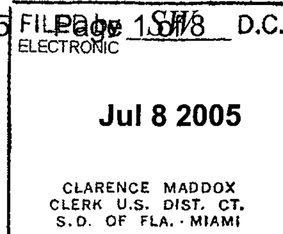
EXHIBIT C



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-60906-CIV-MORENO/GARBER

ROBERTO MARTINEZ, as court-appointed
Receiver for MUTUAL BENEFITS CORPORATION,

Plaintiff,

vs.

DAVE TRAINA, *et al.*,

Defendants.
_______________________________________/

RECEIVER'S MOTION FOR RECONSIDERATION OF ORDER OF DIMISSAL

Roberto Martínez, Esq., as Court-appointed Receiver of Mutual Benefits Corporation ("MBC"), respectfully requests, pursuant to Fed.R.Civ.P. 59(e), that the Court reconsider its Final Order of Dismissal [D.E. 34] entered in this action.

BACKGROUND

On June 2, 2005, the Receiver filed the Complaint in this action seeking disgorgement from approximately 23 former MBC sales agents who received commissions from MBC in exchange for the sale of unregistered securities. The named MBC sales agents received over $45 million in such commissions. The Complaint asserted a single cause of action for unjust enrichment against each of the MBC sales agents. In addition, because of the large number of sales agents who received such commissions, and because there is a common legal issue for all of them, the Receiver sought certification of a defendant class under Fed.R.Civ.P. 23, and a declaration that the class of MBC sales agents must also return the commissions they

received from MBC. No Defendants have been served with the Complaint.

On June 22, 2005, this Court *sua sponte* entered a Final Order of Dismissal of this action. The Court stated that "[a]lthough the Receiver's attempt to protect the investors is commendable, he may only sue on behalf of the companies and not the third party investors." The Court held that "the complaint fails to allege an injury in fact to the Receiver or any of the companies on whose behalf the Receiver is acting," and that "[t]he Receiver also lacks statutory standing to sue under the federal security laws." The Receiver respectfully requests that the Court reconsider this ruling for the following reasons.

DISCUSSION

THE RECEIVER HAS STANDING TO SUE MBC'S FORMER SALES AGENTS

The Complaint filed by the Receiver is intended to redress the injury suffered by the Receivership Estate as a result of the depletion of MBC through the payment of millions of dollars in commissions to MBC's sales agents. This injury is distinct from the injuries suffered by the investors as a result of the sales agents' conduct. The Receiver brought this action as part of the coordinated litigation efforts with the Investors Class Action and intended to continue to coordinate with class counsel to secure global settlements and avoid double recoveries or inconsistent remedies. The Receiver respectfully requests that this Court allow the Receiver's action to proceed, either in the form that it was filed or in an Amended Complaint tailored to make the distinctions between the Receiver's claims and the investors' claims more explicit.

First, the Receivership Estate has suffered an injury separate and distinct from any

injury suffered by the investors. The harm to the Receivership Estate – and the measure of its damages – is different from the harm to the investors. The Receivership Estate paid the MBC sales agents millions of dollars in commissions that they should not have been paid because the services they were rendering on behalf of MBC were illegal (and were furthering the Ponzi-type scheme carried out by the former principals of MBC). The payment of these commissions depleted MBC (and thus the Receivership Estate), left less money available to satisfy the claims of investors and creditors, and increased MBC's liabilities. The damages sought by the Receiver are limited to these commissions actually paid out of MBC's accounts to the sales agents.[1]

The investors, on the other hand, suffered a different injury. The investors gave the MBC sales agents their money as consideration for unregistered securities. The damages to the investors are the consideration they parted with plus interest. The Investors Class Action (*Scheck Investments L.P., et al. v. Viatical Benefactors, LLC, et al.*, Case No. 04-21160-Civ-Moreno) has named approximately 27 MBC sales agents in the Second Amended Class Action Complaint and has asserted a single cause of action against each of them for the sale of unregistered securities in violation of the Florida Securities and Investor Protection Act, Fla. Stat. § 517.07 and § 517.211. The statutory remedy for this violation is rescission -- that

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[1] The damages to the Receivership Estate are particularly glaring in the case of the commissions paid out by MBC on funds that remained in the pre-closing purchaser escrow account – funds that are in the process of being returned to the investors. Because MBC generally paid commissions to the sales agents at the time when investor money was received, MBC paid out millions of dollars in commissions on this money even though it was never placed on an insurance policy. The sales agents have those commissions in their pockets at this point in time, even though the investor money is being returned.

is, a return of their consideration plus interest – and reasonable attorney's fees. *See* Fla. Stat. § 517.211(1). The injuries to the Receivership Estate and to the investors are thus different: both have out-of-pocket damages as a result of the sales agents, but in different amounts and for different reasons.[2]

Federal courts have affirmed the distinction between the types of injuries in closely analogous cases. For example, in *In re Alpha Telcom*, 2004 WL 3142555, at *8 (D. Or. Aug. 18, 2004), the Receiver in an SEC action moved for disgorgement of approximately $21 million in commissions that the company's former sales agents had received for the sale of unregistered securities on a theory of unjust enrichment. (The Court did not require the matter to be brought as an independent action, but allowed it to proceed as a motion as part of the Receivership proceeding.) The SEC joined in the motion. The court held as follows:

> The services provided by the agents were, in hindsight, illegal. They could not lawfully sell unregistered securities. It is a strict liability offense, regardless of whether they knew it was wrong. . . . The law cannot permit them to benefit from the sale of unregistered securities. Consequently, the agents must disgorge the amount by which they were unjustly enriched.

Id. at *4.

Further, in response to the agents' claim that they should not be subject to disgorgement when they were also being sued by the investors, the court held:

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[2] Take, for example, the case of an hypothetical sales agent who solicited a $100,000 investment from an investor and received a $6,000 commission from MBC as a result. The investor may claim as damages the $100,000 that he or she parted with (plus interest and reasonable attorney's fees), while the Receiver may claim as damages the $6,000 that MBC parted with.

> The injuries sustained by the former clients are entirely distinct from the commissions that the agent received. The agent can be liable for both. It is analogous to a malpractice claim against a surgeon. He may be required to refund the amount paid for the surgery, and also be liable for any injury sustained by the patient.

2004 WL 3142555, at *8. *See also CFTC v. Chilcott Portfolio Mgt., Inc.*, 713 F.2d 1477, 1481-82 (10th Cir. 1983) (holding that CFTC receiver for commodities pool had properly brought action against brokers where "the Receiver's action, although naming some of the same defendants [as investors' action], is based on the dissipation of the pool's assets rather than on any culpable conduct in soliciting the investments.").

In light of the distinct injury suffered by the Receivership Estate, the Receiver has standing to bring an action on the Receivership Estate's behalf. *See Obermaier v. Arnett*, 2002 WL 31654535, at *3 (M.D. Fla. 2002) ("An equity receiver, like a bankruptcy trustee, has standing for all claims that would belong to the entity in receivership, and which would thus benefit its creditors and investors, but no standing to represent the creditors and investors in their individual claims." (citation omitted)). As one federal court summarized the distinction between the claims held by investors and the claims held by a receiver:

> It is undoubtedly true that persons who were directly victimized by the alleged sale of unregistered securities under false pretenses, the alleged fraud, etc. have claims against the parties directly involved . . . . But that does not mean that the plaintiff, as Receiver for BFS, should be precluded from asserting that the defendants' wrongful conduct has rendered BFS liable to the defrauded investors, thus increasing the liabilities of BFS. So long as double recoveries are avoided, I see no reason why the Receiver should be precluded from proceeding against wrongdoers who damaged BFS by increasing its liabilities, merely because, eventually, any recovery by the Receiver would inure to the benefit of the defrauded investors.

Marion v. TDI, Inc., 2004 WL 1175740, at *3 (E.D. Pa. 2004).

Finally, the Court also noted in the Order of Dismissal that it "is concerned with the possibility that, if also sued by the investors, the sales agents might be forced to pay double damages . . . ." The Receiver and class counsel for the Investor Class Action have agreed to work together to jointly settle any actions against MBC sales agents and provide mutual releases. As a practical matter, whether sued by the Receiver or in the Investor Class Action, the MBC sales agents will likely demand releases from both before settling any action. As the Eleventh Circuit has noted in a case where defendants challenged a bankruptcy trustee's standing to bring claims: "Where, as here, the trustee is litigating in concert with investors, and the trustee may be able to assert injuries not duplicative of those suffered by the investor plaintiffs, we find the concern that the trustee is somehow displacing the rights of the investors to be misplaced." *O'Halloran v. First Union Nat'l Bank of Florida*, 350 F.3d 1197, 1203 (11th Cir. 2003). Further, this Court can police this coordination, as any settlement proposed by the Receiver must be submitted to the Court for approval, and any settlement entered into by the Investor Class Action must be submitted to the Court for approval.

WHEREFORE, the Receiver respectfully requests that the Court vacate the previously entered Final Order of Dismissal in this action, and allow the Receiver either to proceed on the Complaint in this action or to file an Amended Complaint making explicit the distinctions between the Receiver's claims and those presented in the Investors Class Action or such other revisions as the Court may require.

Respectfully submitted,

COLSON HICKS EIDSON
255 Aragon Avenue
Coral Gables, FL 33134-5008
Telephone: (305) 476-7400
Facsimile: (305) 476-7444
E-mail: curt@colson.com

By: s/ Curtis Miner
CURTIS MINER
Fla. Bar No.: 885681

CERTIFICATE OF SERVICE

No Defendants have been served with the Complaint or otherwise appeared in this action. Accordingly, the undersigned has only caused this motion to be served on the following by electronic mail on this 7th day of July 2005:

Alise M. Johnson, Esq.
Securities & Exchange Commission
801 Brickell Avenue, Suite 1800
Miami, FL 33131

Counsel for Securities & Exchange Commission

Michael A. Hanzman, Esq.
Kevin Love, Esq.
Hanzman & Criden
Commercebank Center
220 Alhambra Circle, Suite 400
Coral Gables, FL 33134

Victor M. Diaz, Jr., Esq.
Podhurst Orseck Josefsberg et al.
City National Bank Building
25 West Flagler St., Suite 800
Miami, FL 33130

Lead Counsel for Plaintiffs in Scheck Investments LP, et al.

s/ Curtis Miner
Curtis Miner, Esq.