

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 04-60573-CIV-MORENO/TORRES

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

MUTUAL BENEFITS CORP., et al.,

Defendants,

VIATICAL BENEFACTORS, LLC., et al.,

Relief Defendants

REQUEST FOR INSTRUCTIONS

Tew Cardenas LLP (“Tew Cardenas”), on behalf of Alexander Cook, Patricia F. Cook, and other members of the putative class of “Pre-Closing Purchase Escrow Plaintiffs,”¹ files this Request for Instructions.

1. On February 22, 2005, this Court issued a Disbursement Order [DE 727] which ordered the return of roughly \$105 million to the Pre-Closing Purchase Escrow Plaintiffs. The \$105 million was held by Union Planters Bank (“Union Planters”), and included approximately \$75 million that belonged to the individual Pre-Closing Purchase Escrow Plaintiffs and approximately \$30 million that belonged to certain institutional parties (*i.e.*, Traded Life Policies Limited, Life Settlement Holding, and Mutual Benefits Japan) that were separately represented and filed separate

¹ We refer to the class as “putative” because this Court denied the Motion for Class Certification as being moot on February 23, 2005 [DE 75] given this Court’s February 22, 2005 Order requiring the return of the funds to the Pre-Closing Purchase Escrow Plaintiffs. [DE 727].

actions. At the time, Union Planters was also holding \$2,629,108 in interest.

2. For approximately four years since the Disbursement Order, the disbursing agent, the Garden City Group (“Garden City”), Union Planters, the Receiver and Tew Cardenas have worked diligently to return the funds to the Pre-Closing Purchase Escrow Plaintiffs. To that end, Union Planters has filed over forty reports with this Court detailing the efforts that have been made to return the pre-closing funds to the Pre-Closing Purchase Escrow Plaintiffs.

3. Despite the efforts made during the last four years to return the pre-closing funds, there remains approximately \$3.8 million in “Unclaimed Funds.” The \$3.8 million comprises (1) \$2,814,903 in various Pre-Closing Purchase Escrow Plaintiffs’ accounts for which no Disbursement Form² was ever submitted; (2) \$206,882 in interest on the foregoing amount; and (3) \$808,967 in leftover interest from the \$2,629,108 in interest that Union Planters was holding before any disbursements were made. This leaves a total of \$3,830,752 in Unclaimed Funds.

4. As stated in Union Planters’ numerous reports to this Court, mailings were sent to each Pre-Closing Purchase Escrow Plaintiff, at their last known address, on four separate occasions over the course of the last four years (with the exception of approximately five Pre-Closing Purchase Escrow Plaintiffs whose names and/or addresses were unknown or incomplete). At this juncture, neither Union Planters nor Garden City believes that additional efforts to return the Unclaimed Funds to the Pre-Closing Purchase Escrow Plaintiffs will be successful.

5. Tew Cardenas is advised that Garden City has not received payment of its fees associated with the return of the pre-closing funds, or reimbursement of its costs, since 2006, and

² Union Planters’ records revealed that there were 2,052 Pre-Closing Purchase Escrow Plaintiffs with accounts at Union Planters; only 1,859 of them have submitted Disbursement Forms.

is owed \$67,826. Greenberg Traurig, Union Planters's counsel, has also not received payment of its fees associated with the return of the pre-closing funds, or reimbursement of its costs, since 2006, and is owed \$85,788. In addition, several of the Receiver's objections to various Disbursement Forms have recently been resolved, which will result in additional distributions of \$487,355. After the foregoing amounts (totaling \$640,969) are reserved for or paid, \$3,189,783 in Unclaimed Funds will remain.³ This Request for Instructions is directed to these remaining Unclaimed Funds.

6. On May 6, 2005, this Court elected to withhold the interest on the Pre-Closing Purchase Escrow Plaintiffs' funds in order to pay attorneys' fees and other costs associated with returning the funds to the Pre-Closing Purchase Escrow Plaintiffs. [DE 981]. Some Pre-Closing Purchase Escrow Plaintiffs – roughly three percent (*see* DE 1802) – objected to their interest being withheld to pay these expenses. As stated above, at that time, Union Planters was holding \$2,629,108 in interest.

7. Although the action that Tew Cardenas filed was never certified as a class action, it was treated, in all material respects, as a class action proceeding with Tew Cardenas acting as lead class counsel. When there are unclaimed funds in a class action, District Courts appear to have broad discretionary powers in shaping equitable decrees for distributing the unclaimed funds. The Court's options include:

(1) *pro rata* distributions to the existing class members. *See Beecher v. Able*, 575 F.2d 1010 (2d Cir. 1978);

(2) fluid or *cy pres* distributions to a charitable organization relating to the subject of the lawsuit or to some other purpose analogous to the

³ It is possible that some of the foregoing amounts may change – particularly the amount due to Pre-Closing Purchase Escrow Plaintiffs as a result of objections being resolved – but the changes are not expected to be more than \$100,000.

objectives underlying the lawsuit. *See Schwartz v. Dallas Cowboys Football Club, Ltd.*, 362 F.Supp.2d 574 (E.D. Pa. 2005); *In re Motorsports Merchandise Antitrust Litig.*, 160 F.Supp.2d 1392, 1394 (N.D. Ga. 2001);

(3) escheating the funds to a governmental body. *See Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990);

(4) returning the funds to the defendant. *See Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir. 1984); or

(5) the payment of attorneys' fees. *See Wilson v. Southwest Airlines, Inc.*, 880 F. 2d 807 (5th Cir. 1989).⁴

8. Because this Court has a number of options available to it to deal with the \$3,189,783 in Unclaimed Funds (after payment of Garden City's and Greenberg Traurig's fees), Tew Cardenas respectfully requests that this Court return the \$2,629,108 in interest that was on hand when the distributions began to the Pre-Closing Purchase Escrow Plaintiffs. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F. 3d 423 (2d Cir. 2007) (finding that distributing unclaimed funds to plaintiffs who had not received pre-judgment interest was a better use of the funds than the *cy pres* distributions to charities ordered by the District Court).

9. This will result in approximately 2,000 Pre-Closing Purchase Escrow Plaintiffs recovering 100% of their principal, together with interest on those funds. Garden City believes that the approximate cost for its role in that distribution (preparing and mailing the checks) would be

⁴ At the time that Tew Cardenas requested its fee, it requested no more than 2% of the common fund – an “extraordinarily low percentage” (DE 1802 at p.2) – so that the class members could receive 100% of their principal. In other words, Tew Cardenas limited its fee request based on the \$2,629,108 that was then being held as interest so that the class members' principal would not be used to pay Tew Cardenas's fee.

\$75,000. Tew Cardenas has also spoken to a local accounting firm – Morrison, Brown, Argiz & Farra – and they believe that, depending on Union Planters’ records, the approximate cost for the accountants in the distribution (computing the amounts to which each Pre-Closing Purchase Escrow Plaintiff is entitled), if they are even needed, would not exceed \$50,000.⁵

CONCLUSION

Based on the foregoing, Tew Cardenas respectfully request instructions from this Court regarding how the Unclaimed Funds should be distributed.

Dated: October 14th, 2009.

Respectfully submitted,

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⁵ If this Court elects to pay the \$2,629,108 in interest to the Pre-Closing Purchase Escrow Plaintiffs, \$560,675 will still be remaining in Unclaimed Funds (from which the expenses of the distribution of interest will need to be paid).

CERTIFICATE OF SERVICE

I hereby certify that on October 14th, 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 or pro se parties 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 or parties who are not authorized to receive electronically Notices of Electronic Filing.

s:/Jeffrey C. Schneider

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