

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.

**RECEIVER'S MOTION FOR AUTHORIZATION TO MAKE FINAL
DISTRIBUTION AND FOR DISCHARGE OF RECEIVER**

Roberto Martinez, 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 requesting (1) the Court's authorization to make a final distribution of restitution funds that have been transferred to the Receiver by the Clerk of the Court through the United States Department of the Treasury as well as certain residual funds, and (2) the entry of an Order discharging the Receiver in this matter.

RE-CAP OF THE MBC RECEIVERSHIP

MBC was in the business of selling viatical settlement contracts. In a viatical settlement contract, a provider like MBC would purchase the rights to the death benefits on a life insurance policy from an insurance policyholder who was

terminally ill or of advanced age and would then sell fractional interests in those death benefits to investors, who would realize a return on their investment when the policyholder died.

The MBC Receivership began in May 2004 as a result of the action brought by the Securities and Exchange Commission (“SEC”) against MBC and its former principals, Joel Steinger, Leslie Steinger, Steven Steiner and Peter Lombardi for violations of the federal securities laws by selling unregistered securities and making fraudulent misrepresentations in the sale of those securities. MBC had sold viatical settlements to over 30,000 investors around the world, and VSI was administering over 7,000 insurance policies with a face value in excess of \$1.5 billion. The Defendants all eventually agreed to the entry of Consent Orders and to pay disgorgement and civil fines of varying amounts to settle the SEC Action.

The Policy Disposition Process. A fundamental dilemma in this Receivership was that the enormous portfolio of insurance policies serviced by VSI also required an enormous sum in premiums to be paid to keep the policies in force. A process for disposition of the policies, by sale or otherwise, had to be implemented before the money available to pay the premiums ran out. This Court eventually entered an order authorizing a disposition process. Under the Court’s Order on Disposition of Policies and Proceeds [D.E. 1339], a voting process was implemented in which the investors were allowed to vote whether they wanted to sell their policy, keep their policy by assuming the responsibility for payment of premiums themselves, or allow their policy to lapse. The weighted majority vote (based on

amount invested) controlled the decision as to each policy. The disposition process ultimately resulted in 3,052 policies being kept by the investors, representing over \$1 billion in face value (the “Keep Policies”).

The Claims Process. The Receiver also initiated a claims process to determine who should be permitted to share in the pool of funds to be distributed by the Receiver and on what basis. On April 3, 2008, the Court entered its Order Authorizing Claims Process [D.E. 2058]. The Receiver subsequently sent out 49,127 Claim Forms to every MBC investor whose policy had not yet matured, as well as to other potential claimants and creditors. 36,922 Claim Forms were ultimately returned. After briefing and hearing before the Court, the Court entered its Order Granting Receiver’s Motion for Final Determination of Allowed Claims [D.E. 2188] in October 2008. The Court determined that the basis for all investors’ claims would be the amount invested.

The Distribution Process. In December 2009, the Court authorized the Receiver to distribute the approximately \$120 million that had been recovered during the course of the MBC Receivership (the “Original Distribution”). The distribution process began in January 2010. The distribution was made to all MBC investors who returned a Claim Form. The Receiver successfully distributed approximately \$118 million to 34,431 investment interests around the world.¹ The

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

Original Distribution, including tracking down hard-to-locate investors and reissuing checks that went uncashed, was largely completed by mid-2011.

As is typical in any large-scale claims process, there was a relatively small amount of money that was undeliverable and went unclaimed after all practicable steps were taken. The Receiver then sought and received the Court's authorization to use the unclaimed funds to make a Supplemental Distribution to investors who were victims of the MBC fraud but had failed to participate in the Claims Process for one reason or another. The Supplemental Distribution was largely completed in 2012. Throughout this time, Garden City Group ("GCG") has served as the claims distribution agent for the Receiver.

The "Spin-Off" of VSI. The Receiver also undertook the sale of VSI to a new owner and operator. Because VSI was still needed to administer the many Keep Policies, VSI needed to continue to function after the Receivership concluded its work. After an open auction process, the Receiver sought and obtained approval of the sale of VSI to a new owner. The business of VSI was sold to Litai Assets, LLC ("Litai"), which services the Keep Policies pursuant to a Servicing Agreement with the Trustee.

The Keep Policy Trust. Similarly, because the Keep Policies would remain after the Receivership's activities had finished, a trust was established to become the owner of the Keep Policies and to act for the benefit of the MBC investors who opted to keep their policies (the "Keep Policy Trust"). Barry Mukamal is the Trustee of the Keep Policy Trust.

When the Keep Policy Trust was formed in September 2009, it was administering a total of 2,403 policies with a total face value of \$888.5 million. There were 17,448 investors in those policies. In the approximately 8¾ years that have followed, the Keep Policy Trust has paid out a total of \$359,547,942 in death benefits on life insurance policies that have matured. As of May 31, 2018, the Keep Policy Trust is still holding 1,443 policies, with a total face value of \$402.6 million. The number of investors in those policies is down to 2,579.

**ADDITIONAL FUNDS RECENTLY
TRANSFERRED TO THE RECEIVERSHIP**

The U.S. Attorney's Office brought criminal actions against MBC's former principals and others involved in the scheme that were concluded with final judgments requiring the criminal defendants to pay restitution. The criminal actions included *United States v. Peter Lombardi et al.* (Case No. 06-20665), *United States v. Carol Traina, et al.* (Case No. 07-20061), *United States v. Raquel Kohler, et al.* (Case No. 07-20446) and *United States v. Joel Steinger, et al.* (Case No. 08-21158). For various reasons, including appeals after convictions at trial, and the time it took for restitution payments to be made by the defendants, it took a substantial amount of time before the full amount of the restitution funds could be accounted for by the Clerk of the Court and the government and transferred to the Receiver.

The restitution funds, when combined with other residual funds and unclaimed funds that had remained with the Receiver, total **\$2,479,245**.

PROPOSED USE OF THE FUNDS

The Receiver proposes that the restitution funds, and other remaining funds, be used for two purposes, as set forth below. The Receiver has conferred with the SEC and provided a copy of this Motion, and the SEC has indicated it does not object to the proposed uses. The United States Attorney's Office has confirmed the restitution amounts paid to the Receiver with the Clerk of the Court.

A. Investors Left Out of All Distributions.

There is a small number of investors who were left out of both the Original Distribution and the Supplemental Distribution discussed above (the "Omitted Investors"). Over the past several years since the Supplemental Distribution was largely completed in 2012, investors that failed to participate in the Policy Disposition Process, failed to participate in the Claims Process, and never previously contacted the Receivership have surfaced. Often, these contacts have come from family members who came across financial paperwork relating to the MBC investment and tracked down the Receivership for information after an investor passed away.

The Receiver has kept track of these Omitted Investors. There are a total of 43 (with some having more than one investment interest). The total investment basis in their MBC policies was \$864,905. If these investors had participated in the Original Distribution on the same basis as Sell Policy Investors, they would have received approximately 23% of their investment basis in the Claims Process. Accordingly, it would require \$200,212 of the funds to be used for this purpose to

put the Omitted Investors in the same place as if they had participated in the Original Distribution.

There will be transaction costs to making such a distribution, which will be paid for using the residual funds that were still in the Receiver's custody. The Receiver would use GCG to make the distribution, as they did for the Original Distribution and Supplemental Distribution. Federal Express would be used for the delivery of each check to minimize the chances of checks going unnoticed or uncashed. As discussed below, the Receiver's proposal includes a complete closure of this Receivership and discharge of the Receiver after this final distribution is made. As a result, in the event another Omitted Investor surfaces in the future at a point in time after this final distribution is made, they would be left with no recovery and no recourse.

B. Payment of Administrative Fees for Investors Still in the Keep Policy Trust.

As part of the Servicing Agreement between the Trust and Litai, Litai is permitted to charge the investors on the Keep Policies an administrative fee. The purpose of the fee is to cover the cost of administering the policies by Litai, which includes billing for and collecting annual premiums to keep the policies in force, periodically monitoring the insureds, and processing claims for death benefits when the insureds pass away. The amount of the administrative fee is currently \$437.⁰⁹ per year per investor, of which \$147.⁸⁷ is subsidized by the Trust, for a net to the investor of \$289.²².

The Receiver proposes to use the balance of the funds to pay the administrative fees for the original MBC investors who are still invested in policies held by the Keep Policy Trust. For the preceding 12 months, these investors paid a total of \$1,039,481 in administrative fees to Litai (not including the portion subsidized by the Trust). As a result, if used in this manner, the funds would give these original MBC investors an administrative fee “holiday” of approximately two years.

This “holiday” would only apply to the original, victim investors of the MBC fraud. As part of the Keep Policy Trust’s procedures, if an MBC investor defaults on his or her share of the premium or defaults on the administrative fee, there is a process by which other investors can purchase the defaulting investor’s interest. This has been essential to preserving the value of the policies because it keeps them from going into default. Many of these defaulted investment interests have been purchased by an investment fund, Acheron Capital, Ltd. and affiliated entities (“Acheron”). The administrative fee “holiday” would not apply to Acheron, because Acheron is not one of the original MBC victim investors. Nor would this process “benefit” Litai. Litai is entitled to payment of the administrative fee under the Servicing Agreement and would ordinarily receive it directly from the investor. Under this proposal, no change would be made to the amount Litai receives; the investor would simply be relieved of the obligation to pay it for the length of the “holiday.”

To accomplish this administrative fee “holiday,” the Receiver proposes that the balance of the funds – less the amounts used to make the proposed distribution to the Omitted Investors, and less the unreimbursed costs described below – be placed in a segregated fund earmarked for this particular purpose and under the control of the Trustee, who shall be responsible for administering the segregated fund to subsidize the administrative fees otherwise payable by original MBC investors over a period of two years. If the available funds are insufficient to pay the full amount of administrative fees payable by such investors over that two-year period, the Trustee shall prorate the available funds among the original MBC investors on a per investment unit basis. The funds shall not be considered Trust Assets and shall not be used for any other purpose other than as described herein.

C. Receiver’s Unreimbursed Costs

Finally, the Receiver’s counsel has a small amount of unreimbursed costs that have been incurred since August 2012 (when the Court last authorized the Receiver to be reimbursed for costs). The unreimbursed costs total \$1,270.79. The Receiver’s counsel have spent substantial amounts of time on the ongoing distribution process and other issues that have arisen since 2009, but have not sought any compensation for their work since that time.

JUSTIFICATION FOR THE PROPOSAL

There are several advantages to using the funds in the way proposed above in the Receiver's view.

First, it would be too costly and administratively unworkable to distribute the funds to *all* of the MBC victim investors across the board based on any formula. There are simply too many of them (>50,000 investment interests); the administrative costs of mailing the checks and handling follow up calls and problems would eat up most of the proceeds; and any resulting checks for distribution would be too small to make it a worthwhile endeavor. A distribution to the very small subset of Omitted Investors (43) is the only cost-effective and practicable distribution that can be made directly to investors.

Second, there is an equitable basis for using the funds to benefit the MBC investors who are still in the Keep Policy Trust. These investors presumably made a rational decision to choose to "keep" their investment interests and assume responsibility for the ongoing premium payments and were aware of the risks that their policies would not "mature" for a substantial period of time. It was part of the MBC fraud that the life expectancies of the insureds on these policies was misrepresented to investors. However, the Keep Policy investors who are still paying their share of the premiums at this stage (almost a decade after the Disposition Process was conducted) have received a worse outcome than those whose policies matured more quickly. In the rough equity that can be accomplished

by a receivership, alleviating the burden of administrative fees for a period of time has an equitable logic to it.

Finally, providing the balance of the funds to the Trustee to distribute as proposed here allows for a “clean exit” to the Receivership. That is, the Receiver can make sure that the Receivership ends up with a zero dollar balance of funds (and can close its bank account), because everything that is left over can be transferred to a segregated bank account administered by the Trustee. If the Receiver were to do a distribution directly to investors, there would inevitably be uncashed checks and inevitably be some balance left in the Receiver’s account for which the Receiver might need to return to the Court yet again for direction. Similarly, the Receiver can hold back a small amount to cover the costs of the distribution to the “left out” investors, without being concerned about being left with a residual amount after the expenses are paid. Allowing any remaining funds to be distributed by the Trustee as proposed here will avoid this problem.

RELEASE AND DISCHARGE OF RECEIVER

Finally, for the sake of complete closure, the Receiver respectfully requests that an Order be entered that formally closes this Receivership and discharges the Receiver and his professionals of any further duties with respect to the Receivership. A proposed Order accompanies this Motion.

Respectfully submitted,

s/ Roberto Martinez
Roberto Martinez, as Receiver

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I HEREBY CERTIFY that, on August 30, 2018, I filed a true and correct copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will cause a Notice of Electronic Filing to be delivered by e-mail to all counsel of record.

s/ Curtis B. Miner _____
Curtis B. Miner