

**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.

RECEIVER'S SUBMISSION TO COURT REGARDING VSI SALE

Roberto Martínez, 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 (collectively the "Receivership Entities"), makes this submission to the Court in connection with the proposed sale of the business of VSI. The purpose of this submission is to explain, for the Court and other parties' benefit, the proposed transaction for the sale of the VSI business. If the Court so directs, the Receiver will provide his analysis of the submissions of Silver Point Capital, L.P. and Litai Assets, LLC, upon the Court's determination of whether it is going to permit consideration of the Silver Point submission and if so, how further bidding with respect to the proposed sale will proceed.

The Proposed Transaction

There are four primary documents that implement the transaction:

- **Asset Purchase Agreement** – this is the agreement between the Receiver and the Purchaser, by which the assets used in the VSI business are conveyed to the Purchaser in exchange for the purchase price to be paid by the Purchaser;
- **Trust Agreement** – this is the agreement between the Receiver and the Trustee (the Receiver has proposed Barry Mukamal, C.P.A. of the Marcum Rachlin firm as Trustee, and both Litai and Silver Point concur) by which the Trustee takes control of (1) the nominal ownership interests in the Keep Policies; (2) the funds currently held by the Receiver for the payment of premiums on the Keep Policies; and (3) the funds currently held by the Receiver as administrative fees collected by VSI for the servicing of the Keep Policies; the Trustee also assumes responsibility for monitoring the Purchaser's performance of its duties as servicer of the Keep Policies;
- **Servicing Agreement** – this is the agreement between the Purchaser and the Trustee, by which the Purchaser agrees to undertake the responsibility for servicing the Keep Policies (including collection and payment of premium funds, tracking of insureds, processing death claims, and marketing and selling under-subscribed policies) for a period of at least five years, in exchange for the fees set forth in the Servicing Agreement.
- **Transitional Services Agreement** – this is the agreement between the Purchaser and the Receiver by which the Purchaser agrees to provide such assistance to the Receiver as he should require in the wrap-up of the receivership case for at least 26 weeks after closing of the sale.

What is expected to occur at closing is the following: (1) all of the assets used to perform the VSI servicing business will be transferred to the Purchaser; (2) the ownership and nominal beneficiary interests in the Keep Policies will be transferred from the Receiver to the Trustee; (3) the

funds currently held by the Receiver in connection with the servicing of the Keep Policies including premium funds collected, undistributed death benefits, and unspent administrative fees collected from Keep Policy investors (the unspent administrative fees are effectively what is described as the "Overpayment Balance," which is currently projected to be approximately \$2.5 million), will be transferred to the Trustee; (4) the Purchaser will assume responsibility for performing the servicing functions done by VSI for the Keep Policies; and (5) the Trustee will assume responsibility for monitoring the Purchaser's performance of those servicing functions.

The assets being sold, generally speaking, include all of the hard assets used in the VSI business (i.e., furniture, office and computer equipment and the like), the existing accounts receivable of VSI, the rights to the lease for the VSI premises which is being assumed by the Purchaser, VSI's rights to its employment and independent contractor relationships with operational personnel, VSI's computer software and databases, including the VSI policy billing and tracking system, and VSI's books and records. The purchase price paid for the VSI assets will become general receivership funds and will be distributed to all investors *pro rata*.

Under the Servicing Agreement, the Purchaser will be compensated for its services by charging an Administrative Fee to the Keep Policy investors. The initial fee will be \$300 per investment interest; however, \$60 of the fee will be paid from the Overpayment Balance, resulting in a net fee to the investors of \$240 per investment interest. From year to year the Administrative Fee will be adjusted in accordance with changes in the Consumer Price Index. The fee will continue to be subsidized from the Overpayment Balance unless and until the Overpayment Balance is depleted. The Servicing Agreement provides for an additional subsidy of the Administrative Fees if the number of investor interests drops below certain specified amounts for each year. The Purchaser also receives other income for its servicing functions, including the interest credited on certain

accounts, a \$200 fee chargeable upon maturity of a policy, excess death benefit proceeds upon policy maturities, and a fee of 10% of the gross proceeds received from dispositions of under-subscribed policies.

The funds in the Overpayment Balance will be used to help subsidize the Administrative Fees as described above, and will also be used to pay the expenses of the Trust (including the expenses of the Trustee). The Overpayment Balance will be replenished to some degree with the net proceeds from the sale of under-subscribed policies. In the event that the Trustee determines that the Overpayment Balance is at risk of being depleted, he may direct that the Trust cease subsidizing the Administrative Fees and/or may direct the Purchaser to begin charging an additional Administrative Fee to cover the anticipated Trust expenses.

The Purpose of the Trust Structure

There are at least two primary reasons for the Trust structure. First, the Trust provides for a fiduciary responsible for overseeing the Purchaser's performance of its duties as servicer. The Trustee will have the responsibility and ability (by means of the reporting required by the Purchaser and the Trustee's control of the funds available for things such as premium payments and death benefit distributions) to review and supervise the Purchaser's performance of its obligations under the Servicing Agreement and to ensure its capacity to do so for the term of the Agreement. This is something that several thousand individual investors would have difficulty doing on their own. Particularly given the affiliation between both Silver Point and Litai and potential policy purchasers and the potential for at least perceived conflicts of interest, the Receiver believed such a structure was appropriate and in the interests of the Keep Policy investors.

Second, the Trust provides authority to the Trustee to negotiate and arrange for the extension of the Servicing Agreement after its initial five-year term is completed, or arrange for a substitute

servicer if necessary. There are a number of different situations where it may be necessary to restructure the relationship with the servicer or make alternate arrangements. For instance, when the five year term of the Servicing Agreement has been completed, it is anticipated that there will still be policies remaining which have not yet matured (no potential buyer that the Receiver was contacted by expressed any interest in a servicing agreement which would extend beyond a five-year term). Some arrangements will need to be made for the servicing of those policies, either through an extension of the Servicing Agreement or by contracting with an alternate servicer. Individual investors, who typically only have a beneficial interest in a fraction of a particular policy, have no authority – much less the practical ability – to negotiate such arrangements, either with the Purchaser or with a third-party servicer.

It is also possible that the Purchaser may default on its obligations under the Servicing Agreement: it may either fail to adequately perform the servicing functions, or it may for whatever reason decide to breach the Servicing Agreement and resign as servicer. If so, the Trust structure enables the Trustee to seek appropriate relief – either to compel the Purchaser to perform, to seek damages for its breach, and/or to seek to engage a substitute servicer. Again, such actions would be difficult if not impossible for thousands of individual investors holding fractional interests in policies to undertake on their own. If at some point it becomes completely unfeasible to service the Keep Policies, the Trust Agreement also gives the Trustee the authority to sell or surrender the policies and distribute the proceeds to the investors – an authority which is necessary in order to avoid the outright lapse of the policies otherwise, but which the Receiver believed was more appropriately entrusted to a fiduciary for the investors rather than directly to the servicer.

Reservation of Jurisdiction

The Court expressed concern with the potential reservation of jurisdiction with this Court in this proceeding over future disputes arising from the Agreements. With the agreement of both Silver Point and Litai, the Agreements have been modified to provide for agreement among the various parties that any actions arising from the Agreements would be brought in the United States District Court for the Southern District of Florida, or if that Court lacks jurisdiction, in an appropriate State Court within the District. The Agreements do not provide for the reservation of jurisdiction by this particular court in this particular proceeding over future disputes – unless the Court wishes to so provide.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served in accordance with the attached Receiver's Service List on July 28, 2009.

By: _____



David L. Rosendorf

SERVICE LIST OF RECEIVER

Case No.: 04-60573 CIV-Moreno

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