UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 04-60573-CIV-MORENO/GARBER

SECURITIES AND EXCHANGE COMMISSION.

Plaintiff,

v.

MUTUAL BENEFITS CORP., *et al.*,

Defendants,

VIATICAL BENEFACTORS, L.L.C., *et al.*,

Relief Defendants.

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REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Plaintiff's Motion for Preliminary Injunction (D.E. #2), pursuant to an Order of Reference entered by the Honorable Federico A. Moreno, United States District Judge. The Court held an evidentiary hearing regarding this matter, and has carefully reviewed the pertinent portions of the record and the relevant law. For the following reasons, it is respectfully recommended that the Court GRANT Plaintiff's Motion for Preliminary Injunction (D.E. #2) as to all defendants, and as to relief defendants Viatical Benefactors, LLC and Viatical Services, Inc.; but DENY Plaintiff's Motion for Preliminary Injunction as to all other relief defendants.

BACKGROUND

On May 3, 2004, plaintiff, the Securities and Exchange Commission ("the SEC"),

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commenced this action by filing its Complaint for Injunctive and Other Relief, and its Motion for Temporary Restraining Order and Other Relief and Entry of Preliminary Injunction. The SEC's stated purpose in bringing this action was "to enjoin Defendants from committing further violations of the antifraud and registration provisions of the federal securities laws in connection with an offering of securities issued by Defendant Mutual Benefits Corporation ('MBC' . . .)." Complaint (D.E. #1), at 1 ¶1.

The SEC named MBC and three individuals as defendants: Joel Steinger, who allegedly is the *de facto* CEO of MBC, *id.* at 3 ¶5; Leslie Steinger, who is Joel Steinger's brother and allegedly "is one of the principals of MBC and is in charge of running the company's sales force . . . ," *id.* at 3 ¶6; and Peter Lombardi, who the SEC alleged "is listed as director and president of MBC in corporate filings in various states, and is touted to investors as MBC's president." *Id.* at 4 ¶7.

The SEC also named eight entities as relief defendants: Viatical Benefactors, LLC, which allegedly was owned and operated by MBC, and allegedly is controlled by defendant Joel Steinger, *id.* at 4 ¶8; Viatical Services, Inc., which allegedly is controlled by Joel Steinger, *id.* at 4 ¶9; Kensington Management, Inc., of which Joel Steinger is allegedly president, and which allegedly has received at least $6.35 million in consulting fees from MBC, *id.* at 4 ¶10; Rainy Consulting Corp., of which Leslie Steinger is allegedly the sole officer and director, and which allegedly has received at least $9.06 million in consulting fees from MBC, *id.* at 4 ¶ 11; Twin Groves Investment, Inc., which allegedly is controlled by Leslie Steinger, and which allegedly has received at least $1.2 million in consulting fees from MBC, *id.* at 5 ¶ 12; P.J.L. Consulting, Inc., of which defendant Lombardi is allegedly is the sole officer and director, and which allegedly has received at least $8.25 million in consulting fees from MBC, *id.* at 5 ¶13; SKS Consulting, Inc., which the Steingers'

brother, Steven Steiner,[1] allegedly controls, and which allegedly has received at least $2.25 million in consulting fees from MBC, *id.* at 5 ¶14;[2] and Camden Consulting, Inc., for whose bank accounts Steven Steiner allegedly shared signature authority, and which allegedly has received at least $7.48 million in consulting fees from MBC, *id.* at 5 ¶15.

The securities which defendants offered for sale were viatical settlements. As the Court noted in its Order Denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (D.E. #193), a viatical settlement is a transaction in which a terminally-ill or chronically-ill insured (*i.e.*, a "viator") sells the benefits of his or her life insurance policy to a third-party in return for a lump-sum cash payment equal to a percentage of the policy's face value. Viatical settlement providers, including MBC, purchase the polices from the viators and then sell fractionalized interests in the policies to investors.[3]

On May 4, 2004, one day after the SEC commenced this action, the Court entered an *ex parte* Temporary Restraining Order. Also on May 4, 2004, the Court placed MBC, as well as relief defendants Viatical Benefactors, LLC and Viatical Services, Inc., into receivership and appointed Roberto Martinez, Esq., to be receiver. Since that date, the Court has extended the TRO several times, and it remains in effect.

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[1] In the Complaint and in other documents, the SEC and defendants spelled Steven *Steiner*'s last name differently than his brothers' last name.

[2] The SEC did not include in its Proposed Findings of Facts and Conclusions of Law any proposed findings regarding SKS Consulting, Inc., and the Court therefore finds that the SEC is not entitled to a preliminary injunction against SKS.

[3] "MBC is also a life settlement provider. The only distinction between life settlements and viatical settlements is that in life settlements, the insured is not terminally or chronically ill." D.E. #193, at 3 n.2.

From June 30 through July 2, 2004, and from July 19 through July 22, 2004, the Court held an evidentiary hearing regarding the SEC's Motion for Preliminary Injunction. Based on the evidence submitted at that hearing, as well as other documentary and testimonial evidence which the parties have submitted, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

From 1994 until May of 2004, more than 30,000 investors in the United States and abroad invested more than $1 billion in fractionalized interests in viatical settlements offered by MBC. Those viatical settlements were "securities" which are governed by the Securities Act of 1933. *See* Order Denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (D.E. #193), at 8-13. MBC and other defendants, however, never registered the viatical settlements with the SEC, and no registration statement has been filed or is in effect with the SEC concerning those securities.

With regards to the viatical settlements at issue, MBC located the polices to purchase, negotiated purchase prices, bid on policies, obtained life expectancy evaluations of individual viators, and created the legal documents needed to conclude the transactions. In order to sell the viatical settlements, MBC solicited investors both directly and through sales agents. MBC or its agents asked investors to identify a desired maturity date and to submit a purchase agreement, and MBC promised rates of return ranging from 12% to 72%, depending on the anticipated date of maturity of the policy, *i.e.*, the date when the viator was predicted to die. If the viator lived beyond his or her life expectancy, then the term of the investment was extended and the premiums for that policy had to be paid either from additional funds provided by the original investor or by new investor funds which had been assigned to other policies. MBC, through relief defendant Viatical

Services, Inc., would pay the insurance policies' premiums, monitor viators' health, collect the benefits upon the viators' deaths, and distribute the proceeds to investors.

The States of Alabama, Alaska, Indiana, Pennsylvania, and Vermont have issued cease-and-desist orders against MBC in connection with its sale of the viatical settlements. MBC, however, never advised potential or current investors of that fact.

Defendants Joel Steinger and Leslie Steinger are listed as consultants to MBC in an annual report which MBC filed with the State of Florida. Defendant Peter Lombardi is MBC's sole shareholder and president.

Joel Steinger is also the *de facto* CEO of MBC, as he controls the company and has the power to make the final decision regarding all of the company's principal decisions, including: recruiting brokers, hiring and firing employees, acquiring insurance policies from viators, assigning life expectancies to individual policies, and assigning investors to specific policies. Joel Steinger also received regular reports concerning MBC's operations, participated in sales meetings to discuss management issues with sales agents, hired and fired the doctors whom MBC engaged to perform life expectancy evaluations, and handled MBC's legal and regulatory issues.[4]

Leslie Steinger is one of MBC's principals and runs the company's sales force. His duties at MBC included: recruiting sales people, managing sales agents, and participating in daily sales

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[4] The evidence regarding the individual defendants' roles within MBC was for the most part undisputed. To the extent defendants dispute their roles within MBC, and to the extent any minor discrepancies regarding those roles exist, the Court credits those sources of evidence upon which the SEC relied and which are consistent with the Court's findings. Also, and as discussed *infra* in the Court's Conclusions of Law, because defendants exercised their Fifth Amendment rights not to testify regarding their roles within MBC (as well as regarding any other matters), the Court makes an adverse inference against defendants regarding the roles they undertook within MBC.

meetings with the in-house sales force. Leslie Steinger often decided to which policies MBC would allocate newly invested funds and whether an investor who requested a refund of his or her investment would receive that refund.

Peter Lombardi performed accounting and administrative functions at MBC, and he regularly participated in meetings with sales agents and prospective investors. He signed correspondence letters, including introduction and placement letters, which MBC sent to prospective investors, and he approved materials for sales agents to use when attempting to sell MBC's investments. Lombardi also had the authority to hire and fire MBC's employees.

In May of 1998, in an SEC enforcement action in this Court which arose out of Joel and Leslie Steinger's role in MBC's business of offering investments in viatical settlements, the Steingers were permanently enjoined from violating the registration and anti-fraud provisions of the federal securities laws. *See* Final Judgment of Permanent Injunction and other Relief (D.E. #2) in *SEC v. Steinger*, case no. 98-6442-Civ-Middlebrooks. In that Final Judgment, the Court ordered the Steinger brothers to disgorge $850,000, jointly and severally, and to pay a $50,000 civil penalty. *See id.*

The Commodities Futures Trading Commission ("CFTC") has also brought at least four actions against Joel Steinger and has barred him from the commodities industry. *See* enforcement actions listed in SEC's Proposed Findings of Fact and Conclusions of Law (D.E. #420), at 7-8; D.E. #23, Exs. 28-30. Those four cases related to two separate businesses: Tara Securities Corp. d/b/a Financial Trading Group, and Crown Colony Commodity Options, Ltd. The CFTC has brought two proceedings against Leslie Steinger, both of which related to his role within Tara Securities Corp. In both of those proceedings, the CFTC charged him with fraudulent conduct in connection with the

sales of investments. The CFTC's actions against Leslie Steinger resulted in a permanent injunction, and a permanent bar and civil penalty. Joel Steinger was also criminally convicted of mail and wire fraud in an action which arose out of his involvement with Crown Colony Commodity Options, Ltd. *See United States v. Alter*, 81 F.R.D. 524 (S.D.N.Y. 1980).

None of the defendants advised any of MBC's investors or potential investors of the civil and criminal actions previously brought against the Steinger defendants, or of the results of those actions.

Relief defendant Viatical Benefactors, LLC ("VBLLC") is an affiliate company owned and operated by MBC to purchase policies from viators in California and Texas, where MBC is not licensed to purchase policies. In 1998, Richard Meekins, who is currently VBLLC's vice president, purchased the company. Defendant Joel Steinger assisted and guided Meekins in the conduct of all of VBLLC's business, and in practice all of VBLLC's functions were performed by MBC. VBLLC located viators with policies to sell but had no role in raising money; that function was performed by MBC. VBLLC served as the owner of policies it obtained for MBC's investors, and investors' funds were escrowed to pay premiums and maintained in accounts pursuant to an escrow agreement between VBLLC and Union Planters Bank, N.A. VBLLC was, in effect, a shell company which MBC used to do business in California and Texas, and MBC handled VBLLC's policies in the same manner it handled its own polices, including processing those policies from MBC's offices.

Relief defendant Viatical Services, Inc. ("VSI") was established in 1995 by MBC's lawyers, and a year later all of VSI's shares were transferred to Ameer Khan for no consideration. VSI serviced the vast majority of viatical settlements sold by MBC and VBLLC, and also performed extensive post-closing services, including tracking premiums due on policies and notifying MBC, or one or both of two trustees, Anthony M. Livoti, Jr., Esq. and Union Planters Bank, N.A., of the

amounts of premiums due and the names of the payees. VSI also performed extensive duties in connection with processing death benefits when a policy matured, and held $700,000 in a premium reserve account which was funded by $100 disbursements from each closing on a policy sold by either MBC or VBLLC. Prior to the date the SEC commenced this action, Joel Steinger and other MBC representatives were in regular contact with Ameer Khan and senior staff at VSI; and VSI provided Joel Steinger with many reports generated for Steinger, each of which provided data about the insurance portfolio which VSI serviced, including policies that were past their life expectancies and the amounts of premium payments. Ameer Khan invoked his Fifth Amendment right against self-incrimination and refused to testify in response to the SEC's notice of deposition, and he did not testify at the preliminary injunction hearing.[5]

Defendant Joel Steinger is the sole officer/director of relief defendant Kensington Management, Inc., and there are no other individuals authorized to speak on behalf of Kensington. Kensington and MBC entered into a consulting agreement by which Kensington would "provide overall consulting services and expertise in connection with the operation of MBC's viatical business," and MBC agreed to pay Kensington "a commission equal to a percentage of the death benefit of all life insurance policies which MBC entere[ed] into a contract to purchase." MBC paid Kensington only for services which Joel Steinger performed for MBC. From January 1, 1999, through May 4, 2004, MBC paid Kensington approximately $10 million in "consulting fees." During that same period, Joel Steinger individually received only approximately $71,125 from MBC.

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[5] As discussed *infra* in the Court's Conclusions of Law with respect to the individual defendants, the Court makes a negative inference against VSI based on Khan's refusal to testify. Also as discussed *infra*, however, standing alone that inference is insufficient to warrant entry of a preliminary injunction against VSI.

It is clear that Kensington was merely a conduit through which MBC made payments to Joel Steinger.

Relief defendant Rainy Consulting Corp. is a Florida corporation whose president is Leslie Steinger. MBC and Rainy entered into a consulting agreement by which Rainy agreed to "provide overall consulting services and expertise in connection with the operation of MBC's viatical business," and MBC agreed to pay Rainy "a commission equal to a percentage of funds raised from third-party purchasers of viatical settlements facilitated by MBC." From January 1, 1999, through May 4, 2004, MBC paid Rainy approximately $12.6 million in "consulting fees." During that same period, Leslie Steinger individually received only approximately $4,943 from MBC. It is clear that Rainy was merely a conduit through which MBC made payments to Leslie Steinger.

Relief defendant Twin Groves Investment, Inc., is a Florida corporation whose president is Leslie Steinger. There is no written agreement between MBC and Twin Groves. Nevertheless, MBC has reported that payments it made to Twin Groves were for Leslie Steinger's consulting services. From January 1, 1999, through May 4, 2004, MBC paid Twin Groves approximately $1.2 million in "consulting fees." It is clear that Twin Groves was merely a conduit through which MBC made payments to Leslie Steinger.

Relief defendant P.J.L. Consulting, Inc. ("PJL") is a Florida corporation whose president, sole shareholder, and director is defendant Peter Lombardi. MBC and PJL entered into a consulting agreement by which PJL agreed to "provide overall consulting services and expertise in connection with the operation of MBC's viatical business," and MBC agreed to pay PJL "a commission equal to a percentage of funds raised from third-party purchasers of viatical settlements facilitated by MBC." From January 1, 1999, through May 4, 2004, MBC paid PJL approximately $11.8 million

in "consulting fees."[6] It is clear that PJL was merely a conduit through which MBC made payments to Lombardi.

Relief defendant Camden Consulting, Inc., is a Florida corporation whose only principal is Henry Fecker III. Fecker, however, shares signatory authority over Camden's bank accounts with Steven Steiner, who is MBC's vice president and the Steinger defendants' brother. Fecker is Steiner's domestic partner, and the two men share bank accounts. MBC and Camden entered into a consulting agreement by which Camden agreed to "provide overall consulting services and expertise in connection with the operation of MBC's viatical business," and MBC agreed to pay Camden "a commission equal to a percentage of funds raised from third-party purchasers of viatical settlements facilitated by MBC." Although Fecker did not provide any services to MBC, from January 1, 1999, through May 4, 2004, MBC paid Camden approximately $7.5 million in "consulting fees." The purpose of those payments was to compensate Steven Steiner for his work for MBC. Fecker invoked his Fifth Amendment privilege against self-incrimination and refused to testify in response to the SEC's notice of deposition, and he did not testify at the preliminary injunction hearing.[7]

From 1994 until 2004, MBC offered and sold viatical settlements to the public, primarily through a national network of independent sales agents. Those agents consisted mainly of insurance agents, brokers, and financial advisors. MBC coordinated its sales efforts through a group of in-

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[6] During that same period, Lombardi received from MBC approximately $1.2 million in "shareholder distributions."

[7] As discussed *infra* in the Court's Conclusions of Law with respect to the individual defendants, the Court makes a negative inference against Camden based on Fecker's refusal to testify. Also as discussed *infra*, however, standing alone that inference is insufficient to warrant entry of a preliminary injunction against Camden.

house sales agents, who were called "marketing directors." Those marketing directors dealt primarily with sales agents in the field, and the marketing directors reported primarily to defendants Leslie Steinger and Peter Lombardi.

MBC trained the sales agents and provided them with offering materials and other information which was necessary to solicit investors and procure the sale of an investment in a viatical settlement. MBC required that any advertising materials or other materials created by independent sales agents be reviewed by MBC prior to its use.

The sales agents solicited potential investors through newspaper advertisements, videos, direct mailings, and seminars. MBC also solicited investors directly through its website.

MBC offered and sold investments in viatical settlements by promising investors "fixed, total," and "double-digit" returns ranging from 12-72%, depending on the term of investment chosen by the investor, which corresponded with the purported life expectancy of the viator.[8] Through at least 1998, the MBC Purchase Agreement provided investors with three investment choices: twelve, twenty-four, and thirty-six months. Thereafter, MBC offered seven investment options: twelve months with a "12% fixed, total return on purchase price"; eighteen months with a "21% fixed, total return on purchase price"; twenty-four months with a "28% fixed, total return on purchase price"; thirty-six months with a "42% fixed, total return on purchase price"; forty-eight months with a "50% fixed, total return on purchase price"; sixty months with a "60% fixed, total return on purchase price"; and seventy-two months with a "72% fixed, total return on purchase price." A prospective investor merely had to select the term of investment which he or she desired and fill in the dollar

[8] The Purchase Agreement advised investors that "returns . . . are directly tied to the projected life expectancy of the insured."

amount of the investment. During oral sales solicitations, MBC's sales agents assured investors that the investments were "guaranteed" and downplayed the fact that the viator could live beyond his or her life expectancy.

MBC told sales agents that 70-80% of the viatical settlements which MBC sold matured - *i.e.*, the viators died - on or before the viators' projected life expectancies. The sales agents passed this information on to prospective investors, and MBC also told investors and prospective investors that half of the viators died before their projected life expectancies.

MBC and its sales agents also represented to investors that each policy MBC bought and subsequently sold was reviewed by a state-licensed physician to verify the viator's terminal condition and to provide a life expectancy *before* MBC acquired the policy and *before* MBC assigned the policy, or a fractionalized interest in the policy, to investors. Those agents also focused discussions with potential investors on the high returns and humanitarian aspects of MBC's business, and steered those discussions away from the risks of investing in the viatical settlements.

MBC provided sales agents with offering materials which MBC had designed, and those materials touted the viatical settlements as safe and secure,[9] and boasted that MBC was "the Number One Viatical & Life Settlement Provider" in the United States and owed its "longevity and growth to excelling at the most important aspects of this type of transaction." In those written offering materials, MBC also discussed the viatical settlements' allegedly high, fixed returns which were not subject to stock market volatility, and explicitly stated, in part, that investors could "earn a double-digit fixed, total return which is known to [the investor] at the time of purchase." MBC touted

[9] Those written materials included a Purchase Agreement, Trust Agreement, Suitability Questionnaire, testimonials from investors and sales agents, and other documents.

viatical settlements as being "[v]iewed by many financial professionals as an alternative to traditional equity investments."

MBC included in the offering materials a promotional video or CD-ROM which included a seven-minute presentation about the viatical settlement investments. In that video or CD-ROM, MBC repeated many of the representations contained in the written materials and explicitly stated, among other things, that MBC "offers investors an alternative to stock and bond markets" and that a viatical settlement investment is "not subject to any stock market volatility or current interest rates like the stock market, mutual funds, annuities, and certificates of deposit . . . . Therefore, the potential exists for greater returns to the individual investor than most other forms of conventional investing."

Defendants and their agents represented to outside sales agents that benefits under a group insurance policy would not be used in the viatical settlement program unless the viator's benefits were first converted into those of an individual. MBC represented that the conversion from a group to an individual policy "would be done before it was being offered as a viatical settlement."

The SEC presented unrebutted evidence from VSI's database that contrary to defendants' representations regarding the conversion of policies from group to individual, more than 3,200 policies which MBC sold, *i.e.* approximately 35% of the total policies it sold, were group or term policies and that conversion from group to individual was done by VSI only if the insured separated from the group, *after* the purchase of the viatical settlement.

The individual defendants met with prospective investors and offered them tours of MBC's offices. Defendant Lombardi reiterated to investors what MBC sales agents had told them, including representations regarding the guaranteed rates of return and the safety of investing with MBC.

Most of the policies MBC sold were for individuals diagnosed with AIDS or HIV.[10] MBC represented that "one of the reasons why . . . [MBC] was putting the monies into purchasing policies from people with AIDS or [who] were HIV positive [was] because history had shown that they could be very accurate in predicting someone's life expectancy based on that information." Smith's testimony at July 2, 2004, preliminary injunction hearing, at 394. Later in the company's lifetime, MBC also sold policies which had been owned by insureds who were senior citizens or who had other terminal illnesses; these were generally referred to, respectively, as "senior settlements" and "life settlements."

Almost all of MBC's investors purchased a fractionalized interests in policies, as opposed to entire policies. The offering materials did not give investors the option of selecting the type of policy to which they wanted their investment to apply, and the great majority of investors did not have the choice of selecting their policy.

When an investor purchased a fractionalized interest, he or she was required to execute a Trust Agreement contained in the offering materials and to use MBC's selected trustee for the servicing of that policy, including payment of premiums and the filing and collection of death benefits. Since 1996, MBC has used an attorney named Mr. Livoti as trustee for almost all of its and relief defendant Viatical Benefactors, LLC's policies.

In its offering materials, MBC explained to investors that each proposed viator's medical records were reviewed by an independent, state-licensed physician to verify the insured's medical condition and diagnosis, and to estimate the proposed viator's life expectancy. MBC also

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[10] For purposes of this Report and Recommendation, the court refers to these policies collectively as "AIDS policies," despite the fact that the Court recognizes that there is a distinction between the diagnoses of HIV and AIDS.

represented that investors are assigned to a particular policy only *after* the licensed physician has determined that viator's life expectancy.

In the offering materials, MBC also represented that funds sufficient to make premium payments for the viator's estimated life expectancy, or longer at MBC's discretion, would be placed in escrow at the time of closing. MBC informed investors that the trustee charged with performing the post-purchase functions (such as payment of premiums) maintained a reserve which was comprised of "interest on [the escrowed] funds and any unused premiums," and that relief defendant Viatical Services, Inc. had established another reserve "for payment of premiums on those policies where the insured outlives the projected life expectancy."

MBC's offering materials directed potential investors to send funds payable to MBC's designated escrow account. Although the escrow agent listed on the payment instructions has changed over time, during most of the relevant time period the escrow agent was MBC's law firm: Brinkley, McNerney, Morgan, Solomon & Tatum, LLP. In 2002, MBC began to use financial institutions as its escrow agent.

MBC pooled investors' monies in the escrow account until an insurance policy was acquired and/or matched to each investor, a process which often took several months. In a financial statement, MBC reported that as of December 31, 2003, there was more than $81 million of investors' funds waiting to be placed on policies, and at the time the SEC instituted this action (*i.e.*, May 3, 2004), more than $104 million of investors' funds was in the escrow account, waiting to be placed on policies.

Once an individual investor's funds cleared and were waiting to be placed on a policy, MBC sent the investor a welcome letter signed by defendant Lombardi. MBC then assigned investors to

policies as policies became available.

Upon placement of an investor to a policy, the investor was provided with minimal information upon which he or she could evaluate the investment. The standard placement letter, which defendant Lombardi signed, provided the investor with: (1) a viator number without other information to identify the viator; (2) the name of the insurance company; (3) the amount of the death benefit; (4) the viator's life expectancy, as calculated by MBC; (5) the percentage of return on the investment; and (6) the actual funds applied to the policy and the anticipated amount of return on that investment.

At the time of closing with the viatical broker, funds were paid to various MBC affiliates which had post-closing obligations, including relief defendant Viatical Services, Inc., and the attorney, Mr. Livoti. Additionally, funds sufficient to pay premiums through the life expectancy, or longer at MBC's discretion, were purportedly supposed to be deposited in the appropriate escrow account.

From October of 1994 through May 4, 2004, MBC purchased and sold to investors at least 9,187 policies with a face value of $1,777,027,904. During MBC's bid-solicitation process, it traditionally has divided the viator files into two general groups: AIDS files and non-AIDS files. The policies sold were also tracked in Viatical Services, Inc.'s database as either HIV or non-HIV policies. That database reflected the following breakdown of policies:

	HIV Policies	+	**Non-HIV Policies**	=	**Total Policies**	
	No. of policies	Face value ($)	No. of policies	Face value ($)	No. of policies	Face value ($)
Total Policies =	8,111	674,832,353	1,076	1,102,195,551	9.187	1,777,027,904
Matured Policies +	1,598	107,203,779	267	90,277,505	1,865	197,481,284
Active Policies	6,513	567,628,574	809	1,011,918,046	7,322	1,579,546,620

On average, policies which MBC sold were 53 months beyond the terms and life expectancies which MBC had represented to investors. Even as late as November of 2003, MBC's internal data reflected that 90% of the active policies were beyond their life expectancies.

MBC's bidding department bid on AIDS files immediately upon receipt, without obtaining an independent medical analysis. Instead, MBC determined the amount of its bid based on a chart that listed the insured's T-cells and bid percentages. If the viator accepted the bid, then the AIDS file would typically be forwarded to Joel Steinger, who would determine the viator's life expectancy and match the policy to investors.

MBC's former Closing Coordinator then usually forwarded the AIDS files to one of two physicians, Dr. Clark Mitchell or Dr. Edgar Escobar, or their representatives. However, she did so only *after* the policy had been purchased and assigned to a group of investors, and *after* the closing packages had been sent to the investors. Additionally, the files sent to those physicians already had had a life expectancy assigned to them, which had been set by Joel Steinger or another MBC employee in MBC's bidding department.

Medical reviews for approximately six thousand active AIDS policies, which represent 79%

of MBC's active policies, were conducted by Dr. Mitchell or Dr. Escobar. Dr. Mitchell[11] and Dr. Escobar reviewed the AIDS files and prepared a written summary of each viator's medical history. A viator's medical history was included in a letter or affidavit which MBC later distributed to investors in the relevant policy. With regards to medical history summaries prepared by Dr. Mitchell, the typical life expectancy letter or affidavit included a representation that Dr. Mitchell had spoken to or consulted with the viator's treating physicians, which was not true. Shortly after Dr. Mitchell began executing life expectancy letters, he informed Joel Steinger that he was not calling viators' doctors and that he was uncomfortable with the contrary representation in the letters, but the individual defendants told him to continue to execute the letters and affidavits as they were written.

Upon receiving a medical history summary from Dr. Mitchell, MBC's Closing Coordinator would prepare the life expectancy letter or affidavit for Dr. Mitchell's signature, and she would back

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[11] Without question, Dr. Mitchell's credibility will be hotly disputed at trial, and it is possible that a jury will disregard his testimony in its entirety because of his history of allegedly fraudulent activities, his involvement in the scheme which is the subject of this action, and his possible motivation to lie (*i.e.*, to obtain favorable treatment in any actions regarding MBC and in the other criminal action which is pending against him). However, for purposes of this Motion for Preliminary Injunction, the Court credits Dr. Mitchell's relevant testimony to the extent it supports these Findings of Facts and Conclusions of Law. Much of his relevant testimony is undisputed, in part because defendants refused to testify based on their invocations of their Fifth Amendment privileges; and other portions of his relevant testimony are consistent with, and best explain, other witnesses' testimonies and documentary evidence.

Similarly, the credibility of Albert Trombino, a former inside sales agent for MBC, is questionable in light of, *inter alia*, the criminal and regulatory actions against him; his failure to file tax returns; the misconduct which led to his losing his securities license; his former drug addiction; and his possible motivation to lie, which is based on, *e.g.*, events surrounding a possible sex scandal in which he many have been involved when worked at MBC. As with Dr. Mitchell, however, for purposes of this Motion for Preliminary Injunction, the Court credits Mr. Trombino's relevant testimony to the extent it supports these Findings of Facts and Conclusions of Law. Much of his relevant testimony, like Dr. Mitchell's, is undisputed, in part because defendants refused to testify based on their invocations of their Fifth Amendment privileges; and other portions of his relevant testimony are consistent with, and best explain, other witnesses' testimonies and documentary evidence.

date the letter to match the date that MBC had purchased the policy. MBC's Closing Coordinator testified that MBC required her to do that because MBC "needed to make is seem like it was currently looked at . . . . [I]t had to show that it was reviewed at the time the file was sold, not afterwards." Goldberg Dep., at 27, 55. MBC then sent the letter or affidavit, which contained a false medical review date, to people who had invested in that policy.

In May of 2001, Dr. Mitchell was arrested for insurance fraud related to the life expectancy letters he executed for MBC. Defendants and other MBC officers were aware of Dr. Mitchell's arrest but did nothing to verify that Dr. Mitchell's letters were correct, and MBC failed to inform investors that the physician who had purportedly performed the life expectancy calculations for their letters had been arrested.

Dr. Escobar was also given predetermined life expectancies by MBC, which were inputted into the reviews he drafted. Dr. Escobar invoked his Fifth Amendment right against self-incrimination and refused to testify at deposition, and he did not testify at the hearing regarding the SEC's Motion for Preliminary Injunction. Defendants have not presented any evidence to dispute MBC's former Closing Coordinator's testimony that MBC gave Dr. Escobar predetermined life expectancies, and the Court credits the former Closing Coordinator's testimony.

Out of the 8,111 AIDS policies that MBC purchased and subsequently sold to investors, only 1,598, or 19.7%, have matured. Of those, only 473, which represents 29.6% of those which have matured (and 5.8% of the total AIDS policies), matured at or before the predicted life expectancy. Of the remaining 6,455 AIDS policies that have not matured, approximately 99.1% are beyond their predicted life expectancies. In other words, at least 93.5%, and possibly as many as 94.2%, of MBC's AIDS policies have matured or will mature beyond their viators' life expectancies, as

calculated by MBC.

Although the high percentage of policies maturing after the viators' life expectancies would tend to imply fraud or severe recklessness either in calculating the life expectancies or in misrepresenting the degree of accuracy with which MBC could predict those life expectancies, MBC has raised several defenses to those conclusions. In part, MBC has, at various times, claimed that it stopped selling AIDS policies in 2000. Contrary to that representation, however, MBC sold 700 AIDS policies from 2000 through July of 2003. Therefore, although MBC slowed down its sales of AIDS policies, it did not completely stop selling them, and in fact it sold a significant number of them until July of 2003.

MBC also contends that new drug therapies for treating HIV and AIDS made it extremely difficult to predict life expectancies of patients with those diseases. It is true that in the mid-1990's, new drug therapies, commonly referred to as drug "cocktails," were developed to treat AIDS, and those drug therapies dramatically increased life expectancies of persons afflicted with HIV and AIDS. By 1997, it was well known in the medical community that those treatments were effective and significantly increased the life expectancies of people who were afflicted with AIDS. By 1997 or 1998, it was widely accepted that those drug therapies were effective to treat HIV patients, to decrease the incidence of opportunistic infections, and to allow patients to live longer.

Although those facts were well known within the medical community by 1998, MBC did not change its approach to bidding on and selling AIDS policies. In fact, "[i]t was kind of a standing banter in the [MBC] office, that these people were going to live a lot longer than three years and yet no HIV, AIDS file was ever placed [stet] a longer life expectancy than three years. . . . [T]hese people were going to live a lot longer than three years, and yet we would not put back

a lot more premium money for their policies . . . so it became clear that premium money was not matching life expectancy." Manwell's Testimony at the July 19, 2004, preliminary injunction hearing, at 229-30.

From 1996 to 2003, the average life expectancy assigned by MBC to all of its policies, including non-AIDS and AIDS policies, increased by an average of seventeen months. From the date of inception of MBC's business through September 30, 2003, approximately 96.4% of all life insurance policies that MBC sold were assigned life expectancies between six and thirty-six months.

MBC did not advise new investors about the effects which new medical treatments were having on the viatical settlement industry and, particularly, on the policies MBC sold. To the contrary, in the late 1990's, MBC addressed investors' concerns about new AIDS treatments by informing them that the treatments did not work for all individuals. MBC also sent prospective investors articles which stressed that the new treatments were not effective for all AIDS patients and that many people were still dying of AIDS. At the same time MBC was downplaying the effect of AIDS treatments to prospective investors, however, MBC was telling current investors whose policies were beyond their predicted life expectancies that the new AIDS treatments were working and were the cause of those policies' late maturations.

By 1997, MBC was experiencing persistent, widespread problems with life expectancies assigned to viators of most of the policies it sold. As late as 1999, a former MBC sales agent who represented hundreds of MBC's investors complained to Leslie Steinger that MBC's policies were not maturing within their life expectancies. Leslie Steinger responded by misrepresenting that MBC was not experiencing any company-wide problems and that the sales agent's experience was a

"fluke" or bad "luck of the draw." When individual investors expressed concern over the fact that their policies were not maturing on time, MBC's representatives assured them that MBC was doing well; and the representatives flashed them stacks of checks, purportedly made out to investors whose policies had matured, and encouraged them to wait patiently for their own investments to mature. MBC's representatives told investors that it was simply "bad luck" that their policies had not matured.

From October of 1994 through May 4, 2004, MBC purchased and sold interests in 1,076 non-AIDS policies. MBC handled non-AIDS policies slightly differently than it handled AIDS files. *Prior* to bidding on a non-AIDS file, MBC forwarded the potential viator's medical records to a physician for medical review and an estimation of life expectancy. If the physician's life expectancy estimate were higher than MBC wanted, MBC's representatives would ask the reviewing physician to re-review the medical file in order to determine whether the life expectancy could be adjusted downward. For example, MBC requested Dr. LaMarca, one of the physicians who reviewed non-AIDS policies, to re-review 3% to 10% of the policies to which he had assigned a life expectancy. When Dr. LaMarca re-reviewed a policy, he either left the life expectancy unchanged or revised it downward; he never adjusted a life expectancy upward based upon a re-review. Upon receipt of a final life expectancy determination from the reviewing physician, MBC placed a bid on the policy, and if the bid were accepted, then MBC would forward the policy to Joel Steinger or Leslie Steinger, one of whom would assign investors to the policy.

MBC purchased the majority of those non-AIDS policies after 2000, and therefore the majority of them have not had the opportunity to reach their maturity dates. However, the limited data available suggests that, as with the AIDS policies, MBC has seriously underestimated life

expectancies of viators of the non-AIDS policies. As of June 11, 2004, 267 of the 1,076 non-AIDS polices had matured and 809 had not matured. Of the 267 that had matured, approximately 57.3% (153) had matured on or before the viator's life expectancies, while approximately 42.7% (114) had matured beyond their life expectancies. Of the 809 active non-AIDS policies (*i.e.*, the polices that have not yet matured), approximately 22.9% (185) were already beyond their life expectancies by an average of 552 days, and the remaining 77.1% (624) had not yet matured and were not yet past their life expectancies. Therefore, 27.8% (299) of the total number of non-AIDS policies (including both those which have matured and those which have not yet matured) are already beyond their life expectancies, and more than half of those have not yet matured; by the time all of the non-AIDS policies have matured, up to 85.8% of them (923) could be beyond their life expectancies. Of the 452 non-AIDS policies for which one can definitively say whether they will mature beyond their predicted life expectancies (*i.e.*, the 267 that have already matured plus the 185 that have not matured but which are beyond their life expectancies), an astounding 66.2% (299) were beyond their life expectancies as of June 11, 2004.

The total value of the MBC non-AIDS policies was approximately $1.102 billion, which is approximately $427,363,198 greater than the value of the AIDS policies. As of June 11, 2004, approximately 8.1% ($90,277,505) of those policies as measured by *value* had matured, while approximately 91.9% ($1.012 billion) of those policies as measured by *value* were active. Of the policies that had matured, approximately 65% ($58.6 million) had matured within the predicted life expectancies, while approximately 35% ($31.6 million) had matured beyond the predicted life expectancies. Additionally, approximately 16.2% ($163.8 million) of the value of the active policies were already beyond their predicted life expectancies. Therefore, approximately 17.8%

(approximately $195.4 million) of the total value of all non-AIDS policies (including both those which have matured and those which have not yet matured) are already beyond their life expectancies, and the vast majority of the policies reflected in that figure have not yet matured; by the time all of the non-AIDS policies have matured, up to 94.7% (approximately $1.0435 billion) of the values of those policies could be beyond their life expectancies.

Therefore, if the Court calculates based on the *number* of non-AIDS policies, then when all of those policies have matured, between 27.8% and 85.8% of them will have matured beyond their life expectancies. If the Court calculates based on the *value* of those policies, then between 17.8% and 94.7% of them will have matured beyond their life expectancies.

Notably, MBC retained the firm Milliman USA, Inc. to conduct an actuarial and insurance analysis of the non-AIDS policies in connection with a 2003 examination by the Office of Insurance Regulation. Milliman identified several deficiencies in the underwriting practices undertaken by MBC's doctors, which resulted in the underestimation of life expectancies for non-AIDS policies by 2.5 to 3.5 years.

The SEC also contends that MBC and the other defendants engaged in fraudulent conduct regarding the use of new investors' funds to pay premiums on older policies. Of course, a policy's premiums must be paid to prevent the policy from lapsing and to ensure that investors are paid the death benefits once the policy matures. MBC and its trustees pay the majority of premiums with cash. The exception to this are policies that have a cash value; the premiums for those policies are paid with the cash value of the policy until that cash value is exhausted.

In the Purchase Agreement, MBC advised potential investors: "MBC will escrow funds sufficient to pay future premiums due under a given life insurance policy for a minimum of the

projected life expectancy relied upon by MBC of the respective insured, or longer at MBC's discretion . . . ." Purchase Agreement ¶ 35. In the Trust Agreement, which is included in MBC's offering materials and is executed by most investors, MBC advised prospective investors of a five-tiered system for the payment of premiums:

> Future premiums on a policy will be paid or satisfied by (1) application for disability premium waiver when applicable, (2) payment by the TRUSTEE from funds designated for the particular policy at the time of closing, (3) payment by the TRUSTEE from the reserve funds as described above, which have accumulated in the TRUSTEE'S account, (4) [relief defendant] Viatical Services, Inc., up to the amount of funds in its premium reserve account, or any other service company that provides premium coverage as part of its service, or (5) pro rata by the PURCHASER(S).

Trust Agreement ¶ 7.

Thus, the Purchase Agreement and Trust Agreement assured investors that there were two levels of reserves protecting them from being forced to make additional premium payments. Additionally, in their oral presentations to potential investors, MBC's sales representatives downplayed the possibility of an investor having to pay additional money for premium payments in order to keep his or her policy from lapsing.

Despite the written representations contained in the Purchase Agreement and the Trust Agreement, from 1995 until 1997 MBC did not fund *any* premium escrow accounts to pay future policy premiums. Instead, during that period MBC acquired policies in its own name and listed as beneficiaries the investors who had purchased fractionalized interests in the policies.

In 1996 and 1997, MBC also represented in its offering materials that "premiums for the projected life of the insured" would be transferred to Mr. Livoti, who in turn would "maintain those premiums in a separate escrow account to pay premiums when due . . . ." MBC, however, did not set aside *any* money to pay future premiums on more than 1,500 policies sold between 1994 and

1997. Because MBC did not create escrow accounts for those policies, MBC paid premiums on those policies from its own operating accounts. The funds for MBC's operating accounts came almost exclusively from the amounts paid to MBC from each closing on the purchase of an interest in a viatical settlement by a new investor. In other words, MBC's revenue from a new viatical settlement contract funded the premium payments for the older insurance policies. As of the date the SEC commenced this action, 1,227 of those more than 1,500 policies had not matured, and those 1,227 policies required annual premium payments of approximately $952,359. Because MBC's only source of income is new investors' funds, MBC's ability to continue to make premium payments does, or eventually will, depend on MBC's ability to bring in new investors.

In June of 1996, MBC entered into an agreement with Mr. Livoti which provided for Livoti to act as trustee for the insurance policies which MBC sold. Livoti therefore became the owner of more than 9,600 policies, and as of May 3, 2004, he remained the owner of approximately 7,000 active policies.

Among Livoti's responsibilities were: to receive the amounts set aside from each closing for the payment of future premiums on a policy, to place those funds in escrow, and to make future premium payments to prevent the policy from lapsing. Livoti subsequently entered into an agreement with relief defendant Viatical Services, Inc. ("VSI"), by which VSI was to perform post-closing services associated with the policies, such as notifying Livoti, as trustee, when premiums were due, the amounts due, and the names of the payees.

Livoti deposited the future premium funds for more than 6,500 policies into several money market accounts, one of which was the "Control Checking Account," one of which was referred to in VSI's database as "MM1," and three of which were collectively referred to in VSI's database as

"MM2." The only factor that determined whether premium monies were escrowed and deposited into the MM1 account or the MM2 accounts was the closing date for the policy purchase. Premium monies for transactions that closed on or before March 31, 2001, were escrowed in the MM1 account, and premium monies for transactions that closed after March 31, 2001, were escrowed in the MM2 accounts. The accounts were not divided into separate sub-accounts to track the balance of the premium escrow for each policy, and there was not a separate reserve account among the accounts that Livoti opened and controlled.

As of June 11, 2004, there were 5,129 active policies assigned to the MM1 and MM2 accounts, and they required an annual premium payment of approximately $12.5 million. VSI's database, however, reveals that the escrow balances corresponding to those policies totaled approximately $5.7 million, while the actual cash balances of the premium monies to pay those policies totaled approximately $8 million.

In accordance with its contractual duties, VSI regularly notified Livoti as to which premiums were due on MM1 and MM2 policies, and VSI detailed for him the payees and amounts due, and gave other instructions as to how to pay the premiums. Livoti then presumably transferred funds from the applicable money market account to the Control Checking Account, from which the actual premium payments were drawn.

Livoti paid the premium payments due on MM1 and MM2 policies at his discretion, which was dependent upon his banking relationships and the interests rates being offered by the banks. Livoti treated investors' escrowed funds as "one pair of pants with many different pockets . . . so whatever pocket [he] put [his] hand in to pay didn't necessarily matter." Livoti Dep., at 84. Thus, during 2003 and 2004, funds escrowed for the MM2 policies were being used to pay premiums for

the MM1 policies. During that period, approximately $7.7 million from the MM2 escrow accounts was used to pay premiums for the MM1 policies.

From January 1, 2004, through March 31, 2004, all funds deposited into the Control Checking account originated from the MM2 money market funds. During that period, despite the fact that the check requests from VMI identified $2.5 million in premium payments due for MM1 policies, no funds from the MM1 account were used to pay premiums.

Approximately 65% or more of the active policies that MBC sold have a negative escrow balance.[12] According to VSI's database which tracked premium escrows, as of May 4, 2004, there was a premium escrow deficiency of approximately $19.473 million. That figure supports the SEC's assertion that approximately four out of every ten policies were being used to pay the premiums on all ten policies.

As the Court mentioned *supra*, beginning in 2002, MBC used a third-party financial institution as an escrow agent to hold the funds to purchase policies and administer the premium escrows. The evidence before the Court suggests that Citibank was the first financial institution to begin an escrow agent relationship with MBC at the end of 2001.[13]

MBC then entered into an escrow agreement with American Express Tax and Business Services, Inc. ("AETBS"). Pursuant to that agreement, AETBS set up a premium escrow account at Bank of America to pay premiums from funds escrowed at the times of closings.

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[12] An independent audit conducted in February of 2004 suggested that 74% of the policies had a zero or negative escrow balance. For purposes of this Report and Recommendation, however, the Court will credit the 65% figure supported by other evidence that the SEC submitted.

[13] Apparently, Citibank and MBC commenced their relationship at the end of 2001, but Citibank did not purchase the policies and administer the premium escrows until 2002.

In approximately April of 2003, the funds in the AETBS premium escrow account were transferred to a premium escrow account at Union Planters Bank, N.A. ("UPBNA"), where funds from policies purchased after April of 2003 were also escrowed for the purpose of paying premiums. The premium escrow account at UPBNA was established pursuant to a written agreement with MBC, and the funds in that account primarily came from money transferred to it when viatical transactions closed. The funds in the UPBNA account were commingled and were not divided into sub-accounts designated either to a particular investor or a particular policy. UPBNA issued premium checks based on check requests that were sent on a regular basis by VSI. As VSI did with Mr. Livoti, VSI advised UPBNA via facsimile as to which premiums were due and how much had to be paid. UPBNA transferred funds out of the premium escrow account to its trust department, and UPBNA's trust department then made premium payments with trust department checks.

As of June 11, 2004, there were 475 AIDS policies and 491 non-AIDS policies (*i.e.*, a total of 966 policies) corresponding to the UPBNA escrow account. Those policies require annual premium payments of $21.9 million. According to VSI's database, the escrow balance corresponding to those policies is $99.6 million, but the SEC concedes that the actual bank cash balance of the premium monies at UPBNA to pay those policies totals $101 million.

At defendants' and relief defendants' request, the Receiver used information from VSI's database to determine that approximately $59.5 million would be necessary to pay premiums through June 11, 2004, on policies whose viators have not yet reached their predicted life expectancies. That figure did not include annual premium payments of approximately $11 million for premium payments due on policies from viators who had already lived beyond their life expectancies. In light of the actuarial evidence which suggests that MBC regularly underestimates life expectancies on

non-AIDS policies by approximately 2.5 to 3.5 years, and in light of the fact that a substantial number of non-AIDS policies are maturing beyond MBC's predicted life expectancies for the viators, the SEC has demonstrated a likelihood that MBC has underfunded the premium escrow accounts for those policies. At a minimum, MBC has not taken actions to ensure that the premium escrow accounts are properly funded, and it appears that luck and/or a steady stream of new investors has kept the balances in the premium escrow accounts from falling to zero or less.

As discussed *supra*, the Purchase Agreement and the Trust Agreement refer to a "reserve" account maintained by the Trustee and comprised of interest on the funds set aside for future premiums and any unused premiums. Pursuant to those agreements, the funds in the reserve account may be used "for payment of premiums on those policies where the insured outlives that projected life expectancy." Despite that language, neither MBC nor Mr. Livoti maintained a separate premium reserve account.

Additionally, the UPBNA-MBC Escrow Agreement provided for a "Premium Reserve Sub-Account," which was defined as a "sub-account of the Premium Escrow Account containing funds not reserved for premium payments on specific Policies . . . ." Neither MBC nor UPBNA, however, maintained a Premium Reserve Sub-Account. Instead, there is only one premium escrow account at UPBNA, and in that account all funds escrowed for the payment of future premiums are commingled, and they are not designated on a per-policy basis.

The only "reserve" account is an account which VSI created pursuant to its agreement that it would set aside $100 from each closing and place it in reserve for the future payment of premiums. As of May 4, 2004, there was $718,001 in that reserve account.

Despite the fact that there are no separate reserve accounts which correspond to the UPBNA

or Livoti accounts, the Receiver conducted a preliminary forensic analysis to determine whether there were any "reserves" that could be used pay premiums for active policies whose viators have already lived beyond their predicted life expectancies. The Receiver's unrebutted analysis suggests that there is approximately $5.7 million related to policies with positive escrow balances upon maturity, and an additional $2.3 million of accrued interest and credits which relate to, *inter alia*: dividends and returns from insurance companies, policy conversions, and cash for paid-up additions. When the VSI reserve is added to that figure, the total identified "reserves" available to pay active policies with negative escrow balances is approximately $6.7 million. However, active policies with negative escrow balances account for approximately $14.9 million, which means there is a shortfall in the "reserves" of approximately $8.2 million.

CONCLUSIONS OF LAW

To prevail on a motion for a preliminary injunction, a private litigant must prove: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that its own injury outweighs the injury to the non-moving party; and (4) that the injunction would not disserve the public interest. *See, e.g.*, *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989); *Michael Caruso & Co., Inc. v. Estefan Enters., Inc.*, 994 F. Supp. 1454, 1457-58 (S.D. Fla.), *aff'd*, 166 F.3d 353 (11th Cir. 1998).

The SEC, however, does not appear in this action "as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). The SEC faces a lesser burden than a private litigant seeking a preliminary injunction and does not need to "demonstrate irreparable injury or lack of any adequate remedy at law." *SEC v. Unique Financial Concepts, Inc.*, 119 F.

Supp. 2d 1332, 1338 (S.D. Fla. 1998), *aff'd*, 196 F.3d 1195 (11th Cir. 1999). Instead, the SEC is entitled to preliminary injunctive relief if it establishes: "(1) a *prima facie* case of previous violations of federal securities laws, and (2) a reasonable likelihood that the wrong will be repeated." *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004) (analyzing request for injunctive relief pursuant to § 5(a) and (c) of the Securities Act); *see also, e.g., SEC v. Unique Financial Concepts, Inc.*, 196 F.3d 1195, 1199 n.2 (11th Cir. 1999) ("Under Section 20(b) of the Securities Act of 1933, 15 U.S.C. § 77t(b), and Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d), the SEC is entitled to a preliminary injunction when it establishes the following: (1) a prima facie case of previous violations of federal securities laws, and (2) a reasonable likelihood that the wrong will be repeated.").

Prima facie case: claims for failure to register securities

The SEC alleges, *inter alia*, that defendants violated § 5(a) and (c) of the Securities Act of 1933, which "prohibit persons from, directly or indirectly, offering or selling securities in interstate commerce which are not registered with the SEC, unless an exemption from registration is available." *SEC v. Unique Financial Concepts, Inc.*, 119 F. Supp. 2d 1332, 1339 (S.D. Fla. 1998), *aff'd*, 196 F.3d 1195 (11th Cir. 1999). "In order to establish a *prima facie* case for a violation of § 5 of the Securities Act, the SEC must demonstrate that (1) the defendant directly or indirectly sold or offered to sell securities; (2) through the use of interstate transportation or communication and the mails; (3) when no registration statement was in effect." *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004); *see also, e.g., SEC v. Unique Financial Concepts, Inc.*, 119 F. Supp. 2d at 1339.

Defendants contend that the SEC is not entitled to relief on the basis of its § 5 claims, and

that this Court lacks jurisdiction over this action, because the viatical instruments which defendants sold were not investment contracts or "securities" governed by the Securities Act. *See, e.g.*, Defendants' and Relief Defendants' Brief in Opposition to SEC's Motion for Preliminary Injunction (D.E. #423), at 4. This Court, however, has rejected defendants' contention and has determined that the viatical instruments are governed by the Securities Act. *See* Order Denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (D.E. #193), at 8-13.

It appears that defendants also contend that they are not liable pursuant to § 5 because they lacked scienter.[14] Specifically, defendants assert that they relied on the advice of MBC's counsel, Michael J. McNerney, who advised them "that viatical settlements were not securities and thus Mutual Benefits was not required to follow federal securities laws." D.E. #193, at 6. Section 5, however, "imposes strict liability on offerors and sellers of unregistered securities . . . regardless of . . . any degree of fault, negligent or intentional, on the seller's part." *Swenson v. Englestad*, 626 F.2d 421, 424 (5th Cir. 1980)[15]; *see also, e.g.*, *SEC v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004) ("Scienter is not a consideration."); *SEC v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1367 (S.D. Fla. 1999) ("Neither negligence nor scienter is an element of a *prima facie* case under Section 5 of the Securities Act."). Defendants' assertion that they relied on counsel's advice is therefore

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[14] It is not clear whether defendants raised this defense in response to the SEC's § 5 claims or, instead, only in response to the SEC's other claims. For purposes of this Report and Recommendation, this Court will assume that defendants intended to raise their lack-of-scienter defense as to all of the SEC's claims, including the § 5 claims. *See, e.g.*, D.E. #423, at 4 ("The SEC Failed to Prove That Mutual Benefits *Knowingly and Intentionally* Sold Unregistered Securities") (emphasis added) (bold typeface omitted).

[15] Decisions rendered by the Fifth Circuit prior to October 1, 1981, are binding on federal courts in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

irrelevant to the SEC's § 5 claims.

The SEC has presented unrebutted evidence that defendants directly or indirectly sold or offered to sell securities through the use of interstate transportation or communication and the mails when no registration statement was in effect. The SEC therefore has proven a *prima facie* case of violations of § 5. *SEC v. Calvo*, 378 F.3d at 1214.

Because the SEC has established a *prima facie* case under § 5, defendants have the burden to rebut that *prima facie* case by demonstrating that the securities which they offered qualified for a registration exemption. *See, e.g.*, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126, 73 S. Ct. 981, 985 (1953) ("[I]mposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable."); *SEC v. Unique Financial Concepts, Inc.*, 119 F. Supp. 2d 1332, 1339 (S.D. Fla. 1998), *aff'd*, 196 F.3d 1195 (11th Cir. 1999). Defendants, however, have neither argued nor presented evidence that the viatical settlements qualified for a registration exemption.

<u>*Prima facie* case: anti-fraud claims</u>

The Court next considers whether the SEC is entitled to an injunction regarding its claims that defendants violated the anti-fraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The SEC alleges that defendants violated Section 17(a) of the Securities Act; and Section 10(b), as well as Rule 10b-5, of the Securities Exchange Act. Those provisions

> prohibit the fraudulent offer, purchase or sale of securities and proscribe, *inter alia*, the employment of any device, scheme or artifice to defraud. The provisions also prohibit untrue statements of material fact or omission of a material fact in connection with the offering or sale of securities. The anti-fraud provisions are only violated, however, if the offeror/seller acted with scienter. . . . In other words, the offeror/seller must have acted with the intent to deceive, manipulate or defraud.

SEC v. Unique Financial Concepts, Inc., 119 F. Supp. 2d 1332, 1339 (S.D. Fla. 1998), *aff'd*, 196

F.3d 1195 (11th Cir. 1999); *see also, e.g., United States v. Naftalin*, 441 U.S. 768, 773, 99 S. Ct. 2077, 2081-82 (1979); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, 96 S. Ct. 1375, 1381 (1976).

Scienter may be established not only by a showing of knowing or intentional misconduct, but also by a showing of severe recklessness. *See, e.g., Magna Inv. Corp. v. John Does One Through Two Hundred*, 931 F.2d 38, 39 (11th Cir. 1991); *Kennedy v. Tallant*, 710 F.2d 711, 720 (11th Cir. 1983) ("In this circuit, the necessary scienter can be established by a showing of knowing misconduct or severe recklessness.") ; *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982) ("Scienter may be established by a showing of knowing misconduct or severe recklessness."); *In re John Alden Fin. Corp. Secs. Litig.*, 249 F. Supp. 2d 1273, 1276 (S.D. Fla. 2003). Proof of "severe recklessness" requires "a showing that a defendant's conduct was an extreme departure of the standards of ordinary care which presents a danger of misleading buyers or sellers that is either known to a defendant or is so obvious that the actor must have been aware of it." *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1343 (S.D. Fla. 2003) (citing *Carriba Air, Inc.*, 681 F.2d at 1324).

Additionally, a fact is "material" if a reasonable person "would attach importance to the fact misrepresented or omitted in determining his course of action." *SEC v. Shiner*, 268 F. Supp. 2d at 1342 (citing *Carriba Air, Inc.*, 681 F.2d at 1323); *see also, e.g., Kennedy v. Tallant*, 710 F.2d 711, 719 (11th Cir. 1983); *Carriba Air, Inc.*, 681 F.2d at 1323 ("Mere misinformation or misrepresentation is not sufficient to constitute a violation of the Securities Act; there must be a showing of substantial likelihood that under all the circumstances the admitted fact would have assumed significance in the deliberations of a reasonable shareholder. . . . The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.").

With respect to the fraud claims, the Court draws an adverse inference against defendants based on the individual defendants' refusals to testify on the basis of their Fifth Amendment privileges. *See, e.g.*, *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) ("The district court expressly based its summary judgment for the SEC on Colello's failure to go forward with evidence, as well as his resort to the Fifth Amendment. . . . Parties are free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof. . . . Moreover, a district court has discretion in its response to a party's invocation of the Fifth.") (citing *Wehling v. CBS*, 608 F.2d 1084, 1089 (5th Cir. 1979)) (additional citations omitted); *United States v. Two Parcels of Real Property Located in Russell County, Ala.*, 92 F.3d 1123, 1129 (11th Cir. 1996) ("[T]he trier of fact may take an adverse inference against the parties to a civil action refusing to testify on Fifth Amendment grounds."); *SEC v. Cherif*, 933 F.2d 403, 412 (7th Cir. 1991); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986); *SEC v. Prater*, 289 F. Supp. 2d 39, 50 (D. Conn. 2003) ("Furthermore, in a case such as this, the Court is entitled to, and does, draw adverse inferences from Mr. Prater's invocation of the Fifth Amendment."); *SEC v. Princeton Economic Int'l Ltd.*, 73 F. Supp. 2d 420, 423 (S.D.N.Y. 1999); *SEC v. Grossman*, 887 F. Supp. 649, 660 & n.8 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 109 (Table), 1996 WL 137630 (2d Cir. 1996); *SEC v. Int'l Loan Network, Inc.*, 770 F. Supp. 678, 696 (D.D.C. 1991) ("[T]he Court will consider the defendants' failure to testify, in addition to all of the other probative evidence introduced, to support its conclusion that an ultimate finding of scienter is likely."), *aff'd*, 968 F.2d 1304 (D.C. Cir. 1992); *SEC v. Rehtorik*, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990).

Standing alone, however, defendants' invocation of their Fifth Amendment rights does not provide a sufficient basis upon which the Court may enter an injunction in favor of the SEC; instead,

the SEC must present other evidence in support of its *prima facie* case. *See, e.g.*, *SEC v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998) ("*Lefkowitz [v. Cunningham*, 431 U.S. 801, 97 S. Ct. 2132 (1977)] and *Baxter [v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976)] require that there be evidence in addition to the adverse inference to support a court's ruling.); *SEC v. Rehtorik*, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990) ("Though an adverse inference may be drawn due to their silence, the S.E.C. must still carry its burden of proving fraud committed by the defendants; their silence alone will not give rise to automatic liability."). The SEC has done so.

As discussed *supra*, MBC assured prospective investors that each viator's medical records were reviewed by independent, state-licensed physicians who verified the viator's medical condition and diagnosis, and estimated the viator's life expectancy. MBC assured prospective investors that this determination would be made by a physician prior to the time that an investor was assigned to a specific policy.

However, as discussed *supra*, at least with respect to numerous AIDS policies, physicians did not review viators' medical records until *after* the policies had been selected and *after* investors had been assigned to the policies. Additionally, at times the physicians did not make independent determinations of life expectancies, but instead relied on a pre-determined number which MBC had provided to them, and which had often been calculated by defendant Joel Steinger, who is not a physician. The physicians' letters and affidavits which were later sent to investors were then back-dated to the date MBC had originally purchased the relevant policy, and, with MBC and its principals' consent, Dr. Mitchell falsely represented to investors that he had spoken with each viator's treating physicians. Those facts constitute knowing misrepresentations of facts to which a reasonable person would attach importance in deciding whether to purchase viatical settlements from

MBC. *Cf., e.g., Wuliger v. Christie*, 310 F. Supp. 2d 897, 907 (N.D. Ohio 2004) ("Thus, in this Court's view, it is not the date of the viator's death which establishes the success of the investment but the selection by the promoter of the policy into which the investor's money is placed, based upon its expertise in assessing the viator's life expectancy and other variables, which drives the success of the investment."). The SEC therefore has established a *prima facie* case that defendants violated the anti-fraud provisions of the federal securities laws.

The SEC next contends that defendants violated the anti-fraud provisions of the securities laws by misrepresenting the maturity rate of policies which MBC sold. The Court agrees. Joel and Leslie Steinger told in-house sales agents that 70-80% of the viatical settlements that MBC sold matured on time or before the viators' predicted life expectancies. The in-house sales agents passed those figures on to field agents, who then informed investors of those percentages. As discussed *supra*, however, MBC's policies - both AIDS and non-AIDS - matured at nowhere near that rate, and that fact was so obvious that defendants must have known that fact. That representation constituted a knowing misrepresentation of a fact to which a reasonable person would attach importance in deciding whether to purchase viatical settlements from MBC, and therefore on that basis the SEC has established a *prima facie* case that defendants violated the anti-fraud provisions of the federal securities laws.

As detailed in the Court's Findings of Fact, defendants also misrepresented that: (1) MBC would set aside at closing sufficient funds to pay premiums on investors' policies through at least the viators' estimated life expectancies; and (2) MBC would establish two levels of "reserves" to protect investors from having to pay additional funds as premiums in the event that viators lived beyond their life expectancies. For at least 1,500 policies, MBC failed to set aside *any* funds for

future premium payments, leaving the investors dependent on MBC's ability to make premium payments on those policies At a minimum, a reasonable investor would attach importance to those facts in deciding whether to purchase viatical settlements from MBC,[16] and therefore on that basis the SEC has established a *prima facie* case that defendants violated the anti-fraud provisions of the federal securities laws.

Finally, the SEC contends that defendants' failure to disclose the following facts constituted violations of the anti-fraud provisions of the federal securities laws: (1) that over 90% of MBC's policies' viators had lived past their life expectancies; (2) that more than 74% of the policies have a negative escrow balance and there is currently a premium escrow deficiency of more than $19 million; (3) that MBC misused investors' funds "by paying, in a Ponzi-like fashion, insurance premiums on older policies with new investor[s'] monies . . . ," D.E. #420, at 49; (4) that MBC has been subject to cease-and-desist orders from at least five State's regulatory agencies; (5) that Joel Steinger has a prior criminal conviction for wire and mail fraud; (6) that the Steinger brothers have extensive disciplinary histories, including an action and judgment related to their involvement with MBC; (7) that defendants and relief defendants paid themselves millions of dollars pursuant to undisclosed consulting agreements; and (8) that MBC was selling interests in group policies without converting them into individual policies prior to purchase, and was not disclosing the corresponding risk of purchasing group policies.

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[16] Even assuming defendants are correct that MBC currently has sufficient funds to pay premiums, the way in which MBC structured its escrow accounts, particularly its "reserve" accounts, is different from the structure which it represented to investors it would use, and the structure MBC used likely put investments at more risk than the structure which MBC had represented it would use. Accordingly, MBC's misstatements constituted actionable misrepresentations under federal securities laws.

With the exception of the eighth fact listed above, the Court agrees that a reasonable investor would attach importance to those facts in deciding whether to purchase viatical settlements from MBC, and therefore on that basis the SEC has established a *prima facie* case that defendants violated the anti-fraud provisions of the federal securities laws.[17] *See, e.g.*, *SEC v. Holschuh*, 694 F.2d 130, 142 (7th Cir. 1982) ("Most notably, the circulars . . . failed to disclose the nature and extent of the involvement of Mr. Bartone, a person who had previously been convicted of crime and was then under indictment for bank fraud, in the ownership and affairs of PCR. . . .[E]vidence in the record supports the district court's finding that these misrepresentations were material to the investors' decisions . . . ."); *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1339 (S.D. Fla. 2003) ("Prospective investors were not advised that Defendants Shiner and Switchkow owned and/or controlled the entities (*i.e.*, Relief Defendants Equity, Marketing Media, and USA) that would receive commissions and compensation for various services rendered to the LLPs such as administration, marketing, and advertising."); *id.* ("Prospective investors were not told of the negative regulatory histories of Defendants Switchkow, Shiner, and Wetherald. For example, investors were not told that Defendant Shiner, *inter alia*, had a previous conviction for federal tax evasion, that Defendant Swichkow paid a civil penalty in settlement of allegations that he violated the Federal Trade Commission's Franchise Rule, and that Defendant Wetherald, *inter alia*, entered into a Consent Decree with the State of Washington enjoining him from becoming employed and/or entering into a participation agreement with any such individual or entity selling interstate or intrastate long distance telecommunications services without first providing any such individual or entity a copy of the Consent Decree and

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[17] The Court finds that the SEC has not presented sufficient evidence that a reasonable investor would have viewed the omission regarding conversion of policies from group to individual as important to his or her decision whether to invest in MBC's viatical settlements.

Complaint filed against Defendant Wetherald."); *SEC v. Batterman*, No. 00 Civ. 4835(LAP), 2002 WL 31190171, at *9 (S.D.N.Y. Sept. 30, 2002) ("The Battermans' misrepresentations regarding Batterman's history of sanctions, guilty plea and criminal conviction, as well as the misrepresentations regarding Dynasty's financial performance undoubtedly would have been material to an investor.").

By several means, the SEC has also established that defendants acted with scienter. First, the violations were so obvious that defendants must have known that their conduct constituted fraud. Second, defendants prepared offering materials which contained false information, and they trained sales staff to disseminate the misleading information detailed *supra*. Additionally, despite the fact that new treatments for persons with AIDS may have made it more difficult to predict life expectancies, as discussed *supra*, the evidence demonstrates that defendants failed to alter their life expectancy calculations even when they knew of those advances and even when they were faced with overwhelming evidence that they were underestimating life expectancies for substantial numbers of both AIDS and non-AIDS policies.

Defendants allege that "due to [MBC's] good faith reliance on advice of counsel . . . that federal securities laws did not apply to it, Mutual Benefits did not have the necessary scienter . . . to violate federal securities laws by making any of the material omissions alleged by the SEC." D.E. #423, at 11. Specifically, defendants allege that: (1) in 1996, MBC retained Michael J. McNerney, Esq., "in order to obtain advice regarding the law that was applicable to its sale of viatical settlements . . . ," D.E. #423, at 6; (2) MBC "made full disclosure of its business practices to Mr. McNerney . . . ," *id.*; (3) "[a]fter such disclosure, largely based on the D.C. Circuit's decision in [*SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996)], Mr. McNerney advised Mutual Benefits

that viatical settlements were not securities and thus Mutual Benefits was not required to follow federal securities laws . . . ," *id.*; and (4) MBC "followed this advice in structuring the business plan of Mutual Benefits so that it accorded with applicable law." *Id.*

Defendants also contend that their "reliance defense takes on even more weight where, as here, the SEC is partially responsible for the advice that was given by counsel and relied upon by the Defendants." D.E. #423, at 8. Specifically, defendants contend that: (1) after the D.C. Circuit issued its decision in *SEC v. Life Partners, Inc.*, the SEC filed a complaint against the Steinger brothers regarding activity that had occurred *before* MBC changed its business model based on the *Life Partners* decision; (2) MBC advised the SEC that it planned to continue with its business plan, using a model based on *Life Partners*; and (3) despite receiving that information, the SEC elected not to bring an action at that time based on MBC's activities after it changed its business plan based on *Life Partners*. *Id.* at 6-8.

Good faith reliance on the advice of counsel may negate, or mitigate against a finding of, scienter when the SEC has alleged violations of the anti-fraud provisions of federal securities laws. For this principle to apply, however, defendants have the burden to demonstrate that: (1) they made complete disclosure to counsel; (2) they sought advice as to the legality of their conduct; (3) they received advice that their conduct was legal; and (4) they relied on that advice in good faith. *See, e.g.*, *Markowski v. SEC*, 34 F.3d 99, 104-05 (2d Cir. 1994); *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988); *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 467 (9th Cir. 1985); *SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1101-02 (2d Cir. 1972).

"Even where these prerequisites are satisfied, such reliance is not a complete defense, but

only one factor for consideration." *Markowski v. SEC*, 34 F.3d 99, 104-05 (2d Cir. 1994); *see also, e.g.*, *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) ("[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of a good faith, a relevant consideration in evaluating a defendant's scienter."); *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 467 (9th Cir. 1985); *SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981) ("Even when established, such reliance does not operate as an automatic defense, but is only one factor to be considered in determining the propriety of injunctive relief."); *SEC v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980) (holding that good faith reliance on advice of counsel was not available as a defense to allegations of violations of federal securities laws in light of (1) the high ranking positions held by defendant in various companies engaged in wrongdoing and (2) the district court's specific findings of scienter); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972); *United States v. Custer Channel Wing Corp.*, 376 F.2d 675, 683 (4th Cir. 1967); *United States v. Schaefer*, 299 F.2d 625, 630-31 (7th Cir. 1962); *cf.* *SEC v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1368 (S.D. Fla. 1999) (noting that the reliance-on-counsel defense does not provide a complete defense to allegations of violations of § 5 of the Securities Act).

In support of their reliance-on-counsel defense, defendants relied on the testimony of MBC's former counsel, Michael J. McNerney, at the preliminary injunction hearing. *See* D.E. #423, at 6-8. At a minimum, Mr. McNerney's testimony was insufficient to establish two elements of the reliance-on-counsel defense: that defendants made *complete* disclosures to counsel and that they relied on that advice in good faith.[18] Even if defendants had submitted additional evidence, such as their own

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[18] Absent the individual defendants' testimony, it appears that it would be difficult to establish those elements, and because those defendants exercised their rights not to testify, the Court could even make an adverse inference regarding those elements of the defense. However,

testimony, regarding those elements, in light of the Court's other findings regarding defendants' misrepresentations and material omissions, it would be difficult to conclude that defendants relied on their counsel's advice *in good faith*. Additionally, because the reliance-of-counsel defense is only one element of the Court's determination regarding scienter, to the extent defendants relied on the advice of their counsel, that fact does not overcome the other, substantial evidence of scienter which the SEC presented and the Court discussed *supra*. Defendant's reliance-on-counsel defense therefore fails.

Reasonable likelihood that the wrong will be repeated

With respect to both the registration and anti-fraud claims, the Court must consider whether the SEC has established "a reasonable likelihood that the wrong will be repeated." *SEC v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004).

> Indicia that a wrong will be repeated include "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of the conduct, and the likelihood that the defendant's occupation will present opportunities for future violations."

Id. (quoting *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982); *SEC v. Friendly Power Co. LLC*, 49 F. Supp. 2d 1363, 1372 (S.D. Fla. 1999)). "While scienter is an important factor in this analysis, it is not a prerequisite to injunctive relief." *Id.*

The SEC has demonstrated that this is not the first time that the Steinger brothers have violated federal securities laws, and the Steinger brothers have previously been permanently enjoined

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for purposes of this Report and Recommendation, no such inference is necessary because even without such an inference, defendants failed to meet their burden of proof.

from violating the registration and anti-fraud provisions of the federal securities laws. *See, e.g.*, *SEC v. Calvo*, 378 F.3d at 1216 ("As the district court recognized, this is not the first time Calvo has violated federal securities laws."); *CFTC v. Matrix Trading Group*, No. 00-8880-Civ-Zloch, 2002 WL 31936799, at * 12 (S.D. Fla. Oct. 3, 2002) ("Under such circumstances, a district court may infer a likelihood of future violations from defendants' past unlawful conduct."); Final Judgment of Permanent Injunction and other Relief (D.E. #2) in *SEC v. Steinger*, case no. 98-6442-Civ-Middlebrooks; *see also* additional enforcement actions listed in the SEC's Proposed Findings of Fact and Conclusions of Law (D.E. #420), at 7-8.

Additionally, all defendants have refused to acknowledge their violations of § 5 and the anti-fraud provision of the federal securities laws, and in fact they continue to assert that their sales of the viatical settlements did not constitute sales of unregistered securities and that the federal securities laws do not apply to their conduct. *See, e.g.*, *SEC v. Calvo*, 378 F.3d at 1216 ("Calvo is a recidivist, and has repeatedly failed to acknowledge the wrongful nature of his conduct."); *SEC v. MacElvain*, 417 F.2d 1134, 1138 (5th Cir. 1969) ("The District Court did not abuse this discretion when it entered a permanent injunction. The record shows that appellants have continually attempted to circumvent the registration requirements rather than comply with them. They have always maintained and continue to contend that the second offering does not involve a 'security.' It has been held that in a suit for injunction, a defendant's assertion of the correctness of his behavior is a ground for restraint."); D.E. #423, at 4 ("viatical settlements are not securities"); *id.* at 4 n.2.

In light of the facts that: all defendants continue to assert that they may sell viatical settlements without registering them as securities and without regard to the federal securities laws, the Steinger brothers have previously violated federal securities laws, defendants continue to work

in occupations that "present opportunities for future violations . . . ," *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1343 (S.D. Fla. 2003), and defendants have made no "assurances against future violations . . . ," *SEC v. Calvo*, 378 F.3d at 1216 (internal quotation marks and citations omitted), if the Court does not grant an injunction then there is "a reasonable likelihood that the wrong will be repeated." *Id.* It is therefore recommended that the Court GRANT the SEC's Motion for Preliminary Injunction with respect to all defendants.

<u>Relief defendants</u>

With respect to the relief defendants, the SEC has demonstrated that Viatical Benefactors, LLC and Viatical Services, Inc. were essentially alter egos of MBC, and that they should be held liable to the extent of MBC. It is therefore recommended that the Court enter a preliminary injunction against VBLLC and VSI.

With respect to the remaining relief defendants, although the SEC has demonstrated that they were merely conduits through which MBC made payments to the individual defendants, the SEC has not demonstrated how those relief defendants violated the federal securities laws.[19] Accordingly, it is recommended that the Court deny the SEC's request for a preliminary injunction as to relief defendants Kensington Management, Inc.; Rainy Consulting Corp; Twin Groves Investment, Inc; P.J.L. Consulting, Inc.; SKS Consulting, Inc.; and Camden Consulting, Inc.

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[19] Of course, defendants' failures to disclose their relationships with those relief defendants factored into the Court's conclusion that *defendants* omitted material facts.

RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that the Court GRANT Plaintiff's Motion for Preliminary Injunction (D.E. #2) as to all defendants, and as to relief defendants Viatical Benefactors, LLC and Viatical Services, Inc.; but DENY Plaintiff's Motion for Preliminary Injunction as to all other relief defendants.

The parties have ten (10) days from receipt of this Report and Recommendation to file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. *See* 28 U.S.C. § 636. Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. *See LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 10th day of November, 2004.

BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

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