

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.)	

**ACHERON PORTFOLIO TRUST'S REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION FOR AN ORDER APPROVING A SALE OF CONSRVATORSHIP ASSETS**

Filled with double-speak, meritless invective, and empty jingoism, the Conservator objects to Acheron's Motion. In addition, the OSD filed a short Response, which states it cannot support Acheron's Offer, but unequivocally asserts the OSD would "agree to a cash sale" based on a reasonable offer, and that a lump-sum "would be preferred." (Response of Oklahoma Securities Department ("OSD") at 2, 4). That is exactly what Acheron sought to accomplish in 2009, by first contacting the OSD and then attempting to negotiate with the Conservator. Those efforts were flatly rebuffed by the Conservator. Notwithstanding the Conservator's blithe contention that at an October 2009 meeting, "Acheron declined to increase its offer," (Moran Affidavit, at ¶ 11), the Conservator's affidavit leaves out the critical facts that an Acheron representative flew in for the meeting from London, but the Conservator refused to even discuss a counteroffer to Acheron, flatly told Acheron the Policies were not for sale, and would not entertain any negotiation at all. Clearly, Acheron would welcome an opportunity for negotiation, or as it stated in its Motion, an opportunity to canvas Investor interest for a sale. (Acheron's Motion and Brief, at 22). Indeed, the 8 out of 10 Investors who accepted Acheron's offer in 2008 to purchase their share of the Conservatorship proceeds reflects the only evidence in the

record concerning the Investors' interest in a sale. (*Id.*, at 8). Noticeably absent from the Conservator's Objection is any indication of Investor interest. The Conservator's Objection also ignores absolutely critical undisputed points set forth in Acheron's Motion:

The Conservator's Objection Ignores the Costs to the Investors of Waiting 17 Years

for Full Payment: The Conservator's Objection ignores basic economics and investing—to wit, the time value of money—and unilaterally reaches the economically irrational conclusion the Investors would reject a significant immediate pay out as opposed to a slightly larger total payment, stretched over 17 years, and possibly more.¹ As the Conservator stated in prior submissions to this Court, “many of [the Investors] were elderly and retired” when they made their original investments with ABC, (Mildren Aff., Exhibit 7), and over 11 years have passed since this proceeding commenced. Requiring Investors to wait an additional 17 years in order for the full Purchase Price to be reached, which will only constitute 50% percent of their original investment, as opposed to the approximate 40% which the Investors would receive under Acheron's Offer fails to have the Investors' best interests at heart. Furthermore, the Conservator does not dispute the extended life expectancy tables for all persons, including persons living with HIV and/or AIDS, which comprise the overwhelming majority of viators for the Policies, or the continued medical improvements relating to the treatments for HIV and AIDS. These factors not only affect Acheron, but the Investors as well—the longer the viators live, the longer the Investors must wait to receive their share of the maturities. In sum, Acheron's Offer provides the Investors with a significant return, and the ability to receive that return now, as opposed to small parts over the course of 17 years.

¹ *Atl. Mut. Ins. Co. v. Comm'r of Internal Revenue*, 523 U.S. 382, 384 (1998) (“This designation enabled the PC insurer to take, in effect, a current deduction for future loss payments without adjusting for the ‘time value of money’—the fact that ‘[a] dollar today is worth more than a dollar tomorrow.’”) (emphasis added).

Acheron's Offer is not "Essentially the Same" as the one made in 2008: Both the OSD and Acheron claim that Acheron has essentially made the "same cash offer [that] has been proposed for over two years." (OSD, at 4; Conservator, at 10). This claim is wrong because:

- **Policies Have Matured:** Since 2007, numerous Policies in the portfolio have matured, thereby reducing the face amount of the Policies to be purchased from \$104,821,181 to a present figure of \$98,844,368 (which includes certain policies with unclear legal status). Accordingly, the Conservator's (and the OSD) claim that Acheron's Offer for the Policies, which now contains \$6 million less in total Policies, is the same is not only disingenuous, it is wrong. Offering to pay *more*, for an asset whose value has depreciated can hardly be described as "essentially the same" offer. (Conservator, at 9).
- **The Market for the Policies Has Deteriorated:** As set forth in detail in Acheron's Motion, the market for viaticals and life settlements has deteriorated significantly since the last quarter of 2008. Neither the OSD nor the Conservator dispute this fact, and indeed, the Conservator confirms that "market forces" have "diminished [the] value of the Portfolio." (Conservator, at 14). Notwithstanding the fact that Policies have matured and that "market forces" have "diminished" the market value of the Policies, Acheron's Offer is actually greater than the flat \$10 million offer made in late 2007, when the value of the Policies was much greater.

Thus, the Conservator (and the OSD) are wrong when they claim that Acheron's Offer is "essentially the same" offer made in 2007. Given the maturities and the declining market conditions, Acheron's Offer is materially better than the offer made in late 2007, and Acheron remains ready, willing and able to negotiate a purchase price that is acceptable to the OSD, Conservator and the Investors.

Prepayment of the Portfolio is a "Win-Win" for both the Investors and Acheron:

The Conservator complains that Acheron "is a foreign hedge fund . . . and its efforts here are aimed at serving the best interests of its investors. . ." and that Acheron is not "acting out of any sense of altruism." (Conservator, at 13, 14). Yes, Acheron is not an Oklahoma entity, nor is it a charitable institution. Those facts, however, did not concern the Conservator when Acheron's successor in interest, Lorenzo Tonti, Ltd., another "foreign hedge fund," purchased the Policies. Nor is the fact that Acheron is a "hedge fund" of any legal significance—indeed, the

Conservatorship Order requires that an “institutional buyer” purchase the Policies. Accordingly, that a “hedge fund” purchased the Policies is not surprising.

In addition, Acheron has never hidden the fact that a lump-sum prepayment would improve the financial metrics of its investment in the Policies, and potentially mitigate the “negative cash flow” generated by the present arrangement—which includes huge servicing costs to Heritage.² Acheron itself included in its Motion the December 10, 2007 letter from its prior counsel to counsel for the Conservator, in which it admitted that the “current payment structure under the Purchase Agreement is generating negative cash flow and is not sustainable.” (Mildren Aff., Ex 12). Acheron does not deny that a prepayment benefits its own interests. A lump-sum prepayment here, as set forth above, also is clearly in the Investors’ interest.

The Conservator’s persistent refrains of Acheron’s status as “foreign hedge fund” reeks of unlawful discrimination and blatant jingoism.³ Such abhorrent attacks serve no legal purpose and simply demonstrate the emptiness of the Conservator’s objections. So long as the Investors receive a reasonable return, Acheron’s citizenship is wholly irrelevant.

The Conservator’s platitude that “the current payment structure is generating positive cash flow for the Investors” is also of no legal significance. Any distribution under the Policies will generate a “positive cash flow” for the Investors, as they are not required to pay any of the premium, servicing or any other costs associated with the Conservatorship. The appropriate analysis is whether an early payout provides a reasonable benefit to the Investors. Of course, the

² Attached as Exhibit 1 to the Supplemental Mildren Affidavit is a schedule of the servicing fees for the Future First portfolio, which are close to half the amount of the servicing fees charged by Heritage for the ABC portfolio.

³ Abad v. Bayer Corp., 563 F.3d 663, 666 (7th Cir. 2009) (“we would agree that a foreign plaintiff has the same rights in an American court as an American citizen has, see In re Factor VIII or IX Concentrate Blood Products Litigation, *supra*, 484 F.3d at 956--discrimination against foreign litigants should be unthinkable in this cosmopolitan age of commercial globalization. It should make no difference that the plaintiffs are Argentines rather than Alaskans.”).

Conservator conveniently ignores the fact that he is the principal of Heritage, and that Heritage stands to benefit from the continuation of the “terms and condition of the existing Option Purchase Agreement . . .” (Conservator, at 9).

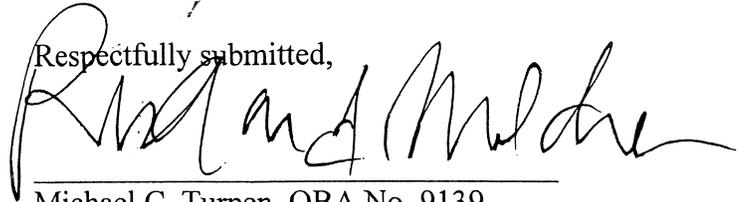
Acheron’s Offer Frees the Premium Reserve Account (“PRA”) for Distribution to the Investors: The Conservator also claims that Acheron’s Offer is only \$10.2 million, and does not include the \$2.5 million in the PRA, and that the “funds already belong to the Investors.” (Conservator, at 3, 7). This ignores economic reality; this money is not going into the Investors’ pockets—essentially the Investors have provided an interest free loan to the Conservator that only gets repaid when the Purchase Price is reached. Acheron’s Offer eliminates the need for the PRA, and allows distribution of the PRA funds to all Investors.⁴

The Conservator’s 2009 Distribution to the Investors is Artificially Inflated: The Conservator also claims to have “distribute[d] approximately \$3.7 million to the Investors.” (Conservator, at 14). However, this amount is artificially inflated by the Conservator’s decision to deplete the PRA by \$700,000—which conveniently occurred after the October meeting with Acheron. While the Conservator concluded that it “would be prudent” to distribute \$700,000 from the PRA in 2009, premium costs in 2010 are actually *greater* than they were in 2009. (Supplemental Mildren Aff., Ex. 2). The Conservator’s prudence smacks of expediency.

Acheron’s Offer Reflects a Reasonable Discount Rate: Contrary to the Conservator’s protests, Roger Annin, of Lewis & Ellis, stated unequivocally, that Acheron’s Offer “amounts to a 13.30% discount rate applied to future expected cash flows under the participation agreement. This is a reasonable discount rate for a buyer to apply in current markets.” (Conservator, Ex. 13). The report of Wm. Scott Page, submitted by Acheron also reaches the same conclusion.

⁴ Based on the time value of money, the PRA funds disbursed now is of far greater value to the Investors, than the same amount disbursed in 17 years.

Respectfully submitted,



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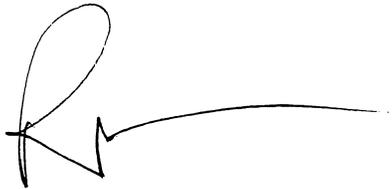
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2010 a copy of the above and forgoing document was mailed via U.S. Mail postage prepaid to:

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Richard A. Mildren

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SUPPLEMENTAL AFFIDAVIT OF RICHARD A. MILDREN

1. I, Richard A. Mildren, being of lawful age and first being sworn upon his oath, deposes and state that the listed and attached exhibits are true and correct copies of the documents listed in this affidavit.

1. Service and Escrow Agreement of November 26, 2003.
2. ABC Annual Projections for 2010 and 2009.

Further affiant sayeth not.



Richard A. Mildren

March 5, 2010

Date

STATE OF OKLAHOMA)
)
) ss
COUNTY OF OKLAHOMA)

On this 5th day of March 2010, the above-referenced individual appeared before me and affixed his signature hereto.



Notary Public