UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-21160-CIV-MORENO

SCHECK INVESTMENTS, L.P., et al.

Plaintiffs,

v.

KENSINGTON MANAGEMENT, INC., et al.

Defendants.
_____/

ORDER AND FINAL JUDGMENT

Lead Plaintiffs Scheck Investments, L.P., Elena Parrales, individually and on behalf of Franova Investment Ltd., The PMT Irrevocable Trust, Juan Manuel Ponce De Leon, and Maria Paulina Ponce De Leon Uribe ("Lead Plaintiffs"), individually and on behalf of all Class Members similarly situated, and Roberto Martinez, as court-appointed Receiver of Mutual Benefits Corp. ("MBC") and other related entities ("Receiver"), and Defendants Peter J. Lombardi and P.J.L. Consulting, Inc. (collectively, the "Lombardi Settling Parties"); Anthony M. Livoti, Jr., P.A. and Anthony M. Livoti, Jr. (collectively, the "Livoti Settling Parties"); Mark Pettyjohn and Diversified Financial Products, Inc. (collectively, the "Pettyjohn Settling Parties") (with all of the above-listed Defendants sometimes collectively referenced herein as the "Settling Parties"), and their insurers, set forth in the parties' Stipulation of Settlement ("Settlement" or "Settlement Agreement"), have submitted for final approval a proposed settlement that is memorialized in the Stipulation of

Settlements executed on August 29, 2006, June 18, 2007 and June 26, 2007 (" Settlement Agreements").[1] Class Counsel has also moved for an award of attorney fees and costs.

For the reasons set out in detail below, the Court has determined that the Settlement is fair, reasonable and adequate, and should therefore be approved. The Court has also determined that Class Counsel's Motion for Fees and Costs should be granted. Accordingly, this Court enters this Order and Final Judgment, approves the Settlement, certifies the settlement class, overrules all of the Class Members' objections, approves an award of attorneys' fees and costs, and dismisses this action against the Settling Parties with prejudice, and therefore;

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. This Court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

2. On October 19, 2007, the Court held a hearing to consider the fairness, reasonableness and adequacy of the proposed Settlement ("Final Approval Hearing").

3. In reaching its decision in this case, the Court considered the Settlement Agreement, the objections to the Settlement filed with this Court by Class Members, the extensive Court file in this case and related MBC cases, and the presentations by Class Counsel, the Receiver, and Counsel for the Settling Defendants in support of the fairness, reasonableness and adequacy of the Settlement.

Class Certification

4. The Class is defined in the Settlement Agreements to include: "All persons who purchased, between October 1, 1994 and May 4, 2004, interests in discounted life insurance policies

[1] All capitalized terms used herein shall have the meanings set forth in the Settlement Agreements.

known as viatical settlements or life settlements from MBC or VBLLC and have been damaged thereby." Excluded from the Class are: Defendants, MBC and any agent or broker who offered to sell viatical settlements or life settlements through MBC or VBLLC, including any of the foregoing companies' respective subsidiaries, affiliates, officers, agents or employees.

5. In its Preliminary Approval Order, the Court conditionally certified the Class for the purpose of settlement under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure. In entering this Order and Final Judgment, the Court has once again considered the class certification prerequisites set forth in Rule 23(a) and (b)(3) and again finds that these prerequisites are satisfied in this case.

6. The Court now affirms its prior Class certification, which was conditional pending further review, and finds that: (a) the Class is so numerous that joinder of all members is impracticable; (b) there are questions of both law and fact common to the Class; (c) the Lead Plaintiffs' claims are typical of the claims of all members of the Class; and (d) the Lead Plaintiffs and Class Counsel have fairly and adequately represented and will fairly and adequately protect the interests of the Class, all pursuant to Fed. R. Civ. P. 23(a).

7. The Court additionally finds that questions of law or fact common to the members of the Class predominate over any questions affecting only individual members, and that this class action is superior to other available methods for the fair and efficient adjudication of this controversy, pursuant to Fed. R. Civ. P. 23(b). In making the latter determination the Court has considered the following: (a) the interest of members of the Class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the Class; (c) the desirability or

undesirability of concentrating the litigation of the claims in the particular forum; and (d) the difficulties likely to be encountered in the management of a class action. The Class, as defined above, is now finally certified.

8. Seventy-three (73) Class Members have timely and properly requested to be excluded from the Settlement; their names are listed on Exhibit 1 attached hereto. The Class Members on Exhibit 1 are not bound by the Settlement, not subject to the release included herein, and cannot participate in the distribution of the Settlement Fund.

Notice to the Class

9. In its Preliminary Approval Order, this Court approved the Notice attached to Class Counsel's motion, and found that the proposed form and content thereof satisfied Rule 23(c)(2) and (e) of the Federal Rules of Civil Procedure, the Local Rules of this Court, as well as the requirements of due process.

10. As set forth in the affidavit of Marcia A. Gomez of the Garden City Group ("Claims Administrator"), Class Counsel and the Claims Administrator timely caused the Notice to be mailed by first class mail, postage prepaid, to each Class Member at their last known addresses. As of the date of the mailing, August 31, 2007, there are 36,930 investors in MBC's database. The MBC database includes not only investors with active polices, but also those investors whose policies have matured, or had their money refunded. In an abundance of caution, the Notice was sent out to all 36,930 addresses.

11. The mailing was completed on August 31, 2007. Spanish translations of the Notice were sent to Class Members where it was believed that Spanish was the Class Member's first language. Moreover, many of the Class Members have their investment in a retirement account and

are using Fiserv Trust Company ("Fiserv") as the account's administrator. These accounts are set up so that all correspondence from MBC is sent to Fiserv. Upon learning of this situation, Class Counsel worked with Fiserv to mail notices directly to all affected Class Members, and served a courtesy notice to Fiserve – providing for additional service on these investors.

12. The Receiver and Class Counsel also caused the Notice to be put on the Receiver's Website - www.mbcreceiver.com.

13. Attorneys from Class Counsel's offices responded to the Class Members who contacted them with questions regarding the proposed settlement. Class Counsel also corresponded with investors by letter, fax and email, and responded to hundreds of direct investor phone calls.

14. As noted elsewhere in this Final Judgment, a handful of investors responded to the Notice by filing exclusions, objections to and comments in support of the Settlement.

15. This Court has again reviewed the Notice and the accompanying documents and finds that the "best practicable" notice was given to the Class and that the Notice was "reasonably calculated" to: (a) describe this case and Class Members' rights in it; and (b) apprise interested parties of the pendency of this case and of their right to have their objections to the Settlement heard. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985); *accord* Fed. R. Civ. P. 23(c)(2) ("best notice practicable under the circumstances, including notice to all members who can be identified through reasonable effort," shall be given to class members); Fed. R. Civ. P. 23(e) ("notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."). The Notice was reasonably calculated to advise each member that: (a) the Court would exclude the member from the Class if the member so requested by a specified date; (b) this Order and Final Judgment, whether favorable or not, would include all Class Members who did

not request exclusion; and (c) any Class Member who did not request exclusion could, if the Class Member desired, enter an appearance. The Court thus reaffirms its findings that the Notice given to the Class Members satisfies the requirements of due process and holds that it has personal jurisdiction over all Class Members.

The Settlement

16. The Settlement includes, among other things, the establishment of a total common fund in the amount of One Million Six Hundred Eighty-Four Thousand Six Hundred Twenty-Four dollars ($1,684,624.00) for the benefit of the Class. This amount, less Class Counsels' fees and expenses as awarded by the Court, and less the expenses of administering the Settlement ("Net Class Settlement Amount"), shall be distributed to Class Members based upon a Court-approved allocation plan to be presented to this Court by Class Counsel and the Receiver at a future date. In return, all claims alleged by Lead Plaintiffs and the Class (and that could have been alleged by the Receiver) against the Settling Defendants shall be dismissed with prejudice (as set forth in the Settlement Agreement and herein).

17. The Court must determine whether the proposed Settlement is "fair, adequate and reasonable and is not the product of collusion" between the parties. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981). In making this determination, the Court considers six factors: (1) the likelihood that Plaintiffs would prevail at trial; (2) the range of possible recovery if Plaintiffs prevailed at trial; (3) the fairness of the settlement compared to the range of possible recovery, discounted for the risks associated with litigation; (4) the complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the Settlement; and (6) the stage of the proceedings at which the

Settlement was achieved. *Bennett*, 737 F.2d at 986; *Corrugated Container*, 643 F.2d at 212; *Behrens v. Wometco Enters, Inc.*, 118 F.R.D. 534, 538-90 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). In considering this Settlement, the Court need not and does not decide the merits of this Action.

18. This Court, after considering the aforementioned factors, finds that the Settlement provides for a reasonable and adequate recovery that is fair to all Class Members. *See Bennett*, 737 F.2d at 986-87.

19. The Court's review of the file demonstrates that there remains substantial risk and uncertainty in Lead Plaintiffs ultimately prevailing on their claims and upholding such an outcome on appeal. Furthermore, if this case were to proceed without settlement, the subsequent motion practice, resulting trial and the inevitable appeal would be complex, lengthy and expensive. The Settlement eliminates a substantial risk that the Class would walk away empty-handed after the conclusion of such appeals. *See Ressler v. Jacobson*, 822 F. Supp. 1551, 1554 (M.D. Fla. 1992). Further, the Settling Parties have vehemently denied any wrongdoing and have indicated that they would continue to vigorously defend the lawsuit absent settlement. Without the Settlement, it could be years before Class Members would see any recovery even if they were to prevail on the merits, which might not produce a better recovery than they have achieved in this Settlement. *Behrens*, 118 F.R.D. at 543 (settlement "shortened what would have been a very hard-fought and exhausting period of time, which may have realistically ended with a decision similar to the terms of this settlement").

20. The Court also concludes that the $1,684,624.00 Settlement Fund is fair and reasonable given the fact that the Settling Parties have limited assets, most of which are exempt from

execution, and – in the case of the Livoti Parties – the one available insurance policy is a "wasting policy" that would quickly extinguish if there were any further litigation. If the Settlement is approved, Lead Plaintiffs and the Receiver will have achieved an excellent result for the Class Members – one that will provide the Class with a substantial monetary recovery and avoid the possibility of further litigation resulting in judgments which were not collectable. *See, e.g., Denney v. Jenkens & Gilchrist*, No. 03-CV-5460, 2004 WL 1197251 (S.D.N.Y. May 19, 2004); *see also Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317 (S.D.N.Y. 2005) (motion for final approval granted).

21. Also weighing in favor of approving the Settlement is the fact that out of 36,930 investors, just four investors filed objections with this Court, and only one of these objections actually addressed the Settlement. This fact weighs heavily in favor of approving the Settlement. *Bennett,* 737 F.2d at 988 n.10 (holding that the district court properly considered the number of objections in approving a class settlement). Also, as noted below, some investors called and sent letters to Class Counsel expressing support for the Settlement.

22. One investor objects that the total settlement amount is not sufficient to cover all investor losses. While this may be true, the objection nonetheless misses the mark. It is too much to ask that this Settlement make the Class whole. As stated above, the proposed settlements must be analyzed in connection with this Defendant's role in the alleged fraud and, more importantly, against the potential recovery against this Defendant if Lead Plaintiffs were to win at trial. Viewed through this prism, the proposed settlements are excellent results.

23. This Court may also consider the opinions of the parties and their counsel. *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982). Here, Class Counsel, the Receiver, and the Receiver's counsel all have considerable experience in the

prosecution of large, complex class actions. Counsel for the Settling Parties are likewise experienced in complex litigation. This Court gives credence to the opinions of these counsel, amply supported by the Court's independent review, that this Settlement is a beneficial resolution of the claims alleged by the Class against the Settling Parties.

24. In addition to finding the terms of the proposed Settlement fair, reasonable and adequate, this Court must determine that there was no fraud or collusion between the parties or their counsel in negotiating the Settlement's terms. *Bennett*, 737 F.2d at 986; *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428-29 (5th Cir. 1977). In this case, there is no suggestion of fraud or collusion between the parties. Furthermore, the terms of the Settlement make it clear that the process by which the Settlement was achieved was fair. *Miller*, 559 F. 2d at 429; *Ressler*, 822 F. Supp. at 1554-55.

25. Based on the above findings, the Court approves the terms of the Settlement Agreement as fair, reasonable, adequate and in the best interests of the Class. The Settlement shall be consummated in accordance with the terms and conditions of the Agreement. The Settlement Agreement is hereby approved and adopted as an Order of this Court. The Court directs all of the Parties and their Counsel to cooperate with the consummation of the terms of the Settlement Agreement.

Request for Attorney Fees and Expenses

26. The Settlement Agreement provides that Class Counsel will make an application to this Court for an award of attorneys' fees up to 30% of the Settlement Fund. Class Counsel requests that the Court award them a fee which represents 25% of the $1,684,624.00 Settlement Fund. While

Class Counsel asserts that any fee up to 30% of the Settlement Fund is "reasonable," they have sought a fee well within the range established by Courts in this Circuit in similar cases.

27. Pursuant to *Camden I Condominium Assoc. v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991), an attorneys' fee award should be "based on a reasonable percentage of the fund established for the benefit of the class." The Court has applied all of the relevant *Camden I* factors to the circumstances of this case in general, and in particular, this Settlement, and it finds the following facts relevant to its decision: (1) although this case came after the SEC filed its case, Class Counsel sued the Settling Parties, most of which were not parties to the SEC lawsuit; (2) although Lead Plaintiffs and Class Counsel were not required to participate in the SEC lawsuit (Lead Plaintiffs are not parties to the SEC lawsuit), they did not simply sit back and let the Government argue the Class's cause alone in connection with one of the most crucial issues in this case – whether MBC viatical settlements were securities. Instead, Class Counsel filed three amicus briefs (and participated in oral argument) in support of the Class's position that MBC viatical settlements are in fact securities; (3) the Settlement with the Livoti Settling Parties was negotiated so that limited insurance monies were not wasted on defending the claims; (4) Class Counsel also negotiated a bar order which shall finally resolve all claims for the Settling Parties – obviating the need for satellite litigation amongst the parties, thereby further streamlining the rest of this litigation; and (5) Class Counsel, as opposed to the Settlement Administrator, chose to directly respond to investor questions regarding the Settlement. Not only did this save the Class money, but it benefitted the Class to have an attorney answer their questions regarding the first settlement in this case. The preceding observations attest to the considerable experience, reputations and abilities of Class Counsel.

28. The Court's decision is also based on the fact that this case has certainly precluded Class Counsel from acceptance of other cases, that Class Counsel is working on a pure contingent basis, and that the customary fee in a case such as this is generally between 20%-30%, with a 25% benchmark being accepted as the norm in this Circuit.

29. Based on the foregoing analysis, the Court finds that an award of 25% of the $1,684,624.00 Settlement Fund (or $421,156.00) in attorneys' fees would be fair and reasonable in this case. The Court finds that Class Counsel's request to be reimbursed for $59,757.89 in expenses is reasonable, and therefore awards Class Counsel $59,757.89 for its costs in addition to the fee award. The fee and cost award shall be paid exclusively from the Settlement Fund as provided in the Settlement Agreement.

30. This award is also fair and reasonable when cross-checked against Class Counsel's lodestar. According to Class Counsel, it has already spent 7,397.45 hours litigating this case for a total lodestar of $2,788,078.50. Even taking into account prior fee awards made to Class Counsel, the fee award represents a small multiplier (1.05) well within the range of what is fair and reasonable given the circumstances of this case.

31. The Court has also reviewed all of the objections filed with the Court by Class Members relating to Class Counsel's request for fees. The Court has reviewed all objections (whether properly filed or not) and finds that they are not relevant and do not warrant further discussion. All objections filed with the Court related to Class Counsel's fee and expense request are overruled.

Miscellaneous

32. Any and all reasonable expenses that are not included in Class Counsel's fee and expense request related to the dissemination of the Notice or administration of the Settlement Fund shall be paid out from the Settlement Fund upon Court approval. The Settlement Fund, after deducting the monies awarded in this Final Judgment, shall be paid to the Receiver to be held earning interest until the Court approves a plan of allocation and distribution.

33. All claims alleged by Lead Plaintiffs and the Class against the Settling Parties shall be, and the same are, hereby dismissed on the merits with prejudice, without fees and costs to any party, except as provided in the Settlement Agreement and approved by the Court herein.

34. Each Releasee (as that term is defined in the Settlement Agreement) shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, and liabilities of any nature whatsoever, known or unknown, in law or in equity, which a Class Member that is not listed on Exhibit 1 ("Releasor"), whether or not they make a claim on or participate in the Settlement Fund, ever had, now have or hereafter can, shall or may have, against any of the Settling Parties related to their investment in MBC viatical insurance policies. The claims covered by the foregoing release are referred to herein collectively as the "Released Claims." Each Releasor shall not hereafter seek to establish liability against any Releasee based in whole or in part on any Released Claims.

35. The Court further bars and enjoins any non-settling defendant in the Action from commencing, prosecuting or asserting any claim for contribution or indemnity against the Settling Parties, solely, arising out of, or in any way related to, their involvement with MBC; in addition, the Settling Parties, shall be barred from commencing, prosecuting or asserting any claim for contribution or indemnity against any non-settling defendant arising out of, or in any way related

to, their involvement with MBC or affiliated entities; in addition, notwithstanding any provision of Florida law to the contrary, the total damages awarded against the non-settling defendants as a result of a trial of this Action, or any related lawsuit, including but not limited to, any pending or future action filed by the Receiver, shall be reduced by the greater of 1) the full amount of the Settlement Fund paid by each respective Settling Party, or 2) another amount as ordered by the Court at a later date.

36. Without in any way affecting the finality of this Order and Final Judgment, this Court hereby retains jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and of this Final Order and Judgment, and for any other necessary purpose.

37. Because there are multiple parties and claims presented in this case, the Court makes an express determination that there is no just reason for delaying the entry of this Order and Final Judgment, and therefore directs the immediate entry of this Order and Final Judgment.

DONE AND ORDERED in Open Court and signed in Chambers at Miami, Florida this 22 day of October, 2007.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

Counsel of record