

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60573 CIV-MORENO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP., et al.,

Defendants,

VIATICAL BENEFACTORS, LLC, et al.,

Relief Defendants.

**RECEIVER'S MOTION FOR ENTRY OF ORDER APPROVING
PURCHASE AGREEMENT AND BIDDING PROCEDURES
WITH RESPECT TO SALE OF VSI BUSINESS**

Roberto Martínez, court-appointed receiver (“Receiver”) of Mutual Benefits Corp. (“MBC”), Viatical Benefactors, LLC (“VBLLC”), Viatical Services, Inc. (“VSI”), and Anthony Livoti, Jr. and Anthony Livoti, Jr., P.A., solely in their capacity as trustee (collectively the “Receivership Entities”), moves for this court to approve the form of Asset Purchase Agreement and related documents in connection with the “stalking horse” offer to purchase the servicing business of VSI, and to approve the proposed bidding procedures. *In accordance with the Asset Purchase Agreement, the Receiver requests that the Court enter such an order no later than April 30, 2009 as required by the Asset Purchase Agreement.*

Specifically, the Receiver requests that the Court:

(i) approve (A) the Asset Purchase Agreement by and between the Receiver and VSI Acquisition Services, LLC (“VSIAS”) and all of the terms and conditions hereof and transactions

contemplated thereby; (B) the Servicing Agreement, Transitional Services Agreement, and Trust Agreement contemplated by the Asset Purchase Agreement, and all of the terms and conditions thereof and transactions contemplated thereby, and (C) the Bidding Procedures;

(ii) enter and approve the *Purchase and Servicing Agreement and Bidding Procedure Order* no later than April 30, 2009;

(iii) set a further hearing for the first available date after the Bid Deadline (contemplated to be May 14, 2009), consistent with the Bidding Procedures, to approve the sale of the Purchased Assets contemplated hereby to the successful bidder, and the entering into of the Transitional Services Agreement, the entering into of the Servicing Agreement, the entering into of the Trust Agreement, and to enter the *Sale of Assets, Servicing and Transfer Order*; and

(iv) order each insurance company that issued a Keep Policy to give full effect to the Sale of Assets, Servicing and Transfer Order and to recognize the Trust as the sole and exclusive owner of all claims, options, privileges, right, title and interest in, to and under the Keep Policies subject only to the rights of the Keep Policy Investors upon consummation of the Closing (including by effecting any change in the named owner and/or beneficiary of the Keep Policies upon direction thereof by Seller or the Trustee (including with respect to any Keep Policy having an irrevocable beneficiary, whether or not such irrevocable beneficiary has consented to such change).

In support, the Receiver states:

BACKGROUND

THE RECEIVERSHIP ORDER

On May 3, 2004 the Securities and Exchange Commission (“SEC”) filed an action seeking entry of a temporary restraining order, preliminary injunction, permanent injunction and other relief

with respect to the Receivership Entities (DE#1). On May 4, 2004, the Court entered a Temporary Restraining Order and Other Emergency Relief (DE#25), and entered an Order Appointing Receiver (DE#26). On February 14, 2005 this Court entered its Order Granting Motion for Preliminary Injunction (DE#711), sustaining the Report and Recommendation of Judge Garber dated November 10, 2004 (DE#522), as supplemented on November 16, 2004 (DE#529).

The Order Appointing Receiver (DE#26) authorizes and directs the Receiver to “take immediate possession of all MBC, VBLLC and VSI property, assets and estate, and all other property of MBC, VBLLC and VSI of every kind whatsoever and wheresoever located belonging to or in the possession of MBC, VBLLC and VSI,” and further authorizes and directs the Receiver to “administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court.” The Order provides that “[t]itle to all property, real or personal, all contracts, rights of action and all books and records of MBC, VBLLC and VSI and their principals, wherever located within or without this state, is vested by operation of law in the Receiver.” It further authorizes the Receiver to “make, or authorize the making of, such agreements as may be reasonable, necessary and advisable in discharging the Receiver’s duties. ...”

THE DISPOSITION ORDER

On September 14, 2005, this Court entered its Order on Disposition of Policies and Proceeds (DE#1339)(the “Disposition Order”). On November 22, 2005, the Court entered its Order Clarifying Disposition Order and Approving Form of Notice (DE#1474) (the “Clarification Order”). These Orders collectively directed that investors be provided an opportunity to vote on whether to keep, sell or surrender the policy(s) in which they had an interest, and authorized the manner by which the

Receiver was to solicit investors' elections. The decision as to how to dispose of each policy was to be determined by the vote of the majority of the interests in a policy that properly submitted votes with respect to the policy.

In accordance with these Orders, voting on each of the policies was conducted, the result of which is that approximately 3,138 policies with a face value of approximately \$383,850,782 were designated to be sold (the "Sell Policies"), and approximately 3,037 policies with a face value of approximately \$1,054,421,059 were designated to be retained by investors (the "Keep Policies"). The Receiver has subsequently been engaged in the process of selling the Sell Policies, and the Court has entered two Sale Orders which collectively approved the sale of approximately \$295 million in face value of policies for total consideration of approximately \$24.6 million. In addition, the Receiver, through VSI, has implemented a process for billing and collecting from each investor in a Keep Policy their proportionate share of the premium obligations with respect to the ongoing cost of maintaining the policy.

THE ROLE OF VSI AND POTENTIAL SALE

VSI, one of the Receivership entities, is responsible for administering the payment of policy premiums, tracking the medical status and whereabouts of the insureds, and, upon the death of an insured, submitting claims to insurance companies to facilitate the distribution of death benefits. Since the Receivership was commenced, the Receiver has continued to maintain the operations of VSI for the purposes of (1) maintaining the Sell Policies until the Receiver is able to dispose of them through sale to a third party; and (2) maintaining the Keep Policies, including the billing of premiums to investors, as well as its original functions of administering premium payments, tracking insureds, and processing death benefit claims. Prior to the Receivership, VSI was compensated by

receiving an administrative fee up front, i.e. when MBC finalized a contract matching an investor with a policy or an interest therein. In connection with the Keep Policies, the Receiver has implemented a process where VSI bills an annual administrative fee to each investor with an interest in a Keep Policy.

The continued servicing of the Keep Policies is a function which will have to be maintained until either every such Keep Policy matures, or until investors in such policies elect to stop funding premium obligations and the Keep Policies are otherwise sold or permitted to lapse. This process may go on for a longer period of time than the other remaining functions of the Receivership, including the prosecution of litigation claims of the Receiver, the sale of the Sell Policies, the liquidation of the remaining Receivership assets, and the distribution of funds to claimants.

As a result, the Receiver explored the possibility of selling the business of VSI. Such a sale would accomplish at least two purposes: (1) it would enable the necessary functions of VSI to be performed post-Receivership until all Keep Policies mature or are otherwise disposed of; and (2) it would enable the Receivership to realize value for the operating business of VSI. There have been several inquiries by interested parties regarding a potential acquisition of VSI, and the Receiver, after requiring the execution of confidentiality and non-disclosure agreements with prospective buyers, has provided information regarding the operations and functions of VSI to such parties in order to enable them to conduct due diligence. The Receiver believes that the business operations of VSI may hold value to a number of interested parties based on VSI's demonstrated capabilities in servicing viaticated insurance policies, the existing portfolio of Keep Policies to be serviced, and the prospect for using VSI's existing infrastructure for additional business.

In pursuing such a sale, the Receiver has sought to ensure that the interests of investors in the Keep Policies would continue to be protected. This Receiver's goals include: (1) providing for the Receiver's present ownership and nominal beneficiary status with respect to the Keep Policies to be transferred to some independent third party (such as a trustee or escrow agent); (2) providing for some structure that would establish a fee structure for the continued servicing of the Keep Policies that would be both financially viable for the purchaser, and fair to the holders of interests in Keep Policies; and (3) providing a mechanism for the disposition of future "lapsing Keep Policy" interests in the event that investors fail to pay their ongoing premium or administrative fee obligations.

Consistent therewith, and pursuant to the Court's June 6, 2008 Order Granting Receiver's Motion to Authorize Potential Sale of Viatical Services, Inc. (DE#2092), the Receiver has had extensive discussions with several parties who were potential prospective purchasers; advertised the potential sale to other potentially interested parties and provided an opportunity to conduct due diligence; set a deadline for the submission of purchase offers, and then evaluated the offers received to determine which offer best advanced the interests of the Receivership and its creditors, including the holders of interests in Keep Policies.

After conducting that process, the Receiver received multiple offers to serve as a "stalking horse" bidder for the purchase of the VSI business. After considering each of the offers received, the Receiver determined that the offer submitted by VSI Acquisition Services, LLC ("VSIAS") was the highest best initial offer received by the Receiver, and best fulfilled all of the goals set forth above. Thereafter, the Receiver undertook the process of formulating and negotiating the transactional documents by which to accomplish the goal of transferring the servicing business of VSI to the acquirer, transferring the ownership and nominal beneficial interest in the Keep Policies to a trustee

to serve in the stead of the Receiver, and establishing procedures and processes to provide for the continued maintenance and processing of the Keep Policies in accordance with the directives of this Court. The end result of that process is the set of transactional documents attached to this Motion, which include the Asset Purchase Agreement between the Receiver and VSIAS (including the Bidding Procedures contemplated thereby); the Servicing Agreement between VSIAS and the (to-be named) Trustee; the Transitional Services Agreement between the Receiver and VSIAS; and the Trust Agreement between the Receiver and the Trustee (the “Transaction Documents”).

THE PROPOSED TRANSACTION

The following is intended as a summary of the Transaction Documents, and is not intended to modify or supersede the terms thereof, which shall govern in the event of any possible conflict.

Asset Purchase Agreement: By this document, VSIAS will acquire substantially all of the assets of VSI which are used in the business of servicing the VSI Keep Policies. VSIAS will also acquire the right and obligation to service the Keep Policies in accordance with the Servicing Agreement. VSIAS is paying \$1 million cash at Closing, less a \$50,000 deposit previously paid, in exchange for the acquisition of the VSI business. The Receiver and VSIAS have agreed in the Asset Purchase Agreement that, in consideration of the substantial effort and expense that VSIAS has undertaken to investigate the VSI business, formulate a business plan, and negotiate the proposed transaction described herein, VSIAS should be entitled to compensation in the event that another party submits a higher bid which is accepted by the Receiver. Accordingly, the Asset Purchase Agreement provides for a Termination Fee of \$200,000 in the event that another bidder submits a higher bid which is accepted by the Receiver.

Servicing Agreement: By this document, VSIAS agrees to service the Keep Policies for a period of at least five years, providing essentially all of the services that have during the course of the Receivership been performed by VSI, including collecting and accounting for premium funds due from Keep Policy Investors, paying policy premiums, tracking viators, processing death benefit claims, distributing death benefits, performing customer service functions for the Keep Policy Investors, general accounting and reporting to the Trustee, and disposition services with respect to Undersubscribed Keep Policies. The Servicing Agreement entitles VSIAS to collect an Administrative Fee from Keep Policy Investors according to a formula set forth in the Servicing Agreement, which is subject to adjustment from year to year in the event that the number of remaining Keep Policy Investors declines at a rate greater than anticipated. The Administrative Fee will be subsidized by the “Overpayment Balance,” which refers to funds to be held by the Trustee which represent monies collected by VSI for Administrative Fees in excess of the present costs of VSI’s operation. The Overpayment Balance is currently estimated to be approximately \$2 million. For instance, in the first year, the Administrative Fee to be charged by VSIAS will be \$300, but \$60 will be paid to VSAIS from the Overpayment Balance, such that the net fee due from each investment unit will be \$240. This structure enables the VSI funds that have been collected to be used to continue to support the operation of the VSI business.

Transitional Services Agreement: By this document, VSIAS agrees to provide continuing services to the Receiver post-closing as are required by the Receiver. It is contemplated that such services will be primarily related to assistance with the claim and distribution process, and processing of the notices to insurers changing the owner and beneficiary of the policies from the

Receiver to the Trustee. The compensation for those services is set forth in the Transitional Services Agreement.

Trust Agreement: By this document, the Receiver will assign to a Trustee the Receiver's present status as the owner and nominal beneficiary of all of the Keep Policies. The Trustee will also become the owner of the Policy Files, and will have custody of the VSI premium account, death benefits disbursement account, and operating account. The Trustee is authorized to disburse funds from such accounts at the request and direction of the Servicer. The Trustee's expenses will be compensated from the Overpayment Balance. The Trustee will be responsible for monitoring the performance of the Servicer, for dealing with any issues that may arise with the Servicer, for negotiating extensions or renewals of the Servicing Agreement upon its expiration, if necessary, for enforcing the Servicing Agreement, if necessary, and for seeking to obtain a substitute servicer in the event that the Servicing Agreement is terminated. The Asset Purchase Agreement contemplates that a Trustee will be selected prior to Closing and the Trust Agreement will be executed in connection with the Closing.

BIDDING PROCEDURES

The Asset Purchase Agreement sets forth the bidding procedures which the Receiver and VSIAS have agreed to ask that this Court approve. Again, by way of paraphrasing, and without intending to supersede the provisions set forth in the Asset Purchase Agreement, to qualify as a bidder, a party must execute a confidentiality agreement; provide financial statements or other evidence of financial capacity satisfactory to the Receiver; and provide a business plan that demonstrates the ability to perform the services required by the Servicing Agreement. Parties that

qualify will be permitted to conduct due diligence and obtain information regarding the assets to be purchased.

In order to qualify as an Overbid, a potential bidder must submit an irrevocable all-cash bid that is in substantially similar form to the Asset Purchase Agreement, Servicing Agreement, and Transitional Services Agreement (and with terms at least as favorable), and provide for a purchase price that is at least \$300,000 greater than the offer from VSIAS (to cover the \$200,000 Termination Fee plus a \$100,000 overbid amount). The Receiver has proposed a Bid Deadline of May 14, 2009 and simultaneously with the filing of this Motion has given notice to potential prospective purchasers of the bid procedures described herein. (In the event the Court directs that any of these procedures be modified, the Receiver will promptly provide notice of any modifications to all prospective bidders).

Within two business days after the Bid Deadline, the Receiver will evaluate all bids submitted and determine which is the highest and best offer, and will advise all parties of his determination. Thereafter, within three business days, VSIAS will have the option of submitting a further overbid which provides cash or non-cash consideration of at least \$100,00 greater than the offer determined by the Receiver to be the highest and best offer (provided that VSIAS shall be permitted to credit the amount of the Termination Fee against this bid). Within two business days thereafter, the Receiver will make a determination of what is the final highest and best offer, and – subject to Court approval – shall proceed to close the sale to such offeror. The next highest bid shall serve as a back-up bid in the event that the successful bidder does not close in accordance with the agreements.

LEGAL AUTHORITY

The Court has previously authorized sales of assets of the estate, including Policies controlled

