

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

CASE NO. 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE  
COMMISSIONS,

Plaintiff,

v.

MUTUAL BENEFITS CORP., *et al*,

Defendants.

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**TRUSTEE’S MOTION TO AUTHORIZE THE  
INITIATION OF TRUST WIND DOWN AND TERMINATION**

Barry Mukamal, as Trustee (“Trustee”) of the Mutual Benefits Keep Policy Trust (the “Trust”), files this motion to authorize an initiation of a process leading to the orderly wind down and eventual termination of the Trust in a manner that will benefit the victims of the Mutual Benefits Fraud (“Victims”) that have retained their viaticated policy interests in the Trust. In support, the Trustee states:

**Facts**

1. This case originates out of a massive fraud by which more than 30,000 investors were induced into investing in viatical insurance policies owned by Mutual Benefits Corporation (“MBC”). In May 2004, the Securities and Exchange Commission commenced an action against MBC, and Roberto Martinez was appointed as Receiver (“Receiver”). During the administration of the receivership, the Court gave investors the choice of maintaining their interests in the MBC

policies and paying their share of the premiums and administrative fees associated with such interests and retaining their investment.

2. In September 2009, the Receiver, as part of the wind-down of the receivership, created the Trust to serve as a vehicle to continue to administer the “Keep Policies” for the benefit of the victims of the fraud whom had elected to retain, rather than sell, their interests in the MBC policies, for the purpose of receiving, maintaining, and administering 2,403 life insurance policies from the Receivership that the investors had elected to retain. The Trust Agreement that created the Trust identifies the beneficiaries of the Trust as the “Keep Policy Investors,” i.e., “persons who have invested in an entire interest or a fractional interest in a Keep Policy owned of record by the Receivership Entities, and whose interest in such Keep Policy has not been forfeited as of the Closing Date.” The purpose of the Trust is to hold and administer the Keep Policies for the benefit of the Keep Policy Investors, and to distribute the pro rata share of the death benefits to the investors in those policies when they mature (i.e., when the insured dies).

3. The Trust Agreement provides that the purpose of the Trust is to “to take custody of the Trust Assets and maintain and administer the Trust Assets for the benefit of the Keep Policy Investors, consistent with the terms and procedures set forth in this Trust Agreement.” Trust Agreement at §2.2. A “Keep Policy Investor” is defined as “Persons who have invested in an entire interest or a fractional interest in a Keep Policy owned of record by the Receivership Entities, and whose interest in such Keep Policy has not been forfeited as of the Closing Date.” *Id.* at § 1.1.

4. At the time of its formation in 2009, it was anticipated that the Trust would only last the few years necessary for the policies to mature as the insureds passed away. The Trust has now been in existence for over 10 years, due to advances in medical science and HIV treatment, many insureds have lived longer resulting in the Trust continuing longer than expected.

5. Due to the nature of the Trust, it cannot have an indefinite existence because all life insurance policies will necessarily mature. Recognizing that the uncontrolled deterioration of the Trust could have negative consequences, the Trustee has determined that an orderly and structured wind down of the Trust would best protect the interests of the Victims. This conclusion is the result of months of careful consideration, the idea of which has been shared with Acheron for over a year.

6. Currently, the Trust has approximately 1,350 policies with a combined \$282 million in face value, which are held by approximately 2,200 investors via 4,900 fractional interests. The Trustee anticipates that the maturation of the policies will accelerate and lead to a point that the cost of administering and servicing the Trust is no longer economically desirable for the remaining Victims and Keep Policy Investors.

7. There is a certain cost associated with administering and servicing the Trust, its policies, and assets. Costs include everything from trust tax returns, to book keeping, to website services, to third party policy servicing, to professional fees and costs incurred in connection with supervising and monitoring the performance of the servicer and managing the operations of the Trust, and lately, litigation expenses as a result of a lawsuit filed by a purchaser of policy interests from the Trust. Some of these costs will remain relatively constant as the number policies and investors declines. At some point, the number of policies – over which these costs are spread – will decline and the costs become prohibitive to the Victims that continue to pay premiums and fees.

8. Neither the Trustee nor the Trust have a profit motive, so an operating deficit is not the motive for raising Trust termination with the Court. Instead, the Trustee's fiduciary duty requires him to advise the Court, and seek its approval, to take steps now to ensure that the Victims

can continue to maximize the benefit of their investment in the viaticated life insurance policies. Currently, the Victims hold the minority of policy face value in the Trust, with post-fraud, institutional investors holding the majority of policy face value. In the Trustee's view, this allocation of policy interest ownership heightens his fiduciary interests as he seeks to protect the original Victims against the "majority rule" mentality of these commercial investors.

### **Authority for Trust Termination**

9. The Trust Agreement that created the Trust contemplates its termination:

This Trust Agreement shall terminate upon the final disposition of all Keep Policies, whether by maturity, sale, surrender, or lapse, and the distribution of *all other Trust Assets* in accordance with the terms of the Servicing Agreement.

Trust Agreement at Section 8. (emphasis added).

10. The Trust Agreement further authorizes the Trustee to terminate the Trust on certain conditions:

[T]he Trustee shall have the following powers and duties: ... In the event that the Servicing Agreement is terminated or expires and the continued servicing of the Keep Policies becomes unfeasible, 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.

*Id.* at Section 3.1(b)(xvii).

11. While the Court-approved Trust Agreement unequivocally empowers the Trustee to terminate the Trust, the Trustee nonetheless seeks the Court's approval and confirmation of authority to initiate the process that could serve as the basis for wind-down and eventual Trust Termination.

**Request to Initiate Process for Trust Termination**

12. The Trustee does not request that this Court now authorize the termination of the Trust or the specific date of terminating the Trust. As set forth below, the orderly wind-down of the Trust will require certain steps that will maximize the value to the Victims and protect their interests. Some of those steps require a long period to implement, so it is important to organize them well in advance of any contemplated termination. At this point, the Trustee only asks the Court to confirm the Trustee's authority and approve the implementation of steps necessary to have in place for Trust termination, subject to the Court's oversight.

13. The Trustee cannot predict the specific date upon which the Trust should be terminated, but he anticipates that the wind-down and eventual termination of the Trust is anticipated to take from 18 to 36 months. Once the elements are in place, the date for termination will be driven by the point at which the cost of servicing the remaining policies becomes significantly more expensive than the current servicing costs per policy.<sup>1</sup>

14. While motions previously filed by the Trust and approved by the Court,<sup>2</sup> as well as one of the Trustee's motions currently pending before the Court,<sup>3</sup> were designed to address only current Trust needs, those motions nonetheless lay some of the groundwork necessary to effect an orderly wind-down of the Trust.

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<sup>1</sup> All proposals provided by servicers bidding for servicing rights after the current servicing term expires reflect that servicing fees will increase on a per policy basis. This increase will not be passed on to investors because the Trustee will subsidize the price increase from the Trust Assets, which, in turn, is designed to avoid an artificial acceleration of investor defaults caused by an increase in their servicing fees.

<sup>2</sup> Trustee's Motion to Authorize Retention of Broker and to Obtain Updated Life Expectancy Reports (ECF #2539) and Court approval (ECF #2576) and the Trustee's Motion for Clarification (ECF #2540) and Court approval (ECF #2577).

<sup>3</sup> Trustee's Motion for Authority to Selectively Preserve or Lapse Unpaid Keep Policies (ECF # 2579).

15. The first step to prepare for a wind-down is to obtain updated life expectancy reports for the insureds.<sup>4</sup> Life expectancy reports are an industry standard report utilized by purchasers of life insurance policies as a significant data point in arriving at their estimate of market value, and hence the offered purchase price. As life expectancy reports are received by the Trustee, which information will be provided to the fractional owners of those policies – both Victims and institutional investors. At that point, the second stage can be performed: the actuarial evaluation of the portfolio of policies. The remaining stages relate to the marketing and sale of policies.

16. The proposed mechanics of Trust termination have not been determined at this stage; however, the Trustee does anticipate that the actual termination process will have some characteristics. The most likely scenario for termination involves the sale of all policies (rather than fractional policy interests) remaining in the Trust at the time of termination. This may include a provision that allows Victims and institutional investors (collectively, the “Policy Investors”) to elect to retain their interests in the policy, if possible. This may take the form of “tag-along” rights that permit a purchaser to acquire the policy while permitting the Policy Investors to continue to hold their beneficial interests in the insurance policy proceeds.

17. The Trustee owns and holds title to the policies and the Policy Investors own beneficial ownership in the fractional interests of the policy. Therefore, the sale of the entire policy is consistent with the Trustee transferring the policies out of the Trust as a precursor to Trust termination. Unless the policy is sold, the Trust will retain ownership of some aspect of the policy that will make it impossible to wind-down and terminate the Trust. As contemplated since its

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<sup>4</sup> For other reasons, the collection of life expectancy reports has already commenced for selected policies in the Trust’s portfolio.

inception, the Trust cannot terminate until all policies and Trust Assets are removed from the Trust. Trust Agreement at Section 8, *supra*.

18. The Trustee also believes that the sale of the policies as a whole will create the highest prices for the Policy Investors that elect to sell. The Trust has historically sold fractional interests to avoid a policy cancellation occasioned by a defaulting owner of a fractional interest. The Trust will continue to do so until the Trust termination in the best interest of the Trust, in addition to other alternatives to the extent authorized by the Court. However, the Trustee's market research, as well as advice from his industry consultants, indicates that fractional interest sales are not anticipated to achieve the best and highest price. The market is very limited for the sale of the fractional interests on an individual basis, and consequently, the prices are deflated and the marketing costs are disproportionate to the value realized by a sale.

19. Closely related, the Trustee has also concluded the policies must be exposed to the open market in order to realize the best and highest possible price for Policy Investors. Unless the policy prices are set by the market, it will be very difficult for the Trustee, the Court, and the Victims to evaluate the proposed purchase price.

20. Consistent with these considerations, the Trustee, in consultation with his industry advisors, will have to examine and determine the most effective manner in which to package, market, and solicit market-based offers.

21. The Trustee will also have to evaluate the date for Trust termination, including factors that might accelerate the need to terminate the Trust, such as servicing costs.

22. Ultimately, the Trustee will have to recommend, and seek approval from, the Court as to the form of the sale of policies and, very importantly, whether Policy Investors can retain

their interests and how those interests could be protected upon sale as well as the way in which the sale proceeds are allocated among the individual investors selling their interests.

### **Proposed Timeline**

23. The Trustee proposes the following timeline for effecting the steps sought in this motion:

- a. Within a short period of time, contemplated to be 90 to 120 days of an order approving the motion, notify Victims and other investors of:
  - i. the intent to wind down and terminate the Trust
  - ii. their right to offer their policy interests for sale to any interim buyer (as set forth below at ¶ 26)
- b. Continue obtaining life expectancy reports for policies selected by the Trustee.<sup>5</sup> It is anticipated to take up to 240 days to complete this process.
- c. Once sufficient life expectancy reports have been received, engage an actuarial firm with expertise in the life settlement industry to perform a portfolio valuation to provide the Trustee with a baseline pricing expectation.<sup>6</sup> The valuation is anticipated to take up to an additional 60 days.<sup>7</sup>
- d. Once the portfolio valuation has been completed, the Trustee can commence soliciting offers for the policies from interested purchasers. The portfolio marketing period is anticipated to take up to 60 days and will be followed by a sale and wind-down of Trust operations, which is anticipated to take up to 90 days.
- e. The Trustee will consider scenarios in which the policies may be packaged for sale depending upon the underlying characteristics of the policies. For example,

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<sup>5</sup> Pursuant to advice from his industry consultants, the Trustee has selected a grouping of policies in the portfolio for which life expectancy reports will be obtained. As a practical matter, the cost of obtaining such reports does not outweigh the benefit to be derived for *all* of the policies in the portfolio. For example, the Trustee does not plan to obtain life expectancy reports for most policies for HIV+ insureds with policy face values of less than \$250,000.

<sup>6</sup> The baseline pricing expectation is advisable to ensure the sale pricing and process is fair to the Victims.

<sup>7</sup> During this time, the Trust will confirm that carriers have processed ownership changes and distribute funds to investors. Once these tasks and other ministerial functions (e.g. – closing bank accounts, final accounting, final tax return) relating to winding up the Trust are completed, the Trust will be terminated.



policies on insureds at least 90 years old are more valuable than policies on insureds that are 60 years old. The Trust's portfolio generally consists of term, whole life and universal life policies on insureds ranging in age from 42 to 105. The portfolio is further stratified into various classifications including: policy face value, HIV+ insureds and non-HIV positive insureds, gender, age, and health status, to name the most salient categories.

24. This timeline is subject to change, primarily based on both the timing of obtaining life expectancy reports as well as feedback from Victims and other investors regarding their interest in terminating the policy interests at the time the Trust portfolio is sold or if they want to retain their fractional interests in the policy after policy sale beyond the Trust termination. If such "tag-along" rights are offered, the number of Policy Investors wishing to retain their fractional interests will influence the consideration of a need for a post-termination oversight function to continue to protect those investors that elect to tag-along.

#### Costs

25. The Trustee anticipates that the cost associated with wind-down and termination will be borne by the Trust, with zero cost to the Victims and other investors. Under the the Trustee's management, the Trust has accumulated assets that should be sufficient to fund the expense associated with steps set forth in this Motion. In order to ensure that the Trust can absorb this cost, the funds needed to implement the processes proposed in the Trustee's Motion to Preserve Policies [ECF# 2579], the potential expense of transitioning to a new servicer if a new servicer is necessary, and defending against litigation brought by a non-Victim investor, the Trustee will allocate the Trust funds necessary to absorb such costs as well as provide a reserve.

Such a reserve would, in part, be used to ensure that policies do not lapse due to defaulting interests that are not purchased by a third-party.<sup>8</sup>

### **Interim Sales for Victims**

26. It is anticipated that some Victims may be interested in selling their policy interests before Trust termination. Currently, defaulted investors have their interests sold by the Trust with the proceeds retained by the Trust. In order to assist such Victims in the period between the present and the Trust termination, the Trustee seeks to provide an alternative. The Trustee seeks approval to allow each Victim to authorize the sale of his or her policy interest before defaulting and realize the net proceeds from the sale. In such a scenario, applicable policy interest sales will be conducted via the Trust's retained broker/dealer.<sup>9</sup> The Trustee believes that it is in the best interest of the Victims, all of whom who have held their policy interests for at least 16 years, to have the option to sell their respective policy interests and realize the proceeds of such sale.

27. This proposal mirrors the original choice provided to the Victims during the Receivership: keep a policy interest or sell it. It also provides the additional choice of selling an interest, instead of just paying premium or forfeiting the interest. While Victims selling fractional interests may not realize the same net proceeds than by waiting for Trust termination,<sup>10</sup> the Trustee nevertheless believes that investors should have more choices.<sup>11</sup>

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<sup>8</sup> Acheron has been the historical purchaser of policy interests but has become increasingly belligerent in its course of conduct with the Trust.

<sup>9</sup> Acheron will be provided an opportunity to participate in any such sales in accordance with the Trustee's March 19, 2015 Agreement with Acheron.

<sup>10</sup> As previously discussed above relative to exposing the policies to the open market.

<sup>11</sup> The Trustee recognizes that offering Victims the opportunity to sell their fractional interests may alter the composition of the Trust and accelerate the point at which a termination is desirable. Nonetheless, the Trustee believes it is in the best interest of the Victims to provide such an option.

**Conclusion**

28. Although the Court-approved Trust Agreement provides the Trustee with the authority to wind-down and terminate the Trust, he nonetheless requests that this Court authorize and confirm such authority to initiate the process to facilitate the wind down and eventual termination of the Trust.

BASED UPON THE FOREGOING, Barry Mukamal, solely in his capacity as Trustee of the Mutual Benefits Keep Policy Trust, moves this Court for entry of an Order authorizing the initiation of a process leading to the orderly wind-down and eventual termination of the Trust as set forth in this Motion using Trust assets, including permitting investors to participate in brokered sales of their policy interests, and such other relief that this Court deems just and equitable.

**GENOVESE JOBLOVE & BATTISTA, P.A.**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on February 24, 2020 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/ John Arrastia  
John Arrastia