

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-61471-CIV-MORENO
(Ancillary Proceeding to Case No. 04-60573-Civ-Moreno/Simonton)

ROBERTO MARTINEZ,
as court-appointed Receiver for
MUTUAL BENEFITS CORPORATION
and VIATICAL BENEFACTORS, LLC,

Plaintiff,

vs.

PETER LOMBARDI, *et al.*,

Defendants.

**RECEIVER'S AND CLASS COUNSEL'S JOINT MOTION TO
ENFORCE SETTLEMENT AGREEMENT WITH PETER LOMBARDI**

Roberto Martínez, as court-appointed Receiver (the "Receiver") of Mutual Benefits Corp., Viatical Benefactors, LLC, Viatical Services, Inc., and Anthony Livoti, Jr. and Anthony Livoti, Jr., P.A. solely in their capacity as Trustee; and Lead Counsel for the MBC Investors Class Action, *Scheck Investments L.P., et al. v. Kensington Management, Inc., et al.*, Case No. 04-21160-Civ-Moreno ("Class Counsel") move to compel the enforcement of a valid and binding settlement agreement with defendant Peter Lombardi on which Lombardi has now reneged.

Colson Hicks Eidson

255 Aragon Avenue, 2nd Floor, Coral Gables, Florida 33134-5008 Telephone: (305) 476-7400 Fax: (305) 476-7444

INTRODUCTION

The Receiver and Class Counsel have both filed actions against Peter J. Lombardi and his consulting company, P.J.L. Consulting Corp. After good faith negotiations with Lombardi and his counsel, the parties entered into and signed a Settlement Term Sheet, notified the Court that they had reached a settlement, and proceeded to prepare detailed settlement documents. Lombardi, however, has now reneged and refused to proceed with the settlement agreement, apparently unwilling to pay the amounts that he previously agreed to pay due to his personal tax obligations to the IRS. The settlement reached by the parties is nonetheless fully binding; the Settlement Term Sheet contains all of the material terms of the settlement; and this Court should enforce the settlement that Lombardi agreed to.

BACKGROUND

On December 7, 2005, after lengthy and good faith negotiations, the Receiver and Class Counsel reached a settlement with Lombardi and his counsel. *See* Affidavit of Roberto Martinez, dated May 9, 2006 ("Martinez Aff.") at ¶ 3; Affidavit of Victor M. Diaz, Jr., dated May 8, 2006 ("Diaz Aff.") at ¶ 3. The terms of the settlement were set out in a Settlement Term Sheet (a copy of which is attached as Exhibit A). *See also* Martinez Aff. ¶ 4 & Ex. A. As set forth in that Settlement Term Sheet:

- Lombardi agreed to pay to the Receivership Estate the greater of (a) \$1.4 million, or (b) all proceeds from the sale of the following assets: (i) Commcare Pharmacy, Inc., (ii) the Ocean Bay Condominium Contract, and (iii) the Townhouse.¹

¹ Regarding the payment terms, it was understood that Lombardi was to sell the three identified assets and pay the proceeds to the Receivership Estate. However, a "floor" of \$1.4 million was agreed to in order to ensure that an adequate amount was received from Lombardi (and to protect against sales for below market amounts).

- The Receiver and Class Counsel agreed to release Lombardi from all claims against him.
- Lombardi agreed to provide a sworn financial statement confirming that the assets disclosed on an exhibit attached to the Settlement Term Sheet were all of his personal assets. If any undisclosed asset of Lombardi was later discovered, Lombardi agreed to forfeit that asset.
- Lombardi agreed to cooperate with the Receiver and Class Counsel in the ongoing litigation in all respects.

Finally, the Settlement Term Sheet provided as follows:

6. The parties will execute settlement documentation embodying these terms for submission to the Court. The parties acknowledge that this settlement is subject to the approval of the Court both for the Receiver's claims and for the Class claims.

Lombardi, his counsel, the Receiver, the Receiver's counsel, and Class Counsel all signed the Settlement Term Sheet. *See Exhibit A; Martinez Aff. ¶ 7.*

The following day, December 8, 2005, the Receiver and Class Counsel filed with the Court a Notice of Receiver's and Class Counsel's Settlement with Peter J. Lombardi, advising the Court that a settlement-in-principle had been reached with Lombardi and that formal settlement documentation would be submitted to the Court. As indicated in the Notice, the Notice was with the authorization of Lombardi's counsel.

Class Counsel proceeded to prepare a Stipulation of Settlement to embody the settlement terms already agreed to and forwarded the draft Stipulation to Lombardi's counsel. *See Diaz Aff. ¶ 6.* On or about February 7, 2006, Lombardi's counsel communicated requested changes to Class Counsel. In particular, Lombardi wished to sell his primary residence, instead of one of his condominium properties, and requested that

\$450,000 from the proceeds of the sale be used towards the settlement instead of the Europa Condominium property; in exchange for agreeing to switch the properties, Lombardi would agree to increase the “floor” amount to \$1,500,000. Lombardi also asked to break the payment of the proceeds of the sale of Commcare Pharmacy into two payments spaced out over a longer period of time. *See* Diaz Aff. ¶¶ 7-8 & Ex. A. All of Lombardi’s requests were agreed to by Class Counsel and the Receiver’s counsel, and all were incorporated in the Stipulation of Settlement. *See* Diaz Aff. ¶ 9.

When Lombardi’s counsel was subsequently asked for any additional comments on the Stipulation of Settlement, Lombardi asked for a reduction from \$450,000 to \$400,000 in the amount of the proceeds from his residence to be paid. *See* Diaz Aff. ¶ 10 & Ex. B. Class Counsel and the Receiver’s counsel again agreed to Lombardi’s requests. When Lombardi’s counsel was provided with a revised copy of the Stipulation of Settlement incorporating his changes, Lombardi’s counsel requested one additional change (to the amount of the offer Lombardi had received for Commcare Pharmacy), which was also agreed to and incorporated. *See* Diaz Aff. ¶ 11 & Ex. C.

A final version of the Stipulation of Settlement – incorporating every change Lombardi’s counsel had sought – was provided to Lombardi’s counsel for execution. *See* Diaz Aff. ¶ 13 & Exs. D, E. Lombardi, however, has refused to sign the Stipulation of Settlement, apparently due to his displeasure with his personal tax obligations to the IRS. *See* Martinez Aff. ¶ 9. However, the Settlement Term Sheet, and the settlement negotiations more generally, were never contingent upon Lombardi’s happiness with his tax obligations in any way. Nor was Lombardi’s happiness with his tax obligations to the IRS ever made a

condition precedent to fulfilling the settlement in any way. *See* Martinez Aff. ¶ 9.

DISCUSSION

THE SETTLEMENT AGREEMENT WITH LOMBARDI IS A VALID AND BINDING SETTLEMENT THAT SHOULD BE ENFORCED BY THIS COURT

As an initial matter, “[s]ettlement agreements are favored as a means to conserve judicial resources. Courts will enforce them when it is possible to do so.” *Spiegel v. H. Allen Holmes, Inc.*, 834 So.2d 295, 297 (Fla. 4th DCA 2002). *See also State Farm Mutual Automobile Insurance Co. v. InterAmerican Car Rental, Inc.*, 781 So.2d 500, 501-02 (Fla. 3rd DCA 2001) (“Settlement agreements are highly favored and the policy of this Court is to enforce such agreements whenever possible.”).

The fact that Lombardi has refused to sign the final settlement documentation for submission to the Court does not mean that it is any less binding. Florida state and federal courts have enforced written and oral settlement agreements reached by parties in a variety of situations where one party reneges before final settlement documentation is executed or submitted to the court. *See, e.g., Southtrust Bank v. Collins Holding Corp.*, 139 Fed. Appx. 133, 133-34 (11th Cir. 2005) (granting motion to compel settlement agreement embodied in a memorandum of understanding entered into after a mediation); *Reed v. United States*, 717 F. Supp. 1511, 1516-17 (S.D. Fla. 1988) (granting plaintiff’s motion to compel oral settlement agreement where government subsequently refused to execute written stipulation of settlement); *Spiegel*, 834 So.2d at 296-97 (granting motion to compel settlement where settlement was announced after first day of trial, and stipulation of settlement was prepared and signed by counsel and defendant, but not plaintiff).

As courts have made clear, “[w]here the parties have agreed to the essential terms of a settlement, it will be enforced.” *State Farm*, 781 So.2d at 502. “A settlement agreement does not have to be in writing, and does not have to definitely fix all details of the parties’ understanding in order to be enforceable.” *Id.* See also *Reed*, 717 F. Supp. at 1516-17 (“All that is required [for an enforceable settlement agreement] is that the terms be clear, definite and capable of proof.”); *Spiegel*, 834 So.2d at 297 (“To compel enforcement of a settlement agreement, its terms must be sufficiently specific and mutually agreed upon as to every essential element. Uncertainty as to nonessential terms or small items will not preclude the enforcement of a settlement agreement.” (citations omitted)).

Here, the essential terms of the settlement were unequivocally agreed to. Specifically, (a) the amount that Lombardi was to pay, (b) what he would receive in return (releases), and (c) Lombardi’s other obligations (cooperation and forfeiture of undisclosed assets) were clearly spelled out in the Settlement Term Sheet. Both Lombardi and his counsel signed the Settlement Term Sheet (as well as Class Counsel, the Receiver, and the Receiver’s counsel).

Moreover, in the subsequent drafting of the documentation to embody the agreed upon terms for submission to the Court, nothing remained in dispute. Draft settlement documentation was prepared and provided to Lombardi and his counsel. All of the comments made by Lombardi’s counsel on the draft documents were accepted and incorporate into the document. In other words, not even “small items” remained in dispute.

In sum, this is a clear cut case where the parties entered into a settlement with all of the essential terms embodied in a written document signed by all of the parties and their

counsel. No essential (or even non-essential) terms remained in dispute. Lombardi has simply changed his mind about his willingness to pay the amounts he agreed to pay.

CONCLUSION

The Receiver and Class Counsel jointly request that the Court enforce the settlement agreement entered into by Lombardi and his counsel and enter the settlement agreement as a final judgment against Lombardi in this action and in *Scheck Investments, L.P., et al. v. Kensington Management, Inc., et al.*, Case No. 04-21160-Civ-Moreno.

Respectfully submitted,

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By: s/ Curtis B. Miner
Curtis B. Miner
(Fla. Bar No.: 885681)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on ~~May~~ ^{July} 6, 2006, to the parties on the attached Receiver's Service List in Case No. 05-61471, and by e-mail to the parties on the attached Service List in Case No. 04-21160-Civ-Moreno.

s/ Curtis B. Miner
CURTIS B. MINER

Roberto Martinez v. Joel Steinger, et al.
Case No. 05-61471-Civ-Moreno/Simonton

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Case No.: 04-60573 CIV-Moreno

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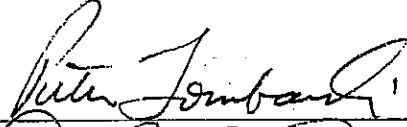
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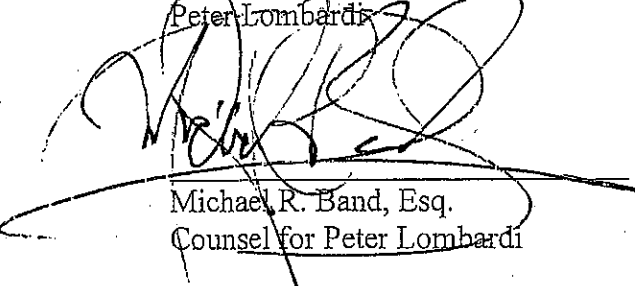
EXHIBIT A
(Settlement Term Sheet)

Settlement Term Sheet

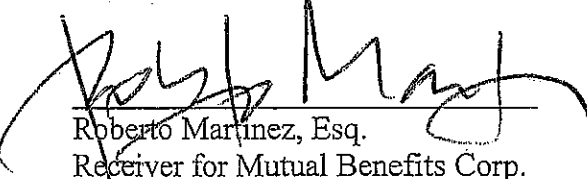
1. The Receiver and the Class will release Peter Lombardi from all claims against him.
2. Upon execution of formal settlement documents, the Receiver and the Class will withdraw any objections to the entry of the SEC's settlement with Peter Lombardi or the lifting of the Asset Freeze for all assets other than those identified in Paragraph 5 below.
3. Peter Lombardi will provide a sworn financial statement confirming that the attached exhibit discloses all of his personal assets. In the event that the Receiver and/or the Class Counsel discover any assets not disclosed on the attached exhibit, Peter Lombardi consents to the forfeiture of that asset and its assignment to the Receivership Estate as a penalty for the failure to disclose it.
4. Peter Lombardi will cooperate with the Receiver and the Class Counsel in the ongoing litigation in all respects, subject to protection of Lombardi's 5th Amendment privileges.
5. Peter Lombardi will pay to the Receivership Estate the greater of (a) \$1.4 million, or (b) all proceeds from the sale of the following assets: (a) Commcare Pharmacy, Inc., (b) the Ocean Bay Condominium Contract, and (c) the Townhouse. Lombardi will sell these properties within a reasonable period of time.
6. The parties will execute settlement documentation embodying these terms for submission to the Court. The parties acknowledge that this settlement is subject to the approval of the Court both for the Receiver's claims and for the Class claims.



Peter Lombardi

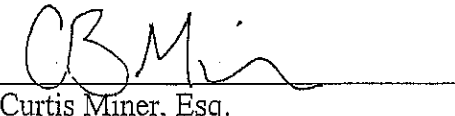


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Counsel for Peter Lombardi

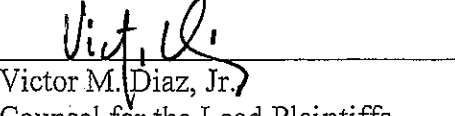


Roberto Martinez, Esq.
Receiver for Mutual Benefits Corp.

12/7/05



Curtis Miner, Esq.
Counsel for the Receiver



Victor M. Diaz, Jr.
Counsel for the Lead Plaintiffs

Privileged and Confidential

**Mutual Benefits Corporation
Analysis of Decedent's Assets
Peter Lombardi and Related Entities**

Name	Property	Description	Amount	Comments
Peter Lombardi	Home	3050 NE 44th Street, FL Lauderdale, FL	1,475,000	Cost \$1,675,000, purchased 8/17/2001 and according to Peter Lombardi currently has a mortgage of \$200,000 (Current assessed value: \$1,463,720)
Peter Lombardi	Townhouse	Ocean Bay Condo Unit #53	375,000	(Peter Lombardi's estimate) Purchased for \$137,500 in June 2003 (Peter Lombardi estimate) Fort Lauderdale by the Sea project, condo prices currently range for \$1.7 to \$4.2 million. Contracts require 10% down.
Peter Lombardi	Europa Condo Contract	Contract for purchase & downpayment (375,000	
Banks and Investments				
Peter Lombardi	Via Tranko LLC	35%-40% Interest	175,000	Loan to Father-in-law
Peter Lombardi	Wachovia Bank Account (101006994277)	Personal Checking Account	41,823	as of 5/5/04 per subpoenaed records
Peter Lombardi	UBS Financial Services (TR 01047 KR)	Investment Account	1,281,655	as of 4/30/05 per subpoenaed records
Peter Lombardi	UBS Financial Services (TR 01048 KR)	Individual Retirement Account	41,882	as of 4/30/05 per subpoenaed records
Peter Lombardi	Smith Barney Account (026-08098-11-748)	Investment Account	39,741	as of 9/09/05 per subpoenaed records
Peter Lombardi	Bank of America	Bank Account	186,276	Balance as of 9/2/05
Peter Lombardi	Bank of America	Bank Account	17,651	Balance as of 8/2/05
(1) P.L. Consulting (100%)				
P.L. Consulting Inc.	Wachovia Bank Account (20000016707654)	Money Market Account	2,875,131	as of 5/5/04
P.L. Consulting Inc.	UBS Financial Services (TR 01352 KR)	Profit Sharing Plan Account	236,189	as of 4/30/05 per subpoenaed records
P.L. Consulting Inc.	UBS Financial Services (TR 01049 KR)	Investment Account	1,611,295	as of 4/30/05 per subpoenaed records
Commecca Pharmacy				
Value to be determined				
Personal Assets				
	Vehicle	2003 Mercedes 500S	64,595	Kelly Blue Book
Estimated Total Assets				
			8,519,218	