[T]ake any and all action as the Receiver may deem necessary or prudent for the preservation, maintenance, and administration of the LifeTime Portfolio comprised of... policies and the beneficial interests" in those policies. *Id.* at ¶ 5. Such steps specifically included those "necessary" to protect the LifeTime investors. *Id.* at ¶ 5(g).
>
> 3. "[I]nstitute... proceedings in state or federal courts... as may, in his discretion,... be necessary or proper for the... preservation, and maintenance of

[1] On May 5, 2004, December 2, 2004 and February 17, 2006, the Court issued orders clarifying and/or modifying its Order of Appointment.

the Receivership Assets." *Id.* at If ¶12.

4. to take "all other steps necessary to protect the interests of the beneficial owners in the LifeTime Portfolio, including, without limitation, the financing, sale or liquidation of all or part of the LifeTime Portfolio...". *Id.* at ¶ 5(g).

A. LIFETIME'S BUSINESS

Prior to the appointment of the Receiver, LifeTime sold viatical or life settlement investments using money from investors to purchase life insurance policies from the terminally or chronically ill or elderly ("viaticals"). LifeTime placed many of the viaticals in irrevocable insurance trusts and allocated interests in the trusts — corresponding to the amount of each investor's investment plus a promised return — to each investor. In this way, the insureds received money in advance of their deaths while the investors were supposed to receive a higher percentage rate of return than with more traditional investment vehicles.

Over a period of time, LifeTime amassed a viatical portfolio with a face value that presently exceeds $139,000,000.00. In excess of 3,000 investors purchased viaticals from LifeTime induced, in part, by LifeTime's provision of projected life expectancies.[2] In

[2] Medical Underwriting, Inc., a company affiliated with LifeTime and controlled by Svete and/or his business associates, provided most of the life expectancies. According to testimony and evidence offered in *United States v. Svete, et al.*, Case No. 3:04 CR 10, United States District Court for the Northern District of Florida, Pensacola Division, Medical Underwriters, Inc. was a sham not independent of LifeTime. Therefore, many of the life expectancies

many instances, the life expectancies of the insureds were artificially represented to be in the range of 12 to 60 months when, in fact, the demonstrated life expectancies have proven to be much longer. Unfortunately, LifeTime was essentially a clearing house for fraudulently procured investor funds. Not only were the viator life expectancies overly optimistic, but Svete and other LifeTime insiders diverted, for their personal use, a substantial portion of money paid by investors, including funds set aside for premium payments.[3]

B. POOLING OF INVESTOR INTERESTS

The amount of money set aside for the payment of premiums for the policies in the LifeTime Portfolio at the time the Court appointed the Receiver was insufficient to pay current premium requirements.

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provided by Medical Underwriters, Inc. were not legitimate.

[3] In early 2004, Svete and a number of other LifeTime insiders or associates were indicted by a grand jury in a multiple-count indictment issued in the United States District Court for the Northern District of Florida, Pensacola Division (Case No. 3:04 CR 10). On August 18, 2004, a Superseding Indictment was returned which alleged fraud, conspiracy, and money laundering between Svete and others to the significant detriment of LifeTime's investors. The scheme and artifice Svete utilized involved many Svete controlled entities and was complicated and extensive. This scheme resulted in the removal of in excess of $20 million from LifeTime. $3 million Svete diverted from LifeTime has been frozen by authorities and courts in British Columbia, Canada and is subject to a criminal forfeiture proceeding in the Northern District of Florida criminal proceedings. The Receiver has engaged Canadian counsel in an attempt to defeat competing claims and recapture at least a portion of the frozen funds for the benefit of the LifeTime investors.

Therefore, many policies within the LifeTime Portfolio were in danger of lapsing. The Receiver, with Court approval, averted the immediate danger by obtaining a line of credit.

However, the Receiver concluded that continuing the present business model – allocating investors to particular policies – would result in inequities among investors if it became necessary to sell some or all of the policies in the LifeTime Portfolio. Consequently, the Receiver determined that the interests of the LifeTime investors should be changed from an interest in a percentage of the maturities of specific policies to an interest in a percentage of the LifeTime Portfolio as a whole. Each LifeTime investor's interest would be determined by dividing the amount of each individual investment by the cumulative amount invested by all investors.

On June 28, 2004, the Receiver moved the Court for an order to pool viaticals. *See* Doc. No. 53. The Court issued an order, on November 23, 2004, pooling the investors' interests. *See* Doc. No. 134. The order provides, in relevant part, that "[t]he interests of each Investor in specific Viaticals are, hereby pooled with the interests of all Investors and each Investor is, hereby, granted a pro rata interest (subject to verification and approval of claims[4]) in the receivership

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[4] The Receiver filed a motion to establish claims procedure plan and to approve claim forms on September 7, 2004. *See* Doc. No. 70. The Court granted the motion on January 21, 2005. *See* Doc. No. 167. The Receiver began sending claim forms to all LifeTime investors. Although various issues have arisen during the claims procedure, the Receiver filed his first motion to allow claims on December 2, 2005. *See* Doc. No. 340. This motion was granted by the Court. Of the 2478 claims returned to the Receiver, the Receiver has to date, been able to confirm approximately one third

assets as a whole." *Id.*

C. THE JORDAN POLICIES

After the appointment of the Receiver on February 20, 2004, LifeTime was informed that Mr. Jordan, a viator on two (2) $3,000,000.00 policies within the LifeTime Portfolio, had died approximately two weeks prior to the Receiver's appointment. When LifeTime purchased the Jordan policies, it caused the policies to be placed in life insurance trusts. The Receiver, after his appointment, ultimately became the Successor Trustee of the LifeTime life insurance trusts. Consistent with the trust agreements and prior orders of this Court, the insurer, on May 14, 2004, paid the Receiver a total of $6,048,786.00 in proceeds from the Jordan policies. The Receiver deposited the funds in interest-bearing accounts.

Because the Jordan policies matured prior to the inception of the Receivership, issues regarding who is entitled to the proceeds – the Receivership or the investors matched to the Jordan policies (the "Jordan Investors") – arose. On September 21, 2004, the Receiver moved the Court for clarification of the status of the Jordan policies proceeds. *See* Doc. No. 82. The Jordan Investors essentially argued that because their property rights to the policy proceeds vested prior to the Receiver's appointment, the policy proceeds never became Receivership Assets. Conversely, the Receiver contended *inter alia* that since LifeTime had commingled investor funds prior to the purchase of the Jordan policies and prior to the time that most Jordan Investors invested in LifeTime, a constructive trust

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of the claims. The Receiver's claims review process is ongoing.

arose for the benefit of the investors as a whole.

After extensive briefing on the issues, the Court held a hearing on January 24, 2005. *See* Doc. No. 168. While the matter was still under advisement, the Sixth Circuit Court of Appeals issued several opinions potentially applicable to the issues before this Court. Therefore, the Court requested, and the parties submitted, supplemental briefing to address the newly issued Sixth Circuit opinions. *See* Doc. Nos. 293, 296 and 298.

On March 16, 2006, the Court ordered the parties to mediate the dispute regarding entitlement to the Jordan policy proceeds. *See* Doc. No. 400. On Tuesday, March 28, 2006, the Receiver and certain of the Jordan Investors of LifeTime Capital, Inc. engaged in court-ordered mediation before the Honorable Michael Merz, Chief United States Magistrate Judge. The Receiver, subject to a fairness hearing and this Court's approval and certain terms and conditions, subsequently reached a settlement. *See* Doc. No. 405.[5] The Receiver agreed to pay each participating Jordan Investor 62.5% of the total amount they originally invested in the Jordan Policies not to exceed $2,068,000.00 in the aggregate. Payment shall be made within the last to occur of either sixty (60) days following the closing of the sale of the LifeTime Portfolio and initial funding or thirty (30) days after the Court's approval of all of the Proofs of Claim of the Jordan Investors. Jordan Investors participating in the settlement must release all claims against the Receiver and the Receivership Estate with

[5] The Court subsequently entered an order denying the Receiver's Motion to Clarify the Status of Matured Policy Proceeds (Doc. No. 82) subject to renewal if the proposed settlement is not approved. *See* Doc. No. 407.

respect to their investment originally allocated to either of the Jordan policies, and the Jordan policy proceeds, and must execute such documents as may reasonably be necessary to effectuate the settlement.

II. ARGUMENTS AND AUTHORTIES

A. THE COURT'S JURISDICTION AND THE RECEIVER'S AUTHORITY

The Court's authority to impose and administer this Receivership is derived from its inherent powers as a court of equity. *See S.E.C. v. Forex Asset Management, L.L.C.*, 242 F.3d 325, 331 (5th Cir. 2001); *United States v. Durham*, 86 F.3d 70, 72 (5th Cir. 1996). A federal court exercises "broad powers and wide discretion" in crafting relief in an equitable receivership proceeding. *See S.E.C. v., Basic Ener. & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001).

This Court's jurisdiction over the LifeTime Portfolio and the Receiver's authority to act on behalf of the Receivership are set forth in the Order Appointing Receiver (*see* Doc. No. 6), the Order Granting Motion to Clarify and/or Modify Order Appointing Receiver entered on May 5, 2004 (*see* Doc. No. 23), the Order Granting Motion to Clarify and/or Modify Order Appointing Receiver entered on December 2, 2004 (*see* Doc. No. 141); and the Order Clarifying Order Appointing Receiver entered on February 17, 2006 (*see* Doc. No. 381). Acting pursuant to this authority, the Receiver performed his duties and responsibilities within the scope of the Order of Appointment and the orders clarifying same and has essentially preserved the LifeTime Portfolio.

B. THE RECEIVER BELIEVES IT IS IN THE BEST INTERESTS OF THE RECEIVERSHIP FOR THE COURT TO APPROVE THE COMPROMISE AND SETTLEMENT AGREEMENT WITH THE JORDAN INVESTORS

The Receiver, in consultation with his counsel has concluded that it is in the best interests of the LifeTime investors to settle and compromise the claims of the Jordan Investors. Following the Court's entry of its Order requiring mediation, the Receiver and the Jordan Investors negotiated a settlement agreement pursuant to which the Jordan Investors would receive 62.5% of the aggregate amount of investments allocated to the Jordan Policies ($3,308,307). If accepted by 100% of the Jordan Investors, the proposed settlement will result in a settlement payment of $2,068,000.00 in the aggregate. It is the Receiver's opinion that settlement with the Jordan Investors is in the collective best interests of the LifeTime investors for several reasons. First, the Jordan Investors represent over 225 claims against the Receivership Assets and an aggregate contingent liability of $6,000,000.00. Settlement with the Jordan Investors reduces the overall total claims of investors to the Receivership Assets thereby increasing the potential distribution to other investors. Second, the settlement retains almost $4,000,000.00 in the Receivership Estate for the benefit of the remainder of the LifeTime investors.[6]

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[6] Pursuant to previous Court orders, The Receiver has used most, but not all, of the Jordan policy proceeds to pay expenses of the Receivership Estate for the collective benefit of all of the LifeTime investors. Also pursuant to applicable Court orders, the Receiver

Finally, settling the disputed claim now will save the Receivership Estate and the Jordan Investors both considerable time and money. As amply demonstrated by the extensive briefing and arguments to the Court, the legal issues surrounding the ownership of the Jordan policy proceeds are complex and uncertain. Therefore, regardless of this Court's decision on the issues, both the Receiver and the Jordan Investors have indicated that they would appeal an unfavorable decision from this Court to the Sixth Circuit Court of Appeals. Not only would appellate briefing have required that both parties expend extensive attorney fees, but because the Sixth Circuit Court of Appeals is currently operating with a backlog based on available information, the parties could have expected a decision in no less than eighteen to thirty-six months.

WHEREFORE, premises considered, H. Thomas Moran II, as Receiver for LifeTime Capital, Inc. respectfully prays that this Honorable Court grant his Motion to Approve Compromise and Settlement Pertaining to Certain Policy Proceeds and enter an order approving and the compromise and settlement and permitting the effectuation of the compromise and settlement.

Respectfully submitted,

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has developed contingency plans for repayment of these proceeds.

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