

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

Oklahoma Department Securities,	)	
<u>Ex rel.</u> Irving L. Faught, Administrator,	)	
	)	
Plaintiff,	)	
	)	Case No. CJ-99-2500-66
vs.	)	Judge Daniel L. Owens
	)	
Accelerated Benefits Corporation, a Florida	)	
Corporation, et al.,	)	
	)	
Defendants.	)	

**MOTION FOR AN ORDER APPROVING SALE OF  
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 accelerate the purchase of the interest in the proceeds of the policies (the “Policies”) which constitute the assets of the Conservatorship. In support thereof, Acheron will demonstrate to the Court as follows:

**PRELIMINARY STATEMENT**

Acheron offers \$13.0 million (the “Acheron Offer”) to accelerate the purchase in full of the Conservator’s present interest in the proceeds of the Policies, as set forth in the Option Purchase Agreement (“Tonti OPA”), dated May 24, 2006, executed by Acheron’s predecessor-in-interest, Lorenzo Tonti, Ltd. with the Conservator. Under the terms of the Tonti OPA, Acheron already owns the Policies; the Tonti OPA sets forth that Acheron receives 40% of the maturities of the Policies, and then utilizes the 60% balance as payment for the Purchase Price, which the Conservator distributes to the Investors, defined below. Acheron now seeks to make a

\$13.0 million lump-sum payment to purchase the remaining 60% interest and terminate the Conservatorship, which will result in an immediate distribution to the Investors.

Acheron's bid is all cash and consists of \$12.7 million in one lump-sum cash payment to the Investors (comprised of \$10.2 million from Acheron and the release to the Investors of \$2.5 million already paid by Acheron presently in the premium reserve account) plus \$300,000 for the servicer, Heritage Agency Group, Inc. ("Heritage"). Acheron's Offer is not subject to any future contingencies or any form of financing. In short, Acheron's Offer provides the Investors with an immediate pay-out, without having to wait for Policies to mature so that the \$38.05 million Purchase Price set forth in the Tonti OPA is reached—which will likely take over 17 more years to occur. Acheron's Offer also represents an above-market offer to purchase the 60% interest in the maturities of the Policies and will result in a better average overall rate of return for the Investors. The Acheron Offer is in the best interests of the Investors and also provides them a meaningful financial return during difficult economic times, and affords them an opportunity to put the entire Accelerated Benefits Corporation ("ABC") nightmare behind them now rather than in 17 years. Indeed, the fairness and reasonableness of Acheron's offer is confirmed by the two most recent audits conducted by the respected actuarial firm, Lewis & Ellis—the most recent audit having been conducted at the request of the Conservator—the most recent transactions in the viaticals and life settlements markets involving portfolios comprised of predominantly HIV-related policies, and by the expert retained by Acheron in this action, an active participant in the life settlements and viaticals markets. This Court should approve Acheron's Offer, and provide the Investors with an immediate payout. Moreover, approving Acheron's Offer will also allow this Court to close this proceeding, end the Conservatorship created in 2002, and bring closure for the Investors who seek finality after ten long years.

## BACKGROUND AND STATEMENT OF FACTS

As this Court is well aware, in 1999, the Oklahoma Department of Securities (the “OSD”) commenced an action alleging fraud against ABC and its Oklahoma agents. ABC’s agents offered and sold viaticals to thousands of investors throughout the country on ABC’s behalf. The viaticals are investments in life insurance policies in which the insured under the policy (the “Viator”) sold his or her interest in the death benefit proceeds to ABC in return for a cash payment during the Viator’s life. ABC funded the transactions with the Viators by executing Purchase Request Agreements with investors (the “Investors”) and receiving money from the Investors in exchange for a pro rata share of the death benefit proceeds upon the death of an individual Viator to which the Investor was matched. The insureds on the Policies in the ABC portfolio were comprised predominantly of persons living with HIV or AIDS.<sup>1</sup> As this Court found, the investments in the viaticals constituted securities under the Oklahoma Securities laws, but were not registered, as required by law, when sold by ABC and its agents. Moreover, ABC and its agents made numerous material misstatements, as well as omissions, in connection with the sale of the investments and violating the Oklahoma Securities laws. (Mildren Aff., Exhibit 2).

This Court appointed the Conservator on February 6, 2002, and created the Conservatorship in order to, among other things, administer the Policies that remained in ABC’s possession, which served as the payment vehicles for the Investors, and to administer “the

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<sup>1</sup> As of January 1, 2009, the ABC portfolio consisted of 1,090 policies. The HIV/AIDS segment of the Policies consisted of 1,018 policies, which had a face value of \$92,070,954, while the non-HIV/AIDS segment included all Viators with a diagnosis other HIV or AIDS, and had a face value of \$11,542,588. (Affidavit of Richard Mildren (“Mildren Aff.”), dated January 14, 2010, Exhibit 1, at 6). Since January 1, 2009, some Policies have matured, but the composition of the Policies has not changed in any meaningful way.

liquidation or sale of the Policies to *institutional buyers*.” (Mildren Aff., Exhibit 3, p. 2 (emphasis added)).

**A. The First Sale of the Portfolio**

In October 2002, the Conservator moved the Court seeking an order approving the sale of the Policies. In connection with that sale, the Conservator “contacted numerous institutional buyers to determine the marketability of the viatical portfolio.” (Mildren Aff., Exhibit 4, at 4). The Conservator stated that “[t]here is no market for the sale of the Policies at or near face value.” (*Id.* at 10). Of the institutional buyers contacted by the Conservator, only 10 “elected to examine the portfolio,” and only three parties submitted offers to purchase the full portfolio of Policies: Life Alliance, L.L.C., Mercurius Capital Management, Ltd. and Infinity Capital Services, Inc. (“Infinity”). (*Id.*). In December 2002, the Conservator canvassed the Investors for their preferences relating to the offers received for the Policies. (Mildren Aff., Exhibit 5). Additionally, an evaluation of the various offers was conducted by the actuarial firm of Lewis & Ellis. While the results of the polling of the Investors appeared to favor one of the Life Alliance offers, which offered various purchase options, the transaction with Infinity was approved.

The Policies were sold to Infinity pursuant to an Option Purchase Agreement (the “Infinity OPA”), dated February 13, 2003. (Mildren Aff., Exhibit 6). The basic components of the Infinity OPA were as follows:

- Infinity paid a \$2.5 million “non-refundable option payment” and would pay 100% of all premium and servicing costs on the Policies;
- Infinity received 40% of the death benefit proceeds, while the Conservatorship received 60% of the death benefit proceeds up to \$56,500,000 (the “First Purchase Price”); and
- After the First Purchase Price was paid, full title to the Policies transferred to Infinity.
- According to the Conservator, the Infinity OPA would result in Investors receiving approximately 55% of their original investments, plus the benefit of Infinity paying the premiums on the Policies. (Mildren Aff., Exhibit 7, at ¶ 11 (“SIG Motion”)).

In November 2004, Infinity failed to satisfy its payment obligations, and after notice and demand by the Conservator, and Infinity's continued default, on November 30, 2004, the Conservator terminated the Infinity OPA. (Mildren Aff., Exhibit 8). On May 20, 2005, this Court terminated the Infinity OPA. (*Id.*).

**B. The SIG OPA**

On May 1, 2005, SIG Partners and the Conservator executed a second option purchase agreement. In the motion seeking approval of the sale, the Conservator confirmed that "many of [the Investors] *were elderly and retired.*" (Mildren Aff., Exhibit 7, at ¶ 5 (emphasis added)).

The SIG OPA's terms resembled the Infinity OPA: SIG agreed to purchase the Policies for \$42,061,771 (the "Second Purchase Price"), which equaled the adjusted First Purchase Price under the Infinity OPA (given maturities of Policies in the portfolio) at the time of Infinity's default. Specifically, the Conservator had received maturities on the Policies totaling \$14,498,229.00, which reduced the First Purchase Price for the Policies from \$56 million under the Infinity OPA, to the \$42.1 million figure agreed to by SIG. Similar to the Infinity OPA, SIG received 40% of the Policy maturities, while the Conservatorship received 60% of the death benefit proceeds up to the \$42.1 million Purchase Price.

The Conservator again advised the Court that under the terms of the SIG OPA the Investors' total return would likely equal 55% of their original investments. Importantly, in support of the SIG OPA, the Conservator stated unequivocally, that "no potential buyer exists who would provide a greater return for the ABC Investors than that offered by SIG." (Mildren Aff., Exhibit 7, at 7-8). The sale was approved without an additional vote by the Investors.

On or about July 7, 2005, SIG assigned its interests to PSK Enterprises, Inc. ("PSK"). Between the months of July 2005 and November 2005, PSK, fulfilled its premium and servicing payment obligations under the SIG OPA. Less than seven months after the execution of the SIG

OPA, however, PSK failed to make the December 2005 payments and, on January 5, 2006, after notice of default and due demand and PSK's failure to remedy the default, the Conservator terminated the SIG OPA. (Mildren Aff., Exhibit 9).

### **C. The Terms of the Tonti OPA**

On June 2, 2006, Lorenzo Tonti Ltd., Acheron's predecessor-in-interest, entered into an Option Purchase Agreement (the "Tonti OPA") with the Conservator. In support of the approval of the Tonti OPA, the Conservator filed a brief stating unequivocally that the Tonti OPA was "in the best interest of the ABC Investors." (Mildren Aff., Exhibit 11). The Tonti OPA contains substantially similar terms to the Infinity and SIG OPAs, which had been previously approved by the Court and contained a further reduced Purchase Price, based on the additional maturities received. Like the SIG OPA, the sale was approved without an additional vote by the Investors.

Specifically, the terms of the Tonti OPA are as follows:

- **The Policies Sold:** The Conservator sold all of its "right, title and interest in and to the face amount of the policies specifically described" to Tonti, "which consist of a viatical portfolio of life insurance policies" and which at the time had an estimated "face amount" of \$109,528,545.25. (Mildren Aff., Exhibit 11, § 2.1).
- **The Viator Files:** In addition, the Conservator sold all of its "right, title and interest in and to the files and records with respect to the Policies, including without limitation, the Policies and correspondence relating thereto; the information and records with respect to the health status and whereabouts of each insured of each Policy; the accounting records including the computer database identifying the accounting and bookkeeping records incident to the ownership, premium payments and receipts and distributions of proceeds with respect to each Policy." (*Id.*, § 2.2).
- **Liabilities:** Importantly, subject to certain terms and conditions, Tonti agreed to "assume all liabilities and obligations of the [Conservator] under the Policies which accrue from and after December 27, 2005 and the costs, and fees and expenses of the Servicer under the Service and Escrow Agreement." (*Id.*, § 4). Of course, this included payment of "applicable premiums for the Policies arising on December 27, 2005 and all subsequently arising obligations," which were described in the Service and Escrow Agreement. (*Id.*)
- **The Purchase Price:** Tonti agreed to purchase the Policies and other assets for the sum of \$38,050,000.00 (the "Purchase Price"). (*Id.*)

- The Remaining Policies: Like the other OPAs, the Conservator received for distribution to the Investors 60% of the proceeds received from maturities, which amounts would be applied to the Purchase Price, and the balance of the proceeds would be paid to Tonti, without application to the Purchase Price. After the Purchase Price had been fully paid under the Tonti OPA, Tonti (now Acheron) would receive 92% of proceeds arising from the remaining Policies.
- The Servicer's Termination Fee: In a unique provision, under the terms of the Service and Escrow Agreement, Heritage would receive an 8% interest in "all rights payments and proceeds with respect to all unmatured Policies received by" Acheron "on the Conveyance Date"—which is defined in the Tonti OPA to occur on the on the date the Conservator has received the full \$38.05 million Purchase Price, and all necessary other documents and approvals have been executed and received. (*Id.*, § 6.6, (*Service and Escrow Agreement*, Schedule "3"))).

In support of the Tonti OPA, the Conservator again asserted that "no potential buyer exists who would provide a greater return" for the ABC Investors than that offered by Tonti. (*Id.*, Exhibit 11, at 8).

In addition, the Service and Escrow Agreement sets forth that the same person acts as both the Conservator and as the "manager on behalf of Servicer." (Mildren Aff., Exhibit 11 at § 10.15). On June 7, 2006, this Court entered an order approving the Tonti OPA.

**D. Initial Negotiations with the Conservator to Purchase the Balance of the Policies**

Since execution of the Tonti OPA, Tonti, originally, and now Acheron, has promptly paid the premiums and servicing fees for the administration of the Policies. Acheron has every intention of continuing with its servicing and premium payment obligations. Acheron, however, now seeks to purchase the Conservatorship's interest in the Policies, and to end the Conservatorship, which is incurring significant costs.

The present offer is not the first time that Acheron has offered to purchase the balance of the Conservatorship interest in the proceeds of the Policies. On Dec 10, 2007, Acheron's predecessor, Tonti offered to purchase the interest it did not own for \$10,000,000 because the "current payment structure under the [Tonti OPA] is generating negative cash flow and is not

sustainable.” (Mildren Aff., Exhibit 12). That offer, however, was summarily rejected by the Conservator, who stated that he would not sell the remaining interest for less than \$17 million, and also required that the Investors receive two additional years of Policy maturities and Heritage provide servicing for the Policies for an additional two years.

Between July 2008 and October 2008, Acheron approached approximately 10 of the Investors with an offer to purchase the Investor’s remaining share of the Conservatorship proceeds for approximately 10 cents on the dollar—if an investor had invested \$20,000 with ABC, they were offered \$2,000 more for their interest in the proceeds. Not surprisingly, 8 of the 10 Investors approached agreed to sell their interests to Acheron and executed assignments in favor of Acheron. The OSD objected to Acheron contacting the Investors directly, and directed that any Acheron offer should be made before the Court, and available to all of the Investors. Acheron agreed with the OSD and, as will be set forth in detail below, offered to negotiate directly with the Conservator—but to date, all good faith attempts to negotiate have been flatly rejected by the Conservator.

### 1. **The April 2009 Lewis & Ellis Report**

As part of its analysis to determine the appropriate value for the accelerated purchase, Acheron requested that Lewis & Ellis<sup>2</sup> conduct an independent evaluation of the ABC Policies. Because, it had conducted such studies before, and because Lewis & Ellis is a well-respected actuarial firm, Acheron believed Lewis & Ellis to be in the best position to conduct such a study.

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<sup>2</sup> Lewis & Ellis are well-recognized actuaries who have provided similar analyses for both the Portfolio as well as numerous other portfolios of life settlements and viaticals. In a prior action, the Conservator confirmed that “Lewis & Ellis (sic) analyses have proven to be relatively accurate,” and that their reports are very good “aid(s) in helping to determine a fair price” for a portfolio of policies. ((Mildren Aff., Exhibit \_\_\_) (*Receiver’s Memorandum Regarding Bids for the Sale of the LifeTime Portfolio*), April 10, 2006, p. 7).

On April 8, 2009, Lewis & Ellis provided Acheron with its report (the “April 2009 L&E Report”), finding the following:

- “The total value of the ABC portfolio was determined to be \$9,841,000 based on a 22% discount rate applied to projected cash flows using assumptions determined by L&E. This value reflects expected future maturities, premiums, and expense cashflows.” (Mildren Aff., Exhibit 1, at 3).
- In determining the value of the Policies, Lewis & Ellis “projected future cash flows over a 35-year period and then discounted these cash flows to the valuation date.” (*Id.*, at 4). The future cash flows were comprised of policy maturities, reflecting any refund of unearned premium upon death, less future premium payments to maintain policies in-force less expenses. (*Id.*).
- Importantly, in coming to the 22% discount rate, Lewis & Ellis concluded that “[l]iquidity is a major issue since relatively few buyers exist for viatical portfolios. As such, *buyers use very high discount rates in evaluating such portfolios* and many quotes employ some form of participation wherein early cash flow is partially diverted to the seller,” as occurs here. (*Id.*) (emphasis added).

In addition, on or about June 4, 2009, Acheron, through counsel, contacted the OSD in order to advise the OSD of its interest in purchasing the remaining interest in the Policies, and to ensure the OSD that it would take instruction from the OSD as to the best way to proceed in its endeavor. The OSD advised that Acheron should proceed with negotiations with the Conservator. In light of that fact, on July 27, 2009, Acheron sent to the Conservator an offer letter advising the Conservator of its offer to purchase the balance of the interest in the Policies.

Probably based on the Acheron Offer, during the summer of 2009, the Conservator requested that Lewis & Ellis conduct another independent evaluation of the ABC Portfolio of Policies, focusing particularly on the “participating share of maturities paid to the receiver.” (Mildren Aff., Exhibit 13, p. 4 (the “August 2009 L&E Report”)). Not surprisingly, Lewis & Ellis’ August conclusions largely matched the conclusions reached in the April 2009 L&E Report. In particular, Lewis & Ellis concluded that the “total value of future payments to the [R]eceiver were determined to be \$12,723,000 based on a 13% discount rate applied to projected

cash flows using assumptions determined by L&E. This implies an approximate discount of 13.30% for the [Acheron] offer. This value reflects expected maturities, premiums and expense cash flows.” (*Id.*, p. 3).<sup>3</sup> Again, Lewis & Ellis stated that “liquidity is also a major issue since relatively few buyers exist for viatical portfolios. As such buyers use high discount rates in 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.” (*Id.*, p. 4).

In addition, in September 2009, Lewis & Ellis also provided Acheron with an analysis of the future servicing costs for the Policies for the last five months of 2009 through the year 2025, when Lewis & Ellis believes the final maturities will occur to satisfy the Purchase Price. Specifically, Lewis & Ellis concluded that the total cost for servicing the Policies would be \$7,311,340, with an average annual cost of \$430,078.82 over the course of the 17-year servicing period between August 2009 and December 2025. (Mildren Aff., Exhibit 14).<sup>4</sup>

Since the inception of the Conservatorship, the Conservator has distributed approximately, \$28,197,870, representing a percentage return to the Investors totaling 26.23% (or a loss of 73.77% of their original investments). After the promised December 2009 distribution, that figure will increase to 26.96% returned to the Investors (representing a loss of 73.04 of the Investors’ original investment).

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<sup>3</sup> In the report, Lewis & Ellis explained that the use of “lower discount rates will result in a higher value offered and higher discount rates will result in reduced value” offered for the Policies. (*Id.*).

<sup>4</sup> Lewis & Ellis assumed an initial servicing cost of \$36.69 per policy per month and an annual inflation rate of 3%. Lewis & Ellis based the initial servicing cost on Acheron’s “actual servicing costs in June 2009 (\$36.15 per policy)” and assumed an increase for 6 months based on inflation rate of 3%, which was the median inflation rate of the CPI index for 1983-2008 (2.95%). (Exhibit \_\_).

**E. Acheron's Offer**

Acheron proposes to accelerate the Tonti OPA and to purchase the remaining interest in the proceeds of the Policies in exchange for \$13.0 million dollars (the "Purchase Amount"). The Purchase Amount is comprised of the following components:

- \$10.2 million lump sum payment to the Conservatorship to "prepay" in full the Present OPA;
- \$2.5 million from the premium reserve account, which is Acheron's property, held by Heritage that will be released for distribution to the Investors based on the acceleration of the Tonti OPA; and
- A termination fee totaling \$300,000 to Heritage to close the Conservatorship.

The Acheron Offer alone represents 11.81% of the Investors' original investment and approximately 13% of the current face amount of the Policies (and of course, does not include the sums that Acheron/Tonti have paid during the last three years for premiums on the Policies and for servicing fees, which totals \$5,750,422, and the amounts already received by the Investors). Acheron believes this offer represents a fair and reasonable offer based on recent market transactions and the underlying actuarial value of the portfolio of Policies and is in the best interests of the Investors. However, the Conservator refuses to even commence negotiation with Acheron, to the detriment of the Investors. Indeed, in early October 2009, a representative from Acheron traveled from London, accompanied by counsel, to Oklahoma City to meet with the Conservator, only to be told by the Conservator that he would not even make an initial counter-offer and start the good faith negotiation process. This is not in the best interests of the Investors, and thus forced Acheron to file this motion.

**ARGUMENT**

**POINT I**

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

Acheron has submitted an all cash offer to accelerate the terms of the Tonti OPA, which will allow Acheron to purchase the balance of the proceeds in the Policies and to provide an immediate payout to all Investors. The Acheron Offer will result in a higher overall percentage rate of return to the Investors based on its immediacy, certainty, and the elimination of further costs to be absorbed by the Conservatorship. Absent the Acheron Offer, Investors will continue to receive the ill-defined, speculative net future cash flows, which Lewis & Ellis has stated will likely take at least 17 years to complete. Given that many of the Investors are “elderly and retired,” an immediate lump-sum payout, based on the terms of the Acheron Offer provides the Investors with a better overall rate of return, and immediate payout during these difficult economic times. In sum, acceptance of the Acheron Offer will end the ten-year ABC ordeal for all Investors, liberate the Investors from the uncertain maturities involved with the Policies, and provide the Investors with more money in their pockets *now*, than they would receive if the Conservatorship continued apace for another 17 years, until maturities under the Policies reached the Purchase Price.

**A. The Acheron Offer Represents a Premium Over Comparable Viatical Portfolio Transactions.**

The market for viaticals and life settlements relating to HIV policies has deteriorated significantly since the last quarter of 2008. Three major factors have caused this deterioration: First, at the end of 2008, updated mortality tables were issued which contained extended life expectancy projections by 10-30%, including persons living with HIV or AIDS. (Mildren Aff. Exhibit 15). Thus, the time for any expected return for even “institutional buyers” appears to have increased significantly. Second, new medical research on HIV mortality indicates a significant increase in life expectancy for persons living with HIV/AIDS. Because these medical improvements have occurred, and continue to occur, HIV/AIDS patients no longer face the same

imminent dangers and health risks as occurred in the 1980s when HIV/AIDS first made major headlines. (*Id.*, Exhibit 16, *see also* Page Report, at 3). Finally, while other areas of the life settlement industry have seen increased activity as more institutional investors enter that market, with respect to the HIV/AIDS segment, there has been a large evaporation of interest from institutional investors to purchase such policies. The result is a lack of liquidity in the market for potential purchasers of portfolios like the Policies.

The effect of these changes can be seen in reduced amounts offered and accepted in actual transactions involving the purchase and sale of life settlement/viatical portfolios (especially those involving policies for persons with HIV):

Portfolio Transactions in Receiver Based Auctions	Date	Face	Price	Price / Face
Life Time (mostly Non-HIV policies)	21/04/2006	139,000,000	19,375,000	13.9%
ABG-Reliance	08/11/2006	45,745,044	4,400,000	9.6%
MBC—Bid 1	13/11/2006	119,355,247	13,600,000	11.4%
Fin Fed	27/02/2007	13,836,624	1,483,875	10.7%
MBC—Bid 2 (predominantly HIV)	22/06/2007	176,670,685	11,000,000	6.2%
MBC—Auction 1 (predominantly HIV)	01/07/2008	24,298,319	1,115,000	4.6%
MBC—Auction 2 (predominantly HIV)	09/10/2008	59,064,085	4,500,000	7.6%
MBC—Auction 3 (predominantly HIV)	17/12/2008	56,919,842	4,600,000	8.1%
USI Portfolio (predominantly HIV)	22/12/2008	35,814,741	2,200,000	6.1%
MBC—Auction 4 (only \$3M of HIV policies) <sup>5</sup>	17/03/2009	13,663,013	1,750,000	12.8%

<sup>5</sup> For the sake of not inundating the Court with an inordinate amount of paper, we have not included the underlying documents relating to these transactions. Information relating to each of these transactions, such as the purchase agreements, or orders approving such sales can be provided at the request of the Court.

As the chart indicates, the amounts offered and accepted for viatical portfolios comprised of predominantly HIV/AIDS related policies have decreased significantly. Importantly, Heritage, the servicer for the Policies here, brokered the USI Portfolio transaction, which was comprised of “certain corporately owned policies that USI purchased out of the receivership of Trade Partners, Inc.” which the Monitor<sup>6</sup> of that proceeding called the “TPI AIDS Portfolio.” The sale of the TPI AIDS Portfolio was executed at a price which was 6.1% of the face amount of the policies—significantly less than the 12.8% (\$12.7 million/ \$99,000,000. (the current face amount of policies is approximately \$99,000,000)) price/face amount of the Acheron Offer.

In addition, the price/face analysis set forth above confirms the competitiveness of the Acheron Offer with other transactions involving portfolios comprised of *mostly non-HIV policies*, such as the MBC—Auction 4 and LifeTime transactions. Those two transactions, which both were executed at the highest price/face percentages among the transactions set forth above, were comprised mostly of non-HIV risks—HIV-related policies comprised just 23% of the MBC—Auction 4 portfolio sold earlier this year. Other transactions involving portfolios predominantly covering individuals with HIV or AIDS have all sold for less than 10% of the face amount of the policies, and indeed, since June 2007 such transactions have averaged just 6.52% of the face amount—approximately half the percentage amount of the Acheron Offer. Thus, not only is the Acheron Offer competitive to the pricing of non-HIV related portfolios, it is significantly better than the most recent HIV-related portfolio transactions executed since 2008. Indeed, in some cases, the Acheron Offer represents an almost 100% better offer than the most recent predominantly HIV-related portfolio transactions.

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<sup>6</sup> The role of the monitor in a proceeding under the Companies’ Creditors Arrangement Act in Canada is not dissimilar to the role of a trustee in a chapter 11 proceeding under the United State Bankruptcy Code.

## **B. The Most Recent Lewis & Ellis Valuations Confirm the use of a Discount Rate**

Furthermore, Lewis & Ellis, the actuarial firm with extensive experience following the ABC Portfolio (having performed numerous valuations on the portfolio since 2002 both for the Conservatorship and for private investors) has produced not one, but, two updated 2009 valuations of the portfolio which confirm the fairness and reasonableness of the Acheron Offer. First, the April 2009 L&E Report set forth that “the total value of the ABC portfolio was determined to be \$9,841,000 based on a 22% discount rate . . .” (Mildren Aff., Exhibit 1 at 3). Thus, according to the April 2009 L&E Report, Acheron’s bid is almost a full \$3 million higher than Lewis & Ellis’ assessed “total value of the ABC portfolio.” In other words, according to Lewis & Ellis, Acheron’s offer represents a 25% premium above the total value of the Policies. Second, Lewis & Ellis stated unequivocally that a 22% discount rate was appropriate to determine the present value of the Policies—but Acheron’s offer is based on a much lower discount rate—again confirming that Acheron’s Offer is well in excess of what Lewis & Ellis believes is the appropriate value for the ABC Policies. Indeed, the April 2009 L&E Report concluded that a much higher discount rate was appropriate to value the ABC Portfolio, because “liquidity is a major issue since relatively few buyers exist for viatical portfolios.” (*Id.*) Mr. Wm. Scott Page, Acheron’s expert in this action, also confirms that the discount rate offered by Acheron represents a lower discount rate than even he would offer for such a portfolio. (Page Report, at p. 3). In order to get a deal done, however, and as a demonstration of its good faith, Acheron’s Offer reflects a much lower discount rate.

When Lewis & Ellis analyzed the “Valuation of the Receiver’s Portion of Maturities,” in the August 2009 L&E Report, Lewis & Ellis concluded that “the total value of future payments to the receiver” was determined to be “\$12,723,000 based on a 13% discount rate applied to projected cash flows using the assumptions determined by L&E. *This implies an approximate*

*discount of 13.30% for the [Acheron Offer].”* (Mildren Aff., Exhibit 15, at p. 3). Thus, even in the study commissioned by the Conservator, Lewis & Ellis’ conclusions again confirm the fairness and reasonableness of the Acheron Offer. Not only is the Acheron Offer below the 22% discount rate that Lewis & Ellis concluded was appropriate in the April 2009 L&E Report, but the Acheron Offer is nearly identical to the \$12,723,000 amount that Lewis & Ellis concluded was the “the total value of future payments to the [Conservator].”

In sum, the fairness and reasonableness of the Acheron Offer is confirmed by both the April 2009 and the August 2009 L&E Reports. Rejection of the Acheron Offer is simply not in the best interests of the Investors.

**C. The Acheron Offer Provides the Investors With A Better Overall Rate of Return than Simply Waiting for Maturities of the Policies.**

The Acheron Offer provides the Investors with a better overall rate of return than does simply waiting for the maturities of the Policies to reach the Purchase Price—which the Lewis & Ellis report states could take an additional 17 years. The Lewis & Ellis projections demonstrate the average annual return that the Investors can expect to receive and how that compares to the performance of the Conservatorship in the past, as well as the present Acheron Offer. For example, based on the original amount invested by the Investors, one can determine that Acheron’s offer equals 11.81% of the amount invested by the Investors:

<b>Conservatorship Start Date</b>	06 February 2002
Original Amount Invested	\$107,514,742
Acheron Payment Date	15 January 2010
Acheron Offer	\$12,700,000
Acheron Offer as % of Invested Amount	11.81%

In addition, based on the current returns to the Investors, the Investors have averaged approximately a 3% annual return

### **The Present Situation**

	<b><u>Before Dec 2009 Payment</u></b>	<b><u>After Dec 2009 Payment</u></b>
% Returned To Investors	26.23%	26.96%
Duration (Years Since Inception of the Conservatorship)	7.86	7.86
Average Annual Return (Arithmetic)	3.34%	3.43%
Average Annual Return (Geometric)	3.01%	3.08%

Based on the current rate of return, the remaining amounts to be paid out to the Investors, and Lewis & Ellis' projected timetable for such a payout, the Investors' average annual payment, to date, will equal only about 2% per year.

### **Remaining Payout Under Conservatorship**

	<b><u>After Dec 2009 Payment</u></b>	<b><u>Cumulative Returns</u></b>
Total Payout	27.07%	54.03%
Average Payout	0.85%	
Duration (Years)	16	23.9
Average Annual Payment (Arithmetic)	1.69%	2.26%
Average Annual Payment (Geometric)	1.51%	1.83%

However, acceptance of the Acheron Offer provides the Investors an average annual payment of more than 4% per year:

### **Acheron Offer**

	<b><u>Cumulative Returns After December 2009 Payment</u></b>
Total Payout	38.59%
Duration (Years)	7.9
Average Annual Payment (Arithmetic)	4.88%
Average Annual Payment (Geometric)	4.21%

These calculations also demonstrate that the performance of the Policies will likely decline over the course of the next seven to eight years. In particular, the calculations above show that the Investors have received an approximate 3% annual return during the first 7-3/4 years of the Conservatorship. According to both L&E Reports, under the current pace the average annual return to the Investors will decrease to about 2% over the course of the total 24 years Lewis & Ellis anticipates it will take to for the Purchase Price to be paid. Contrast this to

the Acheron offer that will actually increase the annual payout to over 4% per year. Additionally, in light of the fact that the Policies have provided approximately a 3% annual return during the first 7-plus years of the Conservatorship, given that the average annual return will decrease to approximately 2% per year, means that the portfolio's performance will likely be much lower in the next 7-plus years than it was in the first 7-plus years. This further militates in favor of the Conservatorship exercising the opportunity presented by the Acheron Offer and provide a reasonable and prompt exit for the Investors.

Given the Conservator's statement that many of the Investors are "elderly and retired" waiting an additional 16 to 17 years to receive the final payments to receive a paltry 2% average return would be unfair to the Investors. Complicated mathematical analysis is not needed to determine that a total of approximately 40 cents on the dollar today, is far better than a total of approximately 54 cents on the dollar to be received 17 years from now. Moreover, 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 Aff., Exhibit 17, p. 12, (emphasis added)). The argument applies with equal, if not, greater force here. The Investors deserve to get something sooner rather than later—and the Acheron Offer provides the Investors with a significant recovery—now.

**D. No Other Potential Institutional Investor Would Offer More than Acheron for the Remaining Assets of the Conservatorship**

At present, under the Tonti OPA, Acheron owns the Policies with the Conservator receiving 60% of the maturities to be distributed to the Investors, while Acheron owns the remaining 40% interest in the Policies, and the corresponding proceeds. No other "institutional

buyer” would make an offer for the Conservator’s share of the proceeds of the Policies for a number of reasons. In other words, the Conservator’s share of the proceeds is unmarketable and has no value to another “institutional buyer” other than Acheron.

First, the Tonti OPA contains an assignment provision which states explicitly that: “The rights of the parties under this Agreement cannot be assigned in whole or in part without the prior written consent of any of the nonassigning parties.” (Mildren Aff., Exhibit 11, § 14.11). Accordingly, if the Conservator sought to assign any part of its interest in the Policies, it would be required to obtain prior written consent of Acheron prior to any assignment of its rights. Thus, the Conservator cannot sell, assign, or transfer any of its rights under the Tonti OPA without Acheron’s prior written approval—thereby granting Acheron a veto right over any assignment.

Second, the Tonti OPA sets forth that once the Purchase Price is paid—which will take 17 years to occur—Acheron is entitled to receive the full amount of any maturities. Thus, even if an “institutional buyer” were to obtain an interest in the Conservator’s share of the proceeds, the buyer’s right to receive such proceeds terminates upon payment of the full Purchase Price. After the Purchase Price is paid in full, Acheron receives the remaining proceeds subject to the Termination Fee. No other “institutional buyer” will want to pay for a partial and finite payment stream which is uncertain in amount and ultimately limited in duration—until the Purchase Price is reached.

Even assuming the potential transfer of part of the Conservator’s share to another “institutional buyer,” for that new party to receive any distributions of proceeds once the Purchase Price has been paid, the Tonti OPA would need to be amended or modified. The Tonti OPA, however, contains an “Amendment” provision, which forbids the amendment of the

agreement except in “a document in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.” (Mildren Aff., Exhibit 11, § 14.10). Thus, for any transfer of the Conservator’s rights to be effective against Acheron, it would be required to execute a document effecting the modification of the Tonti OPA—further confirming Acheron’s ostensible “veto” right over any other potential transaction between the Conservator and another “institutional buyer.”

In sum, these factors are significant, if not dispositive, deterrents to any other “institutional buyer” even approaching Acheron’s Offer. There simply is no market for any other “institutional buyer” to offer the Conservator anything for its interest in the Policies.

No doubt the Conservator will likely say that Acheron’s offer “is good for a hedge fund” and that Acheron is trying to capitalize on a potentially “down” market for HIV-related viaticals. But, these arguments are red herrings. First, as made clear above, this Court has already recognized that only “institutional buyers” should purchase the Policies, including the following provision in the Conservatorship Order:

2. to manage all Conservatorship Assets pending further action by the Court including, but not limited to, the evaluation of the Policies, and to take necessary steps to protect the ABC Investors’ interest including, but not limited to, the liquidation or sale of the Policies to **institutional buyers** and the assessment to ABC Investors of the future premium payments;

(Mildren Aff., Exhibit 3) Thus, the Conservatorship Order sets forth that a sale of the Policies should only be to an “institutional buyer,” and thus what other offers would the Conservator expect other than “hedge fund offers.” Next, as set forth above, Acheron does not dispute that the market for viaticals has deteriorated in the past year and a half. But, the prospects of the market improving in the near future are exceedingly slim, especially if continued medical

improvements occur in the treatment of HIV/AIDS. Indeed, if a cure for HIV is found, then the market for HIV-related viaticals will evaporate entirely.

**E. Heritage's Termination Fee Should not Preclude Acheron's Offer**

Under the Service and Escrow Agreement, Heritage is entitled to receive a Termination Fee, if the full \$38.05 million Purchase Price is received for the Policies. The Acheron Offer, however, would essentially be an accelerated pre-payment and ensure that the full \$38.05 million Purchase Price is never reached because the Investors' 60% interest would be sold for the \$12.7 million lump-sum payment (in addition to over \$25 million already provided to the Investors).

Because Heritage's manager is the Conservator, clearly, both the Conservator and Heritage have an interest in the Purchase Price being reached. To wit, if the full Purchase Price is never received, Heritage never receives the Termination Fee. Moreover, the Acheron Offer would terminate the Conservatorship, thus, reducing significantly the responsibilities and services to be provided by Heritage, thereby reducing the fees to be received by Heritage, and of course also eliminating the Conservator fees to be received. Neither the failure to have the Termination Fee triggered, nor the resulting loss in fees to the Conservator or Heritage because of the Acheron Offer should be the cause of any objection to the Acheron Offer. That would place the Conservator's interests squarely at odds with those of the Investors. Indeed, Acheron has specifically included a payment to Heritage as part of its offer, which reflects the net present value of the likely amount due to Heritage in 2025.

**F. Acheron Would Agree to Canvass The Investors as to their Interest In the Acheron Offer**

The Investors last voiced their opinion as to the merits of a potential sale of Conservatorship assets over seven years ago in connection with the Infinity OPA. While for the

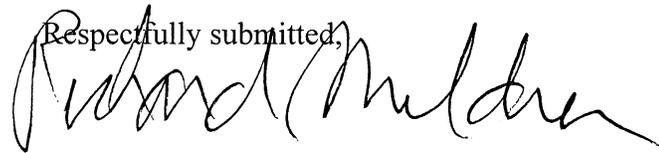
reasons set forth above, Acheron believes that another Investor vote is unnecessary, as the Acheron Offer provides the Investors with a fair and reasonable offer, Acheron is willing to canvass the Investors as to the merits of its Offer. Acheron appreciates that such a canvassing of Investor interest can be an expensive operation and Acheron is willing to pay an independent third party accounting firm like PriceWaterhouseCoopers or KPMG to conduct such an endeavor and tally the results.

Providing notice to the Investors about the merits of the Acheron Offer removes any ambiguity about the terms of the Offer, the future rights that an Investor may be relinquishing, and whether the Investors are interested in receiving an immediate payout as opposed to the paltry, intermittent payouts they are presently receiving. The notion that the Investors cannot make an informed decision about the Acheron Offer is completely unfounded. Investors have been living under the existing arrangement for over seven 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 that most 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.”

When an above- market offer is available, such as the Acheron Offer, which results in fair and reasonable compensation to the Investors, which provides the Investors with finality to their 10-year ABC nightmare, and the *immediate* opportunity to receive funds during these

difficult economic times, the Conservator should approve such an offer, or step aside and let the Investors decide what is truly in their best interests. Moreover, given that it is exceedingly unlikely that another "institutional buyer" would be interested in purchasing an interest in the maturities of the Policies, this Court should approve the Acheron Offer, or at least, allow Acheron to solicit the interest of the Investors to determine their interest in an immediate, significant lump-sum payout.

WHEREFORE, for the foregoing reasons, Acheron respectfully requests that the Court enter an order approving the Acheron Offer, finding that the Acheron Offer is the highest and best value for the Portfolio, and providing such other and further relief as the Court deems just and appropriate.

Respectfully submitted,  


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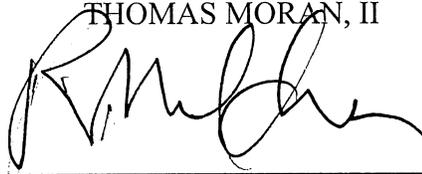
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of January, a copy of the above and forgoing document was mailed via U.S. Mail postage prepaid to:

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