

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 MOTION FOR ENTRY OF ORDER APPROVING
SALE OF VSI BUSINESS AND EXECUTION OF SERVICING AGREEMENT,
TRANSITIONAL SERVICES AGREEMENT AND TRUST AGREEMENT**

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 for this court to approve the sale of the servicing business of VSI in accordance with the Order Granting Receiver's Motion for Entry of Order Approving Purchase Agreement and Bidding Procedures (D.E. 2267) entered by this Court on April 3, 2009, and to authorize the parties to execute and consummate the Servicing Agreement, Transitional Services Agreement and Trust Agreement contemplated by the Asset Purchase Agreement by and between the Receiver and VSI Acquisition Services, LLC (now known as "Litai Assets, LLC"), the "stalking horse" bidder ("Buyer").

The Receiver requests that the Court:

(1) Set a hearing on this Motion to hear and consider any potential objections (the Receiver is aware of at least one party that has expressed a desire to be heard on the proposed sale); and

(2) Approve the sale of the Purchased Assets to Buyer, and the entering into of the Transitional Services Agreement, the entering into of the Servicing Agreement, the entering into of the Trust Agreement, and to enter the *Sale of Assets, Servicing and Transfer Order* contemplated by the Asset Purchase Agreement.

In support, the Receiver states:

BACKGROUND

THE RECEIVERSHIP ORDER

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).

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. ...”

THE DISPOSITION ORDER

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.

In accordance with these Orders, voting on each of the policies was conducted, the result of which is that approximately 3,138 policies with a face value of approximately \$383,850,782 were designated to be sold (the “Sell Policies”), and approximately 3,037 policies with a face value of approximately \$1,054,421,059 were designated to be retained by investors (the “Keep Policies”). The Receiver has subsequently been engaged in the process of selling the Sell Policies, and the Court has entered two Sale Orders which collectively approved the sale of approximately \$295 million in face value of policies for total consideration of approximately \$24.6 million. In addition, the Receiver, through VSI, has implemented a process for billing and collecting from each investor in a Keep Policy their proportionate share of the premium obligations with respect to the ongoing cost of

maintaining the policy.

THE ROLE OF VSI AND SALE PROCESS

VSI, one of the Receivership entities, is responsible for administering the payment of policy premiums, tracking the medical status and whereabouts of the insureds, and, upon the death of an insured, submitting claims to insurance companies to facilitate the distribution of death benefits. Since the Receivership was commenced, the Receiver has continued to maintain the operations of VSI for the purposes of (1) maintaining the Sell Policies until the Receiver is able to dispose of them through sale to a third party; and (2) maintaining the Keep Policies, including the billing of premiums to investors, as well as its original functions of administering premium payments, tracking insureds, and processing death benefit claims. Prior to the Receivership, VSI was compensated by receiving an administrative fee up front, i.e. when MBC finalized a contract matching an investor with a policy or an interest therein. In connection with the Keep Policies, the Receiver has implemented a process where VSI bills an annual administrative fee to each investor with an interest in a Keep Policy.

The continued servicing of the Keep Policies is a function which will have to be maintained until either every such Keep Policy matures, or until investors in such policies elect to stop funding premium obligations and the Keep Policies are otherwise sold or permitted to lapse. This process may go on for a longer period of time than the other remaining functions of the Receivership, including the prosecution of litigation claims of the Receiver, the sale of the Sell Policies, the liquidation of the remaining Receivership assets, and the distribution of funds to claimants.

As a result, the Receiver has pursued the sale of the VSI business, in order to accomplish at least two purposes: (1) it would enable the necessary functions of VSI to be performed post-Receivership until all Keep Policies mature or are otherwise disposed of; and (2) it would enable the

Receivership to realize value for the operating business of VSI. In pursuing such a sale, the Receiver has sought to ensure that the interests of investors in the Keep Policies would continue to be protected. This Receiver's goals include: (1) providing for the Receiver's present ownership and nominal beneficiary status with respect to the Keep Policies to be transferred to some independent third party (such as a trustee or escrow agent); (2) providing for some structure that would establish a fee structure for the continued servicing of the Keep Policies that would be both financially viable for the purchaser, and fair to the holders of interests in Keep Policies; and (3) providing a mechanism for the disposition of future "lapsing Keep Policy" interests in the event that investors fail to pay their ongoing premium or administrative fee obligations.

Consistent therewith, and pursuant to a Court order authorizing the Receiver to pursue the potential sale of VSI, the Receiver had extensive discussions with several parties who were potential prospective purchasers; advertised the potential sale to other potentially interested parties and provided an opportunity to conduct due diligence; set a deadline for the submission of purchase offers, and then evaluated the offers received to determine which offer best advanced the interests of the Receivership and its creditors, including the holders of interests in Keep Policies.

After conducting that process, the Receiver received multiple offers to serve as a "stalking horse" bidder for the purchase of the VSI business. After considering each of the offers received, the Receiver determined that the offer submitted by Buyer was the highest best initial offer received by the Receiver, and best fulfilled all of the goals set forth above. Thereafter, the Receiver undertook the process of formulating and negotiating the transactional documents by which to accomplish the goal of transferring the servicing business of VSI to the acquirer, transferring the ownership and nominal beneficial interest in the Keep Policies to a trustee to serve in the stead of the Receiver, and establishing procedures and processes to provide for the continued maintenance and processing of

the Keep Policies in accordance with the directives of this Court. The end result of that process is the set of transactional documents which include the Asset Purchase Agreement between the Receiver and Buyer (including the Bidding Procedures contemplated thereby); the Servicing Agreement between Buyer and the (to-be named) Trustee; the Transitional Services Agreement between the Receiver and Buyer; and the Trust Agreement between the Receiver and the Trustee (the "Transaction Documents").

On April 2, 2009, the Receiver filed his Motion for Entry of Order Approving Purchase Agreement and Bidding Procedures with Respect to Sale of VSI Business (D.E. 2266). By Order dated April 3, 2009 (D.E. 2267), the Court granted the Receiver's Motion and thereby approved the proposed Asset Purchase Agreement with Buyer and the proposed Bidding Procedures described in the Motion and Transaction Documents.

Consistent with the Court's April 3, 2009 Order, the Receiver then proceeded to solicit competing bids for the purchase of the VSI Business in accordance with the Court-approved Bidding Procedures. Notice of the opportunity to bid was provided directly to approximately 100 potentially interested parties identified by the Receiver and his professionals, and notice was also publicized in the New York Times, the Wall Street Journal, the Financial Times, and the Miami Daily Business Review. The deadline for submission of a competing bid was May 14, 2009.

In response to the notice, the Receiver received a multitude of inquiries and identified at least three parties who satisfied the threshold requirements for participating in due diligence and submitting a qualified competing bid. Those parties all were provided an opportunity to conduct due diligence and investigation of the VSI business in order to facilitate the submission of an offer. However, as of the bid deadline of May 14, 2009, no party submitted a qualified competing bid.

The Receiver notes that one prospective bidder has expressed its dissatisfaction with the Bidding Procedures approved by the Court and advised the Receiver of its desire to consummate a transaction which it claims will provide more value to the receivership estate, and has indicated a desire to be heard with respect to the proposed sale. For the Court's information, correspondence from said party is attached as Exhibit "A" hereto. The Receiver notes that no bid was submitted by said party in accordance with the Court-approved Bidding Procedures.

The Receiver further advises the Court that he is in the process of selecting the proposed Trustee required by the Trust Agreement and will submit a further filing advising the Court when the proposed Trustee has been selected, and will seek Court approval of said appointment.

LEGAL AUTHORITY

The Court has previously authorized sales of assets of the estate, including Policies controlled by estate, on the basis that such sales were 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). For the same reasons, here, in light of the necessity of maintaining a servicing operation for the Keep Policies after the receivership has been concluded, and the Receiver's competing goals of realizing a return to the estate for the VSI assets while ensuring the continued viability of the VSI servicing business, the sale procedures implemented by the Receiver with respect to the sale of the VSI business were designed to maximize the value of the Receivership's assets, consistent with the underlying purposes of the receivership. *See, e.g., In re Integrated Resources, Inc.*, 147 B.R. 650 (S.D.N.Y. 1992).

The Receiver respectfully submits that the terms of the Asset Purchase Agreement, Servicing Agreement, Transitional Services Agreement, and Trust Agreement, are reasonable and appropriate,

and that the approval of same is in the best interests of the Receivership estate.

The Receiver further submits that at all times, Buyer has acted in good faith and is a good faith purchaser of the Purchased Assets, that the solicitation of competing bids pursuant to the Court-approved Bidding Procedures was at all times conducted in good faith, and that the consummation of the proposed sale is in the best interests of the receivership and the holders of interests in Keep Policies.

Accordingly, the Receiver, consistent with the Court's April 3, 2009 Order approving the Asset Purchase Agreement and Bidding Procedures, the Receiver now asks that the Court authorize the sale of the Purchased Assets to Buyer, and enter the *Sale of Assets, Servicing and Transfer Order* contemplated by the Asset Purchase Agreement, including all of the terms required by the Asset Purchase Agreement (as reflected in Exhibit "B" hereto).

CONCLUSION


WHEREFORE, the Receiver respectfully requests that the Court:

- (1) set a hearing on this Motion;
- (2) approve the sale of the Purchased Assets contemplated hereby to Buyer;
- (3) approve the entering into of the Transitional Services Agreement, the entering into of the Servicing Agreement, and the entering into of the Trust Agreement;
- (4i) enter the *Sale of Assets, Servicing and Transfer Order* contemplated by the Asset Purchase Agreement; and
- (5) order each insurance company that issued a Keep Policy to give full effect to the Sale of Assets, Servicing and Transfer Order and to recognize the Trust as the sole and exclusive owner of all claims, options, privileges, right, title and interest in, to and under the Keep Policies subject only to the rights of the Keep Policy Investors upon consummation of the Closing (including by effecting

any change in the named owner and/or beneficiary of the Keep Policies upon direction thereof by Seller or the Trustee (including with respect to any Keep Policy having an irrevocable beneficiary, whether or not such irrevocable beneficiary has consented to such change).

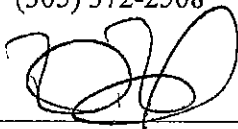
Respectfully submitted,

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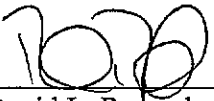
- and -

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By: 
David L. Rosendorf
FL Bar No. 996823

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 June 16, 2009.

By:  _____
David L. Rosendorf

287987.2

SERVICE LIST OF RECEIVER

Case No.: 04-60573 CIV-Moreno

VIA ELECTRONIC MAIL		
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<p>Jay S. Blumenkopf, Esq. Adorno & Yoss 700 S. Federal Highway, suite 200 Boca Raton, FL 33432 E-mail: jblumenkopf@adorno.com <i>Counsel for Allmerica Financial Life, et al.</i></p>	<p>Charles Wachter, Esq. Fowler White Boggus Banker 501 E. Kennedy Boulevard, Suite 1700 Tampa, FL 33602 E-mail: cwachter@fowlerwhite.com <i>Counsel for John Hancock Life Ins.</i></p>	<p>Carla M. Barrow, P.A. 1395 Brickell Avenue 8th Floor Miami, FL 33129 E-Mail: carlabarrow@bellsouth.net <i>Counsel for Claimants Maria Antonieta Mejia, et al.</i></p>

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EXHIBIT A



May 27, 2009

VIA EMAIL (DROSENDORF@KTTLAW.COM)

Mr. Roberto Martinez
c/o Kozyak Tropin & Throckmorton, P.A.
2525 Ponce de Leon Boulevard
9th Floor
Coral Gables, Florida 33134
Attention: David Rosendorf, Esq.

Dear Mr. Martinez:

We are writing to inform you that Silver Point Capital ("SPC") is prepared to purchase the viatical servicing business of Viatical Services, Inc. ("VSI") by entering into an asset purchase agreement with you which contains substantially the same terms as those of the March 31, 2009 stalking horse asset purchase agreement. Moreover, SPC is prepared to pay an amount entirely in cash which is greater than the purchase price being paid by the stalking horse bidder. However, as we previously informed you, SPC is not willing to participate in the current bidding process, which protects the stalking horse bidder at the expense of the receivership estate.

As we noted in our May 14th letter, the current bidding procedures do not promote, and for that matter do not permit, an open forum of competitive bidding. In fact, we understand that these procedures failed to elicit a single bid to compete with the stalking horse bidder, which is striking since SPC (and perhaps other parties) is prepared to purchase VSI's viatical servicing business for an amount greater than the purchase price being paid by the stalking horse bidder. The current bidding procedures have not generated maximum value for the receivership estate, but have rather had the opposite effect of chilling the participation of at least one other party.

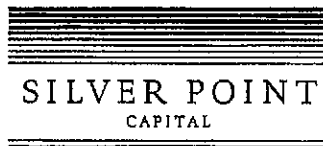
We reiterate that SPC is prepared to consummate a transaction which provides more value to the receivership estate than the transaction with the stalking horse bidder. However, in order for SPC to proceed, the bidding process needs to be adjusted so that SPC is not placed in such a disadvantage to the stalking horse bidder that participation is unwarranted as a starting point.

We look forward to discussing the foregoing with you and your counsel. In particular, we again request that you provide us with sufficiently advance notice of any scheduled hearing regarding, or any court filing seeking to approve, a transaction with the stalking horse bidder or another bidder, such that we will be afforded a proper opportunity to maximize value to the receivership estate.

Very truly yours,

SILVER POINT CAPITAL, L.P.

By:  
Name: Michael Gatto
Title: Authorized Signatory



May 14, 2009

VIA EMAIL (DROSENDORF@KTTLAW.COM)

Mr. Roberto Martinez
c/o Kozyak Tropin & Throckmorton, P.A.
2525 Ponce de Leon Boulevard
9th Floor
Coral Gables, Florida 33134
Attention: David Rosendorf, Esq.

Dear Mr. Martinez:

We refer to your most recent invitation to submit an offer for the purchase of the viatical servicing business of Viatical Services, Inc. ("VSI"). As you are aware, Silver Point Capital, L.P. ("SPC") previously submitted an offer on October 3, 2008 to purchase the assets of VSI relating to its life settlement/viatical servicing business and to enter into certain related servicing and other arrangements.

Notwithstanding our continued belief that the terms of our October 3, 2008 offer are superior to the transaction contemplated by the Asset Purchase Agreement (the "Stalking Horse APA") you entered into with VSI Acquisition Services, LLC (the "Stalking Horse Bidder"), the purpose of this letter is to advise you that the bidding procedures in their current form are so prejudicial to any party desiring to submit an offer to purchase VSI's viatical servicing business that SPC is unwilling to participate in the bidding process as currently structured. As an initial matter, the bidding procedures do not contemplate a traditional auction at which potential bidders (including the Stalking Horse Bidder) could competitively increase the purchase price in an open forum, but rather only permits third parties to submit a single bid to you, following which the Stalking Horse Bidder will be provided a final "right of last look." Moreover, this right of last look allows the Stalking Horse Bidder to offer a combination of cash and non-cash consideration, while all other bidding parties are limited to offering solely cash consideration. These features and certain other terms of the bidding procedures (*e.g.*, a large termination fee equaling 20% of the purchase price stated in the Stalking Horse APA) clearly do not promote a process that is intended to maximize the return to the receivership estate.

Additionally, we were not provided with an opportunity to challenge the propriety of the bidding procedures. The court approved the bidding procedures a mere day after your counsel submitted the motion seeking approval, without any notice or opportunity to object.

SPC believes that it can offer a transaction which provides more value to the receivership estate than the transaction contemplated by the Stalking Horse APA. However, in order for SPC to proceed, the bidding process needs to be adjusted so that SPC and other potential third party bidders are not placed in such a disadvantage to the Stalking Horse Bidder that participation is unwarranted as a starting point. Ultimately our participation, as well as the participation of other interested bidders, are in the best interests of the receivership estate.

Silver Point Capital, L.P.

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We look forward to discussing the foregoing with you and your counsel. In particular, we request that you provide us with sufficiently advance notice of any scheduled hearing regarding, or any court filing seeking to approve, a transaction with the Stalking Horse Bidder or another bidder, such that SPC will be afforded a proper opportunity to maximize value to the receivership estate.

Very truly yours,

SILVER POINT CAPITAL, L.P.

By:  

Name: Michael Gatto

Title: Authorized Signatory

EXHIBIT B

Exhibit 7.1(j)

**CERTAIN TERMS OF THE
SALE OF ASSETS, SERVICING AND TRANSFER ORDER**

The Sale of Assets, Servicing and Transfer Order shall be in form and substance reasonably satisfactory to Buyer. The Sale of Assets, Servicing and Transfer Order shall approve and authorize Seller to, on behalf of the Receivership Entities, the Keep Policy Investors and the Third Party Beneficiaries, sell and assign the Purchased Assets to Buyer in accordance with the terms of the Purchase Agreement, enter into the Transitional Services Agree with the Buyer and authorize the Servicing Agreement between the Trust and the Buyer, and shall include, without limitation, findings of fact and conclusions of law that:

(a) based on the record presented at the hearing on the Sale of Assets, Servicing and Transfer Motion and the hearing to approve the sale and all pleadings in the Receivership Proceeding and arguments by counsel and evidence presented, Buyer has acted in good faith and is a good faith purchaser of the Purchased Assets and a good faith party to the Servicing Agreement;

(b) Seller has the sole and absolute authority to, on behalf of the Receivership Entities, the Keep Policy Investors and the Third Party Beneficiaries, convey all claims, options, privileges, right, title and interest in, to and under the Purchased Assets;

(c) Seller has the sole and absolute authority to, on behalf of the Receivership Entities, the Keep Policy Investors and the Third Party Beneficiaries, convey all claims, options, privileges, right, title and interest in, to and under the Keep Policies, Policy Files and Trust Cash being assigned to the Trust;

(d) the sale of the Purchased Assets in accordance with the terms of this Agreement and the entering into of the Transitional Services Agreement with the Buyer is approved and Seller shall be directed to consummate all of the transactions contemplated hereby;

(e) the entering into of the Servicing Agreement between the Trust and the Buyer is approved

(f) at the Closing, Buyer will be vested with all claims, options, privileges, right, title and interest in, to and under the Purchased Assets, free and clear of all Encumbrances;

(g) at the Closing, the Trust will be vested with all claims, options,

privileges, right, title and interest in, to and under the Trust Assets, free and clear of all Encumbrances;

(h) the Trust and any subsequent owner of a Keep Policy and the Buyer, acting pursuant to the authority granted to it under the Servicing Agreement shall have the right to from time to time obtain updated medical information regarding the viator/insured under each Keep Policy, including (i) pursuant to 45 C.F.R. § 164.512(e)(1)(i), all health care providers who are served with a copy of the Sale of Assets, Servicing and Transfer Order and a written request by the Trustee or by the Buyer or by any subsequent owner of a Keep Policy shall be authorized and compelled to immediately release copies to the Trustee or such subsequent owner of such Keep Policy, or the Buyer, as the case may be, of all records relative to the care, treatment and health of the insured/viator under such Keep Policy so requested by the Trustee or such subsequent owner thereof, as the case may be, for the purpose of predicting health and life expectancy and (ii) each insured/viator under a Keep Policy being required to provide the Trustee and any subsequent owner of such Keep Policy and the Buyer with Health Insurance Portability and Accountability Act of 1996 compliant medical authorizations and contact information for all physicians and other medical providers who have treated such insured/viator since December 31, 2000, and any and all medical information generated since December 31, 2000 pertaining to such insured's/viator's health and medical condition, and the Trustee and each subsequent owner of a Keep Policy shall be entitled to seek enforcement of this clause (e) as to any person, including by way of example, and not limitation, an application for a finding of contempt; to the extent there is such a then existing Order of the Court for the benefit of Seller, the Sale of Assets, Servicing and Transfer Order will cause such existing Order to be applicable to the Trustee;

(i) the sale of the Purchased Assets, the entering into of the Transitional Services Agreement and the entering into of the Servicing Agreement is not precluded by or contrary to any prior Order issued by the Court and no further consents by any Person (including any Governmental Authority) are required to convey the Purchased Assets to Buyer in accordance with the Agreement; or to enter into the Transitional Services Agreement or the Servicing Agreement;

(j) explicitly exculpates the Buyer, and its officers, directors, employees, shareholders, member(s), successors and assigns from and against any and all obligations, claims, debts, demands, promises, damages, covenants, contracts, promises, agreements, liabilities, interest, expenses, costs, attorneys' fees, actions or causes of action or any nature whatsoever, whether known or unknown, with respect to the operation of any of the Receivership Entities prior to the closing date of the Acquisition and Servicing Agreements, including, without limitation, any and all pending or threatened claims initiated by past investors, Keep Policy Investors, Third Party Beneficiaries and any other parties in relation to any of the activities conducted by any of the Receivership Entities or the Receiver prior to the closing date of the Acquisition and Servicing Agreements;

(k) the Sale of Assets, Servicing and Transfer Order constitutes an interlocutory or a final judgment in a receivership action and thus shall become effective

immediately upon its entry as provided in Rule 62(a) of the Federal Rules of Civil Procedure;
and

- (1) such other and further relief as Buyer deems appropriate