

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 04-21160-CIV-MORENO/TORRES

SCHECK INVESTMENTS, L.P., et al.

Plaintiffs,

v.

KENSINGTON MANAGEMENT, INC., et al.

Defendants.

ORDER AND FINAL JUDGMENT

Lead Plaintiffs Scheck Investments, L.P., et al., individually and on behalf of all Class Members similarly situated, and Roberto Martinez, as court-appointed Receiver of Mutual Benefits Corp. ("MBC") and other related entities ("Receiver"), and Defendants Anthony LaMarca ("LaMarca") and Michael Azizi ("Azizi") (together, the "Settling Defendants" and together with Plaintiffs, the "Settling Parties"), have submitted for final approval a proposed settlement that is memorialized in the Stipulation of Settlements executed on Jun10, 2009 and July 13, 2009 ("Settlement Agreements" or "Settlements").¹ Class Counsel has not moved for an award of attorney fees and costs in connection with the Settlements.

For the reasons set out in detail below, the Court has determined that the Settlements are fair, reasonable and adequate, and should therefore be approved. Accordingly, this Court enters this Order and Final Judgment, approves the Settlements, certifies the settlement class, notes that no

¹ All capitalized terms used herein shall have the meanings set forth in the Settlement Agreements.

objections have been filed and dismisses this action against the LaMarca and Azizi with prejudice, and therefore;

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. This Court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

2. On August 31, 2009, the Court held a hearing to consider the fairness, reasonableness and adequacy of the proposed Settlement ("Final Approval Hearing").

3. In reaching its decision in this case, the Court considered the Settlement Agreements, the absence of any objections to the Settlements filed with this Court by Class Members, the extensive Court file in this case and related MBC cases, and the presentations by Class Counsel, the Receiver, and Counsel for the Settling Defendants in support of the fairness, reasonableness and adequacy of the Settlement.

Class Certification

4. The Class is defined in the Settlement Agreements to include: "All persons who purchased, between October 1, 1994 and May 4, 2004, interests in discounted life insurance policies known as viatical settlements or life settlements from MBC or VBLLC and have been damaged thereby." Excluded from the Class are: Defendants, MBC and any agent or broker who offered to sell viatical settlements or life settlements through MBC or VBLLC, including any of the foregoing companies' respective subsidiaries, affiliates, officers, agents or employees.

5. In its Preliminary Approval Order, the Court conditionally certified the Class for the purpose of settlement under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. *See* DE 1066. In entering this Order and Final Judgment, the Court has once again considered the class

certification prerequisites set forth in Rule 23(a) and (b)(3) and again finds that these prerequisites are satisfied in this case.

6. The Court now affirms its prior Class certification, which was conditional pending further review, and finds that: (a) the Class is so numerous that joinder of all members is impracticable; (b) there are questions of both law and fact common to the Class; (c) the Lead Plaintiffs' claims are typical of the claims of all members of the Class; and (d) the Lead Plaintiffs and Class Counsel have fairly and adequately represented and will fairly and adequately protect the interests of the Class, all pursuant to Fed. R. Civ. P. 23(a).

7. The Court additionally finds that questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and that this class action is superior to other available methods for the fair and efficient adjudication of this controversy, pursuant to Fed. R. Civ. P. 23(b). In making the latter determination the Court has considered the following: (a) the interest of members of the Class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the Class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. The Class, as defined above, is now finally certified.

8. No requests for exclusions have been received and, accordingly, all Class Members are bound by the Settlements and can participate in the distribution of the Settlement funds.

Notice to the Class

9. In its Preliminary Approval Order, this Court approved the Notice attached to Class Counsel's motion, and found that the proposed form and content thereof satisfied Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure, the Local Rules of this Court, as well as the requirements of due process.

10. As set forth in the Declaration of Alexander Rundlet of Podhurst Orseck, P.A., Class Counsel and timely caused the Notice to be posted on the website of the MBC Receiver (<http://www.mbreceiver.com>). Posting was performed as of July 17, 2009,

11. Attorneys from Class Counsel's offices were available to respond to the Class Members who contacted them with questions regarding the proposed Settlements. No contact was made to Class Counsel.

12. As noted elsewhere in this Final Judgment, no investors responded to the Notice by filing exclusions, objections to and comments in support of the Settlement.

13. This Court has again reviewed the Notice and the accompanying documents and finds that the "best practicable" notice was given to the Class and that the Notice was "reasonably calculated" to: (a) describe this case and Class Members' rights in it; and (b) apprise interested parties of the pendency of this case and of their right to have their objections to the Settlement heard. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985); accord Fed. R. Civ. P. 23(c)(2) ("best notice practicable under the circumstances, including notice to all members who can be identified through reasonable effort," shall be given to class members); Fed. R. Civ. P. 23(e) ("notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."). The Notice was reasonably calculated to advise each member that: (a) the

Court would exclude the member from the Class if the member so requested by a specified date; (b) this Order and Final Judgment, whether favorable or not, would include all Class Members who did not request exclusion; and (c) any Class Member who did not request exclusion could, if the Class Member desired, enter an appearance. The Court thus reaffirms its findings that the Notice given to the Class Members satisfies the requirements of due process and holds that it has personal jurisdiction over all Class Members.

The Settlements

14. The Settlements include, among other things, the establishment of a total common fund in the amount of Forty Four Thousand Dollars (\$44,000.00) for the benefit of the Class. Class Counsel have foregone any request for fees and expenses in connection with the Settlements. Therefore, full amount of the Settlements shall be distributed to Class Members based upon a Court-approved allocation plan approved by this Court. In return, all claims alleged by Lead Plaintiffs and the Class (and that could have been alleged by the Receiver) against the Settling Defendants shall be dismissed with prejudice (as set forth in the Settlement Agreement and herein).

15. The Court must determine whether the proposed Settlements are "fair, adequate and reasonable and is not the product of collusion" between the parties. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981). In making this determination, the Court considers six factors: (1) the likelihood that Plaintiffs would prevail at trial; (2) the range of possible recovery if Plaintiffs prevailed at trial; (3) the fairness of the settlement compared to the range of possible recovery, discounted for the risks associated with litigation; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the Settlement; and (6) the stage of the proceedings at which the

Settlement was achieved. *Bennett*, 737 F.2d at 986; *Corrugated Container*, 643 F.2d at 212; *Behrens v. Wometco Enters, Inc.*, 118 F.R.D. 534, 538-90 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). In considering these Settlements, the Court need not and does not decide the merits of this Action.

16. This Court, after considering the aforementioned factors, finds that the Settlements provide for a reasonable and adequate recovery that is fair to all Class Members. *See Bennett*, 737 F.2d at 986-87.

17 The Court's review of the file demonstrates that there remains substantial risk and uncertainty in Lead Plaintiffs ultimately prevailing on their claims and upholding such an outcome on appeal. Furthermore, if this case were to proceed without settlement, the subsequent motion practice, resulting trial and the inevitable appeal would be complex, lengthy and expensive. The Settlements eliminate a substantial risk that the Class would walk away empty-handed after the conclusion of such appeals. *See Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992). Further, the Settling Parties have vehemently denied any wrongdoing and has indicated that they would continue to vigorously defend the lawsuit absent settlement. Without the Settlements, it could be years before Class Members would see any recovery even if they were to prevail on the merits, which might not produce a better recovery than they have achieved in these Settlements. *Behrens*, 118 F.R.D. at 543 (settlement "shortened what would have been a very hard-fought and exhausting period of time, which may have realistically ended with a decision similar to the terms of this settlement"). Most significantly, the Settlements should be approved because there are serious questions regarding the collectability of any judgment obtained against these Defendants.

18. The Court also concludes that the \$44,000.00 Settlement Fund is fair and reasonable given the fact that, the extent of the Settling Parties have limited assets and collectability of these funds remains an open questions. If the Settlements are approved, Lead Plaintiffs and the Receiver will have achieved an excellent result for the Class Members – one that will provide the Class with a monetary recovery and avoid the possibility of further litigation resulting in judgments which were not collectable. *See, e.g., Denney v. Jenkins & Gilchrist*, 2004 WL 1197251 (S.D.N.Y. 2004); *see also Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317 (S.D.N.Y. 2005) (motion for final approval granted).

19. Also weighing in favor of approving the Settlements is the fact that out of 36,930 investors, no investors filed objections with this Court. This fact weighs heavily in favor of approving the Settlements. *Id.* at 988 n.10 (holding that the district court properly considered the number of objections in approving a class settlement).

20. This Court may also consider the opinions of the parties and their counsel. *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982). Here, Class Counsel, the Receiver, and the Receiver's counsel all have considerable experience in the prosecution of large, complex class actions. Counsel for the Settling Parties are likewise experienced in complex litigation. This Court gives credence to the opinions of these counsel, amply supported by the Court's independent review, that these Settlements are beneficial resolutions of the claims alleged by the Class against the Settling Parties.

21. In addition to finding the terms of the proposed Settlements fair, reasonable and adequate, this Court must determine that there was no fraud or collusion between the parties or their counsel in negotiating the Settlements' terms. *Bennett*, 737 F.2d at 986; *Miller v. Republic Nat'l Life*

Ins. Co., 559 F.2d 426, 428-29 (5th Cir. 1977). In this case, there is no suggestion of fraud or collusion between the parties. Furthermore, the terms of the Settlements make it clear that the process by which the Settlements was achieved was fair. *Miller*, 559 F. 2d at 429; *Ressler*, 822 F. Supp. at 1554-55.

22. Based on the above findings, the Court approves the terms of the Settlement Agreements as fair, reasonable, adequate and in the best interests of the Class. The Settlements shall be consummated in accordance with the terms and conditions of the Agreements. The Settlement Agreements are hereby approved and adopted as an Order of this Court. The Court directs all of the Parties and their Counsel to cooperate with the consummation of the terms of the Settlement Agreements.

Request for Attorney Fees and Expenses

23. Class Counsel has not moved for attorneys fee and expenses and, accordingly, the Court need not address these issues.

Miscellaneous

24. All claims alleged by Lead Plaintiffs and the Class against the Settling Parties shall be, and the same are, hereby dismissed on the merits with prejudice, ~~without fees and costs to any party, except as provided in the Settlement Agreements and approved by the Court herein.~~ Set
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25. Each Releasee (as that term is defined in the Settlement Agreement) shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever, known or unknown, in law or in equity, whether or not they make a claim on or participate in the Settlement Fund, ever had, now have or hereafter can, shall or may have, against any of the Settling Parties related to their investment in

MBC viatical insurance policies. The claims covered by the foregoing release are referred to herein collectively as the "Released Claims." Each Releasor shall not hereafter seek to establish liability against any Releasee based in whole or in part on any Released Claims.

26. The Court further bars and enjoins any non-settling defendant in the Action from commencing, prosecuting or asserting any claim for contribution or indemnity against the Settling Parties, solely, arising out of, or in any way related to, their involvement with MBC; in addition, the Settling Parties, shall be barred from commencing, prosecuting or asserting any claim for contribution or indemnity against any non-settling defendant arising out of, or in any way related to, their involvement with MBC or affiliated entities; in addition, notwithstanding any provision of Florida law to the contrary, the total damages awarded against the non-settling defendants as a result of a trial of this Action, or any related lawsuit, including but not limited to, any pending or future action filed by the Receiver, shall be reduced by the greater of 1) the full amount of the Settlement Fund paid by each respective Settling Party, or 2) another amount as ordered by the Court at a later date.

27. Without in any way affecting the finality of this Order and Final Judgment, this Court hereby retains jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreements and of this Final Order and Judgment, and for any other necessary purpose.

28. Because there are multiple parties and claims presented in this case, the Court makes an express determination that there is no just reason for delaying the entry of this Order and Final Judgment, and therefore directs the immediate entry of this Order and Final Judgment.

Open Court

DONE AND ORDERED in ~~Chambers~~ in the Southern District of Florida, at Miami, Florida

this 29 day of August, 2009.



THE HONORABLE FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of record