UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORPORATION, *et al.*,

Defendants,

VIATICAL BENEFACTORS, LLC, *et al.*,

Relief Defendants.
_____/

RECEIVER'S RESPONSE TO TRADED LIFE POLICIES LIMITED, *et al.'s* MOTION FOR DETERMINATION OF ENTITLEMENT TO AWARD OF ATTORNEYS' FEES

Roberto Martínez, Esq., as Court-appointed Receiver of Mutual Benefits Corporation, Viatical Services, Inc., Viatical Benefactors LLC, and Anthony J. Livoti, Jr. and Anthony J. Livoti, Jr., P.A. solely in their capacity as Trustee, responds to Traded Life Policies Limited, Lord Bissell & Brook LLP, and Stack Fernandez Anderson & Harris, P.A.'s Motion for Determination of Entitlement to Award of Attorney's Fees and Expenses. (the "TLPL Motion").

RESPONSE

Traded Life Policies Limited and its attorneys (collectively "TLPL") have moved for a ruling that they are entitled to an award of attorneys' fees and costs because "there can be no doubt that Traded Life's work in this matter has inured to the benefits of thousands of Investors and served to enhance and preserve both the Policies themselves and their value. Traded Life, therefore, has preserved and enhanced a common fund." TLPL Motion at 3-4. While TLPL's attorneys have advanced their client's interests effectively and well (as have many other attorneys involved in this matter), their compensation should continue to come from TLPL (as it apparently has been to date). Their work on the disposition process that has now been approved by this Court did not *create* any new assets or funds; their work simply advanced positions on various *distribution* issues that benefited their client, just as many other attorneys argued for positions that would benefit their own clients. The Receiver therefore opposes this request for the reasons set forth below.

First, and foremost, this should not be considered a "common fund" case. The typical "common fund" case involves the *creation* of a pool of assets, such as through a settlement or judgment (as with the Receiver and Class Counsel's recent settlement with Brinkley McNerney Morgan Solomon & Tatum, LLP) or the reform of a corporate practice that

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benefits a plaintiff class.[1] Here, by contrast, the pool of assets already existed. The pool of assets at issue is the MBC life insurance policy portfolio plus the "escrowed" funds earmarked for premiums. The asset pool has existed since the Receivership was created by this Court and will continue to exist right up until the point of disposition. No assets have been "created" by the work of TLPL. Every party involved in this matter has agreed that the policies need to be disposed of in some manner whether by selling them, returning them to the investors, or finding some other alternative. The relevant question has always been *how* to do so most equitably, effectively and practicably. The Receiver has necessarily had to take positions on the questions of what is equitable, what will be effective, and what will be practicable.

In the proceedings to sort out precisely how to dispose of the asset pool, TLPL did not create, preserve or increase a "fund" in which others will share. TLPL has simply prevailed in positions that will likely benefit it in the disposition of the pre-existing pool of assets. In any plan for the disposition of assets, some people stand to fare better than others. In the MBC Receivership, there are several different "classes" of investors (e.g., those who have HIV policies and those who have non-HIV policies; those who have policies that are beyond

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[1] The few general cases cited by TLPL in its motion involve exactly these types of situations. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 474-75 (1980) (class action counsel obtained judgment against Boeing for benefit of debenture holders); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389-90 (1970) (counsel was entitled to attorneys' fees award for establishing violation of securities laws by corporation that benefited class of shareholders); *In re Sunbeam Secs. Litig.*, 176 F. Supp. 2d 1323, 1326-28 (S.D. Fla. 2001) (class counsel obtained $110 million settlement from accounting firm for benefit of Sunbeam shareholders).

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life expectancy and those who have policies that are still within life expectancy). TLPL has simply prevailed in having a disposition plan put in place in which it will likely fare better than certain other classes of investors. TLPL's investments took place more recently in the course of the MBC scheme. As a result, TLPL's policies are more likely to be within their life expectancy and more likely to have premium funds still "in escrow" for their policies. Thus, by prevailing in their position that the premium funds should not be pooled for the benefit of all investors, TLPL has simply obtained a distribution ruling that benefits itself. This benefit comes at the expense of the class of investors whose policies are beyond life expectancy for whom it would be better to have the premium funds pooled. In other words, TLPL has not worked to create a "pie," but has simply prevailed in having the existing "pie" divvied up in a way that gives it more than it might otherwise have received.

Second, a holding that TLPL is entitled to attorney's fees would set a troublesome precedent for future distribution issues in this Receivership. There are myriad distribution issues that will still come up in this case, particularly during the claims process. For example, trade creditors may contend that their claims should be paid before investors' claims, and *vice versa*. The Receiver will have to take a position. If counsel representing a trade creditor prevails on the issue, that does not mean the attorney has created a "common fund" for the benefit of all other trade creditors for which he is entitled to payment of attorneys' fees. The attorney has simply prevailed on a *distribution* issue. If TLPL's position here is adopted, then every distribution issue that comes up down the road will potentially result in the prevailing attorney being able to claim an entitlement of fees from

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the diminishing existing pool of assets (even though no new assets have been added to the pool).

Third, the ruling entered by this Court in connection with the proceedings on the Union Planters Bank, N.A. pre-closing purchaser escrow account is distinguishable in at least one crucial aspect. The very first sentence in the "Discussion" in Judge Garber's Report & Recommendation makes it apparent that the ruling was predicated on the fact that "[I]t is undisputed that Tew Cardenas undertook the representation of its clients on a contingent fee arrangement and also agreed to and did advance costs and expenses. Thus, it is clear that Tew Cardenas took a substantial risk in undertaking such representation since an unsuccessful result would result in a total loss to that firm." Report & Recommendation [D.E. 993] at 3. That is not the case here. TLPL's attorneys acknowledge that they are being compensated on an hourly basis. TLPL Motion at 4 n.3.

Finally, it is also worth noting that a number of other parties took the same position that TLPL did in the proceedings on the plan for disposition. For example, (1) Life Settlement Holding, A.G., (2) Charitable Concepts, Inc. and George Owens, and (3) Great West Growth, LLC, et al. all filed pleadings and took positions similar or identical to TLPL's positions in relevant respects. Indeed, even the defendants, Joel and Leslie Steinger, joined in TLPL's position in many respects. On TLPL's argument, the defendants themselves would also be entitled to an award of attorneys' fees and costs as a result of the disposition plan ultimately adopted by the Court. Nor did TLPL's position in the proceedings over the disposition plan even "prevail." In its ancillary complaint, TLPL sought relief that goes far

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beyond what the Court actually order in connection with the disposition process. TLPL sought declaratory relief that the Receiver could *only* use the funds in the Union Planters premium escrow account to pay premiums on the policies purchased while Union Planters was the escrow agent. *See* TLPL Motion, Ex. B at ¶ 29. (Although this position would have preserved *TLPL's* policies, which were purchased while Union Planters was the escrow agent, it would have resulted in all non-Union Planters' policies defaulting, since all other premium escrow accounts have been depleted.) That, of course, is not what the Court has ordered. The Receiver continues to pay all premiums on *all* policies to this day and has been instructed to do so until the policies are disposed of (and beyond that point for some policies).

CONCLUSION

Accordingly, the Receiver respectfully requests that the Court deny Traded Life Policies Limited, Lord Bissell & Brook LLP, and Stack Fernandez Anderson & Harris, P.A.'s Motion for Determination of Entitlement to Award of Attorney's Fees and Expenses.

Respectfully submitted,

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By _____
CURTIS MINER
Fla. Bar No.: 0885681

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by electronic mail in accord with the attached Receiver's Service List on January 9, 2006.

Curtis Miner

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