

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

Case Number: 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE
COMMISSION et al.,

Plaintiff,

vs.

MUTUAL BENEFITS CORP. *et al*,

Defendants.

**ORDER GRANTING TRUSTEE'S MOTION TO APPROVE (1) SALE OF POLICIES
TO ACHERON PORTFOLIO TRUST; (2) PROPOSED ALLOCATION AND
DISTRIBUTION PROCEDURES; AND (3) SETTLEMENT WITH ACHERON PARTIES**

On January 26, 2023, the Court conducted a hearing on the *Trustee's Motion to Approve (1) Sale of Policies to Acheron Portfolio Trust; (2) Proposed Allocation and Distribution Procedures; and (3) Settlement with Acheron Parties* ("Sale, Settlement, and Allocation Motion") (D.E. 3188) filed by Barry Mukamal, as Trustee ("Trustee") of the Mutual Benefits Keep Policy Trust ("Trust"). The Court, having considered the Sale, Settlement, and Allocation Motion, any objections and responses thereto, the proffer by the Trustee in support, and the record in this case, and being otherwise fully advised in the premises, it is

ADJUDGED as follows:

A. On August 14, 2009, the Court entered an *Order Granting Receiver's Motion for Entry of Order Approving Sale of VSI Business and Execution of Servicing Agreement Transitional Services Agreement and Trust Agreement* (D.E. 2322), and on December 14, 2009, entered an *Order Granting Receiver's Motion for Entry of "Sale of Assets, Servicing, and Transfer Order"*

(D.E. 2367), collectively the “Trust Authorization Orders,” which *inter alia*, authorized the creation of the Trust, the appointment of Mr. Mukamal as Trustee, and the transfer of the “Keep Policies” (as defined therein) to the Trust.

B. Pursuant to the Trust Authorization Orders, the Court ordered that (a) Roberto Martinez as Receiver for Mutual Benefits Corp., Viatical Benefactors, LLC, Viatical Services, Inc., Anthony Livoti, Jr. and Anthony Livoti, Jr. P.A., solely in their capacity as trustee (the “Receivership Entities”) had the sole and absolute authority to convey all claims, options, privileges, right, title and interest in, to and under the Keep Policies and Policy Files (as defined therein) to the Trust; (b) that the Trustee was vested with all claims, options, privileges, right, title and interest in, to and under the Trust Assets (including the Keep Policies and the Policy Files), free and clear of all encumbrances; and (c) that the Trust Authorization Orders were binding in all respects upon all creditors of the Receivership Entities, any investor in the Receivership Entities, any beneficial interest holder or other interest holder of the Policies, any insurance company or other entity which issued or is obligated under the Policies, and any other party in interest in the Receivership Proceeding and any of the successors or assigns of the foregoing.

C. On November 16, 2020, the Court entered an Order (D.E. 2825) adopting a Report and Recommendation (D.E. 2723) (“Wind Down Order”) to approve the *Trustee’s Motion to Authorize the Initiation of Trust Wind Down and Termination* (“Trustee Wind Down Motion”) (D.E. 2609), seeking authority to commence the wind down and liquidation of the Trust, consistent with the provisions of the Trust Agreement that expressly contemplate that upon the Trustee determining that the continued servicing of the Keep Policies becomes unfeasible, the Trustee may authorize and direct the sale, surrender, or lapse of the Keep Policies, and to

distribute the proceeds, if any, of the Keep Policies upon such sale, surrender or lapse, to the Keep Policy Investors in such manner as the Trustee determines to be appropriate. Trust Agreement Section 3.1(b)(xvii) (emphasis added).

D. On April 27, 2021, the Trustee, with Court approval, sent a *Notice to Keep Policy Investors Regarding Intent to Sell Policies and Wind Down the Mutual Benefits Keep Policy Trust*. (D.E. 2919). The Notice described the Trustee's intention to proceed with the wind down and termination of the Trust through the sale of the remaining policies, and to distribute the net sale proceeds to the investors. Since then, the Trustee has filed, and posted to the Trust's website, regularly monthly status reports advising Keep Policy Investors of the steps being taken toward the sale and liquidation of the remaining Keep Policies.

E. On August 31, 2021, the Court entered an Order ("Instructions Order") (D.E. 2967) adopting a Report and Recommendation (D.E. 2941) granting the Trustee's request for instructions, which confirmed that "the Trustee is empowered to sell whole Keep Policies as part of his wind down and liquidation of the Trust," and that "the Trustee is not required to sell the Keep Policies on a policy-by-policy basis nor that the Trustee is required to value the Keep Policies on a policy-by-policy basis in order to sell the Policies as part of the Trust's wind down and liquidation."

F. On January 21, 2022, the Trustee filed his *Trustee's Motion to Approve Procedures for Sale of Policies in Connection with Trust Termination* ("Sale Procedures Motion") (D.E. 3065), requesting that the Court: (1) authorize the Trustee to implement the procedures described therein for the sale of the remaining Keep Policies held by the Trust; (2) authorize the Trustee to enter into an Asset Purchase Agreement with a prospective "stalking horse" buyer (or buyers) for the sale of the Keep Policies; (3) approve the bidding procedures for submission of higher and

better offers for the purchase of the Keep Policies, including the means of providing notice of the bidding procedures; (4) approve the form of notice to be provided to interested parties; and (5) schedule a final hearing to approve the sale of the Keep Policies to the highest and best bidder (or bidders) submitted in accordance with the procedures described herein. The Trustee provided a Notice of the Sale Procedures Motion to the Keep Policy Investors advising them of its filing, a summary of its contents, how to request a copy, and how to address potential objections.

G. The Court on June 29, 2022, entered an *Order Adopting Magistrate Judge's Report and Recommendation and Granting Trustee's Motion to Approve Procedures for Sale of Policies in Connection with Trust Termination* ("Sale Procedures Order") (D.E. 3142) adopting a Report and Recommendation ("Sales Procedures R&R") (D.E. 3130) recommending, with certain qualifications, that the Sale Procedures Motion be granted.

H. Consistent with the procedures set forth in the Sale Procedures Motion and the Court's Sale Procedures R&R, the Trustee proceeded to solicit and negotiate "stalking horse" purchase offers for the Keep Policies to establish a "floor" for bids, subject to higher and better offers. After expressions of interest, due diligence, and extensive discussions with multiple parties, the Trustee ultimately selected stalking horse purchase offers for Tranche A and Tranche A-1 ("Stalking Horse Bids"), as reflected in the *Trustee's Notice of Selection of Stalking Horse Bids* filed on May 26, 2022 (D.E. 3140). Following the Court's entry of the Sale Procedures Order, on July 8, 2022, the Trustee filed his *Trustee's Notice of Filing Regarding Stalking Horse Bids and Auction* (D.E. 3147), which (a) gave notice of the selection of the Stalking Horse Bids for Tranche A and A-1; (b) gave notice of the scheduling of an auction on September 15, 2022; (c) set forth the schedule for commencement and completion of due diligence by prospective bidders, and the deadline and conditions for submission of a qualifying bid; and (d) set forth the

proposed schedule for the Trustee to provide a report of the auction, move for approval of the sale, the proposed deadline for objections to the sale, and the request for a hearing date to consider entry of an order approving the sale (“Sale Approval Order”).

I. The Trustee’s sales advisors undertook extensive efforts to advise potentially interested parties of the opportunity to submit a qualifying bid, and extensive efforts to organize, maintain and enhance the data available in the “data room” to facilitate due diligence on the Keep Policies by potential bidders. The Trustee’s sales advisors communicated with 82 potential bidders, and at least 18 groups (aside from the “Stalking Horse” bidder) executed Non-Disclosure Agreements and satisfied the additional qualifications to be provided access to the data room and perform due diligence.

J. As a result of a stay pending appeal of the Sale Procedures Order (“Stay Order”) (D.E. 3157) upon a motion by Acheron Capital, Ltd. (“Acheron Capital”) as the investment manager for Acheron Portfolio Trust (“APT”), Avernus Portfolio Trust, Lorenzo Tonti 2006 Trust and STYX Portfolio Trust (“Other Acheron Trusts,” and collectively with Acheron Capital and APT, “Acheron”), which had objected to the entry of the Instructions Order, had objected to the entry of the Sale Procedures Order, and had indicated its intention to object to the entry of a Sale Approval Order following the conclusion of the scheduled auction, the September 15, 2022 auction was canceled. The Eleventh Circuit Court of Appeals subsequently issued an Opinion dismissing Acheron Capital’s appeal of the Sale Procedures Order for lack of jurisdiction.

K. Upon the Stay Order being vacated, the Trustee rescheduled the auction for December 8, 2022 with a bid submission deadline of December 2, 2022, gave notice of the rescheduled dates (D.E. 3169), and his sales advisors recommenced efforts to reengage with potential bidders and facilitate updated due diligence with respect to the Keep Policies available for sale.

L. On November 30, 2022, the Court entered an *Order on DE 3174* (D.E. 3177), granting Acheron Capital’s *Emergency Motion to Enforce and Compel Compliance with Order Adopting*

Magistrate Judge's Report and Recommendation and Granting Trustee's Motion to Approve Procedures for Sale of Policies in Connection with Trust Termination (DE 3142) with Incorporated Memorandum of Law ("Motion to Enforce") (D.E. 3174), ruling that even if Acheron Capital were selected as the successful bidder following auction, it was not required to waive objections to, or appeal of, a Sale Approval Order.

M. Thereafter, roughly contemporaneous with the rescheduled bid deadline, the Trustee and Acheron Parties began good faith settlement discussions regarding potential resolution of disputes relating to the sale and the Acheron Parties' objections thereto.

N. On December 6, 2022, the Eleventh Circuit Court of Appeals issued an Opinion in an appeal by the Acheron Parties of a judgment entered in favor of the Trustee, and against the Acheron Parties, on several claims (not directly related to the Sale Procedures Order) asserted by the Acheron Parties against the Trustee asserting breaches of the March 2015 Agreement between the Trustee and Acheron Capital, and asserting breach of fiduciary duties supposedly owed by the Trustee to the Acheron Parties. The Eleventh Circuit opinion affirmed in full the Court's ruling in the Trustee's favor, thereby resolving another matter of dispute between the Trustee and the Acheron Parties.

O. On Wednesday December 7, 2022, the Trustee made the determination, in his business judgment, to postpone the scheduled auction for a week. (D.E. 3178).

P. On Thursday, December 8, 2022, the Trustee and the Acheron Parties executed a Settlement Term Sheet, the terms of which were subsequently incorporated into the Settlement Agreement attached to the Sale, Settlement and Allocation Motion.

Q. The Settlement Agreement addresses (1) the sale of the Tranche A, A-1 and B Policies to APT pursuant to the APT APAs; (2) the Acheron Parties' waiver of objections to the entry of a Sale Approval Order and agreement that APT will proceed expeditiously to closing of the sale; (3) the agreement among the Trustee and the Acheron Parties with regard to the allocation procedure to be applied to the allocation of the value of the sale proceeds among the Keep Policies; (4) the agreement

among the Trustee and the Acheron Parties with regard to the allocation and deduction of the Liquidation Costs from the sale proceeds; (5) the resolution of certain other claims between the Trustee and the Acheron Parties; and (6) the waiver and release of other claims among the parties and agreement not to assert additional claims. The Trustee and Acheron Parties announced the settlement and provided a general description of the terms thereof at a status conference on December 16, 2022.

R. On December 16, 2022, the Court entered an Order Setting Sale Approval Hearing and Briefing Deadlines, which set deadlines for the Trustee to file a Sale Approval Motion, for any objections, and for the Trustee to reply, and scheduled a hearing on the Sale Approval Motion for **January 26, 2023 at 10:00 a.m.** (D.E. 3184). The Court subsequently entered a further Order directing that the Sale Approval Motion be filed by **December 27, 2022**, that any objections thereto be filed by **January 17, 2023**, that the Trustee may file a reply by **January 23, 2023**, and that the hearing on the Sale Approval Motion would proceed as scheduled on **January 26, 2023** (D.E. 3187). The Trustee promptly posted those Orders on the Trust's website, and further notice has been provided to all Keep Policy Investors as reflected in the Sale, Settlement and Allocation Motion.

S. Notice and a reasonable opportunity to object and be heard with respect to the Sale, Settlement and Allocation Motion has been afforded to all known interested parties.

T. The Trustee's decision to proceed with the APT APAs is consistent with the Trustee's duty of prudent administration and represents a reasoned exercise of the Trustee's business judgment that the total value to be received in connection with the sale, together with the additional benefits of the Settlement Agreement, including avoiding the costs, delays, and risks of further objections and appeals, represents the highest and best offer and fair consideration for the Keep Policies.

U. The Trustee's decision to enter into the Settlement Agreement is consistent with the Trustee's duty of prudent administration and represents a reasonable exercise of the Trustee's business judgment that the Settlement Agreement is in the best interests of the Trust and the Keep Policy

Investors, and accordingly the Trustee is authorized to execute and implement the Settlement Agreement.

V. The Trustee's decision to implement the Allocation and Distribution Procedures is consistent with the Trustee's duty of prudent administration and represents a fair and reasonable exercise of the Trustee's discretion under the Trust Agreement "to distribute the proceeds, if any, of the Keep Policies, upon such sale, surrender, or lapse, to the Keep Policy Investors *in such manner as the Trustee determines to be appropriate.*" Trust Agreement § 3.1(b)(xvii) (emphasis added), and accordingly the Trustee is authorized to implement the Allocation and Distribution Procedures.

NOW, THEREFORE, BASED UPON ALL OF THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED:

1. The Sale, Settlement and Allocation Motion is **GRANTED** as set forth herein, and any objections thereto are overruled.

2. The Trustee has the sole and absolute authority, on behalf of the Trust, to convey all options, privileges, right, title and interest in, to and under the Keep Policies (the "Policies") and Policy Files to be sold to APT under the APT APAs (collectively, the "Acquired Assets").

3. The sale of the Acquired Assets to APT, in accordance with the terms of the APT APAs, is approved and the Trustee and APT are authorized to consummate all the transactions contemplated thereby.

4. At the Closing, APT will be vested with all options, privileges, right, title and interest in, to and under the Acquired Assets, free and clear of all Encumbrances (as defined in the APT APAs), including without limitation any claims or interests of Keep Policy Investors, who shall no longer have any interests in the Keep Policies and shall be entitled to the proceeds of the sale solely in accordance with the Allocation and Distribution Procedures. Any person, including, without limitation, any Keep Policy Investor, any creditor of the Trust, any beneficial interest holder or other holder of a Policy that is an Acquired Asset, and any insurance company or other entity which issued

or is obligated under a Policy that is an Acquired Asset, and the successors and assigns of any of the foregoing, asserting or having an Encumbrance of any kind or nature against or in the Trust or the Acquired Assets, arising out of, in connection with, or in any way relating to the Trust, the Policies and other Acquired Assets, or the transfer thereof to APT and its successors and assigns, shall be, and hereby are, forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing such Encumbrance against: (i) APT, and its successors and assigns or any subsequent owner of the Acquired Assets; and (ii) the Acquired Assets.

5. This Approval Order shall be binding in all respects upon all Keep Policy Investors, all creditors of the Trust, any beneficial interest holder or other interest holder in the Policies that are Acquired Assets, any insurance company or other entity which issued or is obligated under the Policies that are Acquired Assets, and any other party asserting an interest in the Acquired Assets and any of the successors or assigns of all of the foregoing.

6. Based on the record presented at the Sale Approval Hearing and all pleadings filed and arguments by counsel and evidence presented, APT has acted in good faith with respect to the purchase of the Acquired Assets pursuant to the APT APAs and is a good faith purchaser of the Acquired Assets.

7. The sale of the Acquired Assets to APT 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 Acquired Assets to APT in accordance with the APT APAs.

8. Upon the Closing, any issuer of a Policy sold to APT, and any assignee thereof, is directed to recognize APT (or APT's Securities Intermediary, as applicable) as the owner of such Policy, and to direct any correspondence and any funds distributed in connection with such Policy to APT (or APT's Securities Intermediary, as applicable) or such designee as APT directs. The foregoing provision does not supersede or limit any provision of the APT APAs including, without limitation, Sections 3.3 and 3.6 thereof.

9. At Closing, the Trustee is expressly authorized to pay (without limitation on the Trustee's authority to pay any and all other expenses and obligations of the Trust in accordance with the Trust Agreement) (i) the broker's fee of 7.5% of the purchase price, plus expenses, due to the Trustee's sales advisors; (ii) the Stalking Horse Break Fees totaling \$425,000; and (iii) the outstanding balance due on the Trust's line of credit, in order to deliver title to APT free and clear of Encumbrances.

10. The Settlement Agreement is approved, and the Trustee is authorized to execute and implement the Settlement Agreement and all the terms and conditions thereof.

11. The Allocation and Distribution Procedures are approved, and the Trustee is authorized to implement the Allocation and Distribution Procedures as set forth in the Sale, Settlement and Allocation Motion, as the exclusive process for allocating the proceeds of sale of the Policies and applying and deducting the Liquidation Costs from the interests of all parties in the Keep Policies, including the Keep Policy Investors and the Acheron Parties.

12. The Court retains jurisdiction until the completion of the Closing to enforce and implement the terms of the APT APAs, the Settlement Agreement, and the Allocation and Distribution Procedures, including to resolve any disputes relating thereto, and to interpret, implement, and enforce the provisions of this Order.

13. The parties shall agree on dispute resolution procedures for disputes relating to liquidation costs prior to the Closing.

DONE AND ORDERED in Chambers at Miami, Florida this 3rd day of March 2023.



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies Provided:
Counsel of Record