

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

Oklahoma Department of Securities,	)	
Ex rel. 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.	)	

**REPLY BRIEF IN SUPPORT OF ACHERON PORTFOLIO TRUST'S MOTION FOR  
AUTHORIZATION TO OFFER TO PURCHASE ABC INVESTORS' INTEREST IN  
CONSERVATORSHIP ASSETS**

Acheron Portfolio Trust ("Acheron"), by and through its attorneys Riggs, Abney, Neal, Turpen, Orbison & Lewis and Stroock & Stroock & Lavan LLP, respectfully submits this joint reply brief in support of its motion seeking authorization to 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:

**Reply to the Oklahoma Department of Securities' ("Department") Response**

The Department's Response states unequivocally that "a lump-sum payment is in the best interests of ABC Investors and [the Department] believes that ABC Investors would be agreeable to an immediate payout." (Department Response, at p. 3). Since mid-2008, this has been Acheron's position—that a lump-sum payout to the ABC Investors will eliminate the uncertain maturity stream associated with the Conservatorship, provide the ABC Investors with a significant and immediate return, as opposed to the piece-meal distributions they are currently receiving. Additionally, after having canvassed a small group of ABC Investors, who

overwhelmingly agreed to sell their interests, Acheron agrees that ABC Investors would likely agree to a lump-sum payout.

Moreover, the Department also confirms that “[m]any of the ABC Investors are elderly,” (Department Response, at pp. 3-4), something that Acheron has set forth in its prior papers (see Acheron’s First Reply Brief, p. 2), as well as the Conservator in prior submissions to this Court. Forcing the ABC Investors to wait until 2025 to receive their full payout simply makes no sense when many of the Investors are elderly and could use the funds right now—something a lump sum payout provides.

Furthermore, the Department suggests this Court hold an evidentiary hearing regarding the sufficiency of Acheron’s Offer because the Department “does not have the expertise to express an opinion on the sufficiency of the dollar or percentage amount offered, but believes that the valuations by those with financial expertise, like Acheron, the Conservator, and Lewis and Ellis, can provide the Court with competent information on which to make a determination” regarding the sufficiency of Acheron’s Offer. (Department Response, at p. 4). Acheron has no objection to the Court holding such an evidentiary hearing, and welcomes the opportunity to present additional expert evidence regarding the sufficiency of its offer and other relevant facts for the Court.

Finally, the Department states that if the Court grants Acheron’s request to offer to the ABC Investors the lump-sum payout, that any such notice should be “prepared and circulated by the Conservator with the disclosures having the prior approval of the Court.” While Acheron has no objection to the Conservator distributing such a notice, similar to in class action settlements, the notice should be the cooperative end-product based on contributions by the Conservator, the Department and Acheron. Any notice must also be approved by this Court. In addition, similar

to in a class action settlement situation, Acheron believes that retention an independent third-party administrator, who could impartially answer questions about a potential payment plan, administer the election form process and distribution of Fund proceeds makes the most sense. Presently, the Conservator is a principal in the servicing company that reaps over \$400,000 in servicing fees each year, has already been paid over \$2.1 million in servicing fees by Acheron alone, and also stands to be paid 8% of the policy maturities should the Purchase Price under the Acheron OPA be reached—which could total millions of dollars. Where a party has such a potential financial interest, it cannot be considered impartial or without some appearance of a conflict of interest.

#### **Reply to the Conservator's Response**

Once again, the Conservator complains that Acheron is acting in its self-interest, seeking to reduce its financial obligations pursuant to the Acheron OPA. But, as Acheron argued in its first Reply Brief, it does not deny that the lump-sum prepayment contemplated by its Offer improves the financial metrics, and mitigates the “negative cash flow” under the OPA generated by the high servicing costs and the policy premiums. The improved Acheron Offer, however, provides the ABC Investors an above-market offer for their 60% interest in the Policy maturities, and eliminates the protracted and uncertain payment stream presently in place. Indeed, in neither Response submitted by the Conservator, it has come forward with no evidence refuting the fact that Acheron's Offer represents an above-market offer for a portfolio of HIV/AIDS viaticals.

Moreover, pages of the Conservator's Response could have been avoided if it had simply contacted either Acheron or its counsel, as did the Department, and asked simple questions regarding the Acheron Offer and the proposed notice included in Acheron's papers. Rather, as

will be set forth in greater detail, the Conservator's Response is replete with straw men and the Conservator's own self-serving speculation, not based in any fact whatsoever.

**Acheron's Inclusion of 2010 Maturities in the Lump-Sum has Long Been A Part of the Discussions**

The Conservator criticizes the Acheron Offer's inclusion of the participation in 2010 maturities, claiming that "the Investors will receive these monies regardless of whether Acheron is allowed to accelerate the Purchase Price." (Conservator's Response, at p. 12). The Conservator's criticism is specious. Assuming a sale to Acheron, the ABC Investors' participation in the receipt of maturities would cease. Indeed, in May 2008, in response to Acheron's first attempts to purchase the balance of the Policies via an accelerated lump-sum program, it was the Conservator's counsel who advised Acheron's prior counsel that "We can visit with the Department about an offer of \$13,250,000.00, but with that offer they will still want to have some participation with respect to maturities for 2 years." (First Emmons Aff., Exhibit 9 (emphasis added))<sup>1</sup>. The Acheron Offer attempted to incorporate a component the Department and the Conservator agreed vital to any resolution. Furthermore, Acheron's Offer was made in March of this year, when no maturities for 2010 had been distributed, and if accepted then, would have cut off at least nine months of potential 2010 maturities. Even now, given the paltry maturities in 2010, Acheron is still willing to guarantee the ABC Investors expected \$1.8 million in maturities for 2010 as part of its Offer.

---

<sup>1</sup> In 2008, the Conservator also approached Acheron with an offer of \$13 million in cash, plus participation in 30% of the maturities for two additional years. (Second Supplement Mildren Aff., Exhibit A). Of course, notwithstanding the improvements in medical treatments for HIV/AIDS and the decreased liquidity in the viaticals portfolio market, the Conservator now thinks \$21 million in cash is a reasonable offer.

The Conservator also admits that after the passage of almost nine full months in 2010, the ABC Investors' share of maturities for 2010 is still just \$606,468.80. In short, the pace of maturities for 2010 has lagged significantly behind the pace that L&E had forecast for 2010, and the maturity rate for 2009. In order for the ABC Investors to reach the \$1.8 million in maturities figure, the amount of maturities in the final three months of the year would have to be twice as great as the pace of maturities for the preceding almost nine months. This is exactly the unpredictability that Acheron's Offer would eliminate.<sup>2</sup>

**The "Up To" Language in Acheron's Notice and Motion:**

The explanation for the inclusion of the "up to" language in the Notice as well as Acheron's Motion is simple: Acheron understands that all ABC Investors must be treated similarly under the Conservatorship, and that no ABC Investor can receive preferential treatment. Thus, because of the possibility that not all of the ABC Investors would accept the Acheron Offer, the qualifying "up to" language was included. Clearly, if only one or ten ABC Investors accepted the Acheron Offer—which is exceedingly unlikely given the fact that so many accepted a less rich offer almost two years, and even the Department believes that many would be interested in a lump-sum—Acheron needed to make sure that those ten ABC Investors would not reap an unexpected windfall that dwarfed the amount they originally invested. Of course, unlike the Department, neither the Conservator nor its counsel ever called Acheron or indicated to Acheron's counsel its intent to clarify any issues relating to the Acheron Offer. A simple phone call would have eliminated three superfluous pages of the Conservator's Response.

---

<sup>2</sup> Interestingly, notwithstanding the paltry maturities in 2010, the Conservator claims that, "Today, however, maturities are more than sufficient to [fund the premiums for the policies];" and thus, the "ABC Investors' interests "would not be harmed by a default by Acheron under the OPA." (Conservator's Response, at p. 15). This statement, however, does not stop the Conservator from claiming that Acheron should be forced to post a bond. (*Id.*, at 16).

Indeed, even the Conservator answers its own criticism stating that “it would be nonsensical for Acheron to pay the entire \$11.5 million . . . to purchase the interest of some, but not all, of the ABC Investors in the Policies. (Conservator’s Response, at p. 10). Clearly, if only 30% decided to accept—and Acheron is confident the number will be significantly higher—those 30% would receive the total 43% payout set forth in the Acheron Offer.

**Acheron’s Discount Rate Analysis is Confirmed by the August L&E Report Commissioned by the Conservator**

The Conservator’s additional carping that Acheron’s Offer will “not fairly compensate the ABC Investors” also misses the mark. While the Conservator confidently prognosticates that “According to the L&E projections, the ABC Investors’ share of maturities will exceed \$11.5 million by the end of 2015,” the Conservator has no rational basis on which to base its claim. A review of the maturities between 2007-present proves this point. In 2007, maturities [exceeded] the L&E projections; in 2008, maturities lagged below L&E’s projections; in 2009, maturities exceeded L&E projections, and so far in 2010, maturities have lagged well below L&E’s projections. In short, that is the point of the Acheron Offer, to provide ABC Investors—many of whom are elderly—with an immediate lump-sum payout.

Next, the Conservator again claims that Acheron’s “discount rate” is unreasonable, and even contends that “L&E specifically did not make any findings of an appropriate discount rate for the ABC Investors’ share of future maturities.” (Conservator’s Response, at p. 14 (emphasis added)). But, in the L&E Report commissioned by the Conservator, L&E specifically concluded that:

The total value of future payments to the receiver were determined to be \$12,723,000.00 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 [Acheron’s first

offer]. This value reflects expected future maturities, premiums and expense cash flows.

(First Mildren Aff., Exhibit 13, at p. 3 of 10 (emphasis added)). Accordingly, contrary to the Conservator's claims, L&E did specifically calculate a specific discount rate for the "ABC Investors' share of future maturities." Most important, in the L&E Report commissioned by the Conservator, L&E concluded 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., at 4 of 10). The Conservator does not refute this passage, nor does the Conservator provide any reasonable analysis as to why any other "institutional buyer" who conducts even a modest amount of due diligence on the Policies would reject L&E's conclusion, and make an offer at a 5% discount rate—a discount rate utilized for much less risky investments.

What the Conservator does not attempt to refute—because it cannot—is the fact that the ABC Investors' best return is capped, but is still subject to the unpredictable and protracted process of awaiting maturity of policies because of the death of a viator.

### **Inclusion of the Premium Reserve Account Funds**

The Conservator makes many of the same arguments regarding the inclusion of the Premium Reserve Account ("PRA") it did previously. The Conservator, however, continues to miss the point that he is presently holding these funds—tantamount to an interest-free loan from the ABC Investors—and these funds are not in the ABC Investors' pocket. Acceptance of Acheron's Offer eliminates the need for the PRA and means more distribution to the ABC Investors.

### **The Conservator's Website Still Advises ABC Investors That They Will Receive 50%**

Notwithstanding the Conservator's contentions, the Conservator's website still advises all ABC Investors, unequivocally, that "You should receive approximately 50% of your original invested amount. If you invested \$1,000, you should expect to receive approximately \$500. . ." (Supplemental Mildren Aff., Exhibit E). The Conservator's Response fails to address the discrepancy between these figures and the 54.9% referred to in the Response.

In addition, the Conservator's website also fails to advise the ABC Investors as to:

- How long it will take to be paid the 50% the Conservator promises?; and
- That L&E projects that it will take until 2025 for those payments to be made.

During the three years that Acheron has been involved with the Policies, and after a review of the prior submissions by the Conservator in this proceeding, at no time has the Conservator ever communicated to the ABC Investors that Lewis and Ellis projects that the full payout under the Conservatorship will be completed in 2025. Even the original election form that ABC Investors executed with respect to the Infinity OPA did not include any statement relating to how long the payment of maturities could take. Does the Conservator believe that eleven years after the commencement of this case, that the ABC Investors want to wait another 15 years or more to be compensated?

### **The Conservator's Criticism of the Notice**

The Conservator dedicates pages 17-19 of its Response in a vain attempt to criticize the Notice—essentially creating its own false straw men that it, of course, refutes. statements to both the Department and counsel for the Conservator for further discussion—additionally it includes blanks for additional information. Instead of calling counsel for Acheron, like the Department did, to seek clarification, however, the Conservator simply "shot first . . ." We address the Conservator's criticism in series:

- How does an ABC Investor “participate” in the Fund? Who administers?: Because the payments to the ABC Investors resemble settlement or damages payments to members of a class of plaintiffs, like in most class action settlements, Acheron intended to retain an independent program administrator. Such administrators routinely provide such services in the context of class action settlements or administration of a damages fund that needs to be distributed. If any ABC Investor questioned the amount it received, it would have the right to make an application to the Court for resolution.<sup>3</sup>
- The 60% Threshold: Again, in most class actions, there is a provision which states that if a certain percentage participation is reached, then the relief is class-wide, and only a person or entity that specifically seeks to be excluded from the class does not receive class relief. Because the Acheron Offer essentially reflects an “opt-in” class, a threshold level for full participation was included. The Conservator’s naive criticism “[t]he Court has not made *any* rulings that would support these statements. Yet Acheron highlights these representations by setting them out in bold-face type and making them twice on the same page” is nothing short of silly. Acheron is making a motion specifically to obtain Court approval to be able to make its offer to the ABC Investors. Court approval would also be required concerning both the content and the ability to send any Notice to the ABC Investors.
- The Lack of Any Statement From The Conservator: The Conservator next takes Acheron to task for failing to include any statement from the Conservator. Acheron has absolutely no objection to the inclusion of any statement from the Conservator or the Department in a Notice to the ABC Investors. Ironically, while out of one side of his mouth the Conservator complains his voice was silenced from the Notice, the Conservator has no qualms about shutting Acheron out of any proposed Notice to the ABC Investors. (Conservator’s Response, at p. 19). As set forth above, any Notice should be the product of the Department, the Conservator and Acheron, with approval by the Court.
- Acheron’s “Threat” of Default: While the Conservator may try to twist Acheron’s words, Acheron was simply providing the ABC Investors with the reasons why Acheron is making its offer now—a valid question that Acheron anticipates some ABC Investors might have when reviewing any Notice.

**The Conservator’s Suggestion that Acheron “Release the Conservator from the OPA and Waive Any Right, Title or Interest in the Policies” is Shameless**

---

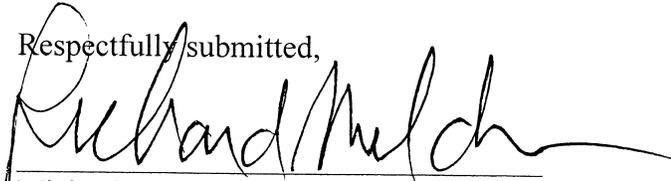
<sup>3</sup> Similarly, Acheron has no intention of taking ownership of the Fund. Of course, had the Conservator sought to discover this fact, a simple phone call would have sufficed. Moreover, creation of the Fund, allows for the pooling of all the funds in an interest bearing account, while the third-party administrator receives election forms from ABC Investors, allows for the cutting of one check to a participating ABC Investor, rather than the inefficient, and wasteful mailing of multiple checks—such as is done by the Conservator now. (Supplemental Mildren Aff., Exhibit E).

Finally, the Conservator claims that “to effectively market or obtain other offers for the Portfolio, the Conservator must be able to assure potential purchasers that he can assign title to the Policies free of other claims.” This is patently false—three times the Conservator has “effectively marketed” receipt for many years, of just a 40% maturity stream from the Policies, combined with the ABC Investors’ “claim” on 60% of the maturities. The Conservator could easily market just the ABC Investors’ interest in the Policies—the discrete portion Acheron seeks to purchase now. L&E has easily put a value on that portion, and any other “institutional buyer” could make a determination whether it made economic sense to purchase that interest.

The Conservator brazenly request that the “Court should require” Acheron to “release the Conservator from the OPA and . . . waive any right, title or interest in the Policies is ludicrous. (Conservator’s Response, p. 20). Acheron has already paid over \$5 million in premiums, and an additional \$2.1 million to the Conservator’s servicing company, and the Conservator readily admits that Acheron has not defaulted under the OPA. That the “Court should require” Acheron and force it to waive its contractual rights and interest in the OPA is a blatant interference and taking away without just compensation of Acheron’s valid contractual rights protected by the Fifth Amendment.

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,



Michael C. Turpen, OBA No. 9139  
Richard Mildren, OBA No. 6182  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
5801 Broadway Extension, Suite 101  
Oklahoma City, OK 73118  
Telephone: (405) 843-9909  
Facsimile: (405) 842-2913

and

Claude G. Szyfer  
Stroock & Stroock & Lavan LLP  
180 Maiden Lane  
New York, New York 10038-4982  
(212) 806-5934 phone  
(212) 806-6006 central fax

**CERTIFICATE OF SERVICE**

I hereby certify that on the 17th day of September 2010, a copy of the above and forgoing document was mailed via U.S. Mail postage prepaid to:

Patricia A. Labarthe, Esq.  
Oklahoma Department of Securities  
120 North Robinson Ave., Suite 600  
Oklahoma City, OK 73102  
ATTORNEY FOR PLAINTIFF

Melvin R. McVay, Jr.  
Sahnon K. Emmons  
Kenneth A. Tilotson  
PHILLIPS MURRAH, P.C.  
Corporate Tower/Thirteenth Floor  
101 North Robinson  
Oklahoma City, OK 73102  
ATTORNEYS FOR CONSERVATOR H.  
THOMAS MORAN, II



---

Richard A. Mildren