

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

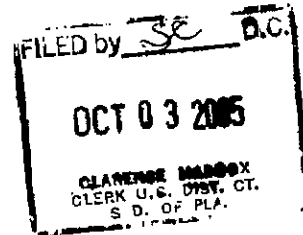
vs.

MUTUAL BENEFITS CORP., *et al.*,

Defendants,

VIATICAL BENEFACTORS, LLC, *et al.*,

Relief Defendants.



**ORDER GRANTING IN PART RECEIVER'S MOTION FOR TURNOVER OF
RETAINER DEPOSITS FROM HOLLAND & KNIGHT LLP**

THIS CAUSE came before the Court upon the Receiver's Motion for Turnover of Retainer Deposits from Attorneys (D.E. No. 896), filed on April 19, 2005.¹

THE COURT has considered the motion, the response, the reply, the parties' representations at oral argument, and the pertinent portions of the record, and is otherwise fully advised in the premises. As explained below, it is

ADJUDGED that the motion is **GRANTED in PART** as to **Holland & Knight LLP**. Holland & Knight LLP shall return all of the retainer funds except for an amount equal to the fees

¹ The Receiver indicated in his reply that he has withdrawn the motion as to the other two law firms. The motion is only pending as to Holland & Knight LLP.

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incurred from May 25, 2004 to June 3, 2004. Holland & Knight LLP shall file a detailed accounting of its fees and costs for this period no later than October 31, 2005. Additionally, if the parties would like to submit supplemental briefs regarding H&K's entitlement to fees from the retainer deposits during this time, they shall file any supplements no later than October 31, 2005.

Analysis

The parties agree that prior to the Receivership, H&K held \$435,000 in retainer deposits in its trust accounts on behalf of Mutual Benefits Corporation. As of the date of H&K's response, \$441,691.66 was being held in an interest bearing account.

According to the Receiver, the retainers remained intact and had not been billed as of the date of the Receivership. Thus, the Receiver argues that under receivership and bankruptcy law, pre-Receivership retainers provided as a security remain the property of the estate and must be returned upon demand.

H&K argues that, due to the unique circumstances relating to its representation of MBC both prior to and after entry of the Temporary Restraining Order, the Court should allow H&K to submit a fee application following the same procedures as all other legal professionals rendering services to the receivership estate for some of its work done before and after entry of the TRO.

A. Pre-TRO Legal Work

As of the entry of the TRO, H&K states that MBC owed it \$118,395.05 for work performed in six different matters. According to H&K, two of those matters were entirely unrelated to the business activities that are the subject of this SEC proceeding. H&K argues that its work in

negotiating a settlement in an unrelated case for the return of all funds in a forfeiture proceeding and its work in setting up MBC's anti-money laundering compliance program resulted in a benefit to the Receivership estate and to investors. Accordingly, H&K would like to collect its fees for this work from the retainer before returning the balance to the Receiver.

As cited by the Receiver, the weight of authority under both receivership and bankruptcy law makes clear that pre-receivership security retainers are the property of the estate. *See, e.g., Indian Motorcycle Assocs. III Ltd. Partnership v. Massachusetts Housing Finance Agency*, 66 F.3d 1246, 1255 (1st Cir. 1995); *SEC v. Credit Bancorp, Ltd.*, 109 F. Supp. 2d 142, 144 (S.D.N.Y. 2000). Further, although not controlling, the Southern District of New York has held that a law firm is not entitled to transfer funds held in a trust account that is the subject of a freeze order to pay for legal services rendered prior to imposition of the freeze order. *SEC v. Credit Bancorp, Ltd.*, 109 F. Supp. 2d 142, 144 (S.D.N.Y. 2000). Under Florida law, there is a presumption that prepaid retainers are security retainers. *See, e.g., In re Keller Financial Services of Florida, Inc.*, 248 B.R. 859, 904 (Bankr. M.D. Fla. 2000). The parties do not dispute that the retainers held by H&K are security retainers.

While H&K acknowledged these authorities at oral argument, it argues that its work on the forfeiture case provided significant benefit to investors, as the firm negotiated for return of nearly \$700,000 to MBC. H&K states that MBC owes it \$16,979.36 for work on this matter. Further, H&K states that its work on the anti-money laundering compliance program was a significant factor in the settlement negotiations. H&K claims that MBC owes it \$31,630.48 for work on the program. Accordingly, H&K states that because this work provided such a large benefit to the Receivership estate and to the investors, under equitable principles it should be able to collect these fees.

However, other professionals undoubtedly performed work during this same time that ultimately benefitted the Receivership estate and the investors. Thus, even accepting that H&K's work significantly benefitted investors, allowing H&K to effectively "jump the line" in front of other creditor law firms that also performed work on behalf of MBC would be inequitable. Accordingly, H&K must file a claim against the Receivership estate like the other creditor law firms to pursue its pre-TRO fees.

B. Post-TRO Legal Work

According to H&K, it represented MBC from May 5, 2004 to June 3, 2004. The Court granted H&K's motion to intervene on May 25, 2004. While the Court initially granted the motion to intervene, it was on the condition that H&K could not communicate with the rest of the defense counsel. Eventually, on June 3, 2004, the Court ruled that H&K was no longer permitted to represent MBC in the preliminary injunction proceedings. H&K seeks the Court's permission to file a fee application consistent with the procedures for other professionals providing services to MBC since entry of the TRO. H&K seeks \$274,926.50 in fees and costs for the period from May 5, 2004 to June 3, 2004. In response, the Receiver states that H&K did no work that benefitted the Receivership estate, but instead opposed the relief and remedies requested by the SEC to protect the investors. Accordingly, the Receiver argues that H&K should not be permitted to collect these fees from the retainer.

The Court agrees with H&K that the circumstances of H&K's representation during this period are unique. Nevertheless, based on the authorities cited above, and because the Court had already appointed a Receiver during this period, the Court orders that H&K return all the retainer

deposits except for an amount equal to the fees incurred from May 25, 2004 to June 3, 2005. The Court will take the parties' arguments under advisement with respect to the fees incurred from May 25, 2004 to June 3, 2005 - the time during which H&K was allowed to intervene. No later than **October 31, 2005**, H&K shall submit a detailed breakdown of the fees and costs incurred during this period. Additionally, if the parties would like to submit supplemental briefs regarding H&K's entitlement to fees from the retainer deposits during this time, they shall file any supplements no later than **October 31, 2005**.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of September, 2005.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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