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

H. THAYNE DAVIS,	:	
Plaintiff,	:	Case No. 3:04cv00059
vs.	:	Magistrate Judge Sharon L. Ovington
LIFETIME CAPITAL, INC.,	:	
Defendant.	:	

ORDER

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)

---

[1] Policy 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).

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

---

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

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.

---

[3] As 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).

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.

November 10, 2011

s/Sharon L. Ovington
Sharon L. Ovington
United States Magistrate Judge