ORDERED in the Southern District of Florida on September 29, 2015.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

CLSF III IV, Inc. *et al.*,

Debtors.
_____/

Case No. 12-30081-EPK
CHAPTER 7
(Substantively Consolidated)

PARCSIDE EQUITY, LLC,

Plaintiff,
v.

DEBORAH MENOTTE, THE CHAPTER 7 TRUSTEE FOR THE IBRAHIM RABADI TR DTD 02/03/2011 a/k/a IBRAHIM RABADI TRUST DATED 02/03/2011, THE ALTER EGO OF CLSF III IV, INC,

Defendant.
_____/

Consolidated
ADV. PROC. NO. 13-01479-EPK

DEBORAH C. MENOTTE, CHAPTER 7 TRUSTEE,

Plaintiff,
v.

PHILIP LIAN,

Defendant.
_____/

PROPOSED CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court upon *Parcside's Motion for Summary Judgment Declaring that "It is the Owner of All Right, Title, and Interest" in the Rabadi Policy* [ECF No. 324] (the "Motion") filed by Parcside Equity, LLC ("Parcside"). As discussed more fully below, the Motion should be granted in part as provided herein.

The Court also considered the *Trustee's Motion to Strike the Affidavits of Philip Lian Filed in Support of Parcside's Motion for Summary Judgment (ECF No. 324)* [ECF No. 394], *Parcside's Motion to Strike (i) All References to the Unauthenticated Purported CLSF and BGI Funds "Prospectus", (ii) the Entire Affidavit of Michael Graviss and (iii) the LMA Report Dated February 10, 2015* [ECF No. 423], and *Parcside Equity, LLC's Motion for Entry of an Order Compelling Testimony of Michael Graviss or Striking Expert Report and Precluding Testimony* [ECF No. 415].

The Court held a hearing on all of the motions on August 18, 2015.

Background

Parcside is in the life settlement business. Parcside purchases and sells existing life insurance policies that insure the lives of individual insureds who are 65 years of age or older.

Pursuant to a *Life Settled Policy Purchase and Sale Agreement* dated November 15, 2011 (the "Rabadi Agreement"), Parcside sold a certain life insurance policy insuring the life of Ibrahim Rabadi, policy number 97526065, with a total death benefit of $5,000,000 (the "Rabadi Policy"), issued by the Phoenix Life Insurance Company ("Phoenix"), to the Ibrahim Rabadi TR DTD 02/03/2011, a trust formed and existing under the laws of the State of Florida (the "Rabadi Trust").

The total purchase price for the Rabadi Policy was $603,574.00. On the date of the Rabadi Agreement, consistent with its terms, the Rabadi Trust paid to Parcside by wire transfer the sum of $100,000. The balance of the purchase price was to be paid by the so-called BGI Trusts (as listed in an appendix to the Rabadi Agreement) from proceeds received from any sale or maturity of any life insurance policy owned by any of the BGI Trusts, until the balance of the purchase price (including interest and all premiums paid by Parcside under the Rabadi Policy) had been paid in full to Parcside. Under the Rabadi Agreement, if Parcside did not receive at least $300,000 by December 1, 2012, or if Parcside did not receive payment of the full amount of the purchase price by December 1, 2013, then Parcside retained the unconditional right to foreclose upon the Rabadi Policy and obtain all ownership and beneficial interest thereunder without notice of any kind to the Rabadi Trust.

The Rabadi Agreement provides that all funds due to Parcside in connection with the transaction are to be placed in escrow and held by Deborah C. Peck, as Escrow Agent. In the Rabadi Agreement, Deborah C. Peck is also identified as the trustee for the BGI Trusts (the entities responsible for payment of the remainder of the purchase price) and the Trustee for the Rabadi Trust. In connection with the Rabadi Agreement, Ms. Peck had multiple, likely conflicting, fiduciary obligations. Ms. Peck is a debtor in these consolidated bankruptcy cases.

At all times since its acquisition of the Rabadi Policy, including during the term of the Rabadi Agreement, Parcside maintained physical possession, custody and control of the original Rabadi Policy.

Paragraph 11 (the "Termination Provision") of the Rabadi Agreement provides as follows:

> The Seller has the unconditional right to terminate this Agreement and the transaction contemplated hereunder at any time and for any reason whatsoever at its sole discretion without incurring any legal liability or responsibility whatsoever prior to the Closing by giving written notice of Termination to the Purchaser and Escrow Agent of the Seller's decision to terminate.

As defined in paragraph 5 of the Rabadi Agreement, "Closing" is the final transfer of ownership of the Rabadi Policy by Parcside to the Rabadi Trust. Closing is expressly subject to specified conditions precedent. Among other things, "Closing will be executed by and in accordance with procedures established by [Parcside] and under no circumstances occur prior to [Parcside] being paid the full Purchase Price, interest and any premiums due herein."

Paragraph 3 of the Rabadi Agreement provides, in relevant part, that "[the Rabadi Trust] is solely responsible for the payment of all premiums due for the Policy to the Insurance Company, and shall pay when due, all premiums that are due and/or may become due on the Policy after the date of this Agreement." If the Rabadi Trust failed to pay premiums due on the Rabadi Policy prior to Closing, Parcside could pay them but was not required to do so. If Parcside paid premiums prior to Closing, the amount so paid would become part of the purchase price.

As security for payment of the purchase price and any premium payments that Parcside elected to make, Parcside received certain executed documents effecting the transfer of ownership and transfer of beneficiary interest of the Rabadi Policy and a power of attorney providing Parcside the right to direct Phoenix to indicate in its own records that Parcside was the sole owner and beneficiary of the Rabadi Policy (collectively, the "Rescission Documents"). Parcside also received a formal collateral assignment of the

Rabadi Policy. As noted above, Parcside always retained, and continues to retain, physical possession of the Rabadi Policy, thereby perfecting the security interest.

Parcside did not receive any payment under the Rabadi Agreement other than the initial payment of $100,000. Parcside issued to Deborah Peck, as Trustee of the Rabadi Trust, an invoice dated as of August 31, 2012 stating an amount due of $713,151, including accrued interest. Parcside later issued an updated invoice as of September 30, 2012 indicating a total of $725,988.00 outstanding under the Rabadi Agreement.

On September 30, 2012, using the Rescission Documents, Parcside submitted to Phoenix a change of owner and change of beneficiary request for the Rabadi Policy, causing Phoenix to indicate in its records that Parcside was the sole owner and beneficiary of the Rabadi Policy. On October 15, 2012, Parcside sent a Termination Notice to Deborah Peck in her capacity as Trustee of the Rabadi Trust and as Escrow Agent, formally terminating the Rabadi Agreement.

Summary Judgment Standard

Federal Rule of Civil Procedure 56(a), made applicable to this matter by Federal Rule of Bankruptcy Procedure 7056, provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "An issue of fact is 'material' if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). In considering a motion for summary judgment, the Court must construe all facts and draw all reasonable inferences in the light most favorable to the non-moving party. *Id.*

The moving party has the burden of establishing that there is an absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets that burden, the burden shifts to the non-movant, who must present specific facts showing that there exists a genuine dispute of material fact. *Walker v. Darby*, 911 F.2d 1573, 1576 (11th Cir. 1990) (citation omitted). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Id.* at 1577 (*citing Anderson*, 477 U.S. at 252).

At the summary judgment stage, the Court will not weigh the evidence or find facts; rather, the Court determines only whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003).

Analysis

Parcside seeks a declaratory judgment that it owns the Rabadi Policy because: (a) the Rabadi Trust breached the Rabadi Agreement (First Claim for Relief); (b) the Rabadi Trust anticipatorily breached the Rabadi Agreement (Second Claim for Relief); and (c) Parcside had the unconditional right to terminate the Rabadi Agreement prior to receipt of the full purchase price (Third Claim for Relief). For the reasons that follow, the Court determines that Parcside is the sole owner of the Rabadi Policy.

The Trustee argues that the Rabadi Policy belongs to a debtor-entity called BGI 2. The Trustee argues that, after entering into the Rabadi Agreement, the Rabadi Trust assigned the Rabadi Policy to BGI 2. The Court need not determine whether the anti-assignment provisions in the Rabadi Agreement render void any purported assignment to BGI 2, because the evidence now before the Court shows that there was no such assignment to BGI 2.

To begin with, under the explicit terms of the Rabadi Agreement, outright ownership in the Rabadi Policy was not to be lodged in the Rabadi Trust until Closing. Closing was defined as payment in full under the Rabadi Agreement. There is no dispute that the full purchase price, even in the lesser amount alleged by the Trustee, was never paid. Closing never occurred under the Rabadi Agreement, and so the Rabadi Trust did not have the right to assign the Rabadi Policy to anyone.

One might argue that the retention of a security interest in the Rabadi Policy by Parcside, and certain other provisions of the Rabadi Agreement, tend to negate the conclusion that the Rabadi Policy was not to be lodged in the Rabadi Trust until Closing. That Parcside permitted Phoenix to reflect for a time ownership and beneficiary status in the Rabadi Policy in the name of the Rabadi Trust, and later caused Phoenix to reverse this in its records, is not conclusive on the issue of ownership. It was obviously expected that the Rabadi Trust and BGI Trusts would pay the full purchase price under the Rabadi Policy, and would pay premiums in the meantime, and so it was reasonable for the issuer of the policy to indicate the purchaser's name in its records. Consistent with the conclusion that transfer of title was delayed until Closing, the Rabadi Agreement explicitly provides that the Rabadi Trust may not assign its rights under the agreement or transfer the policy. And, perhaps most importantly, Parcside retained the right to cause Phoenix to reflect Parcside as the sole owner and beneficiary of the policy at any time prior to Closing, without notice to the Rabadi Trust. Overall, the Rabadi Agreement indicates an intent of the parties that title to the Rabadi Policy would not be transferred to the Rabadi Trust until all conditions were satisfied for the Closing.

Yet even if the Rabadi Trust obtained title to the Rabadi Policy upon execution of the Rabadi Agreement, there was no valid assignment of the Rabadi Policy to BGI 2. The

sole documentary evidence offered to indicate that the Rabadi Policy was assigned by the Rabadi Trust to BGI 2 consists of handwritten notes on a statement of value for the Rabadi Policy as of December 7, 2011, and handwritten notes on a Verification of Coverage. Both printed documents were apparently prepared by Phoenix. On the statement of value, the handwritten notes appear to state "BGIF2" and include an illegible scribble that could be someone's initials. On the Verification of Coverage the handwritten notes appear to state "BGIF2", "#6065", and include an illegible scribble that again may be someone's initials. While Deborah Peck testified at deposition that the Rabadi Policy was assigned to BGI 2 by some "internal" process, there is no evidence to suggest that the handwritten notes on the statement of value or the Verification of Coverage were intended to constitute that assignment. Indeed, there is no evidence now before the Court indicating who wrote on those documents.

The parties agree that New York law applies to the assignment of the Rabadi Policy. The New York statute of frauds provides, in relevant part, as follows:

> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 9. Is a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to the promisor, to name a beneficiary of any such policy. This provision shall not apply to a policy of industrial life or health or accident insurance.

N.Y. Gen. Oblig. Law § 5-701(a)(9).

For a valid assignment of the Rabadi Policy, there must be a writing subscribed by the Rabadi Trust indicating an intent to assign the Rabadi Policy to BGI 2. There is nothing on the face of the statement of value or the Verification of Coverage that an

assignment was intended. There is nothing to suggest, even, that the unreadable scribbles were added on behalf of the Rabadi Trust. There is no other evidence, testimonial or documentary, to suggest that such notations were intended to constitute an assignment. And so there is no evidence before the Court to establish a written assignment, as required by New York law. Based on the evidence now before the Court, assuming the Rabadi Trust had an ownership interest in the Rabadi Policy that it could assign, there was never a valid assignment of the Rabadi Policy to BGI 2. BGI 2 has never had an interest in the Rabadi Policy.

Parcside properly terminated the Rabadi Agreement pursuant to its absolute, unconditional right under paragraph 11 of the Rabadi Agreement. It is undisputed that Parcside had not received the full purchase price for the policy, even the lesser amount the Trustee claims was due. The Closing had not occurred under paragraph 5 of the Rabadi Agreement. Parcside thus retained the absolute, unconditional right to terminate the Rabadi Agreement under paragraph 11. Parcside still held the original Rabadi Policy, which it had never released to anyone. It also caused Phoenix to correct its records to indicate that Parcside was the sole owner and beneficiary of the Rabadi Policy. Whether by these acts Parcside was merely reaffirming its continued title in the Rabadi Policy, or obtaining title back from the Rabadi Trust, has no bearing on the outcome here. After formal termination of the Rabadi Agreement there is no question that Parcside was the sole owner and beneficiary of the Rabadi Policy.

In the alternative, Parcside argues that the Rabadi Trust was in default of the Rabadi Agreement as it failed to make scheduled premium payments. Parcside argues that the periodic premiums stated in the policy are "due on the Policy" and thus were payable by the Rabadi Trust under the Rabadi Agreement, even if the Rabadi Policy would not have

fallen into the grace period or lapsed as a result of failure to pay all such premiums. Because the Rabadi Trust did not make any premium payments, Parcside argues that the Rabadi Trust was in default of its obligations under the Rabadi Agreement and Parcside had the right to terminate the agreement. The Trustee asks the Court to interpret paragraph 3 of the Rabadi Agreement, which includes an affirmative requirement that the Rabadi Trust "pay when due, all premiums that are due and/or may become due on the Policy," to mean that the Rabadi Trust was required to pay only those premiums necessary to prevent lapse. The Trustee argues that there was no need to make any premium payments under the Rabadi Policy as there was sufficient cash value held by Phoenix such that the policy would not have lapsed even if no premium payments were made. At a minimum, it appears that the parties have a factual dispute as to the cash value of the Rabadi Policy during the relevant period, and thus whether the Rabadi Trust was in default of its payment obligations under the Rabadi Agerement.

Similarly, Parcside argues that the entry of an injunction by this Court made it impossible for the BGI Trusts to pay the Deferred Purchase Price, resulting in an anticipatory breach of the Rabadi Agreement, permitting Parcside to terminate the agreement.

But it is not necessary for the Court to determine whether Parcside was in default under the Rabadi Agreement as a result of alleged non-payment of premiums as required under the Rabadi Agreement. Nor is it necessary for the Court to determine whether the Rabadi Trust anticipatorily breached the Rabadi Agreement because the BGI Trusts allegedly did not have the financial ability to pay the full purchase price. No default was required under the Rabadi Agreement for Parcside to terminate it. Parcside rightfully

terminated the Rabadi Agreement under the terms specifically agreed to by the Rabadi Trust.

Parcside retained a security interest in the Rabadi Policy, both under the Rabadi Agreement itself and in a separate collateral assignment.[1] This was simply a protective device – belt and suspenders – in case it was later determined that the policy was indeed transferred to the Rabadi Trust upon execution of the Rabadi Agreement. In this Court's view, the security interest accomplished nothing as Parcside never lost title to the policy. Nevertheless, the Trustee challenged the validity of the collateral assignment arguing that it arose from a usurious contract. Yet even if the Rabadi Agreement required payment of interest at 21.9% as alleged by the Trustee (and this appears to be simply a calculation error), the agreement would not be invalid under New York law. N.Y. Gen. Oblig. Law § 5-501 (excepting loans of $250,000 or more from the interest rate caps set by New York penal statutes). Thus, if a security interest was necessary to effectuate Parcside's rights in the Rabadi Policy, there was a valid security interest and it was continuously perfected by Parcside's uninterrupted possession of the original policy.

The Trustee makes the somewhat specious argument that because Parcside utilized a power of attorney executed on behalf of the Rabadi Trust to notify Phoenix of Parcside's ownership and beneficiary interest in the policy, Parcside owed a fiduciary duty to the Rabadi Trust which it violated by acting in a manner inconsistent with the best interest of the Rabadi Trust. It is generally true that the holder of a power of attorney must act

[1] The Trustee argues that the earlier of two extant collateral assignments is not effective as it was signed by Deborah Peck without indication that she was acting in a representative capacity. This argument is a red herring for three reasons. First, the only parties to the document are the grantor and the grantee, Ms. Peck was the trustee for the grantor, and so her signature can only be in a representative capacity. Second, there is a second collateral assignment that the Trustee does not challenge. And, third, the Rabadi Agreement itself contains a valid grant of a security interest.

consistent with the interests of the principal. The exception to that rule is where the context of the granting of the power of attorney is clearly inconsistent with a fiduciary duty. It is obvious from the text of the Rabadi Agreement, pursuant to which the Rabadi Trust gave the power of attorney, that no fiduciary obligation was intended by the parties. Parcside obtained the power of attorney specifically to act in protecting its own rights, potentially contrary to the interests of the Rabadi Trust, and this was apparent from the Rabadi Agreement when it was signed by the Rabadi Trust. Parcside, as the counterparty to the Rabadi Trust, owed no fiduciary duty to the Rabadi Trust, and so could not have breached such a duty.

The Trustee argues that the termination of the Rabadi Agreement by Parcside, and the confirmation of ownership and beneficiary interest in the policy by Parcside in connection therewith, violated an injunction entered by this Court. This Court entered an *Amended Order Granting Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction* (the "Preliminary Injunction") in another adversary proceeding (number 12-01889-EPK) that enjoined "Deborah C. Peck, individually, and Deborah C. Peck, P.A., and all persons and entities operating by, through or for any of them from transferring, selling, dissipating, wasting, encumbering, or otherwise hypothecating, the assets of any and all of the Investment Entities or the Plaintiffs. In addition [certain listed entities] . . . are enjoined from transferring, selling, dissipating, wasting, encumbering, or otherwise hypothecating, transferring the assets of any and all of [those entities]". BGI 2, apparently identified in the Preliminary Injunction as "BGI II Life, Inc.," was an entity subject to the injunction. The Trustee argues that Parcside violated the Preliminary Injunction by obtaining an asset of BGI 2 in the form of the Rabadi Policy. Yet the Court has determined that even if the Rabadi Trust had the ability to assign the Rabadi Policy,

there was no such assignment to BGI 2. And even if the Rabadi Trust had title to the policy at the time Parcside terminated the Rabadi Agreement, neither the Rabadi Trust nor Deborah Peck acting in her capacity as its trustee were subject to the Preliminary Injunction. Parcside did not in any way violate the Preliminary Injunction.

The Trustee also argues that Parcside violated the automatic stay, because BGI 2's effective petition date—and therefore the commencement of the automatic stay—was September 25, 2012 and Parcside exercised the power of attorney to have the Rabadi Policy transferred back into Parcside's name after September 25, 2012. The Court has previously determined that BGI 2 did not have title to the Rabadi Policy at any time and so Parcside could not have violated the automatic stay that arose as the result of BGI 2's substantive consolidation into the case. In any event, there is simply no circumstance that would cause this Court to substantively consolidate a non-debtor entity as of a prior date so as to retroactively implicate the automatic stay and thereby cause prior acts to be in violation of the stay (and, in this circuit, void). Indeed, the Court has specifically withheld ruling on substantive consolidation of the Rabadi Trust to permit completion of this litigation.

<u>The Discovery Motions</u>

The Trustee filed her *Trustee's Motion to Strike the Affidavits of Philip Lian Filed in Support of Parcside's Motion for Summary Judgment (ECF No. 324)* [ECF No. 394]. The motion seeks to strike portions of two affidavits—one submitted as evidence in support of the defendant's motion for summary judgment and the other submitted as evidence in support of the defendant's reply to the Trustee's response to their motion for summary judgment. The Trustee argues that the affidavits should be stricken because they contain improper expert testimony, they contain legal conclusions, they violate the best evidence

rule, and they are sham affidavits because Lian lacks personal knowledge or there are contradictions with prior testimony.

There are several problems with the motion to strike. The motion was filed on July 22, 2015. The Trustee filed her response to the motion for summary judgment on May 8, 2015, pursuant to this Court's briefing schedule order. If the Trustee wished to argue that evidence such as Lian's affidavit filed with the motion for summary judgment is not admissible or is otherwise defective, the Trustee should have done so in her response to the motion for summary judgment. Yet the Trustee responded to the motion for summary judgment, which included one of Lian's affidavits, without challenging the affidavit. It is an improper procedural move, and a violation of this Court's scheduling order, to respond to an affidavit offered in support of summary judgment by separate motion, filed at a time later than the response deadline, and which with the earlier filed response exceeds the page limit set by the Court without leave of Court. The motion to strike should be denied to the extent it seeks to strike an affidavit that should have been addressed in the Trustee's response.

Of course, the Trustee could not in her response address an affidavit yet to be filed with the defendants' reply. The appropriate response to an affidavit filed in connection with a reply to a motion for summary judgment is to move to strike it or ask for permission to file a sur-reply. And so the Court considers the motion to strike to the extent it seeks to strike the affidavit filed with the Parcside's reply.

The Trustee argues that some portions of the affidavit filed with Parcside's reply violate the best evidence rule. However, under Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056, a party seeking to strike evidence offered in support of or against summary judgment must show that the evidence cannot be offered

in admissible form at trial. It does not matter whether the evidence offered at the summary judgment stage is admissible in the form then presented. In any case, the documents referenced in the affidavit were also submitted to the Court in connection with the motion for summary judgment. Even if the best evidence rule applied at this stage of the litigation, the documents themselves are in evidence.

In the end, the Court does not rely to any extent on either affidavit that is the subject of this motion, and so the motion should also be denied as moot.

Parcside filed *Parcside's Motion to Strike (i) All References to the Unauthenticated Purported CLSF and BGI Funds "Prospectus", (ii) the Entire Affidavit of Michael Graviss and (iii) the LMA Report Dated February 10, 2015* [ECF No. 423]. To begin with, Parcside's motion seeks to strike documents that were filed as part of the Trustee's timely opposition papers to Parcside's motion for summary judgment, yet Parcside filed its motion to strike on August 10, 2015, well after May 26, 2015 when it filed its reply to the Trustee's response and therefore well after briefing ended on the motion for summary judgment. Parcside's motion to strike constitutes an additional brief that should have been included in its reply, and is both untimely and causes Parcside's reply to exceed the page limit without leave of Court. Parcside's motion to strike should be denied on these grounds alone.

In any event, the sole argument presented in the motion to strike is that certain evidence presented in connection with the Trustee's response is not admissible under the rules of evidence. Again, under Fed. R. Civ. P. 56(c)(2), made applicable to this adversary proceeding by Fed. R. Civ. P. 7056, Parcside must show that the matters in question cannot be presented in admissible form when the case gets to trial. It does not matter if the evidence in its current form would be subject to objection. This is an additional reason to deny Parcside's motion to strike.

Finally, Parcside also filed its *Parcside Equity, LLC's Motion for Entry of an Order Compelling Testimony of Michael Graviss or Striking Expert Report and Precluding Testimony* [ECF No. 415]. Michael Graviss, an expert witness to be offered by the Trustee, refused to testify at deposition regarding the identity of certain life settlement providers he consulted in the course of preparation of his written report, and refused to answer certain questions as to how he is compensated by his employer, Longetivity Market Advisors, LLC. The Trustee argues that Mr. Graviss's reputation in the business community will be harmed if he is forced to identify the parties he consulted, and that how he is compensated by his employer is not relevant. Neither argument is persuasive. Mr. Graviss admitted at deposition that he consulted the parties he refused to identify to confirm certain of the matters on which he will offer expert testimony. The Trustee cites no rule of law permitting Mr. Graviss to refuse to identify these parties. And Mr. Graviss's compensation scheme is relevant for purposes of bias. Mr. Graviss should be required to answer questions relating to how the outcome of this particular case may affect compensation that he will receive or expects to receive from his employer, but shall not be required to answer general questions as to how he and his partner determine how and when to distribute profits from their firm without regard to this particular case. The motion to compel should be granted consistent with these limitations.

Accordingly, the Court proposes the following:

1. The Motion [ECF No. 324] should be GRANTED as to Parcside's First Claim for Relief, Parcside's Third Claim for Relief, Count I of the Trustee's Second Amended Counterclaims, Count IX of the Trustee's Second Amended Counterclaims, Count XI of the Trustee's Second Amended Counterclaims, and Count XII of the Trustee's Second Amended Counterclaims, and DENIED as to Parcside's Second Claim for Relief.

2. Judgment should be entered in favor of Parcside on the following claims of its Second Amended Complaint: the First Claim for Relief and the Third Claim for Relief. Judgment should be entered in favor of Parcside on the following counts of the Trustee's Second Amended Counterclaims: Count I, Count IX, Count XI, and Count XII.

3. The *Trustee's Motion to Strike the Affidavits of Philip Lian Filed in Support of Parcside's Motion for Summary Judgment (ECF No. 324)* [ECF No. 394] should be DENIED.

4. *Parcside's Motion to Strike (i) All References to the Unauthenticated Purported CLSF and BGI Funds "Prospectus", (ii) the Entire Affidavit of Michael Graviss and (iii) the LMA Report Dated February 10, 2015* [ECF No. 423] should be DENIED.

5. *Parcside Equity, LLC's Motion for Entry of an Order Compelling Testimony of Michael Graviss or Striking Expert Report and Precluding Testimony* [ECF No. 415] should be GRANTED as follows: Mr. Graviss should be required to answer all questions relating to how the outcome of this particular case may affect compensation that he will receive or expects to receive from his employer, but shall not be required to answer general questions as to how he and his partner determine how and when to distribute profits from their firm without regard to this particular case.

6. This Order constitutes the Court's proposed conclusions of law consistent with the *Order on Plaintiff's Motion to Withdraw Reference* entered in District Court Case No. 14-cv-80919-MIDDLEBROOKS.[2]

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[2] Prior to consolidation of these two adversary proceedings, this Court's Adv. Proc. No. 14-1600 was subject to an order withdrawing the reference entered by Judge Marra in District Court Case No. 14-81501-CIV-MARRA, while this Court's Adv. Proc. No. 13-01479-EPK was subject to a similar order entered by Judge Middlebrooks in District Court Case No. 14-cv-80919-MIDDLEBROOKS. The primary difference between the withdrawal orders entered by Judge Marra and Judge Middlebrooks is that the order entered by Judge Marra would have permitted this Court to enter final orders on

7. The clerk is directed to submit to the District Court, pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033 the following:

a. this Order;

b. the second amended counterclaims [ECF No. 243] and the second amended complaint [ECF No. 291];

c. the instant Motion and exhibits [ECF Nos. 324, 326, and 328], the response with exhibits [ECF Nos. 367 and 368], and the reply and exhibit [ECF Nos. 374 and 375] thereto[3];

d. the joint stipulation of facts relative to the Motion [ECF No. 380];

e. Parcside's statement of undisputed facts [ECF No. 325] and the response [ECF No. 372] thereto;

f. the *Trustee's Motion to Strike the Affidavits of Philip Lian Filed in Support of Parcside's Motion for Summary Judgment (ECF No. 324)* [ECF No. 394] and response thereto [ECF No. 432];

g. *Parcside's Motion to Strike (i) All References to the Unauthenticated Purported CLSF and BGI Funds "Prospectus", (ii) the Entire Affidavit of Michael Graviss and (iii) the LMA Report Dated February 10, 2015* [ECF No. 423] and response and exhibits thereto [ECF Nos. 436, 438, and 441];

h. *Parcside Equity, LLC's Motion for Entry of an Order Compelling*

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dispositive motions (such as the one now before the Court) to the extent such orders did not constitute a final determination terminating the action, while the order entered by Judge Middlebrooks requires the filing of proposed findings of fact (where appropriate) and conclusions of law on all dispositive motions even where the proposed ruling would not constitute a final ruling terminating the action. Because these cases are now consolidated with Judge Middlebrooks, this Court will issue proposed findings of fact (where appropriate) and conclusions of law on all pending dispositive motions.

[3] As noted at the hearing, the Court did not consider any evidence submitted after close of briefing pursuant to this Court's briefing schedule order [ECF No. 337] as extended [ECF Nos. 360 and 377].

Testimony of Michael Graviss or Striking Expert Report and Precluding Testimony [ECF No. 415] and response thereto [ECF No. 435]; and

i. any objections filed pursuant to Fed. R. Bankr. P. 9033.

8. The parties shall comply with Fed. R. Bankr. P. 9033.

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Copies furnished to:

Eyal Berger, Esq.

Eyal Berger, Esq. is directed to serve a conformed copy of this order on all appropriate parties and to file a certificate of service.