

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division**

CASE NO. 04-60573-CIV-MORENO/STRAUSS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

MUTUAL BENEFITS CORP., *et al*,

Defendants.

TRUSTEE’S JUNE 2021 STATUS REPORT REGARDING WIND DOWN

Barry Mukamal, as Trustee (“Trustee”) of the Mutual Benefits Keep Policy Trust (“Trust”), submits this Status Report in accordance with the Court’s *Report and Recommendation on Motion by Acheron Capital, Ltd. for Order Directing (A) the Wind Down and End of the Mutual Benefits Keep Policy Trust and (B) Disbursement of Certain Assets to the Non-Acheron Related Investors in Keep Policies (“Acheron’s Wind Down Motion”) (DE 2593) and on Trustee’s Amended Motion to Authorize the Initiation of Trust Wind Down and Termination (“Trustee’s Amended Wind Down Motion”) (DE 2640) [D.E. 2723]*, and the Court’s *Order Adopting Magistrate Judge’s Report and Recommendation and Denying Acheron’s Wind Down Motion and Granting the Trustee’s Amended Motion to Authorize Initiation of Trust Wind Down and Termination [D.E. 2825]* (collectively, the “Wind Down Order”), and the Court’s May 20, 2021 Order Setting Status Conference [D.E. 2940]

Attached hereto as Exhibit “A” is an updated report of the information provided to the Court in accordance with the Wind Down Order since the Trustee’s last Status Report was filed on May 14, 2021 [D.E. 2934].

Progress on Wind Down Steps

The Trustee advises of the following steps taken in furtherance of the wind down of the Trust since the last Status Report:

- The Trustee sent the Notice to Investors approved by the Court to approximately 2,000 Keep Policy Investors shortly before the filing of the last Status Report. Since that time, the Trustee's personnel have fielded and responded to approximately 100 inquiries from Keep Policy Investors. More detail as to those communications is provided below.
- The Trustee has updated the "Frequently Asked Questions" on the Trust website – www.mbckeeptrust.com – to address some of the common inquiries made by Keep Policy Investors.
- The Trustee has completed negotiations for an engagement agreement with Longevity Asset Advisors, LLC, a life settlement industry expert with extensive experience, to manage and conduct a sale process for the Trust portfolio. The agreement provides for a \$100,000 retainer, and a 7.5% success fee of the gross purchase price paid for policies sold, with the retainer credited against the success fee.
- The Trustee pursued a motion for injunctive relief in a state court action originally filed by the Trust's servicer, Litai Assets, LLC ("Litai"), seeking to compel Litai to provide the Trustee with all of the Trust Data relating to the Keep Policies. This matter was originally addressed by this Court, which had issued a Report and Recommendation determining that the Trustee was entitled to the data and compelling Litai to deliver it, but which Litai then objected to, contending this Court lacked subject matter jurisdiction to compel Litai's compliance. Litai opposed the Trustee's injunction motion in state court and requested a 2-day special set hearing. The state court scheduled a hearing for June 3-4, 2021. On June 4,

2021, Litai provided a partial delivery of the Trust's data to it, in "JSON" format, and the hearing on the Trustee's injunction motion has been deferred. The Trustee is in process of reviewing the data delivery to evaluate its functionality, utility and completeness. From the Trustee's initial review, the dataset provided has a different schema (structure) from the sample that was provided previously when this matter was before this Court. Those differences have required modifications to the script used to import the dataset, so that the import process can be repeatable and auditable. There also appears to be quite a bit of ambiguity and lack of detail in the "Data Dictionary" provided with the dataset, which the Trustee is continuing to review.

- On June 11, 2021 Litai delivered an external drive to the Trustee containing what Litai advised is approximately 500,000 files. The Trustee is in the process of assessing the information on the external drive for utility and completeness.
- The Trustee has considered the logistics of a post-sale data and documents transfer to policy buyer(s) and anticipates determining the most appropriate manner in which such transfer can be accomplished in short order.
- The Trustee has negotiated pricing for transferring the policies in the portfolio to a securities intermediary and anticipates entering into an agreement for same within the next 30 days.
- The Trustee has had preliminary communications with potential stalking horse bidders in anticipation of formally commencing the stalking horse bidder process.

Communications with Keep Policy Investors

Since the Notice to Investors regarding the wind down process was sent, the Trustee has responded to nearly 100 inquiries from Keep Policy Investors as of June 10, 2021, either by the

investor portal on the MBKPT website, by email, or telephone. The Trustee has generally responded to all inquiries within 24 hours. Most of those inquiries seek general information: an explanation of the notice, what the next steps are, technical assistance in setting up investor portal access, updating of contact information, inquiries about tax reporting, and the like. Many also have general questions about their policy of the type that routinely should be addressed by Litai as part of its customer service functions. Several investors have contacted the Trustee to inquire about the sale process, including how much they will receive from a sale, how the proceeds will be allocated, and what happens to policies that mature prior to the sale (inquiries that are also addressed by the Notice and the FAQ's on the MBKPT website). A few investors have expressed interest in purchasing policies at sale. Several of the investors have inquired about their continued payment of premiums prior to sale.

Approximately fifteen investors have expressed their desire to retain their policies if possible, and/or their opposition to a sale of the policies. Of these, most inform the Trust that they own 100% of the policy, or that the insured is, or is nearly, 100 years old and that they have been advised that no further premiums will need to be paid to maintain the policy, or that the policy is on premium waiver. Several of the investors have also expressed their frustration with difficulties communicating with Litai, obtaining information from Litai about the viator's health status, and concerns with whether Litai is adequately monitoring the policies for maturities.

The Trustee is not able to discern from these communications any clear consensus regarding the proposed sale process. While several investors have communicated that they are frustrated and disappointed with the prospect of a sale of the policies and would like to retain their policies, those who have so indicated represent only a small fraction of the approximately 2,000 Keep Policy Investors who hold interests in the Trust policies.

Addendum Regarding Sale Alternatives

In the last Order Setting Status Conference, the Court directed the Trustee to provide a separate addendum “explaining what alternatives to selling the Keep Policies that the Trustee has considered thus far, what alternatives other courts in analogous circumstances have provided to investors, and why those alternatives are not viable in lieu of selling the Keep Policies.” [D.E. 2940, pp. 2-3] In response, the Trustee advises of the following alternatives that have been presented to and considered by the Trustee:

Acheron “Tag Along” Proposal

On April 13, 2021, in a response to the Trustee’s Motion to Approve Proposed Final Revised Notice Regarding Wind Down [D.E. 2900], Acheron Capital, Ltd. (the investment advisor for a group of funds that have purchased interests in policies from the Trust) filed a “Proposal” which Acheron sought to have included in the notice to investors. The “Proposal,” according to Acheron, would permit investors interested in keeping their policy investment to do so by a majority vote, while dissenting investors “could still have their interests sold by the Trustee.” [D.E. 2903-2] Under the Proposal, policies in which Acheron owns 50% or more of the interests, and 50% of the remaining investors elect to “keep” the policy, could only be sold subject to the “tag along” rights of Acheron and the other investors. An investor who elects not to “tag along” “shall receive its proportionate share of the sale proceeds in the manner previously disclosed and approved by the Court.”

The “Proposal” contains several other provisions solely designed to enhance Acheron’s leverage in any sale, both for those policies with “tag along” rights and those without, including

that Acheron can bid, and exercise its “last look / topping right,” on a “policy per policy” basis;¹ that Acheron can credit bid its ownership interest in any policy; and that Acheron is not responsible for paying a broker’s commission on its credit bid. If “tag along” investors fail to pay their share of the premium obligations, they “forfeit” their interests and Acheron would acquire them and pay 2% of face value for HIV policies and 5% of face value for Life Settlement policies.

The proposal contains no details as to how the interests of the “tag along” non-Acheron investors would be protected, how the inherent conflict of interest on the part of Acheron, as an investor in and acquirer of interests in policies, versus the “tag along” Keep Policy Investors, would be addressed or mitigated, or what the rights and remedies of the “tag along” investors would be, either as against Acheron or the servicer.

As Acheron has already acknowledged, there is no meaningful market to sell policies subject to “tag along” rights, and accordingly, Acheron would be the only likely purchaser of such policies, and would only pay a *de minimus* price for them, to the detriment of the Keep Policy Investors who do not wish to “tag along” with a foreign hedge fund manager which for the past ten plus years has profited from the forfeitures of prior Keep Policy Investors. The “Proposal” is in substance markedly similar to the one which Acheron made a year ago in connection with the competing “Wind Down Motions” of Acheron and the Trustee, and which the Court rejected, in part, because the turnover of the policies to Acheron’s control would be inconsistent with the purpose and terms of the Trust, and in particular the duty to have a fiduciary to protect the interests of the Keep Policy Investors:

Under Acheron’s plan, the proposed ombudsman, and Acheron itself, would have no fiduciary duty to the Keep Policy Investors. Nor is Court oversight of the

¹ The Court’s recent Report and Recommendation rejected Acheron’s arguments that it is entitled to demand a “policy by policy” sale or that it has a “last look” right beyond the right to participate in an auction and top any bid submitted by another party. D.E. 2941.

ombudsman under Acheron's proposal a sufficient substitute for a structure such as the Trust that facilitates administration of the Keep Policies by a fiduciary. By law, Acheron would be able to conduct itself consistent with "[the] morals of the market place" and put its own interests ahead of the Keep Policy Investors. Thus, the relief requested by Acheron must be denied because the lack of any continued fiduciary duty in the continued administration of Keep Policies directly conflicts with the purpose and terms of the Trust.

[D.E. 2723, p. 15] Indeed, Acheron's new proposal does not even bother with the window dressing of an "ombudsman," and instead proposes to have the "tag along" investors' interests owned and managed under the complete and unfettered control and discretion of Acheron.

The Trustee has consistently expressed to Acheron that in order for the Trustee to consider any sort of "tag along" proposal, it would have to, at a minimum: (1) be accompanied by robust disclosures of all of the risks to investors, both generally, and specifically with regard to Acheron, which has a financial incentive to acquire interests in policies, also being the entity that manages and controls the policies and the servicing thereof; (2) ensure that investors who do not choose to "tag along" receive the full value of their interest in the policy which could otherwise be sold and liquidated by the Trust; and (3) ensure compliance with all securities laws and regulations, an issue which appears to be particularly problematic since Acheron proposed to offer investors the opportunity to invest in a fractionalized interest in an insurance policy, for which the realization of profit is entirely dependent on the efforts of Acheron as its new owner, and Acheron's retained servicer, to manage and maintain that viaticated policy – i.e., precisely what was determined to be a "security" in the MBC receivership case. *S.E.C. v. Mutual Benefits Corp.*, 408 F.3d 737, 744-45 (11th Cir. 2005). Acheron's "Proposal" does not satisfy any of those concerns, and Acheron has made no effort to modify it to do so in response to the Trustee's comments.

Acheron “Subsidy” Proposal

Shortly after filing the “Proposal,” Acheron also filed a “Supplemental Response” [D.E. 2908] in which it proposed to pay a “Trust Subsidy” of \$198.95 per fraction for calendar year 2022, in exchange for which it demanded the Trustee agree to an “independent audit of the Trust’s expenses.” Aside from the fact that the Court has already repeatedly ruled that such an audit is not required by the Trust Agreement or applicable law, and not warranted by any of Acheron’s arguments, the proposed “subsidy” does nothing to solve the fact that Trust liquidation is required because the *Trust’s* operating resources will be depleted – largely as a result of professional expenses due to the litigious conduct of Acheron and Litai. The “subsidy” Acheron proposes to pay is paid to Litai on account of the servicer’s administrative fees – not to the Trust. The Trustee has already taken steps so that the administrative fee subsidy is now being paid entirely from Restitution Funds for the benefit of the Keep Policy Investors, not from the Overpayment Balance which also funds the Trust’s operations. Accordingly, Acheron’s proposed “subsidy” does not do anything to restore funds to the Trust for Trust operations.

Litai 100% Owned Servicing Proposal

Following the last status conference, Litai circulated a proposal to provide continued servicing for policies which are 100% owned by non-Acheron investors, and on Thursday, June 10, 2021, circulated a proposed Servicing Agreement to provide such services. On Monday, June 14, 2021, Trustee’s counsel provided extensive comments on the proposed Servicing Agreement. Litai filed a “Notice of Filing” shortly before this Status Report was filed, and it is unclear from that filing whether Litai intends to address any of the Trustee’s comments.

Litai < 100% Owned Proposal

Also on Thursday, June 10, 2021, Litai circulated a draft “Proposed Alternative Plan for Investors That Want to Retain Their Existing Beneficial Interests in the Policies.” The “Plan” proposes for Litai itself to own and manage a “Special Purpose Vehicle” entity which will be the nominal owner of policies in which 100% of the investors decide to “stay invested” rather than have their policy sold, and Litai will continue to perform the servicing functions of tracking insureds, sending premium and administrative fee notices, processing premium payments, monitoring the insureds, and processing death benefit claims. Litai also will be responsible for determining when investors have “forfeited” their interests due to failure to pay premium and administrative fees, and for offering the “Lapsed Fractions” for sale to the other investors in the policy, with Acheron serving as a “placeholder of last resort” to acquire “Lapsed Fractions” for 5% of face value for HIV policies and 7.5% for non-HIV policies. (Acheron has since advised it is not willing to pay 5% for HIV policies). Litai indicates that its proposal will provide for Litai to do so “for the next 10 years,” after which “the investors owning any remaining policies would be allowed to decide how they wish to proceed.” It is far from clear what that means.

The Trustee only received this proposal a few days ago and still is analyzing it. However, the most obvious preliminary concern is that there is absolutely no oversight whatsoever of the servicer. The “Plan” proposes for an “annual review of procedures of the SPV” to be performed “along the same lines as that what [sic] was performed in the past” – but there is no review of the *servicer’s* procedures, and in any event, the entity directing the review is under the same control and management as the entity being reviewed. The concern with the lack of accountability and review is heightened because the “Plan” provides no detail or explanation as to what the relationship, if any, will be between the investors, the servicer, and the SPV, what rights and

abilities the investors will have to review, monitor and direct the servicer's performance of its duties, and what rights and remedies they will have for a breach of the servicer's obligations. Far from having any fiduciary responsibilities to the investors, neither the servicer nor the SPV would appear to even have any contractual responsibilities to the Keep Policy Investors.

These issues are exacerbated by the concern with the unusually close relationship between Litai and Acheron, the investment manager for funds which have already acquired nearly two thirds of the interests in the Trust's policies. Litai has persistently refused to provide complete disclosures requested by the Trustee of all of the relationships between Litai, Acheron and their respective principals, but those efforts to obtain complete disclosure have revealed that Litai's principal, Jan-Eric Samuel, holds substantial investments in the Acheron funds which, based on the limited information he has agreed to disclose, would be worth millions of dollars. The "Plan" provides absolutely no safeguards against the inherent conflict of interest of having a servicer responsible for management of the policies on behalf of the Keep Policy Investors who is also an investor in the funds which acquire interests in those policies when the Keep Policy Investors forfeit their interests.

No other prospective purchaser with whom the Trustee has communicated has indicated any interest in acquiring the policies subject to "tag along" rights of existing investors, and the Trustee's industry advisors do not anticipate that there will be any such interest.

With regard to alternatives other courts have provided, the Trustee is not aware of any meaningfully "analogous circumstances." The disposition process and the creation of the Trust during the receivership were themselves relatively novel. Typically in a receivership, either the assets are returned to the owners upon the termination of the receivership, or alternatively the assets of the receivership entities are liquidated and distributed pursuant to a court-approved plan.

Accordingly, the Trustee has not found any useful precedent to address the present situation, where the Trust, after having served its purposes for over a decade, will run out of resources and be required to liquidate. The mechanism for such liquidation is expressly addressed in the Trust Agreement itself, in particular in Section 3.1(b)(xvii), which contemplates that in such circumstances, the Trustee is empowered “to 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.”

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on June 15, 2021 on counsel for all the parties by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ David L. Rosendorf
David L. Rosendorf

Mutual Benefits Keep Policy Trust

As of June 1, 2021 ^[1]

3a The amount of Overpayment Balance account 1,922,775

3b Amount of funds currently available to pay expenses

Cash / Money Market Accounts	1,420,745
Fixed Income investments	502,030
Total Overpayment Funds	<u>1,922,775</u>

3c The most recent total amount of monthly operating expenses ^[2] 260,493

3d Estimated average run-rate of monthly Trust operating expenses

	<u>Jun - Aug 2021</u>	<u>Sep - Dec 2021</u>
Operating Expenses	67,400	67,400
Enhanced Oversight	29,000	29,000
Acheron Subsidy ^[3]	13,500	-
Subtotal	<u>109,900</u>	<u>96,400</u>
Litigation ^[4]	97,500	48,750
Estimated Average Monthly Run-Rate	<u>207,400</u>	<u>145,150</u>

3e Total amount of money owed to Trustee and other professionals ^[5] 216,814

3f Estimated minimum number of policy interests needed to rationalize costs for those interests 150 - 300

The current number of policies and policy interests the Trust is servicing:			
Current # of policies the Trust is servicing ^[6]			1,065
Total Face Value	MBC Victims	Acheron ^[6]	Total
HIV	52,131,891	62,539,623	114,671,514
Non-HIV	28,187,699	69,447,340	97,635,039
Total	<u>80,319,590</u>	<u>131,986,963</u>	<u>212,306,553</u>
%	37.83%	62.17%	
Current number of policy interests the Trust is servicing			
	MBC Victims	Acheron ^{[7][8]}	Total
	2,055	815	2,870

Mutual Benefits Keep Policy Trust

As of June 1, 2021 ^[1]

Notes:

- 1) Provided pursuant to the Court's Report and Recommendation dated July 27, 2020 (ECF #2723) affirmed and adopted by the Court November 16, 2020 (ECF #2825).
- 2) May expenses were greater than average due to approximate \$75,000 Trustee E&O insurance premium paid.
- 3) The investor subsidy was discontinued effective March 15, 2021. The estimated average monthly subsidy reflected above is solely for Acheron-owned policy interests invoiced prior to March 15, 2021.
- 4) Estimated litigation expenditures for June through August 2021 have been revised from prior reports consistent recent litigation expenditures incurred by the Trust, as well as continuing and new litigation matters being pursued against the Trustee by Acheron, adjusted for voluntary 20% holdback of fees by attorneys. Estimated litigation expenditures for September - December 2021 are lower than prior months in anticipation that some of the current matters may be resolved.
- 5) Adjusted for voluntary 20% holdback of fees for attorneys, accountants and Trustee.
- 6) Includes 80 policies with a combined \$8 million face value 100%-owned by Acheron. Policy transfer documents required by the carriers to effect the ownership change from the Trust to Acheron Portfolio Trust continue to be processed by the servicer.
- 7) Includes the 80 policies 100%-owned by Acheron. Without those policies, the Acheron column would reflect approximately 61% face value.
- 8) Some policy interests owned by former Acheron entities Avernus Portfolio Trust, Lorenzo Tonti 2006 Trust and Styx Portfolio Trust have not yet been retitled as and merged with Acheron Portfolio Trust by the Servicer. The Servicer has advised that the retitling/merger will occur as applicable invoices are prepared.