

20% to 150%. ABC Viaticals, Inc. (“ABC”) was placed into receivership by virtue of this Court’s order on November 17, 2006.

FACTUAL BACKGROUND

2. On November 17, 2006, Michael J. Quilling was appointed Receiver of ABC by Agreed Order (“Receivership Order”) and was authorized to have complete and exclusive control, possession, and custody of all Receivership Assets of ABC. Receivership Assets were defined in the Receivership Order as “the assets, monies, securities, choses in action, and properties, real and personal, tangible and intangible, of whatever kind and description, wherever situated, of Defendant and of Relief Defendants that are attributable to funds provided to the Defendant or Relief Defendant by an investor and/or any entities they own or control” (§ 1, Receivership Order).

3. The Receiver has begun to conduct his investigation to gain a complete understanding and accounting of ABC and to marshal the Receivership Assets for the benefit of ABC’s creditors and investors. Based on the Receiver’s preliminary review of the books and records of ABC, it appears that it co-mingled investor funds to pay premiums on the life insurance policies, contrary to what it told investors.

4. By various written representations and contracts, ABC promised to pay premiums on the life insurance contracts/policies that it sold in fractionalized shares to over 4,000 investors worldwide. In many instances, ABC represented that funds from investors would be segregated and placed in escrow accounts, under third-party control, to pay premiums during the estimated life expectancy of the insureds, and in some circumstances, for a longer period of time. The unfortunate but true fact is that ABC did not retain sufficient funds in escrow or otherwise, and is unable to pay the premiums on the policies for the duration of the estimated life expectancy of the insureds.

5. Based upon the Receiver's preliminary investigation, premiums on all the policies are current.¹ However, the source of funds to make those payments has been the inflow of new investor funds, which the Receiver has terminated. Premium payments in the future must come from existing assets.

6. Again, based upon the Receiver's preliminary investigation, ABC has an aggregate of approximately \$4,500,000.00 of cash currently available, including approximately \$225,000.00 of new investor funds that were received by ABC prior to the appointment of the Receiver but not yet matched to particular policies. On the other hand, the monthly premium carry on the K Policies alone is approximately \$300,000.00. It is the Receiver's preliminary information that the premium carry on the balance of the policies is approximately \$3,000,000.00 per year.

7. If the foregoing numbers hold true, the Receiver currently has funds to carry the policies for a short period of time, but there is no way that continued payments of premiums can be sustained.

8. Accordingly, consistent with controlling law in this Circuit that has been followed by the majority of jurisdictions in the United States, it is the Receiver's position that all assets of ABC need to be pooled for the benefit of the common good. See, e.g., SEC v. Forex Asset Mgt., 242 F.3d 325, 331 (5th Cir. 2001); Liberte Capital Group v. Capwill, 148 Fed. Appx. 426, 434-36 (6th Cir. 2005); Michael J. Quilling v. Trade Partners, et al, Cause No. 1:03-CV-0236 (W.D. Mich.) [Docket No. 51, 52-1, 90]. Specifically, all funds that constitute Receivership Assets, regardless of how previously allocated, should be held to constitute one fund. All the insurance policies should also be placed into one common fund with investors no longer having a specific

¹ With the exception of nine policies relating to the same two individuals having a face value of approximately \$44,000,000.00 and monthly premiums of approximately \$300,000.00. To protect the identity of the insureds, these policies will be referred to as the "K Policies".

interest in a specific policy, but rather having their interest transformed into a claim against the receivership estate and the pooled funds that it holds. Death benefits, as they are received, should be paid into the pooled fund and all pooled funds used to pay the cost of administration, including premium payments during the course of the receivership estate or until further order of the Court.

9. Pooling of all Receivership Assets, including death benefit proceeds, will benefit the receivership estate as a whole, as opposed to delegating some investors to being winners and some to being losers based upon the fortuitousness of how ABC allocated their funds at the time of receipt and/or the ability of the receivership estate to pay premiums on a given policy in the future. The K Policies provide an example of why this should occur. The K Policies total approximately \$44,000,000.00 with premiums of \$300,000.00 per month. There are approximately 1,200 investors who have a beneficial interest in these policies. If the Receiver is unable to find a premium funding solution, these investors stand to lose the entirety of their investment. If the Receiver can, instead, pay the premiums on other policies, those investors may recover their investment. Such a scenario is inherently inequitable.

10. In addition, pooling will allow the Receiver to seek bank financing to obtain a line of credit that can be secured by a first lien position against the pooled policies as a whole. The Receiver has successfully been involved in this type of financing before and has already had extensive discussions with a local bank regarding extending a similar line of credit in these proceedings. Details regarding that proposed financing will be the subject of a separate motion to be filed by the Receiver in these proceedings. It is not currently known how long negotiations with respect to that bank will take to make final arrangements regarding a proposed line of credit. Even after reaching agreement on the terms and documentation, notice must be given to interested parties and Court approval must be obtained before any financing can be

consummated and funds made available to the Receiver to pay premiums to prevent policy lapses. Pooling will allow an immediate solution pending those banking arrangements being put in place.

11. Historically, when an insured dies, the death benefit proceeds have been paid to the named beneficiary, which is usually a trust established by ABC. The funds were then distributed to each investor who held a fractionalized interest in that particular policy. The Receivership Order did not include the various trusts and their assets by name as part of the Receivership Assets. The Receiver will be filing a Motion to Clarify and Modify the Receivership Order to state explicitly that the Receivership Assets include the trusts and their assets and that the Receiver has full control and possession over the Trusts and the assets of the Trusts, including the insurance policies and any death benefits.

12. The approximate \$4,500,000.00 held by ABC and future death benefits are needed to pay premiums to prevent policy lapses. The only means of paying investors and creditors of ABC are these funds and future proceeds from matured life insurance policies. There are no other funds available to pay premiums as ABC has ceased operations and funds from any loan established in the future may not be available in time to prevent irreparable harm from failure to pay premiums. Simply stated, if the policies are not maintained, the investors will lose tens of millions of dollars invested with ABC.

LEGAL AND EQUITABLE AUTHORITY

13. Sitting in equity, this Court is a “court of conscience.” Wilson v. Wall, 73 U.S. 83, 90 (1867). As such, this Court has the power in equity “to do what is right under the circumstances.” U.S. v. Durham, 86 F.3d 70, 73 (5th Cir. 1996). Thus, although the relief sought by this motion may be broad sweeping, the authority of the Court to grant such relief is likewise extremely broad.

14. When specifically faced with a business failure or fraud scheme affecting persons across a widespread area, this Court has the discretion to order the commingling of assets and consolidation of legal title that the Receiver requests. See, e.g., Cunningham (as Trustee for Ponzi) v. Brown, 265 U.S.1 (1924) (discussing principles of tracing and reversing lower courts’ failure to uphold right of trustee to commingle assets and make pro-rata distribution to similarly situated victims, including the right of the trustee to recover funds distributed shortly before collapse of scheme); Durham, 86 F.3d at 72-73 (affirming district court’s exercise of discretion not to impose constructive trust, but also recognizing district court’s authority to apply tracing principles where equity and justice demand).

15. The authority to pool assets has been recognized even where funds were held by separate corporate entities. SEC v. Forex Asset Mgt., 242 F.3d 325 (5th Cir. 2001) (affirming decision by this Court to pool of assets for all victims of securities fraud even where one investor’s funds had been placed in separate entity).

16. Pooling assets for a pro-rata distribution has been the approach of an overwhelming majority of courts faced with similar situations. E.g., Cunningham, 265 U.S. at 13; Durham, 86 F.3d at 72-73; Forex Asset Mgt., 242 F.3d at 331; and SEC v. Credit Bancorp, Ltd., 290 F.3d 80, 88-89 (2d Cir. 2002); CFTC v. Topworth Int’l, Ltd., 205 F.3d 1107, 1115-16

(9th Cir. 1999); U.S. v. Real Property Located at 13328 and 13324 State Hwy., 89 F.3d 551, 553 (9th Cir. 1996); U.S. v. Vanguard Inv. Co., 6 F.3d 70, 73 (4th Cir. 1993).

17. In a case very similar to the case at bar, the 6th Circuit directed the pooling and pro-rata distribution of viatical interests in a “life settlement” business. Liberte Capital Group v. Capwill, 148 Fed. Appx. 426, 434-36 (6th Cir. 2005). This same approach was followed in *Michael J. Quilling v. Trade Partners, et al*, Case No. 1:03-CV-0236 (W.D. Mich.) [Docket No. 51, 52-1, 90].

WHEREFORE, PREMISES CONSIDERED, the Receiver requests that this Court:

1. Grant this Motion in expedited fashion to avoid irreparable injury and authorize the Receiver to use all Receivership Assets to pay premiums and other costs and expenses in the administration of this receivership estate for the benefit of the investors and creditors of ABC; and
2. Give such notice to all interested parties as is appropriate and consider any objections or motions to vacate the Order as improvidently granted; and
3. For such other and further relief, general or special, at law or in equity, to which the Receiver may be justly entitled.

