UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 04-60573-CIV-MORENO/GARBER

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff,

v.

MUTUAL BENEFITS CORP., *et al.*,

Defendants,

VIATICAL BENEFACTORS, L.L.C., *et al.*,

Relief Defendants.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court *sua sponte*.[1] Based on the following analysis, it is respectfully recommended that the Court: (1) require the receiver to return to the pre-closing purchase escrow plaintiffs the funds which they deposited in accounts at Union Planters Bank, N.A., and other institutions, but which were never used to purchase viatical settlements or related investments, and (2) hold that those funds are not part of the receivership.

On October 18, 2004, the Court entered an Order in which it informed the parties that it "ha[d] received numerous inquiries as well as additional complaints pertaining to a return of funds to putative investors who had not entered into contracts for the acquisition of interests in viatical

[1] A detailed factual and procedural background of this action is contained in the Court's November 12, 2004, Report and Recommendations (D.E. #522).

contracts prior to the receivership in this cause." D.E. #504, at 1. The Court informed the parties that it "wishe[d] to address such issues . . . ," *id.*, and therefore directed the receiver to "show cause, if any exists, . . . as to why escrowed deposits should not be forthwith returned to investors who did not enter into contracts for the acquisition of interests in viatical agreements." *Id.* at 1-2. The receiver and some of the investors at issue ("pre-closing purchase escrow plaintiffs") filed memoranda in response to the Court's Order, and the parties appeared at a November 9, 2004, show cause hearing.

In the months before the SEC initiated this action, the pre-closing purchase escrow plaintiffs attempted to invest in viatical settlements through MBC. Their money was deposited in various bank accounts, but the SEC instituted this action before their money was withdrawn from those accounts and invested in viatical settlements. Because the Florida Office of Insurance Regulation has suspended MBC's license and because of the prohibitions contained in this Court's temporary restraining order, the pre-closing purchase escrow plaintiffs' money cannot be invested by MBC in viatical settlements and is effectively frozen in bank accounts over which the pre-closing purchase escrow plaintiffs have no control.

The pre-closing escrow plaintiffs have asked the Court to direct the receiver to immediately return those funds to them. *See, e.g.*, Traded Life Policies Limited's (Summary) Reply Memorandum to Receiver's Response to October 18 Rule to Show Cause (D.E. #520), at 3 ("Accordingly, TLPL respectfully requests that the Court Order the Receiver to return these funds to TLPL, and others who are similarly situated, forthwith."). The receiver opposes the return of those funds to the pre-closing purchase escrow plaintiffs.

DISCUSSION

Essentially, the pre-closing purchase escrow plaintiffs and the receiver dispute to whom the funds at issue belonged on the date the Court appointed the receiver. *Cf., e.g., In re: Scanlon*, 239 F.3d 1195, 1197 (11th Cir. 2001) ("'A debtor's estate in bankruptcy consists of all legal and equitable interests of the debtor in property *as of the commencement of the case.*'") (quoting *T&B Scottsdale Contractors, Inc. v. United States*, 866 F.2d 1372, 1376 (11th Cir. 1989)) (internal quotation marks and additional citations omitted) (emphasis added); *In re Cardian Mortgage Corp.*, 122 B.R. 255, 260 (Bankr. E.D. Va. 1990) ("Thus the critical time for determining whether the funds were property of Cardian's estate was the time of filing."). The receiver contends that the pre-closing purchase escrow plaintiffs did "not have legal title to the funds" and that "[u]ltimate distribution of those monies would therefore be governed by equitable receivership principles . . . ." Response to Rule to Show Cause (D.E. #514), at 9. The pre-closing purchase escrow plaintiffs, on the other hand, contend that the funds were never invested but instead were merely being held in escrow for their benefit until they were invested, and that defendants had no legal right to the funds.

In accordance with the general rule that "[p]roperty interests are created and defined by state law . . . ," *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918 (1979), the receiver contends that "the extent and validity of the Receiver's interest in property is a question of state law . . . ," Response to Rule to Show Cause (D.E. #514), at 2 (citing *In re: Scanlon*, 239 F.3d 1195, 1197 (11th Cir. 2001)). None of the parties or pre-closing purchase escrow plaintiffs has disputed that assertion, and the Court therefore assumes that Florida law applies.[2] *See In re: Scanlon*, 239 F.3d at 1197 &

[2] The receiver also wrote: "The Pre-Closing Purchase Escrow Plaintiffs rely on bankruptcy cases to support their position that they are entitled to distribution of the funds currently held in the Pre-Closing Escrow Accounts. While bankruptcy law is not binding on

n.4 ("Because no argument to the contrary has been presented, we conduct our review according to principles of Florida law."); *id.* at 1197 ("'The extent and validity of the debtor's interest in property is a question of state law.'") (quoting *T&B Scottsdale Contractors, Inc. v. United States*, 866 F.2d 1372, 1376 (11th Cir. 1989)) (internal quotation marks and additional citations omitted); *O'Neal v. General Motors Corp.*, 841 F. Supp. 391, 398 (M.D. Fla. 1993) ("The capacity of a receiver to sue in federal court is governed by the law of the forum state."); *In re Cardian Mortgage Corp.*, 122 B.R. 255, 258 (Bankr. E.D. Va. 1990) ("The determination of a property interest is to be made under appropriate state law.").

The receiver stands in the shoes of MBC and the other defendants. *O'Neal*, 841 F. Supp. at 398; *Hamilton v. Flowers*, 183 So. 811, 817, 134 Fla. 328, 343 (1938) ("The general rule is that a receiver takes the rights, causes and remedies which were in the corporation, individual or estate whose receiver he is, or which were available to those whose interests he was appointed to represent.") (quotation marks and citations omitted); *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. 2d Dist. Ct. App. 2003) ("It is axiomatic that Mr. Freeman as a receiver obtained the rights of action and remedies that were possessed by the person or corporation in receivership."); *see also, e.g., Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230, 236 (7th Cir. 2003) (applying Indiana law); *Javitch v. First U. Secs., Inc.*, 315 F.3d 619, 625 (6th Cir. 2003);

---

issues relating to an equitable receivership, there are instances in which the principles are analogous and therefore helpful." Response to Rule to Show Cause (D.E. #514), at 3.

The Court agrees, and therefore will apply analogous bankruptcy law principles when they do not conflict with the applicable Florida law. *See, e.g., In re Cardian Mortgage Corp.*, 122 B.R. 255, 259 n.1 (Bankr. E.D. Va. 1990) ("Cardian argues that federal bankruptcy policy should control the constructive trust analysis . . . . Those decisions will not be followed by this court to the extent they suggest that the existence of a constructive trust in bankruptcy should be determined by a stricter standard than the applicable state law.").

Armstrong v. McAlpin, 699 F.2d 79, 89 (2d Cir. 1989) (applying New York law); *cf. SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 903 (5th Cir. 1980)[3] ("As a general rule a receiver, standing in the shoes of management . . .").[4]

Generally, "[o]nce property is placed under the control of the court through appointment of a receiver, no creditor may obtain preference by any lien rendered subsequent thereto even if the suit under which the judgment lien is acquired was commenced prior to the date of the order appointing the receiver." *Sunland Mortgage Corp. v. Lewis*, 515 So. 2d 1337, 1339 (Fla. 5th Dist. Ct. App. 1987). However, "[a] receiver has no right to property which does not belong to the corporation over which the receiver was appointed." *Tourist Channel, Inc. v. Namey*, 568 So. 2d 543, 544 (Fla. 5th Dist. Ct. App. 1990); *see also, e.g., Hamilton v. Flowers*, 183 So. 811, 817, 134 Fla. 328, 343 (1938) ("A receiver has no right to property which does not belong to the individual or corporation over which he was appointed."). Consistent with that principle, the Court's Order Appointing Receiver authorized the receiver to take control only of MBC's and some of the relief defendants' "property, assets, and estate . . . ." D.E. #26, at 2 ¶ 1. Therefore, if the disputed funds did not belong to MBC or any of the other defendants but instead belonged to the pre-closing purchase escrow plaintiffs, then the receiver had no authority to seize them and the pre-closing purchase escrow plaintiffs are entitled to the return of those funds.

The receiver focuses his arguments on whether the accounts in which the pre-closing

---

[3] Decisions rendered by the Fifth Circuit prior to October 1, 1981, are binding on district courts within the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

[4] In *SEC v. Spence & Green Chem. Co.* and *Javitch v. First U. Secs., Inc.*, the Fifth and Sixth Circuits did not specify which states' laws they were applying to determine the extent of the powers of the relevant receivers.

purchase escrow plaintiffs' funds are being held constituted escrow accounts under Florida law. He concedes "that the monies at issue should be returned to the investors who deposited those funds if . . . a true escrow was created under Florida law." Response to Rule to Show Cause (D.E. #514), at 3 (emphasis omitted). He contends, however, that no true escrow was created under Florida law, and that "[a]bsent agreements that meet all elements of a valid escrow relationship, . . . the [pre-closing purchase escrow plaintiffs] do not have legal title to the funds" at issue. *Id.* at 9. According to the receiver, therefore, there apparently exist only two possibilities with regards to the funds at issue: (1) the accounts at issue were true escrow accounts, in which case the funds in them must be returned to the pre-closing purchase escrow plaintiffs; or (2) the accounts at issue were not true escrow accounts, in which case the funds in them are part of the receivership and are subject to equitable distribution along with the rest of the receivership's assets.

"Under Florida law, an escrow is established by 'an instrument embodying conditions mutually beneficial to both parties . . . and it must be communicated to and deposited with a third party.'" *Gibson v. Resolution Trust Co.*, 51 F.3d 1016, 1021 (11th Cir. 1995) (quoting *Aberbach v. Wektva Assocs.*, 735 F. Supp. 1032, 1035 (S.D. Fla. 1990)); *see also, e.g., Shultz v. Sun Bank/Naples, N.A.*, 553 So. 2d 202, 205 (Fla. 2d Dist. Ct. App. 1989) ("An escrow agreement must be in writing, and the funds must be delivered to a third party."). "The third party must itself not be involved in the transaction." *Gibson*, 51 F.3d at 1021. "Upon delivery of the *res* to a third person in escrow, the grantor by his act of delivery loses all control over the *res*." *Id.*

Once an escrow account is established, "'legal title to property placed in [the] account remains with the grantor until the occurrence of the condition specified in the escrow agreement.'" *In re: Scanlon*, 239 F.3d 1195, 1197-98 (11th Cir. 2001) (quoting *Dickerson v. Central Fla.*

Radiation Oncology Group, 225 B.R. 241, 244 (M.D. Fla. 1998)). "Nonetheless, 'funds that are deposited into an escrow account by a debtor, for the benefit of others, cannot be characterized as property of the estate.'" *Id.* at 1198 (quoting *In re S.E.L. Maduro*, 205 B.R. 987, 990-91 (Bankr. S.D. Fla. 1997)). Thus, even if it is ambiguous who has "legal title to the funds in [an] escrow account . . . ," the funds are not part of the estate if they were "not intended to benefit the Debtor." *Id.* Additionally, "even if the Debtor could be deemed the legal owner of the funds" in an escrow account, those funds are not part of the debtor's estate if they merely "experienced a temporary layover in an account maintained by [the debtor's] counsel while *en route* to compensating without any oversight by the Debtor . . . ." *Id.*

The receiver agrees that the first condition for establishment of an escrow, *i.e.* the existence of an instrument embodying conditions mutually beneficial to both parties, was met because the pre-closing purchase escrow plaintiffs "and MBC entered into a contract whereby they agreed that the investors' money would be put into an account to be disbursed only on certain conditions." Response to Rule to Show Cause (D.E. #514), at 4-5. MBC's standard State of Florida Viatical Settlement Purchase Agreement supports that conclusion. *See, e.g.*, State of Florida Viatical Settlement Purchase Agreement (D.E. #514, Ex. A), at 4-5 ¶ 15 ("Purchaser appoints Union Planters Bank, N.A., as Escrow Agent for the purpose of holding funds for the purchase of the death benefit of a life insurance policy(ies). The sole responsibilities of the Escrow Agent are: a) To hold the funds forwarded by the Purchaser pursuant to this Agreement."); *id.* at 5 ¶ 16 ("The Escrow Agent will not release any of the Purchaser's funds to Mutual Benefits Corp. or any other third party until such time as the Escrow Agent has written acknowledgment from the seller's insurance company of the change of beneficiaries reflecting the Purchaser(s) of the policy and his/her designees.").

The receiver contends, however, that the escrow account contemplated by the agreements between MBC and the pre-closing purchase escrow plaintiffs never came into existence because the agreements were not "'communicated to and deposited with a third party.'" *Gibson v. Resolution Trust Co.*, 51 F.3d 1016, 1021 (11th Cir. 1995) (quoting *Aberbach v. Wekiva Assocs.*, 735 F. Supp. 1032, 1035 (S.D. Fla. 1990)).

The Court does not have sufficient evidence to determine whether the agreements between MBC and the pre-closing purchase escrow plaintiffs were communicated to and deposited with Union Planters Bank, N.A. ("Union Planters") or any of the other purported escrow agents.[5] Based on the contents of a separate agreement between MBC and Union Planters and similar agreements between MBC and other purported escrow agents, however, it appears likely that the receiver is correct that MBC failed to communicate the agreements between MBC and the pre-closing purchase escrow plaintiffs to, and failed to deposit them with, Union Planters and other purported escrow agents.

The agreement between MBC and Union Planters does purport to establish an escrow account. *See* "Escrow Agreement - Union Planters Bank, N.A." (D.E. #514, Ex. B). That agreement, however, does not refer to the agreement between MBC and the pre-closing purchase escrow plaintiffs, does not appear to relate to an escrow account set up for the benefit of the pre-closing purchase escrow plaintiffs, and does not contemplate that the pre-closing purchase escrow

[5] Some of the pre-closing purchase escrow plaintiffs' funds were deposited in accounts with American Express Business and Tax Services, Inc.; Northern Trust; and RBC Centura Bank. *See* Response to Rule to Show Cause (D.E. #514), at 5 n.1. The agreements between MBC and those entities contained similar provisions to the agreement between MBC and Union Planters. According to the receiver, as of June 30, 2004, $104,958,761 was held in accounts with all of those banks, "with the vast majority of that amount ($103,477,127) held in accounts at Union Planters Bank, N.A." *Id.* at 2.

plaintiffs will be the "grantors" for the account. Instead, the agreement suggests that MBC is the intended beneficiary of, and the grantor to, the contemplated escrow account. *See, e.g., id.* at 2 ¶ II.A.1 ("Upon the execution of this Agreement, Escrow Agent shall establish and maintain one or more additional escrow accounts for the benefit of MBC or MBC's designee.[6]"); *id.* at 3 ¶ III.A.1 ("From time to time, with respect to facilitating each *purchase by MBC* of life insurance policy death benefits, Escrow Agent shall perform the following services") (emphasis added); *id.* at 5 ¶ III.B (providing for disbursements to MBC). The agreement refers to separate agreements among "the *Insured* [*i.e.*, the viator], MBC and the Escrow Agent [*i.e.*, Union Planters] . . . ," *id.* at 4 ¶ III.A.4 (emphasis added), but it does not reference the agreements between MBC and the pre-closing purchase escrow plaintiffs. Additionally, the agreement states:

> The duties and responsibilities of the Escrow Agent hereunder shall be determined solely by the express provisions of the Escrow Agreement [*i.e.*, the agreement between MBC and Union Planters] and no other future duties or responsibilities shall be implied. The Escrow Agent shall not have any liability under, nor duty to inquire into the terms and provisions of any agreements or instructions, other than as outlined in this Agreement. Without limiting the foregoing, the Escrow Agent shall . . . have no duties or obligations other than those specifically set forth herein . . . .

Id. at 8 ¶ V.H.

Thus, the only evidence before the Court suggests that the escrow accounts contemplated in the agreements between the pre-closing purchase escrow plaintiffs and MBC were never created.[7]

---

[6] There is no evidence before the Court that pursuant to the agreement between MBC and Union Planters Bank, MBC named any of the pre-closing purchase escrow plaintiffs as a "designee."

[7] Of course, further discovery could lead to the conclusion that the agreements between the pre-closing purchase escrow plaintiffs and MBC were communicated to and deposited with Union Planters with respect to the Union Planters account, thereby establishing that the escrow account contemplated by the agreement between the pre-closing purchase escrow plaintiffs and MBC was established. However, because of the Court's conclusions *infra*, the Court does not

However, it is undisputed that MBC set up the escrow accounts[8] described in its agreements with Union Planters; American Express Business and Tax Services, Inc.; Northern Trust; and RBC Centura Bank. It is also undisputed that the pre-closing purchase escrow plaintiffs, not MBC, deposited the funds that are in those accounts, *see, e.g.*, Response to Rule to Show Cause (D.E. #514), at 3 ¶ 6 ("the investors who deposited those funds"), and such deposits were in accordance with the agreements between MBC and the pre-closing purchase escrow plaintiffs, *see* D.E. #514, Ex. A, at I ¶ I.1 ("The Purchaser hereby agrees to deposit the sum of $_____ with Union Planters Bank, N.A. the Escrow Agent, for the purpose of acquiring the death benefit of a life insurance policy(ies) which will be allocated as set forth herein.").

The receiver contends that because the Union Planters account was not a true escrow account, or at least not the escrow account contemplated in the agreements between MBC and the pre-closing purchase escrow plaintiffs, the funds in that account automatically became property of the receivership. The authority which the receiver has cited, however, does not support that proposition.

For example, the receiver cited *In re: Scanlon*, 239 F.3d 1195 (11th Cir. 2001), for the following proposition: "account which was not a true escrow account under Florida law became property of the bankruptcy estate . . . ." Response to Rule to Show Cause (D.E. #514), at 4. That is not, however, an accurate representation of the facts or the Eleventh Circuit's holding in *In re: Scanlon*.

---

need to consider that issue further.

[8] For purposes of this Report and Recommendation, the Court will refer to these as "escrow accounts," despite the fact that some or all of the accounts may not have met the legal definition of an escrow account. Based on the Court's conclusions *infra*, for purposes of this Report and Recommendation it is irrelevant whether the accounts met that legal definition.

(who are referred to in the Agreement as 'Agents') . . . . ," and "[t]he fund was held for the sole benefit of the Bank . . . and the Agents." *Id.* at 1019-20 (quotation marks and citation omitted). The bank "retained power over investment decisions of the assets comprising the fund. It was free to remove all monies in the fund unless it had been notified of a claim against its Agents; thereafter, withdrawals required a two-thirds approval by the Agents." *Id.* at 1020. Also pursuant to the agreement, the law firm was "to oversee the fund which was kept at Citibank in a trust account . . . ." *Id.*

When RTC became conservator of the bank, it repudiated the agreement with the law firm, in accordance with the Financial Institutions Reform, Recovery and Enforcement Act of 1989. 51 F.3d at 1020. RTC asked the law firm to return the funds, but the law firm refused. *Id.* The law firm filed a declaratory judgment action, and RTC filed a counterclaim seeking a determination that it properly repudiated the contract and a cross-claim against Citibank seeking return of the funds in the account. *Id.*

The law firm contended, *inter alia*, "that the fund was the property of the officers and directors[, not the bank itself,] as the Agreement [between the bank and the law firm] constituted an escrow or guaranty agreement." 51 F.3d at 1021. The Eleventh Circuit held that the agreement did not constitute an escrow agreement. 51 F.3d at 1021-22. The court based that decision on the facts that:

> [t]he directors and officers were not parties to the Agreement; the Law Firm, who held the fund in a trust account, was not a disinterested third party to the Agreement but rather a party to the Contract; moreover the word 'escrow' never appears in the Agreement. Nor did [the bank] lose control over the fund; it retained the rights to add, substitute, value, invest, sell, dispose of, and audit fund assets.

51 F.3d at 1022. The Eleventh Circuit therefore affirmed the district court's conclusions that RTC's

Contrary to the receiver's representation, the *In re: Scanlon* court did not hold that the account at issue was not a true escrow account. Instead, the court did not directly address the issue of whether it was an escrow account, but implied that it *was* a true escrow account by repeatedly referring to it as an "escrow account." *See, e.g.*, 239 F.3d at 1196 (identifying the main issue on appeal as "whether certain funds in a temporary escrow account constituted estate property"); *id.* at 1198 ("the two opinions below inform the analysis of who possessed legal title to the funds in the temporary escrow account and who were the intended beneficiaries of those funds"); *id.* ("While the issue of who possessed legal title to the funds in the escrow account is not free of ambiguity . . .").

Additionally, the *In re: Scanlon* court did not conclude that the account at issue "became property of the bankruptcy estate . . . ." D.E. #514, at 4. Instead, the court "conclude[d] that the funds in the temporary escrow account [we]re *not* part of the bankruptcy estate . . . ," 239 F.3d at 1199 (emphasis added).

The receiver also appears to rely on *Gibson v. Resolution Trust Corp.*, 51 F.3d 1016 (11th Cir. 1995), for the proposition that funds which are not held in a true escrow account are part of a receivership, to be administered by the receiver. *See* Response to Rule to Show Cause (D.E. #514), at 3-4 ¶ 6. *Gibson*, however, does not support that proposition.

In *Gibson*, a bank had become insolvent and Resolution Trust Corporation ("RTC") was acting as the bank's conservator. 51 F.3d at 1019. Before the bank had become insolvent, it entered into a contract with a law firm "to provide legal representation to [the bank's] officers and directors if claims were made." *Id.* at 1020. Pursuant to the terms of that agreement with the law firm, the bank "had deposited over $11 million in assets in an account to be used for indemnification purposes to fund legal fees and any damage awards resulting from claims made against its officers or directors

repudiation of the agreement with the law firm was proper, that the funds in the account belonged to RTC (as conservator of the bank), and that Citibank had to follow RTC's instructions regarding disposition of the assets in the account. The Eleventh Circuit noted that even if the agreement were construed to be an escrow agreement, the law firm would not be entitled to the funds in the account because "the conditions precedent required to transfer interest in the fund's assets to the Law Firm never occurred." *Id.* at 1022 n.7.

Gibson is factually distinguishable from this action because, among other reasons, in *Gibson* there was no dispute that the money in the account had been deposited by insolvent bank, the money had originally belonged to the bank, the money was intended for use by the bank to fund its own legal fees and damage awards against it, and the bank maintained control over the funds. In this action, on the other hand, the funds at issue originally belonged to the pre-closing purchase escrow plaintiffs and were deposited by the pre-closing purchase escrow plaintiffs; pursuant to the agreements between MBC and the pre-closing purchase escrow plaintiffs, the money was intended to be invested in viatical settlements; and pursuant to the agreements between MBC and the pre-closing purchase escrow plaintiffs, MBC was not supposed to maintain control over the funds.

As discussed *supra*, regardless of the fact that the Union Planters account was not the escrow account contemplated in the agreements between MBC and the pre-closing purchase escrow plaintiffs, there is no dispute that the money in those accounts was deposited by the pre-closing purchase escrow plaintiffs for the purpose of purchasing viatical settlements, and that MBC and the pre-closing purchase escrow plaintiffs "entered into a contract whereby they agreed that the investors' money would be put into an account to be disbursed only on certain conditions." Response to Rule to Show Cause (D.E. #514), at 4-5. The receiver has not cited any law or facts

which would support a conclusion that MBC or any other defendant had legal title to the funds in the Union Planters account, or to the funds in the accounts with American Express Business and Tax Services, Inc.; Northern Trust; and RBC Centura Bank. MBC obtained whatever "possession" of those funds that it had only because it breached the agreements with the pre-closing purchase escrow plaintiffs and entered into a contract with Union Planters which did not reflect or incorporate the terms of the agreements between MBC and the pre-closing purchase escrow plaintiffs.

The receiver therefore has not demonstrated that MBC or any other defendant had any legal ownership interest in the funds at issue. "A receiver has no right to property which does not belong to the corporation over which the receiver was appointed." *Tourist Channel, Inc. v. Namey*, 568 So. 2d 543, 544 (Fla. 5th Dist. Ct. App. 1990); *see also, e.g., Hamilton v. Flowers*, 183 So. 811, 817, 134 Fla. 328, 343 (1938) ("A receiver has no right to property which does not belong to the individual or corporation over which he was appointed."). It is therefore recommended that the Court require the receiver to return the funds at issue to the pre-closing purchase escrow plaintiffs. *See In re: Scanlon*, 239 F.3d 1195, 1198 (11th Cir. 2001) (Holding that disputed funds in an escrow account were not part of a debtor's estate because although "the issue of who possessed legal title to the funds in the escrow account [wa]s not free of ambiguity, it [wa]s clear that the $650,000 was not intended to benefit the Debtor.").

Additionally, even if MBC somehow had legal title to the funds at issue, the undersigned would recommend that the Court impose a constructive trust over the funds and return them to the pre-closing purchase escrow plaintiffs on that basis. A constructive trust "is an equitable remedy to achieve justice and to prevent unjust enrichment." *Shultz v. Sun Bank/Naples, N.A.*, 553 So. 2d 202,

205 (Fla. 2d Dist. Ct. App. 1989)[9]; *see also, e.g., Mesa Petroleum Co. v. Coniglio*, 787 F.2d 1484, 1486 (11th Cir. 1986); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1030 (5th Cir. 1980) (Describing the remedy of an equitable trust as "an alternative equitable remedy which has long been recognized by the Florida courts."); *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 85 (Fla. 1st Dist. Ct. App.) ("The award of the court below is sustainable under a theory of unjust enrichment, and its particular equitable remedy as applied to circumstances before us is appropriately accomplished by the vehicle of a constructive trust."), *review denied*, 411 So. 2d 380 (Fla. 1981); *cf. In re Cardian Mortgage Corp.*, 122 B.R. 255, 259 (Bankr. E.D. Va. 1990) ("Virginia law permits a constructive trust to be imposed in the situation where the alleged constructive trustee acquires property or a fund of money from the beneficiary.... Where the retention of ownership would unjustly enrich the title holder, the title holder is subject to a duty to convey to one entitled to the property in equity."). As discussed *supra*, MBC obtained possession of the funds at issue by breaching its agreements with the pre-closing purchase escrow plaintiffs, and MBC has been unjustly enriched by virtue of the

---

[9] In *Shultz*, the Second District Court of Appeal found that a constructive trust had not been established. That case, however, is factually distinguishable from this one.

In *Shultz*, the innocent party had delivered to the wrongdoer "cashier's checks with no written restrictions whatsoever...." 553 So. 2d at 205. After the court found that there had not been an escrow agreement, the innocent party attempted to obtain his money on the basis of a constructive trust. The court found that because the innocent party "by reasonable diligence could have protected himself...," *id.*, presumably by writing instructions on the checks or requiring the wrongdoer to sign a contract agreeing to certain conditions, the innocent party was not entitled to "any preference over [the wrongdoer's] other creditors...." *Id.*

In this action, however, the pre-closing purchase escrow plaintiffs did not merely deliver to MBC "cashier's checks with no written restrictions whatsoever," but instead exercised reasonable diligence to protect themselves. They entered into contracts by which MBC agreed to form an escrow account to protect their interests, and they deposited money directly into what they reasonably believed was the escrow account contemplated by their agreements with MBC. The fact that MBC did not set up the contemplated escrow account does not change the fact that as between MBC and the investors, MBC has no legal or equitable right to the funds.

receiver's seizure of those funds. The pre-closing purchase escrow plaintiffs therefore are entitled to return of those funds, and the funds should not be part of the receivership.

RECOMMENDATION

Accordingly, it is recommended that the Court: (1) require the receiver to return to the pre-closing purchase escrow plaintiffs the funds which they deposited in accounts at Union Planters Bank, N.A., and other institutions, but which were never used to purchase viatical settlements or related investments, and (2) rule that those funds are not part of the receivership.

The parties and pre-closing purchase escrow plaintiffs have ten (10) days from receipt of this Report and Recommendation to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. *See* 28 U.S.C. § 636. Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 17th day of December, 2004.

BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
United States District Judge Federico A. Moreno
Teresa Verges, SEC's Assistant Regional Director
C. Thomas Tew, Esq.
J. David Hopkins, Esq.
J. Randolph Liebler, Esq.
David P. Millian, Esq.
Marc Cooper, Esq.
Bruce Zimet, Esq.

Richard Ben-Veniste, Esq.
Jon A. Sale, Esq.
Faith E. Gay, Esq.
John M. Hogan, Esq.
Joseph R. D'Ambrosio, Esq.
Miguel Diaz de la Portilla, Esq.
Roberto Martinez, Esq.
Edward Mullins, Esq.
Steven G. Schwartz, Esq.
Peter M. Kramer, Esq.
James J. Blosser, Esq.
Stephen C. Baker, Esq.
Kenneth W. Lipman, Esq.
Hilarie Bass, Esq.
Barry Glickman, Esq.
Anthony M. Livoti, Esq.
Marc Nurik, Esq.
William Berger, Esq.
Stanley Wakshlag, Esq.
J. David Hopkins, Esq.
William I. Petros, Esq.
Christopher J. Klein, Esq.
Kenneth R. Jones, Esq.
John B. Dempsey, Esq.
Wendy Susan Leavitt, Esq.
Mark S. Shapiro, Esq.
Brian J. Stack, Esq.
Victor Diaz, Esq.
Michael A. Hanzman, Esq.
Roma W. Theus, II, Esq.
David Levine, Esq.

Ms. Frances Albergo
376 Fourth Street
Naples, FL 34182

Mr. Lawrence Nielsen
c/o Millwork of Idaho, Inc.
P.O. Box 60
Sugar City, ID 83448-0060