

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP., et al.,

Defendants,

VIATICAL BENEFACTORS, LLC, et al.,

Relief Defendants.

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**RECEIVER'S MOTION FOR APPROVAL OF PLAN  
OF DISTRIBUTION OF RECEIVERSHIP ESTATE**

Roberto Martínez, as the court-appointed receiver (“Receiver”) of Mutual Benefits Corp. (“MBC”), Viatical Benefactors, LLC (“VBLLC”), Viatical Services, Inc. (“VSI”), and Anthony Livoti, Jr. and Anthony Livoti, Jr., P.A. solely in their capacity as trustee, hereby files this motion seeking the Court’s approval for the below-described plan for distribution of the assets that have been collected and administered by the Receiver to the MBC investors.

<b>SUMMARY OF PLAN</b>
<p><b>Who will receive a distribution?</b></p> <ul style="list-style-type: none"><li>■ All investors who submitted a Claim Form and who have not had their policy mature by the time of the distribution will receive a distribution.</li><li>■ Trade creditors (i.e. non-investors) will <u>not</u> be receiving a distribution.</li></ul>

**How will the amount of the distribution be determined?**

- All investors will share *pro rata* (proportionately) in the general pool of assets that has been collected by the Receivership.
- Investors on Sell Policies will also share *pro rata* (proportionately) in the pool of assets that the Receiver has collected from the sale of those policies.
- Investors on Keep Policies will not share in the pool of assets collected from the sale of Sell Policies, but instead will receive whatever they ultimately obtain when their policies mature in the future.

The Receiver does not intend to undertake to serve copies of this plan of distribution on all 35,000-plus claimants in this matter via mail. The costs of doing so would be substantial. The Receiver will instead be posting this proposed Plan of Distribution prominently on the Receiver's website ([www.mbcreceiver.com](http://www.mbcreceiver.com)), which receives an average of over 18,000 "hits" per month and has proven to be a comparatively effective and efficient means of communication with the widely-distributed pool of claimants in this case.

**BACKGROUND ON THE CLAIMS PROCESS**

On April 3, 2008, the Court entered its Order Authorizing Claims Process [Doc. 2058], which set up the procedure for the submission and determination of claims for damages submitted by investors and creditors of MBC. The Receiver subsequently sent out 49,127 Claim Forms to every MBC investor whose policy had not yet matured, as well as to other potential claimants and creditors. A total of 37,130 Claim Forms have been returned to date. The Receiver has continued to accept Claim Forms that trickled in after the original deadline, and does not intend to object to any Claim Forms received before the date of calculation of the distribution on lateness grounds.

Following a hearing on October 21, 2008, this Court ruled in its Order Granting Receiver's Motion for Final Determination of Allowed Claims [Doc 2188] that the amount of the investment made by each investor (the "dollars invested") would be treated as the recognized claim amount. All other measures of investor damages were rejected, and all claims by trade creditors were subordinated to the claims of the investors. The Court also ruled that any claims on policies that mature before the distribution date shall be disallowed (as the investor will already receive the death benefits on the policy).

The returned Claim Forms presently represent claims for investor damages on this basis totaling approximately \$720,453,198. (This figure will likely continue to drop by some amount by the date of distribution as policies continue to mature.)

#### **THE APPLICABLE LEGAL STANDARDS**

This is an equity receivership resulting from an enforcement action brought by the Securities and Exchange Commission. In such cases, the courts have consistently indicated that the district court has very broad powers and wide discretion to fashion remedies and determine to whom and how the assets of the Receivership Estate will be distributed. *See SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992); *see also SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). When it comes to fashioning a claims process and related distribution plan, "[n]o specific distribution scheme is mandated so long as the distribution is 'fair and equitable.'" *SEC v. P.B. Ventures*, 1991 WL 269982, at \*2 (E.D. Pa. 1991).

#### **THE RECEIVER'S PLAN FOR DISTRIBUTION TO THE INVESTORS**

The Receiver recommends a "two pool" distribution plan. First, the Receiver recommends that all investors recover *pro rata* from the general pool of funds collected and administered by the Receiver (the "Asset Recovery Pool"). This recommendation is consistent with the determination

that the basis for investors' claims should be the same for all investors, regardless of whether they opted to keep or sell their policy interests during the disposition process in this Receivership. It is also a commonly used distribution method in equity receiverships. *See, e.g., SEC v. The Infinity Group Co.*, 2007 WL 1034793, at \*1 (3rd Cir. 2007) ("Courts of Appeals repeatedly have recognized that *pro rata* distribution of a defrauder's assets to multiple victims of the fraud is appropriate and that District Courts act within their discretion in approving such distributions."); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 89 (2d Cir. 2002) (stating that "the use of a *pro rata* distribution has been deemed especially appropriate for fraud victims of a 'Ponzi' scheme" and collecting cases).

As a general matter, the Asset Recovery Pool includes the following funds: (1) funds recovered by the Receiver as a result of various litigation and collection efforts; (2) disgorgement payments made by certain of the defendants in the Securities and Exchange Commission action; (3) funds recovered through various settlements in class action litigation brought on behalf of the MBC investors; and (4) the proceeds of the sale of investment interests that MBC and/or the Receiver had in certain policies and portions of policies. The Asset Recovery Pool will also include any funds received for the anticipated sale of VSI to a new owner. The Asset Recovery Pool does not include (1) funds in the VSI and MBC operating accounts that are being used to run the ongoing business; (2) death benefit proceeds that have been collected by VSI and are still in the process of being distributed to investors; (3) the proceeds received by the Receiver from the sale of policies where the investors opted to sell their policy interests in the disposition process; and (4) any cash held by MBC at the conclusion of the Receivership. A schedule of the cash balances in all bank accounts administered by the Receiver is attached as Exhibit A.

*A pro rata* recovery means that each investor shares proportionately in the Asset Recovery Pool based on the amount of their "dollars invested." By way of example, if an investor had

\$100,000 in “dollars invested,” and the total amount of the claims for “dollars invested” is \$720,453,198, the investor will receive 0.000129% of the Asset Recovery Pool. ( $\$100,000 / \$720,453,198 = 0.000138$ ). While this sounds like a very small percentage, if the final balance of the Asset Recovery Pool is approximately \$85-\$90 million, the investor will recover approximately \$11,730 to \$12,420 – or roughly 12% of the amount he or she invested.

Second, the Receiver recommends that “Sell Policy Investors” (the investors whose policies were voted to be sold as a result of the disposition process) – and only that group of investors – also recover from the pool of funds that represents the net proceeds of the sale of these policies by the Receiver (the “Sell Policy Pool”). The investors who chose to keep their policies (the “Keep Policy Investors”) should not share in this pool of funds. In the disposition process, when the investors were given a chance to vote on how they wanted to mitigate their damages, investors were given the chance to vote to sell, keep or surrender their policies. The investors who chose to keep their policies will eventually receive the death benefits on the policies as their mitigation of damages (assuming there is no forfeiture of the policies in the future due to non-payment of premiums or otherwise). The total amount of their mitigation (if any) will depend on how long it takes for those policies to mature and how much additional money the investor must spend to keep the policy in force (by paying administrative fees and premium shares). Similarly, the investors who chose to sell their policies should receive a share of the proceeds of the policies that were sold – an amount that may be less, more or about the same as the amounts the Keep Policy Investors will eventually receive as a result of keeping their policies, depending on when maturities occur, how much the investor has to pay in premiums and administrative fees, and whether the investor stops paying the premiums and forfeits his or her interest.

All of the Sell Policy Investors should share *pro rata* in the Sell Policy Pool – as opposed to receiving individualized shares depending on what policy they were invested in. The insurance policies were, with isolated exceptions, sold as portfolios of policies for practical and strategic reasons in an effort to maximize the consideration received in their sale. As a result, it is not possible to determine how much was received for any given policy. In addition, the Receiver notes that some policies could not be sold at all for various reasons, including restrictions in the terms of the policies. The Receiver nonetheless recommends that all Sell Policy Investors share *pro rata* in the Sell Policy Pool, regardless of the outcome of their particular policy. This will make the recoveries for all investors more equitable and more even and recognizes the fact that the particular policy any investor was placed on by MBC was largely out of the investor’s control and often fortuitous.

The Receiver has received a net amount of approximately \$20,835,347 for the sale of Sell Policies. The Sell Policy Investors claims represent a total of approximately \$265 million in “dollars invested.” Accordingly, the Sell Investors can expect to receive an additional approximately 7-8% recovery on their claims from this pool of funds.

#### **WHO IS THE MONEY GOING TO BE DISTRIBUTED TO?**

All investors in insurance policies sold by MBC who returned a Claim Form and whose policies have not matured will receive a distribution. No distribution will be made to investors who never returned a Claim Form at all. No distribution will be made to investors on policies that have already matured. And no distribution will be made to investors whose policies mature before the Date of Distribution. As this Court ruled in its Order Granting Receiver’s Motion for Final Determination of Allowed Claims [Doc. 2188], “any claims on policies that mature before the distribution date shall be disallowed (as the investor will already receive the death benefits on the

policy).” Order at p. 4. The purpose of this ruling was to avoid a “double dipping” problem, where certain lucky investors receive both their investment return and a full share of the Asset Recovery Pool. There will inevitably be some investors whose policies mature shortly after the Distribution Date, and so end up with both their share of the death benefits and their share of the Receivership distribution, but there is no practicable way to avoid this problem. A cut-off date of some sort must be chosen, and the Distribution Date of the Receivership assets is the most logical and practical.

In addition, no trade creditors will receive distributions, as the Court held that trade creditor claims are subordinated to the investor claims. *See* Order Granting Receiver’s Motion for Final Determination of Allowed Claims [Doc. 2188]. Because there will be insufficient funds to satisfy the investor claims, no distributions will be made to trade creditors.

There is one sub-group of investors that requires special consideration. Some of the funds in the Asset Recovery Pool were obtained as a result of settlements in the class action litigation brought on behalf of the MBC investors (principally the settlements reached with the Brinkley McNerney law firm, with Peter Lombardi, and a pending settlement with certain banks that acted as “escrow agents” for MBC). These settlements underwent an approval process as required by Fed.R.Civ.P. 23, in which investors who were members of the class benefitted by the settlements were given the opportunity to “opt out” of the settlements.<sup>1</sup> The Receiver recommends that the “opt out” investors nonetheless be treated like any other investor who is sharing in the Asset Recovery Pool for two principal reasons. First, it would be administratively very complicated to try to segregate the opt-out

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<sup>1</sup> There were a total of 59 investors who opted out in connection with the settlement involving the Brinkley McNerney law firm, representing a total of \$3,174,063.00 in “dollars invested.” There were a total of 74 investors who opted out in connection with the settlement involving Peter Lombardi, representing a total of \$4,166,182.00 in “dollars invested.” And there are a total of 29 investors who have opted out in connection with the proposed settlement involving the “escrow agent” banks, representing a total of \$2,475,996.00 in “dollars invested.” The opt-outs were not necessarily the same people in each of the settlements.

investors from the other investors when determining the *pro rata* shares of the Asset Recovery Pool.

Some investors would recover *pro rata* from the entire pool; other investors would recover *pro rata* from the entire pool but not including the settlement proceeds from the Brinkley McNerney settlement; other investors would recover *pro rata* from the entire pool but not including the settlement proceeds from the Brinkley McNerney settlement or the bank settlement; etc., etc. Second, given the small number of opt-out investors, whether or not they recover from the entire pool will not have a material impact on the recovery received by any investor in the distribution process. Third, none of the investors who opted out of the Class Action settlements has proceeded to bring any sort of lawsuit against the settling defendants, suggesting that their “opt out” decisions were not strategic but may have been a result of factors that should not have any bearing on their right to share in the Asset Recovery Pool (e.g., confusion, mistake or a general dislike or distrust of lawsuits or class actions).

### **THE LOGISTICS AND TIMING OF THE DISTRIBUTION**

The distribution will be administered by Garden City Group. The distribution checks will be sent by U.S. mail to investors in the U.S. and by Federal Express to investors outside of the U.S. The Receiver’s goal is to complete the distribution in May 2009, the anniversary date of the Receivership. The Receivership will then be wound down with a motion for termination of the Receiver’s responsibilities.

The primary reason for waiting to conduct the distribution at this point is to wait for the receipt of the settlement funds in a pending settlement with MBC’s former “escrow agent” banks. The final fairness hearing on that settlement is scheduled for March 10, 2009 (and a 30-day appeal period will run from the date of entry of an order on that hearing by the Court.) Given the size of that settlement (\$9,750,000 in gross settlement proceeds), and the administrative cost of doing a

distribution in this Receivership, it makes sense to wait until those settlement funds are received (assuming final approval is given and no appeal taken) before conducting the distribution.

The Receiver will transfer the funds to be distributed to the Garden City Group to cut checks to be sent out to the investors, along with a short cover letter from the Receiver. The amounts to be distributed to each investor based on a *pro rata* distribution of the funds as discussed above will also be finalized on that date (the “Distribution Date”). The Receiver will not be able to accept any additional claim forms after the Distribution Date. (Given the amount of time that investors have had to submit their Claim Forms, there should really be no need for any Claim Form to be arriving this late.) On the Distribution Date, the Receiver will file a notice with the Court and make a posting on the Receiver’s website ([www.mbcreceiver.com](http://www.mbcreceiver.com)) notifying investors that the distribution is being made and providing a final accounting of the funds in the Asset Recovery Pool and the Sale Policy Pool that are being distributed.

The only funds that will be held back from the distribution will be the funds in VSI’s operating accounts that are required to keep it operating going forward and funds sufficient to pay VSI’s and MBC’s professional fees and any other debts owed by VSI or MBC. Approval for these “hold back” amounts will be sought by the Receiver in a separate motion to be filed before the Distribution Date.

Additional asset recoveries may be had after the Date of Distribution. For example, the SEC and the Receiver are still undertaking collection efforts against the Estate of Leslie Steinger and against Steven K. Steiner for the unpaid amounts they still owe on the Final Judgments entered against them in the SEC Action. However, any additional recoveries are likely to be quite small in comparison to the amounts currently in the Asset Recovery Pool. Assuming any additional recoveries are made, and assuming the costs of distributing them makes financial sense, the Receiver

will recommend a supplemental distribution to the investors.

**ISSUES RELATING TO WHAT FUNDS ARE  
INCLUDED IN THE ASSET RECOVERY POOL**

The Receiver also wishes to bring to the Court's attention an issue relating to whether particular funds remaining in MBC's "Pre-Closing Purchaser Escrow Accounts" may be included in the Asset Recovery Pool.

As part of its business model, MBC would place funds it received from new investors into "escrow accounts" maintained by various "escrow agent" banks to be held pending the placement of those funds on insurance policies. At the inception of this Receivership on May 4, 2004, these "escrow accounts" held in excess of \$100 million in un-invested funds received from investors. The great majority of these funds were maintained by Union Planters Bank, N.A. At the conclusion of various proceedings at the inception of this Receivership, the Court held that these funds should be returned to the investors. Union Planters undertook a process to return the funds that were in its custody.

Smaller amounts were also held in "escrow accounts" at Bank of America that were maintained by one of MBC's earlier "escrow agents", American Express Tax & Business Services, Inc. ("AMEXT&BS"). These accounts presently have a balance of approximately \$1,162,858.30. However, the records and reconciliations maintained by MBC did not accurately identify who the funds belonged to, and the Receiver was not able to discern this from records received from AMEXT&BS either. Through general interaction with investors, the Receiver was able to identify one investor who had \$25,000 in the account and returned the funds to that investor. Notably, in the course of reviewing the 30,000-plus Claim Forms returned by investors, the Receiver's staff did not come across any other claims to funds in these accounts either. Accordingly, the Receiver

recommends adding these apparent pre-closing investor funds to the Asset Recovery Pool for distribution to all investors.

In addition, AMEXT&BS used a separate account to hold the interest that investors' funds earned pending placement on a policy by MBC. The account has a current balance of approximately \$52,651. The interest was ordinarily returned to investors after their funds were invested. However, in cases where the interest amounts were very small, the amounts were not returned and accumulated in this account. (And in some cases, the foreign investors to whom the interest amounts were returned did not cash the checks, likely because the small amount of interest was not worth the effort to have the currency converted.) The law firm of Brinkley McNerney, which handled pre-closing purchaser funds before MBC began using "escrow" agents, maintained a similar account. That account has a balance of approximately \$ 75,717. In both cases, it would be impractical to try to return the relatively small amounts of interest to the investor at issue; in addition, the funds represent interest owed to post-closing investors (not pre-closing purchasers who never invested) and so are more properly pooled with the general assets of the Receivership. Accordingly, the Receiver recommends adding these interest accounts to the Asset Recovery Pool for distribution to all investors as well.

**CONCLUSION**

The Receiver respectfully requests that the Court authorize the above-described plan for the distribution of the assets gathered and administered by the Receiver in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served via CM/ECF and by electronic mail in accordance with the attached Receiver's Service List on February 22, 2009.

s/ Curtis B. Miner

Curtis B. Miner

**SERVICE LIST OF RECEIVER**

<b>VIA ELECTRONIC MAIL</b>		
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