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 REPLY TO SEC'S OPPOSITION TO RECEIVER'S APPLICATION FOR FINAL FEE AWARD FOR RECEIVER'S COUNSEL

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 ("Livoti"), hereby files this reply brief in support of the application for a final fee award for his counsel, the law firms of Colson Hicks Eidson ("CHE") and Kozyak Tropin & Throckmorton ("KTT"), pursuant to the terms of their original retention in this matter.

REPLY

The Receiver appreciates the comments by the SEC regarding the Receiver's and his counsel's work on this matter and the successful results obtained. The Receiver is fully cognizant of the privilege he and his counsel have had to work on this matter. The Receiver

submits this reply to the SEC's opposition brief simply to address certain of the arguments made in the opposition to the final fee award request.

First, the SEC argues that the Receiver is seeking a sum that goes "well beyond rates they agreed to accept at the outset of the case." SEC Opposition at 1. However, the terms of the Receiver's employment were made public and transparent in his applications to employ CHE and KTT as his counsel at the outset of this case. The terms of CHE's retention were that CHE would bill its partner time at a discounted flat rate and would discount by 15% the rate charged for associates and paralegals. However, CHE would be permitted to

> make application for enhancement of fees based on all relevant factors as set forth in Section 4-1.5 of the Rules of Professional Conduct for determining a reasonable fee to be determined by the Court, after review by the Receiver, application to the Court, notice to all interested parties and hearing at an appropriate point after conclusion of any significant settlement or resolution of the entire matter.

[D.E. 67 at ¶ 9.] The SEC did not object to these terms of engagement at the time; nor did any other interested party. The Court approved of the Receiver's retention of CHE by Order entered June 4, 2004. [D.E. 105]. The Receiver also retained KTT on basically identical terms [D.E. 61 at ¶ 8], which were also filed and approved by the Court, and were not objected to by the SEC.

Second, the SEC suggests that the Receiver has conceded this is not a "common fund" case – and so a "percentage of the fund" calculation should not be used. That is not the case. The Receiver readily acknowledged in the Final Fee Application that this is not your *typical* common fund case, because the recoveries came in many forms and from many actions. However, as one of the cases cited by the SEC makes clear, this case does indeed fall within the traditional definition of a "common fund" case:

> A common fund is a system in which a plaintiff and his attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of the litigation, including attorney's fees.

SEC v. Goren, 272 F. Supp. 2d 202, 206 (E.D.N.Y. 2003) (citing BLACK'S LAW DICTIONARY (5th ed. 1999)); *see also id.* at 206 ("[A] receivership technically fits within the definition of a 'common fund' . . . .").[1]

The Receiver and his counsel here did each of the above. Through their efforts, they "created and discovered" funds to be added to the Receivership through a wide variety of litigation and collection efforts; they "increased" the value of the existing assets through skillful management of the assets on hand; and they "preserved the fund" by preventing lapses in the insurance policies and fending off attacks on the insurance policies by the Intervening Insurers that threatened to greatly deplete the estate.

The SEC also correctly points out that the Receiver (and the SEC) opposed a fee request by investor Traded Life Policies Limited ("TLPL") at an earlier stage of this Receivership. However, what TLPL claimed a fee for was nothing like the creation of a common fund (and was, frankly, somewhat strange). As this Court noted in its order denying Traded Life Policies' fee request, TLPL had simply urged the Court "to adopt a distribution plan different than the Receiver's proposal," something which did not create or preserve a fund for anyone, but was instead just an argument that "funds in the Receivership should be distributed in a manner favorable to TLPL and similarly situated investors and less favorable to other classes of

[1] In *Goren*, the court declined to use a "percentage of the fund" calculation to determine the Receiver's and his counsels' fee, and instead used the "lodestar method." Under the particular circumstances of that case, the Receiver had acted more like a liquidating trustee in bankruptcy, and had not engaged in "complex and speculative litigation," but had only sold off and wound down the estate's assets. *See Goren*, 272 F. Supp. 2d at 207.

investors." *See* Order Denying Traded Life Policies Limited, et al.'s Motion for Award of Attorneys' Fees [Doc. 1578]. There is nothing inconsistent about the position the Receiver has taken here.

Third, the SEC contends that this Court's prior fee award decision in the Premium Sales Receivership -- *Walco Investments, Inc. v. Thenen*, 975 F. Supp. 1468 (S.D. Fla. 1997) (Moreno, J.) -- is not a valid point of comparison. Contrary to the SEC's argument, Premium Sales was most definitely an SEC receivership case. *See SEC v. Premium Sales Corp., et al.*, Case No. 93-1092-Civ-Moreno. A receiver was appointed by this Court, and the receiver and a private investors' class action *jointly* brought a variety of claims to seek to recover assets from culpable third parties. The funds amassed were eventually distributed by the receiver to the victims. The decision in *Walco* granted a final fee award to both the investors' class counsel and the Receiver and his counsel. *See Walco*, 975 F. Supp. at Appx. Also, as is the case here, the Receiver's counsel was paid under a "hybrid arrangement" with a reduced hourly rate and final enhancement depending on the results obtained. *See id.* at 1469 & 1470 (noting that "hybrid fee arrangement" was adopted by the court and stating that counsel was previously paid "$7,525,200 in interim fees previously awarded"). The Receiver submits that there could be no more closely analogous case to the present one than *Walco*.[2]

[2] The SEC also states that the Receiver's final fee award request would result in the Receiver's counsel receiving approximately $800 per hour for their work. SEC Opposition at p.2. In this case, CHE and KTT have, to date, worked at an average blended rate of only approximately $218 and $264, respectively. If awarded the full amount of the final fee award (and not taking into account the work that has been performed since May 2009 – none of which has been billed for), CHE and KTT would end up receiving an average blended rate of approximately $574 and $684 per hour for its work. This is not a figure that is "far above their normal rates" or far above market rates for comparable work. The Receiver submits that this average hourly figure represents a reasonable premium rate in light of the complexity of the case, the results achieved and all of the other factors discussed in the Final Fee Application.

Respectfully submitted,

ROBERTO MARTINEZ, AS RECEIVER

s/ Roberto Martínez_____

s/Curtis B.Miner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel of parties who are not authorized to receive electronically Notices of Electronic Filing.

s/CURTIS B. MINER
CURTIS B. MINER