

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 EMERGENCY MOTION TO AUTHORIZE
DISPOSITIONS OF "UNDERSUBSCRIBED KEEP POLICIES" AND
INCORPORATED MEMORANDUM OF LAW**

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 to authorize various means of dispositions of policies which were designated to be kept by the investors through the disposition process, but for which the investors have not paid the required premiums ("Undersubscribed Keep Policies"). The Receiver seeks relief on an emergency basis in that there are certain policies for which investors have not paid the required premium funds, and which must be disposed of *immediately* in order to avoid the Receiver having to use Receivership funds for premiums which may not be recoverable. In support, the Receiver states:

1. 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).

2. 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. ...”

3. 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.

4. In accordance with the process directed by the Disposition Order and Clarification Order, more than 3,000 policies with an aggregate face value in excess of \$1 billion were designated to be "kept" ("Keep Policies"). For Keep Policies, the investors in each such policy become responsible for paying the administrative obligations and premium obligations associated with the policies. If an investor fails to pay its pro rata share of the administrative and premium obligations, then that investor's interest is forfeited and beneficial interests in the policy reallocated to other investors who make up the shortfall (the Notice to Investors makes clear, consistent with the Disposition Order and Clarification Order, that "FAILURE TO TIMELY PAY VSI ADMINISTRATIVE FEES OR PREMIUM PAYMENTS WIL RESULT IN FORFEITURE OF YOUR POLICY INTEREST").

5. If the investors in a Keep Policy fail to fully fund the required premium amounts after notice of a shortfall, the Disposition Order directs the Receiver to attempt to sell the non-paying investor's interest to other investors in the policy, to attempt to reduce the face value of the policy, or to attempt to sell the policy. The Notice to Investors provided in connection with the Disposition Order advised that if a policy cannot be sold, "it could be surrendered, and you could lose your entire investment."

6. VSI has implemented the billing process with respect to Keep Policies. The initial billing for VSI's administrative fees were issued before premium billings were issued, and all investors in Keep Policies who voted to sell were given an opportunity to retain their interests by

paying the fees and any subsequent premiums due. Investors who failed to pay the administrative fees were removed from the policy and interests reallocated. The “investor-to-investor” sales process has also been completed with respect to the Keep Policies, wherein the Receiver attempted to facilitate the sale of interests of investors who were not interested in keeping the policy to investors who had indicated a willingness to purchase such interests. For many policies, the billing process has already completed the initial round of billing all investors for their prorated share of the premium obligations, as well as the second round of billing in which those investors who did pay such obligations are given the opportunity to make up any shortfall resulting from non-paying investors in the policy.

7. Once all of those steps are completed, if there are still insufficient funds to pay all premiums, then the policy is at risk of lapsing and the Receiver has been directed to attempt to reduce the face value of the policy (an option only generally available if the policy is a universal policy, and even then may be limited to certain amounts for which the available premium funds are insufficient) or to attempt to sell the policy, surrender the policy or allow it to lapse.

8. During the initial billing cycle, in some instances, the premium payment will be due to the insurance company during or very shortly after the billing cycle described above has been completed. In such instances, if there is any significant delay after determining that a policy is an Undersubscribed Keep Policy, the Receiver may either lose the opportunity to sell the policy, or be required to use receivership funds to pay the premium until there is an opportunity to sell the policy. There is no assurance that the Receiver will be able to recover any receivership funds expended for such premiums from the sale proceeds.

9. The Receiver presently plans to dispose of Undersubscribed Keep Policies by a

variety of methods. These include: (1) sales of particular Undersubscribed Keep Policies, or groups of such policies, to certain third parties who have expressed an interest in purchasing policies from the Receivership, through an abbreviated auction process (as described further below); and (2) sales of the fractional interest in an Undersubscribed Keep Policy, or groups of such interests, for which the premium obligation has not been funded to said third parties, again through an abbreviated auction process which would require the purchaser to fund the “shortfall” amount with respect to the policy plus some additional amount in consideration for the purchase of the interest in the policy. The second option is not one that is expressly provided for in the Disposition Order or the Notice to Investors, but provides a mechanism for potentially avoiding the lapse of policies while preserving the interests of investors who have funded their share of the premium obligation for a Keep Policy.

10. The abbreviated auction process contemplated by the Receiver would be as follows:
 - A. The Receiver would communicate the availability of an Undersubscribed Keep Policy, or an interest therein, or a group of such policies or interests, to the approximately fifty parties who have expressed an interest in acquiring policies from the Receivership, and any other parties who communicate such an interest to the Receiver;
 - B. Potential buyers would be required to execute a confidentiality agreement, an affidavit of non-affiliation with any of the Receivership entities, and provide evidence of financial capability (if they have not already done so);
 - C. Potential buyers would receive the same information with respect to a policy, interest therein, or group of policies as has been provided to the original investors in said policy;

D. The Receiver would establish and communicate a deadline for submission of offers for the purchase of such policy, interest therein, or group of policies; and

E. After the deadline expired, the Receiver would identify the highest bid received for such policy, interest therein, or group of policies, and the purchaser submitting the highest bid would be required to fund the bid and close within two (2) business days. Once a group of interested potential purchasers has been determined and qualified by submission of the items required by "B" above, subsequent offers of policies or interests would be communicated only to that group (and such other parties who subsequently express an interest and qualify).

11. The Receiver is also evaluating the possibility of selling policies or groups of policies through an on-line auction platform, to be provided by a vendor for which the Receiver will seek approval by separate motion once an agreement has been negotiated.

12. In order to engage in such a process and avoid the prospects of either a policy lapsing for non-payment of premiums, or the Receiver being required to use Receivership funds to keep a policy in effect pending a sale, the Receiver requests authority and discretion to engage in the sales pursuant to the process described in Paragraphs 9 and 10 above and to consummate such sales without further notice or Court order. The Receiver notes that while the Notice to Investors indicated that for "Sell Policies," investors would file a motion to approve the sale of the policy and investors would receive notice of that motion if a policy in which they have an interest were to be sold, the Notice to Investors makes no similar provision with respect to the sale of Keep Policies. To the contrary, the Notice to Investors specifies that "FAILURE TO TIMELY PAY VSI ADMINISTRATIVE FEES OR PREMIUM PAYMENTS WILL RESULT IN FORFEITURE OF

YOUR POLICY INTEREST,” and further states that “if at any time until the Policy matures, you, or any other investor retaining his interest in the Policy, fails to pay any premiums due, and the other investors don’t assume the obligation to pay the non-paying investor’s premium obligation pro rata, **the Policy may be sold, and if it cannot be sold, it could be surrendered, and you could lose your entire investment.**” Accordingly, the Receiver submits that Undersubscribed Keep Policies or interests therein may be sold by the Receiver without further notice to investors, and that the Court should approve the proposed method for sale as described above.

13. The Receiver further requests that the Court grant the Receiver discretion, to be exercised consistently with the general goals of administering and preserving assets in the best interests of the receivership and all of its creditors, to determine, with respect to policies for which there are premium shortfalls, to exercise business judgment with respect to whether reduction in face value, sale, surrender, or permitting the policy to lapse is the appropriate course of action to be taken with respect to a particular policy. The Receiver requests this discretion specifically because there will often be situations where the Receiver and/or VSI will recognize that reduction in face value or sale may be economically or practically unfeasible, and where surrender or lapse are the only viable options available. However, if the Receiver is required to pursue each of these alternatives before he may allow a policy to lapse, the Receiver may be required to expend additional receivership funds to support premium obligations (which the investors themselves have failed to pay) which might ultimately not be capable of being recovered. In such circumstances, the Receiver should be permitted to, in his discretion and business judgment, pursue any appropriate alternative which will balance the interest of preserving the policy with the interest of preserving receivership funds without expending money for additional premiums which may not ultimately be recovered.

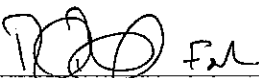
14. By virtue of this Court's Disposition Order, the Receiver has been authorized and directed to sell Keep Policies for which investors fail to fully pay the required administrative fees or premium obligations. Accordingly, the sale contemplated by this Motion has already been authorized by the Court. It is clear that the Receiver of a company that was engaged in the viatical business may properly sell the interests in those Policies where in the best interests of the Receivership estate and investors. *See, e.g., Davis v. LifeTime Capital, Inc.*, 2006 WL 1580211 (S.D. Ohio 2006) (describing approval of bidding and sale procedures for receiver's sale of viatical policies); *Quilling v. Trade Partners, Inc.*, 2006 WL 1134227 (W.D. Mich. 2006) (same). The sale procedures proposed by the Receiver with respect to the sale of the Undersubscribed Keep Policies are designed to maximize the value of the Receivership's assets in the face of the timing constraints presented by the Undersubscribed Keep Policies, which is the appropriate goal of any such procedure. *In re Integrated Resources, Inc.*, 147 B.R. 650 (S.D.N.Y. 1992).

15. The Receiver does not by this Motion intend to resolve how the proceeds of any Undersubscribed Keep Policies should be disposed of, which will be the subject of a claims procedure to be approved by the Court pursuant to separate motion and order.

WHEREFORE, the Receiver respectfully requests that the Court (1) authorize the Receiver to sell Undersubscribed Keep Policies, or interests therein, in accordance with the procedures described herein; and (2) confirm the Receiver's discretion to determine and implement, in the exercise of his discretion and business judgment, the appropriate disposition of Undersubscribed Keep Policies, whether by sale, reduction of face amount, surrender, or lapse.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served in accordance with the attached Receiver's Service List on September 14, 2007.

By:  _____
David L. Rosendorf

SERVICE LIST OF RECEIVER

Case No.: 04-60573 CIV-Moreno

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