IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| **SECURITIES AND EXCHANGE COMMISSION,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**JAMES A. TORCHIA, et al.,**<br><br>**Defendants.** | **CIVIL ACTION NO. 1:15-CV-3904-ELR-CCB** |

## NON-FINAL REPORT AND RECOMMENDATION

This matter is before the Court for consideration of a number of pending motions, including the Objecting Investors' motion for disgorgement of funds, (Doc. 676); the Receiver's motion for an order confirming the directive to require the Sutherlands to assign the Martin policy to the Receiver, (Doc. 725); and the Receiver's motion for an order confirming application of the distribution plan to the Objecting Investors, (Doc. 732).[1]

[1] There are other pending motions that will be addressed separately.

## I. Background and Procedural History

I assume the reader's familiarity with the underlying SEC action and the appointment of the Receiver, as well as with the fraudulent schemes that form the basis for this litigation, all of which are described in prior orders of this Court and the Eleventh Circuit Court of Appeals. (Docs. 66, 120, 501, 654). That being said, a brief recap is appropriate here, as is a more robust discussion of the procedural history of this case.[2]

### A. District Court Proceedings Prior to the Appeals

Beginning in 2010, James Torchia, Credit Nation Capital, LLC (CNC), Credit Nation Acceptance, LLC (CNA), and American Motor Credit, LLC (AMC), engaged in two related schemes to raise money. First, CNC sold unregistered promissory notes to investors who were told they would receive a fixed return and that the notes were 100% asset-backed. CNC told investors that it expected to generate returns from its investments in excess of the interest payable on the notes. CNC invested the proceeds from selling the promissory notes in sub-prime automobile loans and purchased life settlement and viatical life insurance policies

[2] I do not attempt to provide a comprehensive summary of everything that has occurred in this matter—rather, I recount the key events and rulings most applicable to the issues now relevant on remand from the Eleventh Circuit.

(the LS Assets). The second way CNC raised money was by reselling certain of the LS Assets to investors, either as sales of entire policies or as fractional interests in certain policies. (Doc. 501 at 3–4).

These schemes resulted in three general categories of investors: (1) those who loaned money to CNC in return for a promissory note equal to the amount of the loan (Promissory Note Investors); (2) investors who purchased life insurance policies where the investor was named the sole beneficiary of the death benefits (Direct Investors); and (3) investors who purchased, with others, a fractional interest in life insurance policies where CNC or Torchia individually was the sole beneficiary of the death benefit (Indirect Investors). (Doc. 120 at 3).

In a May 25, 2016 order, the Court set forth general guidelines for how the Receiver was to dispose of the insurance policies held by the Defendants. (Doc. 120). The Court approved a pro rata or "pooling" distribution of the assets—that is, the Receiver was to treat the policies owned by either Direct Investors or Indirect Investors, or both, as "pooled" assets of CNC (because CNC paid all of the premiums on the policies) and was to sell all of the policies in bulk or individually. *Id.* at 5–6, 8–9. The Court found "particularly persuasive" the Receiver's finding that CNC commingled funds—in other words, CNC pooled the funds from all three types of investors (Promissory Note, Direct, and Indirect)

without necessarily using, for example, the funds from a Direct Investor to actually purchase the relevant life insurance policy. (Doc. 120 at 9).

The Court noted, however, that Direct Investors are named as beneficiaries on their life insurance policies, which "complicates the otherwise straightforward pro rata analysis." *Id.* at 10. As such, the Court found it equitable to give the Direct Investors a choice as to what they could do with their policies. *Id.* at 11–12. Under the first option, the investor could either keep the policy, and ultimately collect when the person named in the policy passed away, provided that they remitted to the Receiver the amount of premiums that CNC had paid to keep the policy current and in force, along with the fair market value of other services CNC had provided. The Court, and the parties now, referred to those funds-to-be-remitted as "fictitious profits." *Id.* at 11. Under that first option, the Direct Investor would assume responsibility for making any premium payments going forward and, as noted above, they would stand to collect when the policy matured. Under the second option, a Direct Investor could simply assign their life insurance policy or polices back to the Receiver, in which case they would be treated like any other pooled investor. *Id.* at 12 n.7; *SEC v. Torchia*, 922 F.3d 1307, 1312 (11th Cir. 2019).

On April 19, 2017, the Receiver filed a motion to approve the claims process and plan of distribution. (Doc. 433). The Receiver noted that numerous Direct Investors elected to retain their polices and remit the fictitious profits. *Id.* at 7–8. Those investors, the Receiver argued, should therefore be excluded from taking any distribution from any remaining funds. *Id.*

The Receiver proposed that all those with claims against the remaining funds—including Promissory Note Investors as well as Direct and Indirect Investors in pooled assets—"be treated as a single, equal class of claimants" and that no claimant receive any priority over any other creditor. *Id.* at 15. Furthermore, the Receiver proposed that if a particular investor had more than one investment, those investments should be consolidated into one claim. *Id.* at 18–20. So, for example, imagine an investor who invested $100,000 in a promissory note, for which she had received $50,000 in interest payments, and also invested $100,000 in a pooled life insurance asset. The Receiver would treat that investor as having one claim based on a $200,000 investment, and her recovery (investors under the Receiver's proposal would recover approximately 30%, or in this hypothetical $60,000) would be offset by the $50,000 she had already received (meaning she would only receive an additional $10,000). *Id.*

The Court set a schedule for objections to the Receiver's proposed plan. (Doc. 435). One group—the O'Dell Investors[3]—filed an objection alleging that the Court's summary proceedings violated due process, that the Receiver should not be entitled to recover fictitious profits from Direct Investors, that the Receiver's proposal to consolidate claims violated due process, that Promissory Note Investors were prohibited from making defenses, and that the investors were entitled to discovery. (Doc. 461). Two of the O'Dell Investors, Richard and Katherine Sutherland, were separately engaged in motions practice challenging a particular life insurance policy in the name of Jimmy Martin. (Docs. 297, 342, 404, 427, 451, 468).

On July 12, 2017, the Court resolved the Sutherlands' objections (they were refusing to either remit fictitious profits as to this policy or assign it to the Receiver) regarding the Martin policy. (Doc. 484). The Court noted that the Sutherlands had received sufficient process and rejected their argument that they should not have

[3] The name comes from the fact that these investors are represented by attorney Justin O'Dell, and the Eleventh Circuit refers to them as such throughout its opinion. The Court has commiserated in the past with Mr. O'Dell about the fact that this group is identified by his surname but, for ease of reference, the Court will continue the practice.

to remit the fictitious profits as a condition to keeping the Martin policy. *Id.* at 5–7.

On August 7, 2017, the Court overruled all objections to the Receiver's proposed distribution plan. (Doc. 501). And, as most directly relevant here, it rejected objections from the O'Dell Investors. *Id.* at 17–23. The crux of the O'Dell objections related to the process that had been provided to that point—they claimed that this Court had not provided sufficient due process. *Id.* I do not labor too long on recounting those objections here because, as will be explained below, the Eleventh Circuit agreed that the process had not been sufficient. However, this Court's resolution of certain other objections is relevant to where we are today because, now having been provided the process they have requested, the O'Dell Investors repeat many of the objections they made before. As such, I quote somewhat liberally from the Court's prior analysis:

> The crux of the O'Dell Investors' due process argument is that the repayment of Fictitious Profits violates the investors' due process. On May 25, 2016, the Court issued its Order [120] ("Pooling Order") setting forth the method by which the Receiver would distribute assets. The Pooling Order required a pro rata distribution, except allowed Direct Investors to maintain their interests in life insurance policies if they remit to the Receiver fictitious profits they received from CNC as a result of its premium payments and servicing of their policies. On July 21, 2016, certain intervening investors filed their motion to amend the Pooling Order [185], arguing, in part, that fictitious profits should not be required to be remitted to the Receiver.

On August 24, 2016, the Court issued an order rejecting the intervenors' motion to amend, explaining:

> In any case, Intervenors' arguments are unpersuasive, because the Court already determined—and does not change its conclusion here—that because funds from Direct, Indirect, and Promissory Note Investors were commingled, and those commingled funds were used to keep insurance policies in force, a pro rata distribution is equitable. The Court allowed only minor carve-outs from this pro rata rule to account for unique situations presented by the broad range of investments Defendants solicited. To now increase the scope of that carve-out to include all insurance policy investors—and to allow those investors to maintain their interests in the insurance policies without first returning fictitious profits received from commingled funds—would allow Investors "to elevate their claims by standing on the backs of the other [] investors whose funds kept [their] policies viable . . . ."

([208] (citation omitted)). The Court here similarly rejects the O'Dell Investors' renewed arguments that they should not be required to pay Fictitious Profits.

. . .

The O'Dell Investors next set forth arguments related to due process that the Distribution Plan prohibits investors from asserting claims and defenses related to their property rights. They argue that they should have been provided an opportunity to contest Fictitious Profits on the basis that the "investors were good faith purchasers for equivalent value and are entitled to a setoff of the policy premiums and services [for CNC] as bargained for in their purchase agreement." ([461] at 13–14). That the O'Dell Investors may have been good-faith purchasers for value is irrelevant in the context of the liquidation of an equity receivership. As the Receiver notes, it appears that all

> Investors, with a few exceptions, had legally valid contracts with CNC. The issue here, where CNC was placed into a receivership because its liabilities exceeded its assets, is how the assets of the receivership should be distributed in a liquidation.
>
> The O'Dell Investors next argue that O.C.G.A. §§ 18-2-73 and 18-2-78 prevent the payment of Fictitious Profits because Fictitious Profits are "reasonably equivalent value." ([461] at 14). Section 18-2-78(a) provides that "[a] transfer or obligation is not voidable under . . . [section] 18-2-74 against a person who took in good faith for a reasonably equivalent value or against any subsequent transferee or oblige." Again, however, the Receiver does not seek to void any transfer of a life settlement policy directly owned. He seeks only to recoup Fictitious Profits the O'Dell Investors received that kept their policies in force. If a Direct Investor chooses not to remit Fictitious Profits, the investor is not deprived of a property right and would receive a distribution under the Distribution Plan in accordance with the investor's ownership in the directly-owned life settlement policy. The O'Dell Investors' argument also assumes that premium payments were always collected by CNC in the purchase price. As the Receiver shows, however, in all but a few policies, costs for premium payments through the life of the policy were not collected.
>
> Finally, the O'Dell Investors argue that the Receiver is prohibited from clawing back interest payments made before the statute of limitations for fraudulent transfer actions. The O'Dell Investors' argument again appears to be based on the false assumption that the recovery of Fictitious Profits is an attempt to "claw back" or void a fraudulent transfer. The question before the Court is only the fair and equitable division of the assets of the Receivership. There is no statute of limitations on fairness and equity.

(Doc. 501 at 17–23) (footnote omitted, all other formatting as in original). At the end of the day, the Court overruled all objections and approved the Receiver's claims process and plan of distribution.

**B. The Appeals**

The Sutherlands and the O'Dell Investors appealed, and the Eleventh Circuit issued one consolidated opinion. *S.E.C. v. Torchia*, 922 F.3d 1307 (11th Cir. 2019). The appellate court held that, although this Court did not err by appointing a receiver and utilizing certain summary proceedings, "the summary proceedings used by the district court did not provide the Sutherlands or the O'Dell investors with a meaningful opportunity to challenge the receiver's determinations and calculations or to argue their claims and defenses." *Id.* at 1317. Specifically, with regard to the Sutherlands, the court noted that this Court "never expressly addressed the argument of the Sutherlands that their interests were superior to that of the receiver." *Id.* Moreover, the court noted that the receiver never provided the Sutherlands (or this Court, for that matter) "any evidence whatsoever of the premiums [CNC] paid on the [Martin] policy or the nature of the services [CNC] rendered. Nor did the receiver set out the methodology for his calculation of 'fair market value of other services.'" *Id.* at 1318. The court opined that "[m]aybe things would have been different had the receiver—the party with the burden of proof—submitted evidence supporting how he arrived at the amount of premiums paid by [CNC] and/or provided his methodology for determining the 'fair market values of other services' rendered by [CNC]. But he did not, and it was therefore

improper to require the Sutherlands to object to his conclusory demands while simultaneously denying their request for discovery." *Id.* Finally, the court of appeals held that this Court erred in not allowing the Sutherlands to meaningfully present their argument that, as a contractual matter, the premiums CNC paid to service the Martin policy should not be considered fictitious profits because the contract itself required CNC to service the policy. *Id.* The court offered no views on the validity of the Sutherlands' arguments—it simply noted that due process required this Court to "more fully adjudicate" those claims and defenses. *Id.*

As to the O'Dell Investors, the Eleventh Circuit similarly held that this Court erroneously declined to consider their arguments related to fictitious profits. *Id.* at 1319. "Due process required the district court to provide the O'Dell investors a meaningful opportunity to object to the receiver's determinations and calculations, present evidence and argue their claims and defenses, and challenge the substance of the receiver's proposed distribution plan." *Id.*

In concluding its opinion, the Eleventh Circuit provided precise directions for what should occur on remand:

> When the case returns to the district court, the receiver should submit evidence together with a memorandum of law that supports his position that a particular investor must remit fictitious profits. The receiver should also set out the methodology used to calculate each investor's fictitious profits (including the "fair market value of other

> services" provided by [CNC]). Once the receiver does so, the Sutherlands and the O'Dell investors should then be permitted to meaningfully challenge the receiver's legal theories, factual determinations, and mathematical calculations. Once the district court has reviewed the receiver's filings and the submissions from the Sutherlands and the O'Dell investors, it will be in a better position to determine whether any discovery is warranted. Following briefing (and possibly discovery), the district court must address the substantive arguments made by the Sutherlands and the O'Dell investors, including the contention that their purchase agreements foreclose the receiver's recovery of fictitious profits.

*Id.* at 1319–20 (citation omitted).

**C. The Procedures on Remand**

By the time the case was remanded, the District Judge who handled the case originally had retired from the bench and the District Judge who was then assigned to the case appointed the undersigned to serve as a Special Master. (Doc. 687).

On February 8, 2020, the Receiver filed a motion related to the Martin policy seeking an order confirming this Court's prior order requiring the Sutherlands to either remit their fictitious profits or to assign their policies. (Doc. 725). The Receiver, Al Hill, attached a declaration, in which he stated several important things. First, the Receiver generally explained how CNC endeavored to make money from the life insurance policies: CNC purchased life insurance policies either directly from the individuals insured by such policies or from settlement

companies that act as brokers or resellers. (Doc. 725-1 at ¶ 4). CNC then would either hold the policy or sell it to investors, in whole or in part. *Id.* at ¶ 8. After the insured died, if the death benefit on the policy was greater than the total of the purchase price and the premiums paid, CNC (or the investor who bought the policy from CNC) would make a profit. *Id.* at ¶¶ 4, 8.

The Receiver stated that "[n]one of the receivership companies set aside funds to pay future life insurance premiums. I learned from [CNC] and NVI personnel about the companies' pricing methodology for sales of interests in policies and confirmed that they did not include a pre-paid premium calculation in their pricing decisions." *Id.* at ¶ 11. Furthermore, the Receiver stated that CNC commingled funds from its various investment vehicles: "Monies of all the Receivership Companies were commingled. Funds were often transferred among the companies and to Torchia and other entities that he controlled. With regard to the life insurance policies, [CNC] paid premiums on polices from its general funds, which came from the sale of other policies, receipt of death benefits, sale of promissory notes, receipt of payments on automobile loans, and occasionally some other company source. The company did not maintain separate accounts for proceeds from the sale of notes and the sale of life insurance policies. All funds, from whatever source, were commingled." *Id.* at ¶ 13.

The Receiver explained that the Martin policy had a death benefit of $235,000 and an annual premium of $2,729.16. *Id.* at ¶ 20. NVI sold the Martin policy to the Sutherlands on June 30, 2006, for $155,000. *Id.* at ¶ 21. The Sutherlands never made any premium payments on the Martin policy; instead, NVI (and later CNC) managed and maintained the policy from July of 2006. *Id.* at ¶¶ 22–23. On December 16, 2016, the Receiver notified the Sutherlands that to retain the Martin policy, they would have to remit $25,820.34 in fictitious profits: $21,641.71 in premiums (the total amount paid by NVI and CNC since 2006) and $4,178.63 for the fair value of management services provided ($400 per year for slightly more than 10 years and 5 months). *Id.* at ¶ 24. The Receiver explained how he estimated the fair market value of other services provided by CNC:

> After the Court determined that Direct Investors should reimburse the Receivership Companies for premiums paid on their behalf and for the fair value of policy management services that [CNC] had provided, I contacted Track-Life, LLC, which was in the business of managing life settlement policies for the policy owners, to obtain a quotation for managing [CNC's] life settlement policies. Track-Life quoted $50 per policy per month, which is $600 per year. I knew that part of that charge would include a profit component for Track-Life, and I also considered the savings that could reasonably be expected from handling policy management internally at [CNC] instead of outsourcing it. I determined that $400 per year would be a reasonable amount to charge Direct Investors for the receivership companies' management of their policies, and I considered that figure to be below the market price for such management services.

*Id.* at ¶ 19.

The Sutherlands responded to and opposed the relief sought in the motion. (Doc. 731). They noted that it was "the first instance in which the factual and legal basis for the Receiver's conduct has been presented in a manner beyond arguing that the Sutherlands must do something because the Court has already determined that they should (or that any argument to the contrary would be futile)." *Id.* at 13. They requested discovery and the opportunity to engage in cross-examination. *Id.* at 14.

The Receiver also filed a motion for an order confirming application of the previously approved distribution plan as to the O'Dell Investors (referred to in the motion as the Objecting Investors). (Doc. 732). The Receiver attached a declaration in which he states a number of facts related to the polices of several of the O'Dell Investors. (Doc. 732-2). The Receiver also referenced and relied upon the declaration he submitted in support of the motion related to the Sutherlands, (Doc. 725-1), for facts related to the commingling of assets and the value of management services, (Doc. 732 at 13–15). The O'Dell Investors filed a response in which they, in addition to responding to the substantive arguments put forward by the Receiver, also requested further discovery (noting, like the Sutherlands, that the

Receiver's motion represented the first time that he had set forth the factual and legal basis for his proposed distribution plan). (Doc. 736 at 20).

The Receiver's two motions, and the responses filed by the O'Dell Investors and the Sutherlands, correspond to the instructions from the Eleventh Circuit about what should initially happen in this Court upon remand (recall, as noted above, that the circuit instructed that upon remand, the Receiver should submit evidence together with a memorandum of law supporting his position as it relates to fictitious profits and the methodology used to calculate fictitious profits and the fair market value of other services, and that the Sutherlands and O'Dell Investors should be permitted to meaningfully challenge the Receiver's theories, factual determinations, and mathematical calculations). *Torchia*, 922 F.3d at 1319–20. Following those initial steps, the circuit instructed, this Court should review the filings, at which point it would be in a better position to determine whether any discovery was warranted. *Id.* at 1320.

The Court held a hearing with counsel on April 16, 2020, and ordered the Receiver to produce certain documents the Sutherlands and O'Dell Investors were requesting. (Doc. 742). The Court held additional conferences with counsel for the parties, and additional discovery occurred (including the deposition of the Receiver on August 28, 2020, (Doc. 818-1)). (Docs. 773, 806). The O'Dell Investors

(including the Sutherlands) then filed a brief in support of their objections, (Doc. 818, 819);[4] the Receiver filed a brief in response, (Doc. 820); and the Court heard oral argument, (Doc. 822). At the oral argument, counsel for the O'Dell Investors confirmed that there was no process (including discovery or evidentiary hearings) that he felt that his clients were entitled to and which they had not received. The Court followed up, asking if there was anything left to do from a process standpoint in the case other than issue a final decision on the merits, and counsel for the objectors agreed that there was no additional discovery or hearings to be done. With that in mind, the Court takes up the pending motions.

## II. Analysis

### A. Findings of Fact

There are certain discrete findings of fact that significantly impact the legal analysis that comes below.

#### 1. Payment of Premiums and Commingled Funds

As noted above, CNC purchased life settlement insurance policies that it then either held or sold to investors. (Doc. 725-1 at ¶¶ 4, 8). The Receiver states that CNC "almost always obligated itself to make premium payments on the

[4] The briefs filed at Doc. 818 and Doc. 819 appear identical and were apparently docketed twice as a result of actions by the Clerk's Office.

policies for the life expectancy of the insured plus two years, but in some instances the purchase and sale agreement for a policy would assign the purchaser the obligation to pay all future premiums." *Id.* at ¶ 9. Two examples illustrate this point. William Rumer, one of the O'Dell Investors, paid CNA $100,000 for a fractional interest in a life settlement policy on insured A. Galaviz. (Doc. 732-1 at 20, 24). The agreement that Mr. Rumer signed with CNA states that CNA shall make the timely payment of all required costs, commissions, and insurance premiums related to the policy. *Id.* at 21. Rumer also paid CNC $230,000 to purchase a life settlement policy on insured R. Bennett. (Doc. 732-1 at 10). The agreement Rumer signed with CNC makes clear that Rumer is responsible for making all premium payments. *Id.* at 12.

The evidence shows, however, that none of the receivership companies set aside funds to pay future life insurance premiums when one of those companies was responsible for making the premium payment. (*See* Doc. 725-1 at ¶ 11). The Receiver states that he "learned from [CNC] and NVI personnel about the companies' pricing methodology for sales of interests in policies and confirmed that they did not include a pre-paid premium calculation in their pricing decisions." *Id.* In other words, even for those policies where CNC or one of the

other receivership entities was agreeing to pay the premiums, the entity was not including the cost of those premiums in the pricing decision.[5]

Moreover, the evidence shows, all of the money coming into the receivership companies was commingled. As the Receiver states, "Monies of all the Receivership Companies were commingled. Funds were often transferred among the companies and to Torchia and other entities that he controlled. With regard to the life insurance policies, [CNC] paid premiums on policies from its general funds, which came from the sale of other policies, receipt of death benefits, sale of promissory notes, receipt of payments on automobile loans, and

[5] This evidence comes from one of the declarations of Al Hill, the Receiver. This is a declaration the Receiver filed after the case was remanded from the Eleventh Circuit, but before the O'Dell Investors were afforded the bulk (if not all) of the post-remand discovery. And it was certainly filed before counsel for the O'Dell Investors deposed the Receiver on August 28, 2020. However, the O'Dell Investors were afforded the opportunity to file a brief in support of their objections after discovery closed, (Doc. 819), and they cite to no facts in that brief to call into question the Receiver's statement that the entities did not include the cost of the premiums when pricing those polices for sale. When I asked counsel for the O'Dell Investors about this at oral argument, he essentially responded that he could not find any evidence in the discovery to support the notion that the Receiver did the analysis he describes in the paragraph of his declaration cited above. But the fact of the matter is that the declaration is evidence, and there is no competing *evidence* to contradict the Receiver's statement. As such, the evidence is not contradicted, and the Court accepts it—as it does for other statements in the Receiver's declaration that, after discovery, are uncontradicted.

occasionally some other company source. The company did not maintain separate accounts for proceeds from the sale of notes and the sale of life insurance policies. All funds, from whatever source, were commingled." *Id.* at ¶ 13. The O'Dell Investors cite to no evidence in their post-discovery brief to the contrary.

This commingling of funds was necessary for the receivership entities to survive. As the Receiver states, CNC's end-of-year outstanding debt for every year from 2010–2015 "was far greater than the value of its insurance policies." (Doc. 725-1 at ¶ 16). As such, the Receiver states, the "companies could only continue in business so long as enough new investor money was received to pay operating expenses and pay off prior investors as interest payments came due or their promissory notes matured." *Id.* at ¶ 17. "Similarly, both the Direct and Indirect Investors' life insurance policies were kept in force using commingled funds. The life insurance policy investors would have had no policy in force had [CNC] not paid the premiums with funds derived in part from the other investors." *Id.*

**2. Fair Market Value of Other Services Provided by CNC**

As noted above, one of the issues in this case is whether the O'Dell Investors should have to remit to the Receiver the fair market value of other services provided by CNC (sometime referred to in the briefs as management fees). And for purposes of the remand, the Eleventh Circuit expressly instructed that the

Receiver should set out the methodology used to calculate the fair market value of those services. *Torchia*, 922 F.3d at 1319–20. The Receiver has done so in a declaration:

> After the Court determined that Direct Investors should reimburse the Receivership Companies for premiums paid on their behalf and for the fair value of policy management services that [CNC] had provided, I contacted Track-Life, LLC, which was in the business of managing life settlement policies for the policy owners, to obtain a quotation for managing [CNC's] life settlement policies. Track-Life quoted $50 per policy per month, which is $600 per year. I knew that part of that charge would include a profit component for Track-Life, and I also considered the savings that could reasonably be expected from handling policy management internally at [CNC] instead of outsourcing it. I determined that $400 per year would be a reasonable amount to charge Direct Investors for the receivership companies' management of their policies, and I considered that figure to be below the market price for such management services.

(Doc. 725-1 at ¶ 19). The O'Dell Investors point to no contradictory evidence, and the Court finds the Receiver's statement credible.

**B. Conclusions of Law**

The Eleventh Circuit has held that "a district court has broad powers and wide discretion to determine relief in an equity receivership." *S.E.C. v. Wells Fargo Bank, N.A.*, 848 F.3d 1339, 1343–44 (11th Cir. 2017) (internal quotation marks omitted); *see also S.E.C. v. Enterprise Tr. Co.*, 559 F.3d 649, 652 (7th Cir. 2009) ("District judges possess discretion to classify claims sensibly in receivership

proceedings."). "This discretion derives from the inherent powers granted an equity court to fashion relief." *Wells Fargo Bank*, 848 F.3d at 1344. And as the circuit noted on the appeal in this case, courts "now regularly appoint receivers to manage the entities used in Ponzi schemes, collect and sell any assets connected to the fraud, and distribute the proceeds to defrauded investors." *Torchia*, 922 F.3d at 1311. "The goal of such receiverships is to grant fair relief to as many investors as possible." *Id.*

**1. Direct Investors Gravitt, Rumer, and the Sutherlands**

The primary issue with regard to the Direct Investors is whether these investors, who elected to keep their policies (the practical effect of which is that, when the insured dies, the investor will be entitled to collect on the policy) when offered that choice by the Receiver, should be required to remit their "fictitious profits" to the Receiver. The fictitious profits have two components—any premiums the receivership entity paid on the policy to keep it in force, and the management fees the receivership entity paid to manage the policy. In accordance with the Eleventh Circuit's instructions, the Receiver filed a declaration setting forth the amount of the premiums (when applicable) and the management fees as to each relevant policy. (*See* Doc. 732-2 at ¶ 6 (Gravitt's fictitious profits for the Mader policy); ¶¶ 11–12 (Rumer's fictitious profits on the Bennett policy); ¶ 13

(Rumer's fictitious profits on the Galaviz policy); ¶ 17 (R. Sutherland's fictitious profits on the Early policy); ¶ 18 (K. Sutherland's fictitious profits on the Burke policy); ¶ 19 (K. Sutherland's fictitious profits on the Manzaneres policy); ¶ 20 (the Sutherlands' fictitious profits on the Kay policy); ¶ 21 (K. Sutherland's fictitious profits on the Rongey policy).[6]

Before getting to the heart of the O'Dell Investors' objections, the Court first addresses the Receiver's argument that the Sutherlands waived any arguments as to any policies other than the Martin policy by paying the fictitious profits on those other policies without objection and because the Sutherlands did not address those policies on appeal. (Doc. 732 at 9; Doc. 820 at 7–8). This seems like an argument that would have been better suited to the Eleventh Circuit in the course of the prior appeal. Because at this point, the remand from the Eleventh Circuit requires the Receiver to set forth the methodology used to calculate each investor's fictitious profits (which the Receiver has done as to all of the relevant Sutherland policies), requires the Court to allow the O'Dell Investors (the Sutherlands were part of that group on appeal)[7] to challenge the Receiver's position, and requires the Court to

[6] The Court addresses the Sutherlands' arguments about the Martin policy separately below.

[7] To be clear, there were two consolidated appeals that form the basis for

address the substantive arguments made by the Sutherlands and the other O'Dell Investors. *Torchia*, 922 F.3d at 1319–20. Given that the Sutherlands were parties to both of the consolidated appeals, and given the Eleventh Circuit's clear instructions, I see no basis for declining to consider the Sutherland's arguments as to the non-Martin policies.[8]

The Court begins with the trickier of the two components of fictitious profits—the premiums paid by CNC or the other receivership entities. The objectors contend that the Receiver is not entitled to the premiums for those investors who signed agreements with CNC in which CNC was obligated to pay

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the Eleventh Circuit's decision in *Torchia*. Richard and Katherine Sutherland appealed this Court's July 12, 2017 order related to the Martin policy, (Doc. 484), in appellate case number 17-13650-F. (Docs. 503, 509). A larger group of investors (the O'Dell Investors) appealed this Court's August 8, 2017 order, (Doc. 501), in appellate case number 17-13651-F. (Docs. 504, 510). The Sutherlands were appellants in both cases. (Docs. 503, 504). As such, I read the instructions from the Eleventh Circuit as to the O'Dell Investors as applying to the Sutherlands and all of their polices—and not just the Martin policy that they separately appealed.

[8] The Receiver notes that he is "uncertain as to whether [Tony] Duscio is still among the Objecting Investors." (Doc. 732 at 5). And while Mr. Duscio was among the appellants in case number 17-13651-F, (Docs. 504, 510), Mr. O'Dell has since withdrawn as his attorney, (Docs. 683, 696). As such, the present objections do not technically apply to Mr. Duscio. Nevertheless, the Receiver has set forth the basis for how he calculated Mr. Duscio's fictitious profits, (Doc. 732-2 at ¶¶ 3, 4), and the analysis that follows would apply equally to Mr. Duscio as it does to the present objectors.

the premiums on the policy. Their argument, understandably, sounds in contract—the agreement the investor entered into with CNC required CNC to pay the premiums on the policy. (Doc. 819 at 5–10).

To start, the Court agrees that a number of the investor agreements did require CNC to pay the cost of the premiums. The Rumer contract related to the Bennett policy noted above is a good example. But there are others as well. (*See, e.g.*, Doc. 732-1 at 39–40 (requiring CNA to pay the premiums on the Burke policy related to objector Katherine Sutherland)). The problem for the objectors, however, is that the money CNC and the other entities used to pay those premiums came from other victims. Indeed, the evidence shows that the funds from all of the various schemes were commingled. As the Receiver stated, "[CNC] paid premiums on policies from its general funds, which came from the sale of other policies, receipt of death benefits, sale of promissory notes, receipt of payments on automobile loans, and occasionally some other company source. The company did not maintain separate accounts for proceeds from the sale of notes and the sale of life insurance policies. All funds, from whatever source, were commingled." (Doc. 725-1 at ¶ 13). In other words, the premiums were being paid from funds from both other life policy investors, as well as from those investing in the promissory notes. As the Receiver succinctly put it in one of his declarations: "The life

insurance policy investors would have had no policy in force had [CNC] not paid the premiums with funds derived in part from the other investors." *Id.* at ¶ 17.[9]

And because this is a proceeding involving an equitable receivership (as opposed to, say, a breach of contract claim), the commingling matters. *See, e.g.*, *S.E.C. v. Huber*, 702 F.3d 903, 906–07 (7th Cir. 2012) ("When investors' funds are commingled, none being traceable to a particular investor, no part of whatever funds are recovered is property of any investor. Instead each investor is a creditor, and has merely a claim to a share of the funds that is appropriate in light of the relative size of his investment and other relevant circumstances."); *Liberte Cap. Grp. v. Capwill*, 229 F. Supp. 2d 799, 804–05 (N.D. Ohio 2002) (rejecting a tracing theory of disbursement—even where the funds used to pay premiums on life polices were

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[9] The notion that the funds might have been commingled, of course, is not new to this case. Indeed, this Court's prior orders have assumed it, which was part of the problem on appeal. As the Eleventh Circuit noted, "On appeal, the receiver argues that such premiums and 'other services' should be considered fictitious profits because [CNC] paid for them using comingled funds. It is not clear on this record, however, whether the receiver provided evidence that [CNC] used comingled funds to pay for the Martin policy's premiums or for the 'other services' it provided to the Sutherlands. It is similarly unclear whether the Sutherlands had a meaningful opportunity to challenge the receiver's conclusion that they profited from comingled funds." *Torchia*, 922 F.3d at 1313 n.1. Now there is evidence, in the form of the Receiver's sworn declaration. And even after being given the opportunity to engage in discovery, involving both documents and the Receiver's deposition, the objectors point to no evidence in their post-discovery brief calling into question the Receiver's statements in his declaration.

placed in a segregated account—because the "policies were saved from lapsing by the use of other investor funds in the Receivership which were advanced for premium payments"), *aff'd*, 148 F. App'x 426 (6th Cir. 2005).

The Court is sympathetic to the argument of the O'Dell Investors—many of them signed contracts with the receivership entities requiring those entities to pay the premiums, and now the Receiver wants that money back. It doesn't sound fair, and it is not fair. But the situation is *especially* unfair for those other investors who paid the funds into the scheme that allowed CNC to continue making the premium payments. Without those other investors, the policy itself would have lapsed. And the policy itself is the core of the investment. Indeed, the Direct Investors were, if anything, put in a position superior to the other investors because they were given a choice about whether they wanted to retain their policies (and remit back to the Receiver the amount of the fictitious profits) or surrender the policies to the Receiver. To allow them to keep the policies, and to "keep" the premium payments that were funded by other victims, would not be equitable. And equity is the goal. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership. This discretion derives from the inherent powers of an equity court to fashion relief.") (citations omitted).

The fact that CNC was not calculating the cost of the premiums when making their pricing decisions is also relevant. (Doc. 725-1 at ¶ 11 (noting that CNC "did not include a pre-paid premium calculation in their pricing decisions")). None of these investors were paying anything more to have CNC cover the cost of the premiums than they would have paid if the investor was responsible for the premiums—rather, the cost of the premiums was simply being passed along to the general fund populated by the money received from other investors—many of whom were not even investing in life settlement policies. Under these facts, it is simply not enough to point to the contract. Indeed, other investors have contracts that are also not being fulfilled. Some promissory note investors were promised, for example, nine percent interest per year for three years pursuant to a secured redeemable note. (*See, e.g.,* Doc. 819-1 at 102–07). Many contracts with CNC are going unfulfilled. And the Direct Investors should not be elevated over other victims simply because there is a provision providing for CNC to pay for the premiums, at least where the evidence shows that those premium payments were never calculated in the cost of the policy and the payments came from other investors' money.

The O'Dell Investors rely heavily on the Eleventh Circuit's opinion in *Perkins v. Haines*, 661 F.3d 623 (11th Cir. 2011). (Doc. 819 at 9, 15). In *Perkins*, the

court addressed certain transfers to investors that occurred prior to the collapse of a Ponzi scheme and, specifically, whether those transfers were "fraudulent transfers" under provisions of the bankruptcy code and state law. 661 F.3d at 625. The court explained the state of the law in these terms:

> In the case of Ponzi schemes, the general rule is that a defrauded investor gives "value" to the Debtor in exchange for a return of the principal amount of the investment, but not as to any payments in excess of principal. Courts have recognized that defrauded investors have a claim for fraud against the debtor arising as of the time of the initial investment. Thus, any transfer up to the amount of the principal investment satisfies the investors' fraud claim (an antecedent debt) and is made for "value" in the form of the investor's surrender of his or her tort claim. Such payments are not subject to recovery by the debtor's trustee. Any transfers over and above the amount of the principal—*i.e.*, for fictitious profits—are not made for "value" because they exceed the scope of the investors' fraud claim and may be subject to recovery by a plan trustee.

*Perkins*, 661 F.3d at 627 (internal quotation marks and citations omitted). The O'Dell Investors argue that the obligation for CNC to pay the premiums was part of the principal investment and, as such, they are entitled to a set-off in the amount of those premium payments. (Doc. 819 at 9–10).

I disagree. *Perkins* holds than an investor in a Ponzi scheme has given value to the debtor in the amount of the principal investment, but not as to payments in excess of principal. Here, for all the reasons explained above, the principal investment is best understood as the amount the direct investor paid for the life

settlement policy. And not the amount paid for the life insurance policy *plus* the amount that CNC paid in premiums. Again, the result here might be different if the funds to pay for the premiums were not coming from other investors or if CNC had factored the cost of the premiums into what the investor paid for the policy.[10] But the money for the premiums did come from other investors, and CNC did not account for the cost of those premiums in what the investor paid. As such, the amounts paid for those premiums were not part of the principal amount of the investment.[11] And therefore the direct investors who elected to retain their policies should have to remit to the Receiver the amount of those premiums.

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[10] Of course, the contract says that part of what the investors paid for was having CNC make the premium payments. But because this is a matter of equity, the Court can look to what *actually* happened, as opposed to what was *supposed* to happen. In actuality, the investors paid nothing extra for the right to have CNC make the payments because CNC did not factor them into its pricing decision, and the premium payments came from cash infusions from other investor victims.

[11] The *Torchia* panel briefly touched on *Perkins*, noting that *Perkins* is "generally instructive on a receiver's ability to recover fictitious profits" but that "it does not state or hold that premiums paid on a life insurance policy or 'other services' provided in administering such a policy are necessarily fictitious profits." 922 F.3d at 1313 n.1. The court went on to note the Receiver's argument that such premiums and "other services" should be considered fictitious profits because of the commingling, but simply noted that, at the time, that the record was unclear and left the issues for determination on remand. Now, I find the Receiver's argument about commingling both supported by the record and persuasive, as well as consistent with *Perkins*.

The parties do not spend much, if any, time separately arguing the second component of fictitious profits, the value of the management fees. The Eleventh Circuit instructed that the Receiver should detail those amounts and explain how they were calculated. *Torchia*, 922 F.3d at 1319–20. As explained above, the Receiver has done so. (Doc. 732-2 at ¶¶ 4, 6, 12, 13, 17–20; Doc. 725-1 at ¶ 19). And the Court sees no reason to treat them differently from the amounts paid in premiums. The receivership entities were spending time and resources to keep the policies current, and those amounts are properly remitted to the Receiver for those investors who elected to keep their policies.

The O'Dell Investors argue under state law that "the premium payments and services received were for reasonable equivalent value and in good faith." (Doc. 819 at 14–15). Section 18-2-78(a) of the Georgia Code provides that "[a] transfer or obligation is not voidable under . . . Section 18-2-74 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." Georgia law further provides that "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied." O.C.G.A. § 18-2-73(a). The O'Dell Investors argue that because the contracts required CNC to pay the premiums, "the premium payments were made in satisfaction of

antecedent debts by the Defendants" and "none of the premium payments made are recoverable [by the Receiver] because they constitute a reasonable equivalent value." (Doc. 819 at 14–15).

The problem with the argument is that the Receiver is not seeking to void a transfer or claw anything back. Rather, he is simply seeking to determine the amount of the principal investment (and, from there, the amount of the fictitious profits) for those who elected to keep their policies. And as noted above, the premium payments on the policies should not be included in determining the amount of that principal investment (meaning the premium payments should be included within the fictitious profits) because CNC paid the premiums from investments from other victims. For all the reasons stated above, the objections of the Direct Investors should be **OVERRULED**.

**2. The Martin Policy**

The Sutherlands purchased the Martin policy from NVI in 2006 for $155,000. (Doc. 725-1 at ¶ 21). The agreement provides that the Sutherlands would be responsible for making premium payments on the policy and that NVI would be responsible for monitoring and billing the Sutherlands for the premiums. (Doc. 297 at 8–9). Although the contract required the Sutherlands to cover the premiums, they never made any premium payments. (Doc. 725-1 at ¶ 22). Instead, NVI and

CNC advanced the premiums in the amount of $21,641.71 between 2006 and 2016. *Id.* at ¶ 24. The Sutherlands objected to having to remit fictitious profits, and this Court overruled those objections. (Doc. 484). The Martins appealed in case number 17-13650-F, (Docs. 503, 509), and the Eleventh Circuit reversed in *Torchia*, finding that the Sutherlands were not afforded the process they were due.

On remand, the Receiver filed a motion for an order confirming the directive to the Sutherlands to either remit the fictitious profits or to relinquish the policy to the Receiver. (Doc. 725). The Sutherlands responded, (Doc. 731), and the Receiver filed a reply, (Doc. 734). After discovery, the O'Dell Investors filed a brief in support of their arguments, and the Receiver filed a response. (Docs. 819, 820). However, the O'Dell Investors do not address the Martin policy at all in the post-discovery brief. The Receiver takes this omission to mean that the Sutherlands "apparently concede that they are entitled to no relief on that policy." (Doc. 820 at 8).

I do not interpret the lack of discussion of the Martin policy in the post-discovery brief the same way. Indeed, there is a pending motion regarding the Martin policy, (Doc. 725), which the Sutherlands opposed, (Doc. 731). Much of that pre-discovery opposition addresses the process the Sutherlands were requesting at the time, and those arguments are now moot in light of the fact that counsel

confirmed to the Court at oral argument that his clients have received all of the process they requested through written discovery and deposing the Receiver. Rather than viewing the lack of any discussion about the Martin policy as a waiver or concession of that issue, the Court will simply resolve the motion as to the Martin policy, (Doc. 725), as it was originally briefed and argued.

As noted above, the Sutherlands were required to make the premium payments on the Martin policy. (Doc. 297 at 8–9). Their argument related to fictitious profits is, therefore, significantly weaker than the argument of those investors who had contracts where one of the receivership entities was required to make the premium payments. Nevertheless, even without this fact—even if the obligation to make the payments on the Martin policy had been allocated to NVI or CNC—I would recommend resolving the issue the same way I set forth above. Funds were commingled as to the Martin policy, and premiums were paid off the backs of other investors, just as they were as to all of the other Direct-Investor policies.[12]

[12] The Receiver states in his declaration that CNC's outstanding debt at the end of each year between 2010 and 2016 was far greater than the value of its insurance policies. (Doc. 725-1 at ¶¶ 15–17). He bases this statement on two alternative sources—the expert report of Susan Hartman, and an independent assessment of the polices using a discounted-cash-flow methodology. *Id.* The Sutherlands complained, pre-discovery, that the solvency of the entities has never

The Sutherlands do make one unique argument as to the Martin policy that needs to be separately addressed. They argue that on June 30, 2016, in correspondence Mr. Sutherland had with the Receiver, the Receiver represented that "CNC claims no interest in [the Martin] policy and no servicing fee. The file will be sent to you." (Doc. 731 at 8; Doc. 404 at 34). However, as the Receiver points out, the Sutherlands purchased the Martin policy from NVI, and NVI did not become part of the receivership until October 25, 2016. (Doc. 734 at 6; Doc. 253). As such, when the Receiver communicated to the Sutherlands on June 30, 2016, that

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been "established nor subjected to cross-examination." (Doc. 731 at 3). Now that the Sutherlands have received all of the process they were entitled to, there is nothing in their post-discovery brief challenging or calling into question the Receiver's declaration regarding solvency. Nor, as the Sutherlands argue, does the Hill declaration regarding solvency purport "to rely entirely on the work of Susan Hartman." *Id.* at 4. As the Receiver makes clear, his statement regarding solvency is also independently based on his own valuation of the polices. (Doc. 725-1 at ¶ 15). And the Sutherlands, again, after discovery, identify no evidence contrary to the Receiver's declaration. As such, the Court accepts the Receiver's declaration that the entities had yearly debts that far exceeded the value of the policies. The Court therefore finds it unnecessary to dig further into whether Ms. Hartman's opinions are consistent with those of Mr. Hager and Mr. McEntyre, expert witnesses who were retained by Defendant Torchia earlier in this litigation. (*See* Doc. 731 at 4–5).

The Sutherlands also suggest that the Receiver's declaration contains and appears to be based on hearsay. (Doc. 731 at 10). They do not identify specific statements that they contend are hearsay, and the Court therefore does not address this objection any further.

CNC claimed no interest in the Martin policy, that was accurate. Later, however, when the receivership was expanded to include NVI, the Receiver had a basis for demanding premiums and servicing fees as to the Martin policy. And the Receiver cogently explained this to Mr. Sutherland in an email on January 3, 2017:

> Mr. Sutherland: As you are likely aware, the Martin policy is/was part of the National Viatical portfolio, so it was not listed as a Credit Nation policy at the time of your request. Further, at the time of our correspondence, NVI was not subject to the receivership order—now it is. So, my statement on June 30 is correct that Credit Nation does not claim any interest in the policy. But, NVI does, to the extent of the fictitious profits outlined in our letter. I note that there were several other NVI policies on your list (Buttz, Garrone, Lalani, Robbins, Tolchin), but you had paid all premiums on those. You did not pay the premiums on the Martin policy, hence the current demand.

(Doc. 734-1 at 2). The fact that the Receiver accurately told Mr. Sutherland in June of 2016 that CNC claimed no interest in the Martin policy has no bearing on the Receiver's subsequent demand for fictitious profits *after* the receivership was expanded to include NVI. Particularly as to a policy where the Sutherlands were obligated to pay the premiums and never did. For the reasons stated above as to the specifics of the Martin policy, and as to the Direct Investors in general, I recommend that the Sutherlands' objections as to the Martin policy be **OVERRULED** and that the Receiver's motion for an order confirming the

directive to the Sutherlands to pay fictitious profits or relinquish the policy to the Receiver, (Doc. 725), be **GRANTED**.

**3. The Promissory Note Investors**

The O'Dell Investors include—in addition to the Direct Investors in life settlement policies addressed above—certain individuals who invested in promissory notes. (*See* Doc. 819 at 17–36 (addressing the promissory notes of investors S. Gregory, J. Gregory, Hield, Hoyer, T. Jones, S. Jones, Rumer, and K. Sutherland)). The Receiver proposed, and this Court adopted, the rising tide method of distribution. (Doc. 501 at 27). Additionally, this Court adopted the Receiver's recommendation to consolidate an investor's individual accounts for purposes of determining that investor's distribution. *Id.* at 27–29. So, for example, if an investor had one promissory note for $150,000 for which he received interest payments of $25,000, and another promissory note for $100,000 for which he received no interest payments, his total claim would be based on an investment of $250,000 for which he received interest payments in the amount of $25,000. Under the rising tide theory, non-principal payments made to an investor are considered part of the distribution received by an investor and are subtracted from the amount of the receivership assets the investor would otherwise be paid had there been no prior payments. (Doc. 433 at 22). So, for example, if an investor had a

$100,000 promissory note, and received interest payments of $49,500, that investor would receive no additional distribution because the amount of interest he received is greater than his calculated distribution (which, again, is approximately 30%). *Id.* at 24.

The O'Dell Investors raised due process arguments related to the promissory notes on appeal. For example, they noted that consolidating each investor's investment into a single claim violated due process, and they argued that they were prohibited from raising certain defenses in the district court. (Appeal No. 17-13651-F, Appellants' Brief, at 53, 60–61). The Eleventh Circuit, however, did not address the arguments specific to the Promissory Note Investors. Instead, the appellate opinion focuses on how the O'Dell Investors were deprived of due process with regard to fictitious profits (a concept not relevant to the Promissory Note Investors). *See Torchia*, 922 F.3d at 1319 ("The district court declined to substantively address the O'Dell investors' arguments related to fictitious profits. This was error. Due process required the district court to provide the O'Dell investors a meaningful opportunity to object to the receiver's determinations and calculations, present evidence and argue their claims and defenses, and challenge the substance of the receiver's proposed distribution

plan." (internal citations omitted)). And the circuit's instructions about what should happen on remand are entirely centered on fictitious profits:

> When the case returns to the district court, the receiver should submit evidence together with a memorandum of law that supports his position that a particular investor must remit fictitious profits. The receiver should also set out the methodology used to calculate each investor's fictitious profits (including the "fair market value of other services" provided by [CNC]). Once the receiver does so, the Sutherlands and the O'Dell investors should then be permitted to meaningfully challenge the receiver's legal theories, factual determinations, and mathematical calculations. Once the district court has reviewed the receiver's filings and the submissions from the Sutherlands and the O'Dell investors, it will be in a better position to determine whether any discovery is warranted. Following briefing (and possibly discovery), the district court must address the substantive arguments made by the Sutherlands and the O'Dell investors, including the contention that their purchase agreements foreclose the receiver's recovery of fictitious profits.

*Id.* at 1319–20 (internal citation omitted). Again, the concept of fictitious profits (the amount of policy premiums and services provided to direct investors) has no applicability to a Promissory Note Investor.

The Receiver argues that the Court should not revisit its prior rulings with regard to the Promissory Note Investors because the "Eleventh Circuit did not find fault with this Court's decision on the distribution plan with regard to the Promissory Note Investors. Indeed, no part of the appellate decision even touches on the Promissory Note Investors." (Doc. 820 at 21). Although I think it is a close

question, I disagree. Eleventh Circuit case law on this point is clear: "A trial court, upon receiving the mandate of an appellate court, may not alter, amend, or examine the mandate, or give any further relief or review, but must enter an order in strict compliance with the mandate." *United States v. Stein*, 964 F.3d 1313, 1322 (11th Cir. 2020) (internal quotation marks omitted). Here, the instructions from the Eleventh Circuit about what should happen on remand say nothing of the Promissory Note Investors and focus on the issue of fictitious profits—which do not apply to Promissory Note Investors. That being said, a district court is free to address "those issues not disposed of on appeal." *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985); *see also Emergency Recovery, Inc. v. Hufnagle*, ---F. 4th---, 2023 WL 5191149, at *7 (11th Cir. Aug. 14, 2023) ("Although a mandate is completely controlling as to all matters within its compass, a district court remains free to pass upon any issue which was not expressly or impliedly disposed of on appeal." (internal quotation marks omitted)). The Eleventh Circuit held that the O'Dell Investors did not receive due process. Although the court's discussion and instructions for what should occur on remand are framed in terms of the Direct Investors, there is no reason to infer that the court impliedly found that the claims of the Promissory Note Investors were without merit. As such, although I think it

is close, I do not think the promissory note arguments are outside the scope of the mandate.

That being said, the O'Dell Investors identify nothing that occurred during the post-remand discovery that would lead me to recommend anything different vis-à-vis the Promissory Note Investors than what the Court did before. They argue that the method adopted by the Court gives the Promissory Note Investors "no value" for the interest they were supposed to receive under their notes. (Doc. 819 at 17). This, similar to the arguments above raised by the Direct Investors, is a plea for the Receiver to make good on the contract the investor had with CNC. But that cannot happen. There is not enough money left for everyone to get the benefit of their contract. Given the commingling of assets described above, and that fact that interest payments to investors were being paid with new investments, (Doc. 725-1 at ¶¶ 13, 14, 17), it would not be equitable to include the value of those interest payments when considering the scope of the individual's investment.

Nor is this result, as the O'Dell Investors argue, inconsistent with *Perkins*. (Doc. 819 at 17–18). Indeed, *Perkins* holds that a defrauded investor gives "value" to the debtor "in exchange for a return of the principal amount of the investment, but not as to any payments in excess of principal." 661 F.3d at 627. Here, the principal amount of the investment is the amount of the note that the investor paid,

and does not include the interest "payments" above and beyond that principal. The goal of the receivership process should be to return as many of the investors as possible to as close to the place they were in before they invested—not to where they hoped to be if the investment had panned out. None of the options are fair—everyone is a victim. But the Court's plan, using the rising tide method, seems to be the least unfair. And it is certainly not inconsistent with *Perkins*.[13]

Finally, the O'Dell Promissory Note Investors argue that the Receiver's claims for interest payments made prior to 2012 are barred by the Georgia statutes of limitations and repose. (Doc. 819 at 35–36). This purely legal argument was addressed previously with regard to arguments Direct Investors made about void fraudulent transfers in the context of fictitious profits:

> Finally, the O'Dell Investors argue that the Receiver is prohibited from clawing back interest payments made before the statute of limitations for fraudulent transfer actions. The O'Dell Investors' argument again appears to be based on the false assumption that the

[13] Nor have the O'Dell Investors offered any argument, based on the due process they have now received, for why an investor with multiple accounts should not have those accounts consolidated for purposes of determining the distribution. The Court's prior analysis on this issue, (Doc. 501 at 27–29), is persuasive, and nothing has changed that would lead me to recommend deviating from it. *See C.F.T.C. v. Equity Fin. Grp.*, No. Civ. 04-1512 RBK AMD, 2005 WL 2143975, at *26 (D.N.J. Sept. 2, 2005) (agreeing with the receiver that not consolidating would permit an investor who used different investment vehicles and received funds in one account to obtain a disproportionately large distribution when compared to single-account investors).

> recovery of Fictitious Profits is an attempt to "claw back" or void a fraudulent transfer. The question before the Court is only the fair and equitable division of the assets of the Receivership. There is no statute of limitations on fairness and equity.

(Doc. 501 at 23 (footnote omitted)). The same analysis should continue to apply. The Receiver is not clawing back or voiding a transfer of interest. Rather, the Court is simply taking the interest payments into consideration in determining the proper method of distribution.

For all the reasons stated above, I recommend that the O'Dell Investors' objections be **OVERRULED** and that the Receiver's motion to confirm application of the distribution plan at to the O'Dell Investors, (Doc. 732), be **GRANTED**.

**4. Motion for Disgorgement of Funds**

The O'Dell Investors filed a motion for disgorgement of funds. (Doc. 676). The Receiver filed a response, (Doc. 680), and the O'Dell Investors filed a reply, (Doc. 688). As explained below, I recommend that the motion be denied.

The O'Dell Investors seek two things. First, they contend that the Receiver should have to disgorge all fees and expenses paid by the receivership associated with the Receiver's allegedly improper conduct and pursuit of actions in violation of due process. (Doc. 676 at 9–12). Second, they contend that the Receiver should have to disgorge all fictitious profits and policies improperly received from every

investor (this request is not limited to the O'Dell Investors—they purport to make this request on behalf of every investor affected by CNC and the receivership entities). *Id.* at 12–14. In support, the O'Dell Investors recount a good bit of the now-lengthy history of this case, (Doc. 676 at 1–9), to make what boils down to a fairly straightforward argument: due process violations occurred, those violations occurred under the watchful eye and even at the direction of the Receiver, and the receivership should not be liable for the fees and expenses the Receiver incurred in the course of this allegedly improper conduct. *Id.* at 1–12. Further, the O'Dell Investors argue, the Receiver should not be allowed to retain the policies and fictitious profits that he obtained through a process that did not afford them the due process the law requires. *Id.* at 12–14.

And the Receiver's response is, for the most part, similarly distilled down to a rather concise and direct argument: the Receiver followed the directions of the Court. (Doc. 680). The Receiver notes that, while the Eleventh Circuit ultimately disagreed, the due process arguments were presented to this Court and they were rejected. *Id.* at 2–9. The Receiver argues that the O'Dell Investors have failed to cite a case supporting the contention that a receiver's fees and expenses should be disgorged because a district court's order got reversed on appeal, and he maintains that but for his actions, the investor victims would have lost the *entirety* of their

investments. *Id.* at 9–10. The O'Dell Investors filed a reply, and the matter is now ripe for review.

"The district court appointing the receiver has discretion over who will pay the costs of the receiver." *Elliott*, 953 F.2d at 1576. "The court in equity may award the receiver fees from property securing a claim if the receiver's acts have benefited that property," and it is appropriate "for a receiver to be paid from the proceeds of secured property if the receiver has benefitted that property." *Id.* And although the O'Dell Investors point out that they never requested or consented to the appointment of the Receiver, (Doc. 676 at 11), it is the Court's responsibility to protect the Receiver's right to be paid for his services and reimbursed for his proper costs and expenses. *Elliott*, 953 F.2d at 1576.

The necessary premise of the O'Dell Investors' argument—that the Receiver violated their rights to due process (or, more generously to the investors, that the Receiver led this Court down the primrose path toward a violation of their rights)—is fundamentally flawed. No doubt, errors occurred in this case. But they were the Court's errors. Although the circuit noted that the Receiver had the burden of proof, and the Receiver, for example, failed to submit sufficient evidence for how he calculated fictitious profits, *Torchia*, 922 F.3d at 1318, the legal error lied with the Court in requiring the investors to object to the conclusory demands

"while simultaneously denying their request for discovery," *id.*; *see also id.* (noting that the "district court" did not allow the Sutherlands to meaningfully argue certain claims or defenses); *id.* (noting that due process required "the district court" to more fully adjudicate the Sutherlands' claims and defenses); *id.* at 1319 (noting that the "district court" declined to substantively address the O'Dell Investors' arguments related to fictitious profits).

The Receiver is not an adverse party in these proceedings, but rather "an officer of the court." *Elliott*, 953 F.2d at 1577. The Court appoints a receiver to manage and oversee a process that the Court has neither the resources nor expertise to do itself, but the Court bears the responsibility to "independently approve the Receiver's legal and factual findings." *Id.* The buck, so to speak, ultimately stops with this Court.

This is especially so given that the errors that occurred here were ones of due process—procedures (discovery is a perfect example) that were wholly and singularly within the Court's discretion. This Court considered and rejected the O'Dell Investors' due process arguments. (Doc. 501 at 17–23). Erroneously, as it turns out. But the error lies here. Had this Court ordered the Receiver to more fully explain fictitious profits, or ordered the discovery in the first instance that ultimately occurred after remand, the Receiver would have complied. But the fact

that the Court did not do so does not suggest that the Receiver's actions were in some way not for the benefit of the receivership.

This case was not handled in an error-free manner. And from that standpoint, the Court can understand the O'Dell Investors' frustrations. But everyone involved in this process is human, so mistakes will occur. And the process is designed to allow those mistakes to be corrected, which they were when the circuit reversed this Court's prior orders. On remand, I have endeavored to provide the investors with every bit of process they requested.[14] The errors, though, simply and directly, were the Court's errors. I am not aware of a single instance where the Receiver acted in a manner inconsistent with his mission to preserve assets that would allow for the most equitable distribution, and I see no reason at all to disgorge any of the Receiver's fees.[15]

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[14] I recognize that I have likely contributed to the O'Dell Investors' frustrations. Although I believe I have now afforded them the process they requested and deserve, I did not move the case nearly as quickly as I should have. That fault is mine alone and certainly should not in any way be imputed to the Receiver, who no doubt shares in that component of the investors' frustration.

[15] To be sure, not every investor is going to like the position the Receiver takes on a particular issue. Indeed, that result is all but guaranteed, because the individual investors often have positions that are contrary to one another. There is a limited pot, and each investor wants what is in his or her best interest. The Court, with the Receiver's able assistance, is tasked with trying to arrive at the least inequitable distribution for the group of investors as a whole.

The O'Dell Investors rely on *Elliott*, but nothing in that case suggests a contrary result. There the district court apportioned the costs of the receiver between secured and unsecured creditors, noting that when certain of the receiver's services benefit solely unsecured property, "only that property is liable for the costs." 953 F.2d at 1578. The Court noted that the "secured investors are not liable for the Receiver's time spent on activities adverse to them, for these activities benefitted the unsecured creditors." *Id.* Here, the Court has not segregated the Receiver's fees between various claimants (for example, between Direct Investors and Promissory Note Investors), and nobody has suggested that approach. And because the remaining assets will be distributed across all of the investors (recall, even the Direct Investors had the option to either keep their policies or turn them in to the Receiver), all of the investors ultimately benefited from the Receiver's actions in maintaining those assets—even though, at times, the Receiver necessarily took a position that benefited one group of investors while disadvantaging another.[16]

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[16] Nor does *Tucker v. Baker* help the O'Dell Investors. (Doc. 676 at 10 (citing 214 F.2d 627 (5th Cir. 1954))). There, even though the court of appeals held that the district court erred in even appointing the receiver, the remedy was not to disgorge the receiver's fees. Rather, the appellate court held that the receiver's fees should be taxed to the "parties provoking the receivership" except to the extent that "the

In short, none of the due process errors that occurred in this case should result in the fees of the Receiver being reduced or disgorged. Those errors lie with the Court. Nor should the Receiver be required to disgorge fictitious profits or polices. As noted above, I recommend that all of the O'Dell Investors' objections, as well as those of the Sutherlands related to the Martin policy, be overruled. As such, no fictitious profits were inappropriately collected, and no policies were wrongly turned over. There are, quite simply, no fictitious profits or policies that were erroneously collected and none, therefore, to disgorge or reverse.

For all of these reasons, the motion for disgorgement of funds, (Doc. 676), should be **DENIED**.

## III. Conclusion

As set forth above, I **RECOMMEND** that the Sutherlands' objections be **OVERRULED** and that the motion for an order confirming the directive to the Sutherlands to pay fictitious profits or assign the Martin policy, (Doc. 725), be **GRANTED**.

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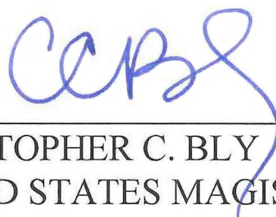
receiver's actions and activities have enured to the benefit of the estate." 214 F.2d at 632. Even in that case, where the receiver never should have been appointed in the first place, the result was not to simply disgorge his fees. Here, on the other hand, the Eleventh Circuit has already held that the "district court in this case did not err by exercising its equitable power to appoint a receiver." *Torchia*, 922 F.3d at 1317.

I further **RECOMMEND** that the O'Dell Investors' objections be **OVERRULED** and that the motion for an order confirming application of the distribution plan as to the O'Dell Investors, (Doc. 732), be **GRANTED**.

I further **RECOMMEND** that the motion for disgorgement of funds, (Doc. 676), be **DENIED**.

**IT IS SO RECOMMENDED,** this 28th day of August, 2023.



CHRISTOPHER C. BLY
UNITED STATES MAGISTRATE JUDGE