

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Vs.

MUTUAL BENEFITS CORP., et al.,

Defendants.

VIATICAL BENEFACTORS, LLC., et al.,

Relief Defendants.

**RECEIVER'S MOTION FOR AUTHORIZATION TO USE
"UNCLAIMED FUNDS" TO MAKE A SUPPLEMENTAL
DISTRIBUTION TO MBC INVESTORS**

Roberto Martinez, Esq., as Court-appointed Receiver of Mutual Benefits Corp. ("MBC"); Viatical Benefactors, LLC; Viatical Services, Inc. ("VSI"); and Anthony Livoti, Jr. individually and Anthony Livoti, Jr. P.A., solely in their capacity as trustee; files this motion to seek the Court's authorization to use the funds that have gone unclaimed to date in the MBC Claims Process Distribution to benefit MBC investors who, for one reason or another, were not included in the Original Distribution. The Securities and Exchange Commission has been provided with a copy of this Motion and has no objection the proposal.

THE MBC CLAIMS PROCESS DISTRIBUTION

Back in December 2009, the Court authorized the Receiver to begin distributing the approximately \$120 million that had been recovered during the course of the MBC Receivership (the “Original Distribution”). The distribution began in January 2010. The distribution was made to all MBC investors who returned a Claim Form. The deadline for the return of Claim Forms was clearly stated on the Claim Forms and on the Receiver’s website. The Receiver continued to accept Claim Forms even after the deadline, right up until the point in time when the checks had to be printed for mailing.

Garden City Group (“GCG”) has served as the claims distribution agent for the Receiver. VSI, which became Litai Assets, LLC after its Court-approved sale by the Receiver, has continued to provide logistical support to the Receiver pursuant to a Transitional Services Agreement that was concluded as part of the sale. The Original Distribution is now essentially over, with the primary remaining issue being what to do with funds that have gone unclaimed.

A. The Distributed Funds.

To date, the Receiver has successfully distributed \$118,996,365. This represents a total of 36,355 investment interests around the world.¹

B. The Unclaimed Funds.

There is a substantial amount of money that has gone unclaimed to date in the distribution process (the “Unclaimed Funds”). The Unclaimed Funds are funds that were sent to the last known address of investors who participated in the Claims Process and were owed one or more claim checks, but the checks were never cashed. The total of the Unclaimed Funds is **\$2,136,771.30.**

For domestic investors, the Receiver has not simply allowed uncashed checks to be treated as Unclaimed Funds. For checks that went uncashed, as a first step, GCG ran the investors’ identifying information through the NCOA (National Change of Address) Database. This is a database that is maintained by the U.S. Postal Service to track changes of address for individuals and business and can be accessed by direct mailers to update their mailing lists. Whenever a new address could be determined, the checks

¹ The distribution was done based on each investment interest with MBC. Some investors had more than one investment interest, so the number of investors who have received distributions is slightly lower than the number of investment interests.

were re-cut and re-sent to the new address. Some of those checks were then cashed; some were not.

In addition, for any investors where the Receiver has a social security number in MBC's records for the investor, GCG conducted an Advanced (Credit Bureau) Address Search using credit databases to attempt to identify valid addresses. Again, whenever a new address could be determined, the checks were re-cut and re-sent to the new address. Some of those checks were then cashed; some were not. In addition, Litai and the Receiver each reviewed the identity of the investors with Unclaimed Funds on an individual basis to determine if any prior contact had been had with the investors and whether any further attempts at finding them were practical. This process was time-consuming and costly, but necessary to get as much of the money successfully distributed as possible. GCG, which has substantial experience in administering distributions in class actions, receiverships and bankruptcies, believes that all reasonable steps have been taken to attempt to locate these domestic investors.

For foreign investors, unfortunately, there is no equivalent to the NCOA database to identify current addresses. Similarly, the foreign investors do not have U.S. social security numbers that would allow use of credit databases to try to track them down. However, based on GCG's historical experience with distributions in Central and South America (the

location of the largest number of foreign investors), the Receiver first used OCASA Logistics Solutions, a specialized delivery service similar to Federal Express or DHL, to deliver all checks going to countries in Central and South America (as well as Africa). Although there was a significant cost to doing so, this service should have increased the likelihood of successful delivery and decreased the likelihood of theft or of checks being “lost in the mail”. This was then followed up with a second effort at delivering checks that had gone uncashed by sending them via Federal Express to all investors in Central and South America (again, an expensive but worthwhile endeavor). GCG, which has substantial experience in administering distributions in class actions, receiverships and bankruptcies, believes that all reasonable steps have been taken to attempt to locate these foreign investors.

And, of course, any investor who has contacted the Receiver to indicate that they have not received their claim check has immediately had their check re-cut by GCG and re-sent to the investor. Most often, these are investors who moved one or more times to a new address and did not update Litai or the Receiver with the new address. This has resulted in a substantial amount of administrative work being performed by GCG and Litai to bring the Original Distribution to an end. At this stage, although there is still an occasional investor who has contacted the Receiver or Litai to say that they have not received a check, the number is down to a trickle.

While the total amount of the unclaimed funds is large when viewed in isolation, the percentage of unclaimed funds is only approximately 1.31% of the total. In light of the large number of individual investors involved in this Receivership, the fact that they are dispersed around the world, and the substantial time that has elapsed since many of these investments were originally made, this does not seem like a large percentage of funds to have gone unclaimed.

C. The “Unpaid Claims”.

As the Court will recall, due to an error in the determination of the number of investors who had participated in the Claims Process, 740 investors were mistakenly left out of the Original Distribution (the “Unpaid Claims”). These 740 investors were owed claim payments totaling \$2,666,000.²⁴ (Conversely, all of the other investors ended up receiving a very small “overpayment” in their claims checks because these 740 investors were not factored into the distribution amounts.) The Unpaid Claims have now been paid in their entirety.

As funds became available, the Receiver has had the Unpaid Claims paid by GCG on a “largest-to-smallest” basis starting with the domestic investors and then moving to the foreign investors. The rationale for doing this was that the investors with the largest amounts owed to them would be most concerned about the delayed payment and potentially most in need of

the funds. The rationale for paying the domestic investors first was the higher success rate the Receiver has had in getting checks delivered to domestic investors. At this point in time, all of the Unpaid Claims have been paid.

The Unpaid Claims have been paid by using additional asset recoveries that have come into the Receivership Estate, including tax refunds that were received by VSI and MBC. In addition, with the Court's permission, as claims checks have been re-issued to investors by GCG (as a result of changes in address or other reasons), the checks have been re-issued in the correct (slightly smaller) amounts, which has resulted in a gradual recoupment of the "overpayment" amounts. In addition, also with the Court's permission, the investors who are on Keep Policies who have been receiving periodic invoices for their share of the premiums on the policies were also "billed" for the amount of the "overpayments" they received in the Claims Process.

D. Potential Future Recoveries.

The U.S. Attorney's Office has criminal actions pending against MBC's former principals that include substantial claims for forfeiture. The U.S. Attorney's Office has restrained several properties – two residences in Fort Lauderdale and one home in Maine – and has caused \$950,000 to be deposited into the Court Registry. If the criminal actions result in forfeiture

of these or other assets, the Government may request that the Receivership be used as the distribution mechanism for the assets.

The Receiver has considered whether it makes sense to defer proposing this Supplemental Distribution until after the results of the criminal actions and forfeiture proceedings are known. There are, after all, substantial costs to making a distribution of this size that could be conserved if any future distribution was done all at once. However, given that the outcome of the criminal cases and forfeiture proceedings cannot be known, and given the potentially lengthy delay entailed in a wait-and-see approach (the trial of the primary MBC criminal action is not set until February 2013), the Receiver believes it makes sense to distribute the Unclaimed Funds now and deal with a potential "Second Supplemental Distribution" if and when the time comes.

MBC FINANCIAL STATUS (AS OF JULY 2012)

MBC has no ongoing operations at this point in time, no employees, and no professionals who are being compensated for any work done for MBC. MBC has no ongoing litigation, although the Receiver's counsel does continue to monitor and engage in various efforts to collect on outstanding judgments obtained by the Receiver and the Securities and Exchange Commission. The Receiver and his counsel also continue to oversee the ongoing distribution process (for which they have not sought compensation).

MBC previously entered into a Transitional Services Agreement with Litai for its ongoing assistance in fielding telephone calls and e-mail inquiries from investors and assisting in the reissuance of checks that were not received by investors who participated in the claims process. Even at this late date, there is still a trickle of investors who participated in the claims process but who did not receive or cash their checks for one reason or another (e.g., they moved and did not update their address; they inadvertently threw away the checks received in the mail; etc.). The Transitional Services Agreement with Litai has been for \$6,000 per month, and has been renewed on a month-to-month basis. The Receiver is negotiating with Litai to replace the month-to-month arrangement with a lump-sum payment to have Litai complete the transitional services and administer the Supplemental Distribution.

The MBC bank accounts that are still administered by the Receiver are as follows:

Account	Balance
MBC Receivership Account	\$154,594.38

Given the limited ongoing activities of the Receivership, the two previously open Receivership bank accounts have been consolidated into a single account for administrative convenience. This account is used by the

Receiver to pay the “transitional servicing fee” to Litai for ongoing services in the Distribution Process and to pay storage charges for the MBC documents. As noted, the Receivership also owes GCG \$94,717.55 for the costs incurred and time spent in its ongoing administration of the Original Distribution over the past two years, which will be paid from this account, leaving a relatively small balance remaining.

PROPOSED USE OF UNCLAIMED FUNDS

The Receiver has taken all practical steps to attempt to distribute the funds to the domestic and foreign investors who participated in the MBC Claims Process. In other SEC receiverships, federal courts have allowed unclaimed funds to be “re-absorbed” for the benefit of the Receivership Estate. *See, e.g., SEC v. Aquacell Batteries, Inc.*, 2010 WL 5534834, at *1 (M.D. Fla. Dec. 22, 2010) (“Authorizing the Receiver to re-absorb, for the benefit of the Receivership Estate, any unclaimed distributions to investors”); *SEC v. W.L. Ware Enterprises and Investments, Inc.*, 2009 WL 2163220, at*1 (M.D. Fla. July 20, 2009) (“The Receiver is to re-absorb into the receivership estates unclaimed claim distributions of \$ 12,653.51 and any future unclaimed distributions for the benefit of the receivership estates.”).

There are two logical things that could be done with the Unclaimed Funds to continue to benefit the victims of MBC’s fraud. One option would be

to make a Supplemental distribution to all of the investors who participated in the original Distribution on a pro rata basis.

However, there are a number of MBC investors who have contacted the Receiver who did not participate in the Original Distribution for one reason or another, but who would have been entitled to receive claim checks if they had submitted a Claim Form (the “Additional Claimants”). Although the Receiver held the deadline open for investors to return their claim forms until the last possible moment before the checks were cut, there were still a substantial number of investors who have contacted the Receiver since January 2010 to report that they did not return a Claim Form for a variety of reasons (e.g., change of address not reported so they did not receive the claim form, confusion over the process, thrown away as junk mail, etc.). The Receiver has maintained a list of these Additional Claimants (attached as Exhibit A) in the event that a second round of distribution would become possible.² There is not enough in Unclaimed Funds to provide these investors with the exact same percentage recovery as was received by investors who participated in the Original Distribution, but it should come close and will provide them with a significant degree of restitution.

² The list of Additional Claimants contains 868 investment interests. Again, the number of distinct investors this figure represents is smaller, because the distribution is done based on each investment interest with MBC, and some investors had more than one investment interest.

On balance, the more equitable approach is to make the Supplemental Distribution to the Additional Claimants. They have received nothing to date, and they are in the end investors with a bona fide claim. The investors who received checks in the Original Distribution, on the other hand, have received a reasonable amount of restitution for this type of fraud. Moreover, given the large number of investors who participated in the Original Distribution, it would be very costly to make the Supplemental Distribution to them and would result in only a *de minimis* increase to their restitution.

In doing a Supplemental Distribution, it will still be advisable to “hold back” a small amount in the event that investors to whom the Unclaimed Funds were due contract Litai or the Receiver in the future and request the reissuance of their checks. Although the “surfacing” of these lost investors has become infrequent at this point, it does still happen and may continue in the future. The Receiver believes that the amount held back should be as little as possible, so that as little money as possible goes undistributed to the victims. This leaves a small risk that, if the hold back is exhausted, and at some point in the future an investor surfaces, there will be nothing left with which to re-issue a check. However, it would seem more equitable to distribute as much as possible in the Supplemental Distribution now as opposed to holding back funds on the chance that investors who have not

been located or surfaced in over two years will surface at some point in the future

Accordingly, the Receiver recommends that the Unclaimed Funds be used in the following manner and seeks the Court's authorization to proceed:

- First, the Receiver will hold back \$150,000 to re-issue checks to any investor to whom the Unclaimed Funds were due who contacts the Receiver in the future or to cover any unexpected expenses that may arise.

- Second, the costs of the Supplemental Distribution which will include the hard costs of printing and mailing, and the administrative costs of employing GCG shall be deducted from the Unclaimed Funds. These costs are \$42,000. (The Receiver's counsel, although having spent substantial time in the ongoing distribution process over the past two years, is not seeking compensation for their work.)

- Third, all remaining Unclaimed Funds shall be distributed on a pro rata basis to the Additional Claimants.

- Fourth, to minimize the costs of the Supplemental Distribution, the Receiver will make a single mailing to the Additional Claimants (via First Class Mail to domestic investors and Federal Express to foreign investors). Returned and uncashed checks will be treated as Unclaimed Funds.

The Receiver also asks for authorization to pay GCG for the substantial work that it has done over the past two years in the amount of \$94,717.55, which is the amount of their outstanding bill (a copy of which is attached as Exhibit B). In addition, the law firm of Colson Hicks Eidson has incurred \$5,832.86 in out-of-pocket costs (as identified on Exhibit C), which the Receiver requests permission to reimburse the firm for.

Finally, even after the Supplemental Distribution is carried out, it is likely that there will still be Unclaimed Funds. Ideally, this will be a relatively small amount. When the Supplemental Distribution process is completed, the Receiver will submit a Report to the Court and, if necessary, make a further recommendation on what do with it or recommend that it simply be held pending the result of the pending criminal actions and forfeiture proceedings against MBC's former principals.

Dated: August 8, 2012

Respectfully Submitted,

s/ Roberto Martínez
Roberto Martínez, Receiver

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on August 7, 2012, the foregoing was served via CM/ECF on all counsel of record.

/s/ Curtis B. Miner
Curtis B. Miner

SERVICE LIST OF RECEIVER

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