UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 04-60573-CIV-MORENO/TORRES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP., et al.,

Defendants,

VIATICAL BENEFACTORS, LLC, et al.,

Relief Defendants.
_____/

PLAINTIFF'S RESPONSE TO RECEIVER'S APPLICATION FOR FINAL FEE AWARD FOR RECEIVER'S COUNSEL

I. INTRODUCTION

The Securities and Exchange Commission opposes the Receiver's request for an $11 million fee bonus for two law firms he employed – one of which is his own. Our opposition is not due to any dissatisfaction with the work Receiver's counsel performed or lack of results they achieved. Rather, it is based on policy and fairness concerns related to rewarding these lawyers well beyond rates they agreed to accept at the outset of the case and well beyond what this Court has already found represents their reasonable fees – with the express result of reducing the recovery of already-defrauded investors.

The Commission does not dispute that Receiver's counsel has worked diligently and efficiently in this complex matter, as well as successfully protected and maximized assets in the receivership estate for the benefit of defrauded investors. However, this is, quite simply, the job they agreed to undertake and that this Court appointed them to do at agreed upon reduced rates.

Furthermore, it is exactly what numerous other Receivers have done in previous Commission cases, often at greater risk of not being paid and under more difficult circumstances than existed here. None of these previous receiverships have applied for the kind of extraordinary bonus the Receiver is seeking here, recognizing, as many courts have, that serving as a Receiver or Receiver's counsel in a Commission enforcement action is an act of public service, to safeguard the receivership assets and protect investors from further victimization.

In these cases, where investors and creditors have been defrauded and victims will recover only a fraction of their losses, Receivers and their counsel should not receive a windfall. The $11 million Receiver's counsel seek would be just that. Pursuant to this Court's Orders, Receiver's counsel have already received reasonable compensation in the amount of $4.7 million. An $11 million bonus would result in Receiver's counsel receiving approximately $800 per hour for their billable work – far above their normal rates. Such a result would be fundamentally unfair to defrauded investors, who are recovering less than a quarter of their losses, as well as cut against the public nature of receivership work.

Finally, from a legal standpoint, the Receiver's bonus request is based on a percentage-of-recovery method inapplicable to receivership cases. This method is only applicable in "common fund" cases and, as the Receiver concedes in his motion, this is not a common fund case. Accordingly, the Commission respectfully opposes the Receiver's motion for a bonus payment to his counsel.

II. ARGUMENT

A. RECEIVERSHIP FEES ARE CLOSELY SCRUTINIZED TO AVOID EVEN THE APPEARANCE OF A WINDFALL.

Courts should scrutinize fee applications to ensure they are reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Even in the absence of an objection, courts should

carefully examine Receivers' fee applications to determine whether the time spent, services performed, hourly rates charged, and expenses incurred are justified under the factors set forth in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974). *SEC v. Megafund Corp*., 2008 WL 2839998, *2 (N.D. Tex. June 24, 2008). The amount of the award, and any reduction in the amount sought, is within the discretion of the trial court. *See, e.g., United States Football League v. National Football League*, 887 F.2d 408, 415 (2nd Cir. 1989). Furthermore, in receiverships in Commission enforcement actions, courts should give "great weight" to the Commission's position. *See, e.g., SEC v. Fifth Ave. Coach Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973) ("Opposition or acquiescence by the SEC to the fee application will be given great weight.").

Receivers and their counsel serve as public servants in Commission matters, to safeguard the receivership assets and protect investors. As a result, "[g]iven the public service nature of equity receiverships, awards granted should avoid even the appearance of a windfall." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2nd Cir. 1974). *See also SEC v. Goren*, 272 F.Supp 2d 202, 206 (E.D.N.Y. 2003) (substantially reducing a fee application and stating it was "especially concerned by the threatened appearance of a windfall, an important public policy concern."); *SEC v. Byers*, 590 F.Supp.2d 637, 644-45 (S.D.N.Y. 2008) ("Courts should take particular care to scrutinize fee applications "to avoid even the appearance of a windfall;" reducing receiver's counsel's fees on grounds that they should be should be moderate in a Commission action) (citing *City of Detroit*, 495 F.2d at 469).

"In considering applications for compensation by receivers and their attorneys, the courts have long applied a rule of moderation, recognizing that 'receivers and attorneys engaged in the administration of estates in the courts of the United States ... should be awarded only moderate

compensation.'" *Byers*, 590 F.Supp.2d at 644 (quoting *In re New York Investors, Inc.*, 79 F.2d 182, 185 (2nd Cir.1935) (reducing receiver's counsel's fee, "[i]n view of the long-established principle that in receivership situations, lawyers should be awarded moderate fees and not extravagant ones.").

This "rule of moderation" should apply to this case, even in light of the unusual factors present in this receivership that the Receiver's motion sets forth. For example, as the Receiver's motion accurately notes, there was a significant jurisdictional question at the beginning of the case that raised the very real risk that Receiver's counsel might never get paid. Yet the two law firms in question were well aware of this risk when it allowed the Receiver to petition the Court to appoint them, and nonetheless agreed to accept reduced rates.

Additionally, every receivership comes with its concomitant risks. Many times Receivers agree to accept Court appointments without knowing whether the estate has any assets to start with or whether they will be able to recover any assets to ensure payment of their fees. Here, in contrast, Receiver's counsel knew if the Court decided the jurisdictional issue in the Commission's favor, there were thousands of viatical policies worth hundreds of millions of dollars in the receivership estate out of which there was a high probability they would get paid.

The Receiver also points to the unusual nature of this receivership and the difficulty with attempting to administer and unwind the complicated viatical policies. We have absolutely no dispute with that statement. But again, there are complexities and difficulties in many receiverships that did not exist here, such as trying to parse through straw-man corporations, tracking down assets in far-flung and secretive foreign jurisdictions, and having to trace illicit proceeds through sophisticated money laundering efforts. The point of this discussion is that there are unknowns, difficulties, and risks in almost every Commission receivership that are

simply part of the landscape and which should not result in a bonus of more than double the reasonable fees already paid. There is nothing forcing any lawyer who does not want to take those risks to apply to be a Receiver or Receiver's counsel.[1]

Furthermore, the "rule of moderation" discussed above is especially applicable where thousands of investors and creditors have been defrauded and these victims will receive only a fraction of their losses. *Byers*, 590 F.Supp.2d at 644 ("As a policy matter, the rule of moderation makes particular sense in circumstances such as those here, where hundreds of investors and creditors have been defrauded, and victims are likely to recover only a fraction of their losses.").

In reviewing counsel's various fee applications, the Court reduced the amounts sought to "represent reasonable fees and costs incurred." *See, e.g.*, DE 1071. *See also* 1075, 1266, 1268, 1594, 1706, 1736, 2007, 2008, 2203, 2204, 2262, 2263 (reducing fee awards). Thus, this Court has already determined Receiver's counsel's reasonable compensation in this case – approximately $4.7 million – which has been paid from the receivership estate. Paying Receiver's counsel an additional $11 million from investors' funds – or, roughly, a 225% bonus – would directly conflict with the "rule of moderation" and the policy of avoiding the appearance of a windfall for Receivers and their counsel.

Finally, approving this bonus will further reduce the recovery of investors – the very group whose interests the Receiver and his counsel were appointed to protect. The Receiver's argument that the reduction for each investor would be minimal is unavailing. *Any* reduction of

[1] For that reason, the Receiver's comparison of this case with *SEC v. Lauer*, Case No. 03-80612-Civ-Marra, is inapplicable. Without commenting on the propriety of fees or actions taken in that case, every Receivership is different and it is impossible to meaningfully compare fees between receiverships because of those myriad differences.

investors' recovery to pay the large bonus Receiver's counsel seek here would be inequitable in light of the fact that most investors are recovering less than a quarter of their investment.[2]

B. THE RECEIVER HAS FAILED TO PROVIDE A LEGAL BASIS FOR THE $11 MILLION BONUS HE SEEKS TO PAY HIS COUNSEL.

Courts typically determine reasonable attorneys' fees based on (i) the lodestar method *or* (ii) the percentage-of-recovery method. *Goren*, 272 F.Supp.2d at 206. Here, the Receiver's counsel has already received reasonable compensation for a Commission receivership based on their billable time, amounting to nearly $4.7 million. Nevertheless, the Receiver asks this Court to compensate his counsel a second time, an additional $11 million, based on the percentage-of-recovery method applicable exclusively in so-called "common fund" cases. Not only does the Receiver's argument run contrary to the principles of moderation set forth in Section II.A. above, it is inapplicable because this is not a "common fund" case.

1. This Is Not A Common Fund Case And Therefore The Percentage Of Recovery Method Is Inapplicable

The Receiver relies principally on the case of *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991) to support his bonus request. In *Camden*, the Eleventh Circuit considered whether fees in class actions in common fund cases should be based upon a percentage of the fund *or* the lodestar method. *Id.* at 771. However, the percentage-of-recovery method on which the Receiver bases his bonus request is only applicable in common fund cases. Thus, *Camden* has no relevance to this case.

The Receiver has conceded, both in the instant motion and in prior briefs before this Court in this case, that this is not a common fund case. Specifically, in opposing Traded Life

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[2] The Receiver's professionals have already been compensated by approximately $10,297,280.55 from the receivership.

Policies Limited's motion for attorneys' fees and costs based on the percentage-of-recovery method, the Receiver opposed the motion on grounds that "First, and foremost, this should not be considered a 'common fund' case." D.E. 1562 (emphasis in original). In denying TLPL's motion, the Court noted:

> Common fund awards typically arise in two kinds of actions: (1) class actions where attorneys' efforts result in the creation of a common fund for the benefit of the plaintiff class, and (2) shareholder derivative suits in which non-suing shareholders benefit from the lawsuit. *Boeing Corp. v. Van Gemert*, 444 U.S. 472 (1980) (Class action); *Mills v. Electric Auto-Lite Co.*, 397 U.S. 375 (1970) (derivative action).

This is neither a class action nor a derivative action. And, as the Receiver has conceded, it is not a common fund case. Accordingly, the percentage-of-recovery method is inapplicable. *Goren*, 272 F.Supp.2d at 205, declining to treat a Commission receivership as a common fund case and stating:

> The instant receivership was somewhat different than a common common-fund litigation…. Specifically, Stone and his professionals did not engage in complex and speculative litigation, as in a typical common-fund case, but merely executed the Court's orders to conserve and liquidate Goren's assets. This consisted primarily of the sale, keep, and/or restructuring of insurance policies, and the sale of several other investments and personal assets. The execution of the Court's orders entailed costs to the receiver and his professionals that do not necessarily correspond to the percentages traditionally employed when the percentage of recovery method is applied.

Id. at 206-07.

Similarly, the Receiver's counsel in this case did not engage in speculative litigation, but executed the Court's orders to conserve and increase the receivership estate with favorable results. While the Receiver points to the initial jurisdictional dispute in this case, it was resolved at the outset of case and primarily through the efforts of the Commission. Further, the Receiver does not, and cannot, argue that his counsel was engaged in speculative matters, meaning it was unclear whether they would be paid their fees. As discussed above, it was well known at the

outset of the case that the estate had significant resources from which the Receiver and his counsel could be paid. And, in fact, Receiver's counsel have already been reasonably compensated for their efforts. *Walco Investments, Inc. v. Thenen*, 975 F. Supp. 1468, 1472 (S.D. Fla. 1997) ("the presence of a consistently paying client for four years, even at a reduced hourly rate, would warm the heart, let alone the pocketbook, of even the most successful securities litigator.").

Even if this were a common fund case where the percentage-of-recovery method could apply, Receiver's counsel have been compensated for their billable time and expenses at amounts this Court has already found "represent reasonable fees and costs incurred." *See, e.g.*, DE 1071. Any additional bonus would therefore exceed what this Court has already deemed reasonable. "It bears emphasis that whether calculated pursuant to the lodestar or the percentage method, the fees awarded in common fund cases may not exceed what is reasonable under the circumstances." *Goren*, 272 F.Supp.2d at 206 (citing *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.1988)).

For the reasons set forth above, and as the Receiver has agreed, this is not a common fund case. Accordingly, the percentage-of-recovery method is inapplicable.

2. This Court's *Walco Investments* Decision Is Inapposite

The Receiver claims this Court's decision in *Walco*, 975 F. Supp. 1468, is analogous in arguing that the percentage-of-recovery method applies here. Contrary to the Receiver's motion, *Walco* is not a Commission action and the fees did not come from a Commission receivership estate. Instead, *Walco* was a common fund case involving a private class action lawsuit where the plaintiff's attorney and receiver bore the risk of prosecution. The Receiver and his counsel did not bear that risk here, and *Walco* is, therefore, wholly inapposite.

The inapplicability of *Walco* is consistent with the Receiver's prior position in this case. In opposing TLPL's motion for attorneys' fees based on this being a common fund case, the Receiver and his counsel distinguished TLPL's efforts from common fund award cases based on "one crucial aspect." The receiver argued that the matter where the Court had applied the common fund method "was predicated on the fact that 'it is undisputed that [counsel] took a substantial risk in undertaking such representation since an unsuccessful result would result in a total loss to that firm.' *Such is not the case here*." D.E. 1562 (emphasis added).

As discussed above, Receiver's counsel did not bear the risk of prosecution in this case. Furthermore, as the Receiver argued in his TLPL opposition, application of the percentage-of-recovery motion would be inappropriate because, just like TLPL counsel, Receiver's counsel have been compensated on an hourly basis in amounts this Court has already found reasonable. In sum, consistent with the Receiver's prior position in this case, *Walco* is not applicable.

III. CONCLUSION

Receiver's counsel have performed their duties admirably in this case and have achieved good results for investors. But this is what they pledged to do at the outset of the case when they agreed to take on this public service assignment. Awarding the type of bonus Receiver's counsel seek here would dramatically alter the public nature of Court-appointed receiverships into profit-seeking ventures, and no doubt result in future Receivers seeking similar windfalls at the expense of already-victimized investors. The Court should congratulate Receiver's counsel on a job well done, but deny the Receiver's motion to pay his counsel an $11 million fee enhancement.

September 21, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 21, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing:

s/ Amie Riggle Berlin
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