

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

FILED IN THE DISTRICT OF
OKLAHOMA COUNTY, OKLAHOMA
JUL 16 2010
PATRICIA PRESLEY, COURT CLERK
by _____ DEPUTY

Oklahoma Department of Securities,)
Ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
vs.)
)
Accelerated Benefits Corporation, a Florida)
Corporation, et al.,)
)
Defendants.)

Case No. CJ-99-2500-66
Judge Daniel L. Owens

**MOTION FOR AUTHORIZATION TO OFFER TO PURCHASE ABC INVESTORS'
INTEREST IN CONSERVATORSHIP ASSETS AND BRIEF IN SUPPORT**

Acheron Portfolio Trust (“Acheron”), by and through its attorneys Riggs, Abney, Neal, Turpen, Orbison & Lewis and Stroock & Stroock & Lavan LLP, respectfully submits this motion in support of Acheron’s offer to purchase the interest of the investors (the “ABC Investors”) in the proceeds of the Policies which are the subject of this Conservatorship proceeding. In support thereof, Acheron will demonstrate to the Court as follows:

PRELIMINARY STATEMENT

Earlier this year, Acheron moved this Court for an Order seeking approval of an offer to purchase the interest of ABC Investors in the proceeds of the Policies in the Portfolio of Accelerated Benefits Corporation (“ABC”), which are the subject of this Conservatorship Proceeding. Acheron is already a party to an Option Purchase Agreement (the “Acheron OPA”), dated May 24, 2006, pursuant to which it purchased an option to purchase the Policies. Through that motion, Acheron sought to accelerate the Acheron OPA, which is presently being paid off through a share of the distributions from the proceeds of the Policies.

Acheron voluntarily withdrew that motion after appearing in Court, recommencing negotiations with both the Oklahoma Department of Securities (the “OSD”) and the Conservator,

and also being advised by this Court that any offer to purchase the ABC Investors' interest in the continuing proceeds was fair, reasonable, and would be in the best interests of the ABC Investors. While Acheron believed that its original offer was fair and reasonable, through further negotiation with the OSD and the Conservator, and mindful of the Court's directive, Acheron now comes forward with an even better offer for the ABC Investors, which includes additional upfront cash and a share of the 2010 maturities, up to \$1.8 million. Thus, Acheron's new offer now totals \$15.1 million (the "Acheron Offer"), and would provide the accepting ABC Investors a total return of approximately 43 cents for each dollar they invested originally.

The fairness and reasonableness of the Acheron Offer is confirmed both by the economics of the offer, as well as the Conservator's own calculation that an ABC Investor "should receive 50% of your original invested amount"—that is, 50 cents for each dollar they invested originally. Since the last Lewis & Ellis ("L&E") actuarial assessments conducted on the Policies concluded that the full 50% amount will be received in either 2024 or 2025, Acheron is offering the ABC Investors an excellent proposal. Assuming this Court grants Acheron's Motion, the ABC Investors have a relatively easy decision to make: Would an ABC Investor prefer to receive a total return *in 2010* of 43 cents on each dollar invested, or would they rather receive *in 2024 or 2025* a total return of just seven cents per dollar more—a difference of less than one half of one cent per year? In short, the reasonableness and fairness of Acheron's Offer is patent. Moreover, given the paltry maturities—and apparently, zero collections—in 2010, the economics of Acheron's Offer and benefit to the ABC Investors is unmistakable. Accordingly, Acheron respectfully requests that this Court grant this Motion, and allow Acheron to canvas the ABC Investors, and let them decide if they want to accept Acheron's Offer.

ADDITIONAL BACKGROUND AND FACTS

Acheron incorporates by reference the Background and Statement of Facts set forth in its Motion for an Order Approving the Sale of Conservatorship Assets and Brief in Support (the “First Motion”), dated January 14, 2010, and presumes familiarity with the facts set forth there.¹ While certain arguments in support of Acheron’s Offer here are similar to arguments made in the First Motion, Acheron has revised them to reflect the improved economics of Acheron’s Offer.

The March 12, 2010 Appearance

On March 12, 2010, when Acheron, the Conservator and the OSD last appeared before the Court, rather than conduct an oral argument on the First Motion, those parties utilized the Court’s jury room and recommenced negotiations regarding the potential increase of Acheron’s first Offer to purchase the ABC Investors’ interest in the distributions under the Policies. During that meeting, Acheron agreed to increase the lump-sum cash component of its offer from \$10.2 million to \$11.5 million. In addition, Acheron agreed that the ABC Investors could receive a share of the maturities for the year 2010. During the meeting, all present agreed that L&E had projected that the ABC Investors’ share of the maturities for 2010 would total approximately \$1.8 million. Furthermore, all agreed that a purchase by Acheron of the ABC Investors’ interest would free the funds in the Premium Reserve Account (“PRA”) for distribution to the ABC Investors. In light of the Conservator’s release of \$700,000.00 from the PRA to the ABC Investors to increase the distribution made in late December 2009, all agreed that approximately \$1.8 million remained in the PRA. Accordingly, at that meeting, the general parameters of

¹ For the Court’s reference, we have attached a copy of the First Motion, and its exhibits, as Exhibit A to the Supplemental Affidavit of Richard Mildren, dated July 15, 2010 (“Mildren Supp. Aff.”). Documents included in the First Mildren Affidavit, dated January 13, 2010, shall be referenced as “First Mildren Aff.” Unless otherwise defined here, all capitalized terms have the same meaning as in the First Motion.

Acheron's Offer were established. At the conclusion of the meeting, the Conservator stated that he wanted time to contemplate Acheron's Offer. All agreed that the Conservator would have two weeks to respond.

On March 26, 2010, however, rather than respond to the improved Acheron Offer, counsel for the Conservator completely ignored the discussions, and perfunctorily rejected the terms of Acheron's prior Offer—which all at the meeting understood was no longer the subject of discussion. (Mildren Supp. Aff., Exhibit B). Moreover, the Conservator made a completely unrealistic counteroffer based entirely on his conclusion that the “appropriate discount rate is five per cent. This conclusion is based on a number of factors, including the realistic rate of return that the Investors could obtain on the payments currently due to them under the OPA.” (Id.). Adding further insult to the process, the Conservator proposed a purchase price of \$23.5 million, reduced by the \$1.8 million in the PRA, leaving a purchase price of \$21.7 million. What made the Conservator's \$21.7 million offer to sell even more galling was the fact that during the March 12 meeting, the Conservator made an offer of to sell for \$14 million in cash, plus the funds in the PRA. Thus, not only did the Conservator ignore Acheron's improved offer, but he increased the potential sale price by over \$5 million.

The April 16, 2010 Meeting In Oklahoma City

On April 16, 2010, in the spirit of good faith, and undeterred by the Conservator's refusal to bargain fairly and openly, a representative of Acheron, accompanied by counsel, traveled to Oklahoma City again to attempt face-to-face negotiations with both the Conservator and the OSD. Once again, Acheron's effort to engage in a meaningful negotiation aimed at resolving the differences between the Conservator and Acheron were rebuffed. At the meeting, the Conservator confirmed that the purported 5% discount rate for valuation of the portfolio was based on the potential rate of return an ABC Investor could receive on the proceeds of the

distribution from the Policies. The discussions quickly reached an impasse, and counsel for Acheron suggested that it put together a sample notice to the ABC Investors detailing the present offer, and that Acheron submit a motion to the Court in support of the current \$15.1 million Offer. The proposed Notice, which has been reviewed by the OSD and counsel for the Conservator, is attached as Exhibit C to the Mildren Supp. Aff.

The Economics of Acheron's Offer

Acheron's Offer will create a fund (the "Fund") through which ABC Investors participate should they elect to sell their respective interest(s) in the Conservatorship Assets. The Fund will consist of the following:

- **Up to \$11,500,000.00:** Lump sum payment from Acheron for the Fund should all ABC Investors elect to participate.
- **\$ 1,800,000.00:** Release of the funds held by the Conservator in the Premium Reserve Account.
- **Upto \$ 1,800,000.00:** Share in Maturities for the year 2010.

Total Amount of Acheron Offer: Up to \$15,100,000.00
available for distribution to the ABC Investors.

Like its prior offer, Acheron's Offer is not subject to any financing contingencies—Acheron is ready to move. Importantly, should the ABC Investors' share of the 2010 Maturities be less than \$1.8 million, Acheron agrees to make up the difference, and to pay the ABC Investors the difference between the \$1.8 million figure, the actual amount of the ABC Investors' share in 2010 Maturities. Moreover, as set forth in the Notice, should 60% of the ABC Investors choose to accept Acheron's Offer, Acheron would request that the Offer be accepted by all ABC Investors.

Acheron believes its current Offer represents a fair and reasonable offer and is in the best interests of the ABC Investors—and indeed, it has pushed to the absolute economic limit of what

makes sense in terms of any type of pre-payment for the Portfolio. However, the Conservator continues to refuse to negotiate in good faith with Acheron, to the detriment of the ABC Investors—and increased the potential sale price by over \$5 million after the March 12 meeting. All of this is not in the best interests of the ABC Investors, who face a capped maximum return, yet remained tethered to the unpredictable and protracted maturities of the Policies. Accordingly, Acheron asks this Court to grant this Motion and allow it to canvass the ABC Investors' interest to sell, free themselves of their interests in the unpredictable viaticals, which all agree are not suitable investments for individuals.

ARGUMENT

POINT I

APPROVAL OF THE ACHERON OFFER IS IN THE BEST INTERESTS OF THE ABC INVESTORS

In the First Motion, Acheron demonstrated that its original offer represented a premium over comparable viatical portfolio sale transactions (Part A of the First Motion) and its valuation was based on an appropriate discount rate for a viatical portfolio (Part B of the First Motion). Given the significant improvement in Acheron's Offer, those arguments apply with even greater force now—the present Offer constitutes a 15.25% price/face amount of the portfolio, a 2.5x premium over the 6.52% price/face amount for other recent viatical portfolio sales. Moreover, as set forth in the August 2009 L&E Report, commissioned by the Conservator a \$15.1 million valuation reflects an approximate 10% discount rate for the cash flow expected from the Portfolio maturities, well within the bounds of reasonableness for a portfolio like this one (First Mildren Aff., Exhibit 13).

But, these are not even the most compelling reasons supporting Acheron's Offer. First, the potential recovery for the ABC Investors—a total of 43% of their originally invested amount

in 2010—is sufficiently close to their total projected recovery of 50% in 2024 or 2025 that it would be economically irrational for any ABC Investor to reject the Acheron Offer. Furthermore, the current 2010 maturities demonstrates why keeping the ABC Investors tied to an unpredictable—and possibly paltry—income stream is unfair, especially in the face of Acheron’s fair and reasonable offer to purchase their interests. The ABC Investors could receive a significant payment from Acheron, which they can then reinvest at a rate of return that even the Conservator recognizes is greater than any yearly return they have ever received under the present arrangement.

1. Comparison of the Acheron Offer with the Potential Recovery Under the Conservatorship

Pursuant to Section 6.4 of the Acheron OPA, the Conservatorship generally receives 60% of the maturities on the Policies until the Purchase Price is received, and Acheron is entitled to receive the 40% balance of the maturities, as well as be responsible for the premium and servicing costs for the Policies.² The Purchase Price under the Acheron OPA is \$38.05 million. The 60% maturities received by the Conservatorship, are distributed to the ABC Investors, and those amounts are credited toward the \$38.05 Million Purchase Price. After the Purchase Price is reached, title to the Policies transfers to Acheron, and the ABC Investors stop receiving any proceeds of the Policies. Thus, in other words, the amount the ABC Investors will receive pursuant to the Acheron OPA—and as has been the case since 2002—is capped, and will not improve over time.

On his website, the Conservator acknowledges this fact, stating that under the present arrangement, “you should receive approximately 50% of your original invested amount”—or a

² Pursuant to Section 6.2 of the Acheron OPA, there are slightly different terms for Large Policies, as defined in the agreement.

return of 50 cents on every dollar originally invested. (Mildren Supp. Aff., Exhibit D). Indeed, the ABC Investors' interest in the maturities is not an investment that can increase in value based on improving market conditions or based on a predictable interest rate, such as a certificate of deposit. On the contrary, they are entitled to a finite return, which the Conservator can reasonably predict, but which is not does not provide a consistent or prompt return. Thus by waiting over the long 15-year haul projected by L&E, the ABC Investors will not be better off. Accordingly, based on the current structure of the OPA, it actually behooves the Investors to want to accelerate their return as much as possible, and reinvest any distributions in a better performing, and more stable, investment and not continue to be tied to these viaticals.

The latest analysis from L&E, the actuarial firm reviewing the Portfolio, projects that the Investors will receive their full 50% return³ sometime in 2024 or 2025. That, of course, is a projection, and is subject to numerous variables, such as the maturity rate of the Policies, or the medical breakthroughs or advancements in the treatment or prevention of HIV/AIDS, which continue to improve each year, and which could further delay full repayment.

Giving the Conservator the benefit of the doubt, and that one should try to maximize the rate of return for the ABC Investors, it behooves them to accept Acheron's Offer—the reason is simple, acceptance of the Acheron Offer provides the ABC Investors the best chance to maximize their largest and fastest return and will allow them to surpass a 50% return years in advance of 2025.

³ In other words, according to L&E, the full Purchase Price under the Acheron OPA will be reached in 2024 or 2025.

To date, the average rate of return for the ABC Investors under the present arrangement has been approximately three percent per year—and this year, the ABC Investors are not anywhere close to such a return.⁴

The Present Situation

	Before Dec 2009 Payment	After Dec 2009 Payment
% Returned To Investors	26.23%	29.03%
Duration (Years Since Inception of the Conservatorship)	7.86	7.86
Average Annual Return (Arithmetic)	3.34%	3.7%

That said, assuming the five percent per year return that the Conservator expects ABC Investors to make, acceptance of the Acheron Offer (which alone represents a 14.1% rate of return for this year) allows the ABC Investors to invest far more this year than they would under the present arrangement, and allows them to make their 50% expected return in the year 2019, rather than in 2024 or 2025. (Mildren Supp. Aff., Exhibit F). A continued return of 5% will afford an ABC Investor to have almost 9% more in 2024 or 2025 than they would if the present arrangement continued.

Of course, given the Conservator’s representations to this Court that many of the ABC Investors are “elderly and retired,” providing the ABC Investors with the highest and fastest potential return should be the Conservator’s primary duty. (Mildren First Aff., Exhibit 7, at p. 2). In a prior action involving similar circumstances, the same Conservator, albeit, without a future stake in the portfolio of Policies, argued that in light of the fact that “approximately 2800” of the 3,000 Investors were 60 years old or older, that the Investors “ought to be able to recover at least a portion of their investments *as soon as possible*.” (Mildren First Aff., Exhibit 18, p. 12,

⁴ Indeed, in early July, 2010, Acheron became aware of an additional, but paltry distribution from the Conservator, which according to its calculations totals approximately \$400,000. (Mildren Supp. Aff., Exhibit E).

(emphasis added). The argument applies with equal, if not, greater force here. The ABC Investors deserve to get something sooner rather than later—and the Acheron Offer provides the Investors with a significant recovery—now.

Since the ABC Investors have only been making approximately 3.7% rate of return on their distributions under the present arrangement, and according to the Conservator can make 5% by investing the money they receive pursuant to the distributions, each ABC Investor should want to free themselves from the Policies, and want to get into a different and potentially better performing investment sooner rather than later. Here, where the Acheron Offer provides them a significant immediate payout, which can then be reinvested at a better rate, the choice is easy. As noted earlier, while the ABC Investors cannot improve their maximum recovery under the present arrangement, they can get an increased—and faster—return, by investing their distribution proceeds in some other investment. Also, where the difference between the Acheron Offer and the Conservator's plan is just seven cents per each dollar invested, but the ABC Investors will get the Acheron Offer 13 to 14 years sooner, the choice is clear.

2. The 2010 Maturities Have Lagged Compared to Prior Years

In addition to the pure economics of Acheron's Offer, there are additional reasons why acceptance of the Acheron Offer makes sense for the ABC Investors. First, acceptance of the Acheron Offer locks in an immediate return, which is materially better for them in the long run, than simply, waiting for the unpredictable, and protracted, maturities of the many Policies. Second, the Acheron Offer is not subject to any future contingencies or any form of financing. Unlike with the maturities under the policies, which must be processed first by the Servicer, and then through the insurance company, here, Acheron has allocated the funds for the Offer, and can pay out such funds as soon as an ABC Investor Acceptance Form is received and processed.

This is in stark contrast to the process required each time there is a maturity of a death benefit. After notification of the passing of one of viators, the servicer must obtain a death certificate, execute the proper forms with the insurance company, and then still face a dispute with insurance company over whether the death benefit should be paid. For example this year, according to the Servicer, one of the viator's passed away in March 2010, but, the insurance company has yet to pay the death benefit, and the matter has been "referred to in-house counsel due to delay in carrier processing." (Mildren Supp. Aff., Exhibit G) Indeed, based on the report prepared by the Servicer, to date, notwithstanding the fact that the Servicer becomes aware of the fact that policies mature, there could be months lag time in collecting any of the available proceeds.

Furthermore, based on the Report prepared by the Servicer, more than half of the Policies for which it has become aware of maturities during the year 2010 actually involved deaths that occurred in 1999 and 2006. Except for three policies, all of the other nine matured policies involved deaths over four years old. Accordingly, acceptance of the Acheron Offer will free the ABC Investors from having to wait until the Servicer discovers a maturity, which could conceivably take years—Exhibit G demonstrates that it can take over 11 years for the Servicer to become aware of a maturity.

Finally, as set forth above, six months into 2010, the Servicer has apparently only become aware of \$715,000.00 in total maturities. Based on the 60/40 split set forth in the Acheron OPA, the Investors will be entitled to share approximately \$429,000.00 in maturities – this means that the average Investor will receive approximately \$86.00 for the first six months of

2010.⁵ Although it is difficult to predict the number of maturities that might occur during the second half of 2010, the rate of maturities as compared to 2009 has lagged considerably, and the likelihood of reach the L&E projected share amount for the ABC Investors of \$1.8 million in maturities in 2010 is highly unlikely.

3. The Conservator's March 26 Letter Further Confirms the Fairness and Reasonableness of the Acheron Offer

In its March 26 Letter, the Conservator claims that the “appropriate discount rate is five per cent. This conclusion is based on a number of factors, including the realistic rate of return that the Investors could obtain on the payments currently due to them under the OPA.” (Mildren Supp. Aff., Exhibit B). During the meeting in April 2010, the Conservator added he believed that possibly three percent was accurate because that is the “realistic rate of return” for the proceeds that the ABC Investors would receive if they invested that money conservatively in today’s markets. Whether the Conservator believes that either three percent or five percent is the appropriate discount rate, neither is reasonable given the nature of the investment vehicle, and historic payment stream from the Portfolio.

First, with respect to the issue of the appropriate discount rate for valuation of the Portfolio, the Conservator’s analysis misses the point. To derive an appropriate discount rate for the Portfolio one should not analyze the “realistic rate of return” the ABC Investors “could obtain” if they invested their proceeds from the distributions received from the Conservator. To get the appropriate discount rate for the Portfolio, one needs to analyze the performance of the Portfolio itself, not the performance of any investments made by an ABC Investor of the proceeds received from the Portfolio—the rate of return for the investment of the proceeds is

⁵ Recently, notwithstanding the small amount of maturities for 2010, the Conservator has still expressed an intention to make a distribution to the Investors at the end of June 2010.

irrelevant to how the Portfolio should be valued. Based on the Conservator's analysis, any money that an ABC Investor had, or expected to receive, whether it was part of their cash savings, their investments, or lottery winnings, could then be invested in the same way, and would be subject to the same "discount rate." In short, the Conservator confuses the concepts of "discount rates" and "rates of return," and its discount rate analysis makes no sense.

Moreover, as set forth in the August 2009 L&E Report, commissioned by the Conservator and the Servicer, L&E opined that a 22% rate was "reasonable" for the valuation of the Portfolio:

The discount rates shown in Table I reflect a "risk component, liquidity issues, and the time value of money. The risk component is necessary since future cash flow is projected based on uncertain assumptions. Primary among these assumptions are: a) current health condition of viators, which is largely estimated on past records since current health records are not available and b) prognosis for trends in treating AIDS and HIV+ individuals.

Liquidity is also a major issue since relatively few buyers exist for viatical portfolios. As such, buyers use high discount rates for evaluating these portfolios. The most recent valuation performed for the entire portfolio utilized a discount rate of 22%, which we believe is reasonable for this type of portfolio valuation.

(First Mildren Aff., Exhibit 13). Significantly, L&E analyzed specific risk factors and attributes of the Portfolio to determine the appropriate discount rate—not the potential rate of return the ABC Investors could receive for their Distributions, as the Conservator contends in the March 26 Letter. Moreover, L&E concludes that a 22% discount rate is appropriate, thus, it is clear that the 10% discount rate reflected by Acheron's \$15.1 million Offer is clearly reasonable and far better than even L&E's conclusion concerning an appropriate discount rate.

4. Acheron Agrees to Canvass the ABC Investors as to their Interest in the Acheron Offer

As set forth in the First Motion, the ABC Investors last voiced their opinion as to the merits of a potential sale of Conservatorship assets eight years ago in connection with the

Infinity OPA. Acheron recognizes that any offer must be open to all ABC Investors, and must be described in fair and easy to understand terms. Accordingly, it has drafted the attached Notice to all ABC Investors, which sets forth the economic terms of the Acheron Offer in easily comprehensible language, and includes a simple Election Form. (Mildren Supp. Aff. Exhibit C).

Should this Court approve the terms of the Acheron Offer, and grant this Motion to canvass the ABC Investors, Acheron agrees to be responsible for the effort. Acheron appreciates that such a canvassing of ABC Investor interest can be an expensive operation and Acheron is willing to pay an independent third party accounting or consulting firm like PriceWaterhouseCoopers, KPMG or other reputable firm, to conduct such an endeavor and tally the results.

Providing the Notice to the Investors about the merits of the Acheron Offer removes any ambiguity about the terms of the Acheron Offer, the future rights that an ABC Investor may be relinquishing, and whether the ABC Investors are interested in receiving an immediate payout as opposed to the intermittent payouts they are presently receiving. The notion that the ABC Investors cannot make an informed decision about the Acheron Offer is completely unfounded. The ABC Investors have been living under the existing arrangement eight years and are well aware of the compensation level that the current arrangement provides. The distinction between maintaining the existing arrangement at reduced compensation levels and a lump-sum payment is something the ABC Investors can understand. Life settlements and viaticals are a complicated and complex product. The risks of investing in these products are numerous – carrier credit risk, operational risk, liquidity risk, mortality risk, and regulatory/tax risk. This Court already recognizes that the Investors should not have invested in this product. Even today, Doug Head, executive director for the Life Insurance Settlement Association (an organization that promotes

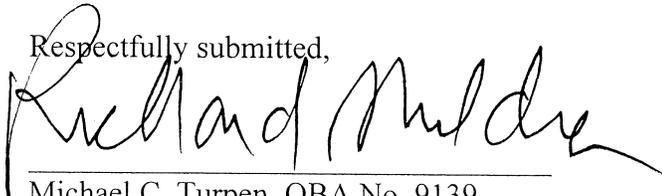
the benefits of life settlements), has stated that “Life Settlements are not appropriate for individual investors.”

The Acheron Offer is fair, reasonable and immediate compensation to the ABC Investors. The Acheron Offer also liberates the ABC Investors from the unpredictable economic returns of the ABC Portfolio, and finally ends their connection to these viaticals.

There is no genuine reason why the Conservator should want to keep the ABC Investors chained to the present arrangement—other than the Conservator’s own financial interest in both the continued servicing of the Policies, and the Conservator’s interest in future returns, should the \$38.05 million Purchase Price be triggered. (First Motion, Part E). The economics of the Acheron Offer are clear, and the Conservator should step aside and let the ABC Investors decide what is truly in their best interests. Indeed, between the potential Termination Fee and the exorbitant servicing fees that the Conservator’s company receives for this Portfolio, the Conservator’s intransigence, and refusal to negotiate in good faith is not surprising. These lucrative financial interests also call into question the conservator’s independence.

WHEREFORE, for the foregoing reasons, Acheron respectfully requests that the Court enter an order approving the Acheron Offer, allow Acheron to send the Notice to the ABC Investors and providing such other and further relief as the Court deems just and appropriate.

Respectfully submitted,



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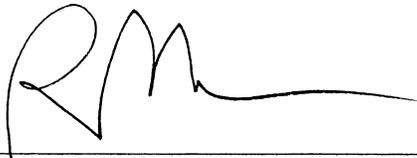
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2010 a copy of the above and forgoing document was mailed via U.S. Mail postage prepaid to:

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