

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

Oklahoma Department of Securities,
ex rel. Irving L. Faught, Administrator,

Plaintiff,

v.

Accelerated Benefits Corporation, a Florida
Corporation, *et al.*,

Defendants.

FEB 17 2010

PATRICIA PRESLEY, COURT CLERK

by _____
DEPUTY

Case No. CJ-99-2500-66

Judge Daniel L. Owens

**OBJECTION OF THE CONSERVATOR TO ACHERON PORTFOLIO TRUST'S
MOTION FOR AN ORDER APPROVING SALE OF CONSERVATORSHIP ASSETS**

February 17, 2010.

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I. INTRODUCTION.

The Conservator, Tom Moran, objects to the MOTION FOR AN ORDER APPROVING SALE OF CONSERVATORSHIP ASSETS filed by Acheron Portfolio Trust ("Acheron").¹ Acheron is not actually seeking an order approving the sale of the policies held by the Conservatorship (the "Policies" or "Portfolio"). Instead, this foreign hedge fund is seeking an order that would change the terms of the Option Purchase Agreement ("OPA") the Court approved when it approved the Sale of the Policies to Acheron in 2006, and which remains in full force and effect.

Acheron agreed to purchase the Policies over three (3) years ago for \$38,050,000 (the "Purchase Price"). Since that time, Acheron has reconsidered its investment. Subsequent changes in the life settlement market have adversely impacted the performance of Acheron's investment under its hedge fund model. Acheron now finds itself obligated to continue paying the Purchase Price for Policies that do not have the same value to Acheron as it anticipated when it purchased the Portfolio in 2006. Also, because Acheron is responsible for payment of premiums and servicing costs for the Policies, it complains that it is experiencing negative cash flow.

Acheron asks the Court to redraft the terms of the OPA to reduce the balance of the Purchase Price. Acheron is seeking to change its deal with the Conservator and is doing so under the guise of what is in the best interests of our Investors, without even once mentioning that its true motivation is to do what is in the best interests of its investors. The Conservator cannot in good faith recommend that the Court approve Acheron's proposal. Revising the OPA to ease Acheron's cash flow problems and

¹ Acheron and its predecessor-in-interest, Lorenzo Tonti Ltd., are referred to collectively as "Acheron."

mitigate its losses would benefit Acheron's investors to the clear detriment of the ABC Investors.

II. SUMMARY OF ARGUMENT.

Acheron's request that the Court enter an order "approving the Acheron Offer" ignores the obvious fact that the Court has already approved Acheron's offer to purchase the Portfolio for \$38,050,000. In 2006, the Court entered its Order approving Acheron's offer, the sale of the Portfolio to Acheron and the terms of the OPA. Having reevaluated its purchase of the Policies, Acheron is now seeking to avoid the terms of the OPA by submitting a new offer for the Court's approval.

Acheron's current offer to "prepay" the Purchase Price is in substance an offer to re-purchase the Policies at a price and on terms that would better serve the interests of Acheron's investors. Under the OPA, Acheron is obligated to pay a total of \$38,050,000 for the Policies, with payment to be made as the Policies mature. Contrary to Acheron's representations to the Court, under the terms of the OPA, Acheron does not own the Policies. Until the entire Purchase Price is paid by Acheron, the Conservatorship remains the owner of the Policies. Additionally, until Acheron pays the remaining balance of the Purchase Price, Acheron is obligated to pay all of the premiums and servicing costs for the Policies. The Conservatorship is not, as Acheron contends, incurring these costs.

Acheron currently owes \$30,953,473 on the Purchase Price. Acheron is not just offering to prepay or accelerate the Purchase Price. It is seeking to reduce the amount of the Purchase Price that it agreed to pay when the Court approved the sale of the Portfolio to Acheron in 2006. Its "offer" should be rejected for the following reasons:

- Despite its contentions, Acheron is not offering a lump sum cash payment of \$12.7 million. The only cash Acheron is really offering to pay is \$10.2 million. The \$2.5 million difference between these amounts would be paid, according to Acheron, from the Conservatorship's premium reserve account ("PRA"). However, these funds do not belong to Acheron, but to the Investors. Therefore, the only amount being offered by Acheron is \$10.2 million.
- Acheron's offer of \$10.2 million does not represent a reasonable value for the balance of the Purchase Price. Acheron's offer is based on a projected sale value of the Portfolio based on the current market where, according to Acheron, "there has been a large evaporation of interest from institutional investors to purchase portfolios like the Polices." In other words, Acheron is asking the Court to reduce the Purchase Price, which Acheron agreed to pay when it believed the Portfolio was worth more, to reflect Acheron's reassessment of the Portfolio's current market value.
- The market value of the Portfolio today is immaterial to the Investors. They are not trying to sell the Portfolio, nor do they need to sell it. They sold it in 2006 to Acheron. The Conservator has a valid and binding contract with Acheron under which Acheron is responsible for payment of the Purchase Price in the amount and under the terms set forth in the OPA approved by the Court.
- Moreover, Acheron's offer is significantly less than the present value of the future payments due under the OPA. From the standpoint of the Investors, the relevant question with respect to Acheron's offer is whether \$10.2 million represents the present value of the payments due under the OPA. It does not. Acheron's offer of \$10.2 million represents a nearly 18% discount rate and would not compensate the Investors for the future cash flow required under the OPA.

If the Court determines that it is in the best interests of the Investors to receive a lump sum payment for the Portfolio, the Investors should receive the maximum amount and should not be forced to accept Acheron's offer without a determination that it represents the best return available. In the event the Court determines that an immediate lump sum payment might better serve the Investors' interests, the Conservator requests that the Court (not Acheron) determine the fair present value of future payments due under the OPA.

Alternatively, should the Court decide that a sale is in the best interests of the Investors, the Conservator requests the Court to allow other potential purchasers to bid

on the Portfolio by employing the same procedure as when the Portfolio was originally sold: solicit bids for the Portfolio, submit the offers to the Investors for their consideration and input, and allow the Conservator and the Oklahoma Department of Securities ("Department") to provide the Court with their recommendations. The Court could then consider all offers in light of Acheron's current obligations under the OPA to determine what best serves the Investors' interests.²

III. FACTUAL BACKGROUND.

A. The Terms of Acheron's Agreement to Purchase the Policies.

1. The Court approved the sale of the Policies to Acheron in 2006.

The Court has already entered an Order approving the offer Acheron made in 2006 to purchase the Policies. On May 17, 2006, the Conservator filed his MOTION FOR APPROVAL OF NEW PURCHASE AND SERVICING AGREEMENTS with Acheron's predecessor-in-interest. On June 7, 2006, the Court entered its ORDER APPROVING OPTION PURCHASE AGREEMENT AND SERVICE AND ESCROW AGREEMENT WITH LORENZO TONTI, LTD. Copies of the Motion and Order are attached as Ex. 1 and 2, respectively.

2. The Purchase Price approved by the Court is \$38,050,000.

In approving the sale of the Policies, the Court approved the terms of the OPA that Acheron executed on May 24, 2006. Under the terms of the OPA, Acheron agreed to pay \$38,050,000 for the Policies with payment to be made as the Policies matured. See, OPA, ¶6, Ex. 3. Under the terms of the OPA, when a Policy matures the

² Because Acheron has a valid and enforceable contract for the purchase of the Portfolio, the Conservator would have to be in a position to assure potential purchasers that Acheron will consent to the termination of the current OPA in the event the Court determines that the Portfolio should be sold to another purchaser. This should not be an issue, however, in light of Acheron's repeated assertions that it is in the best interests of the Investor to resell the Portfolio so that they receive a lump sum payment.

Conservator retains 60% of the proceeds, which is applied against the Purchase Price, and remits 40% of the proceeds to Acheron. *Id.* at ¶6.4. The OPA does not provide any basis for Acheron to renegotiate, adjust or reduce the Purchase Price in the event the Portfolio declines in value due to changes in the life settlement market.

3. Until Acheron pays the entire Purchase Price, the Conservator owns the Policies.

It is a misrepresentation that Acheron "already owns the policies." (Motion, p. 1) On February 7, 2002, the Court entered its Order appointing Mr. Moran as Conservator of certain assets of the Defendant, including "all life insurance policies owned or held beneficially, directly or indirectly, by or for the benefit of ABC and/or the ABC Investors, that were purchased from the date of inception of ABC through September 30, 2000 ('Policies')." See, ORDER APPOINTING CONSERVATOR AND TRANSFERRING ASSETS, p.1, Ex. 4. The Court further ordered that the Conservator "take custody, possession and control of the Conservatorship Assets as they are transferred to Conservator." *Id.*

On February 21, 2002, the Court entered its Order "authorizing the establishment of HTM and granting authority to transfer title to viatical and/or life settlement policies belonging to the Conservatorship to HTM." See, ORDER AUTHORIZING ESTABLISHMENT OF LIMITED LIABILITY COMPANY TO HOLD TITLE TO VIATICAL AND/OR LIFE SETTLEMENT POLICIES BELONGING TO CONSERVATORSHIP, Ex. 5. Pursuant to the Court's orders, ownership to each of the Policies was transferred to HTM and HTM is currently the owner of the Policies. See, Affidavit of Tom Moran, ¶1, Ex. 6.

Under the terms of the OPA, ownership of the Policies will not transfer to Acheron until Acheron has paid the entire Purchase Price. The OPA clearly states:

6.6 Complete Payment. **At the time in which Seller has received the entire Purchase Price**, exclusive of the Earnest Money Deposit, as evidenced by the Servicer's accounting under the Service and Escrow Agreement, **the Servicer will prepare the appropriate assignment documents to cause all unmatured Large Policies and Remaining Policies to be conveyed and transferred to Buyer or as directed by Buyer.** (Emphasis added.)

Acheron owes \$30,953,473 on the Purchase Price. See, Moran Affidavit, ¶2, Ex.

6. Therefore, in accordance with the terms of the OPA, the Conservatorship continues to own the Policies.

4. Acheron is responsible for payment of premiums and servicing costs for the Policies.

Acheron claims that it is seeking the Court's approval of new terms to the OPA "to end the Conservatorship, which is incurring significant costs." (Motion, p. 7) Under the terms of the OPA, Acheron assumed "all of the liabilities and obligations of the [Conservator] under the Policies...and the costs, fees and expenses of Servicer under the Service and Escrow Agreement." See, OPA at ¶4, Ex. 3. Acheron, not the Conservatorship, is incurring the premium and servicing costs of the Portfolio and remains responsible for these costs until the Purchase Price has been paid and ownership of the Policies is transferred to Acheron.

B. Acheron's New "Offer" for the Portfolio.

1. Acheron is offering \$10.2 million – not \$12.7 million – for the Policies.

In its Motion, Acheron states that its "bid" to purchase the Policies "is all cash and consists of \$12.7 million in one lump sum cash payment to the Investors...." (Motion, p. 2) The only cash payment being offered by Acheron is \$10.2 million. The remaining \$2.5 million that Acheron claims is included in the "one lump sum cash

payment" is not a payment from Acheron but "the release to the Investors of \$2.5 million already paid by Acheron presently in the [Conservatorship's PRA]." (*Id.*)

a. The PRA is the property of the Conservatorship, not Acheron.

The Conservator established the PRA when the Policies were first sold in 2002 to cover any shortfalls in the event of a default. See, Moran Affidavit, ¶3, Ex. 6. Accordingly, the funds in PRA already belong to the Investors; the funds are not Acheron's to offer.

b. The \$2.5 million used to establish the PRA was not paid by Acheron, and the current balance of the PRA is \$1.8 million not \$2.5 million.

The original purchaser of the Policies, Infinity Capital Services, Inc. ("Infinity") paid the \$2.5 million that the Conservator used to fund the PRA. See, Moran Affidavit, ¶4, Ex. 6. Under the terms of the Infinity OPA, Infinity paid \$2.5 million in exchange for the right to purchase the Portfolio ("Infinity Option Payment"). See, Infinity OPA, ¶1, Ex. 7. The Infinity Option Payment, which was fully-earned and nonrefundable, represented at the time approximately two (2) years' worth of premium payments. See, Infinity OPA ¶1, Ex. 7; Moran Affidavit, ¶5, Ex. 6

At the end of 2009, the Conservator determined that the PRA no longer required a balance of \$2.5 million. See, Moran Affidavit, ¶6, Ex. 6. Because certain Policies have matured in the seven years since the Conservator established the PRA, the potential risk for payment of premiums in the event of default by Acheron or any other purchaser has decreased. *Id.* The Conservator therefore concluded that it would be prudent to distribute \$700,000 from the PRA to the Investors in December of 2009. *Id.* The current balance of the PRA is approximately \$1.8 million. *Id.*, at ¶7.

However, regardless of the balance currently in the PRA, these funds belong to the Conservatorship and the Investors, and there is no valid basis to credit Acheron with these funds as part of the payment it is offering for the Policies. Therefore, the total amount Acheron is effectively offering to pay the Investors is no more than \$10.2 million.

2. Acheron's offer is motivated by its concerns about its own liabilities under the OPA and the current market value of the Portfolio.

Acheron characterizes its offer as allowing the Investors to "put the entire [ABC] nightmare behind them...." (Motion, p. 2) When Acheron first attempted to renegotiate the Purchase Price in 2007, Acheron was not yet concerned with the Court's perception of why it was seeking to renegotiate the Purchase Price. Instead, Acheron's Boston counsel candidly stated:

The current payment structure under the Purchase Agreement is generating negative cash flow and is not sustainable. My clients therefore believe that the best way to proceed would be to reach an agreement on the prepayment of the balance of the Purchase Price. The Trust is willing to pay the Conservator the sum of Ten Millions Dollars (\$10,000,000) (the Prepayment Amount) in full satisfaction of the balance of the Purchase Price. (Emphasis added.)

See, Letter from Edward S. Brewer, Jr. to Melvin R. McVay, Jr., December 10, 2007, Ex. 8.

Acheron now informs the Court that its offer is intended to "end the Conservatorship, which is incurring significant cost." (Motion, p. 7) Under the terms of the OPA, Acheron is responsible for the premiums and servicing costs for the Portfolio, not the Conservatorship. Thus, it is Acheron, not the Conservatorship, which is "incurring significant cost." The current payment structure is generating positive cash flow for the Investors. In 2009 alone, the Conservator distributed approximately \$3.7 million to the Investors. See, Moran Affidavit, ¶8, Ex. 6. The liabilities that Acheron

assumed may very well be generating negative cash flow for Acheron. However, this does not provide a legitimate basis to redraft the terms of the OPA.

C. The Conservator Has Negotiated in Good Faith with Acheron.

The Conservator has negotiated in good faith with Acheron to bring a meaningful offer to the Court for its consideration. Since receiving Acheron's proposal to make a lump sum payment of the Purchase Price in 2007, the Conservator has communicated with the Department and has had discussions with Acheron's managing director, Jean-Michel Paul, and Acheron's Boston, New York and local attorneys. The Conservator and the Department have repeatedly informed Acheron that they could not recommend to the Court that it approve payment of the Purchase Price in the amount proposed by Acheron and have suggested various counter-proposals that they believe would adequately compensate the Investors. However, after nearly two years of discussions, Acheron's offer to prepay the purchase price remains essentially the same.

1. The Conservator did not summarily reject Acheron's 2007 offer to pay \$10 million for the Policies.

The Conservator never "summarily" rejected Acheron's 2007 offer to pay \$10 million for the Policies. At the time Acheron made this offer, \$34,877,986 remained due and owing on the Purchase Price. See, Moran Affidavit, ¶19, Ex. 6. After discussing Acheron's offer with the Department, the Conservator's counsel responded:

The Oklahoma Department of Securities told us that they would probably be willing to agree to a pre-purchase for the portfolio provided that: Lorenzo Tonti pay \$13,500,000; the receivership continue to participate under the terms and conditions of the existing Option Purchase Agreement for 2 more years [whereby the Conservatorship would continue to receive 60% of the maturities]; notice be sent the investors of the pre-purchase proposal; and the Court approve the pre-purchase proposal. Further, this would all be subject to appropriate documentation to be approved by all parties.

Please let me know your thoughts.

Also, if you still like to talk today, please let me know when would be good time for you. Thanks.

See, Email from Mel McVay to Jean-Michel Paul, dated February 5, 2008, Ex. 9.

At this point in the discussions, Acheron's Boston counsel became involved and extended a slightly revised offer to prepay the Purchase Price for \$13,250,000. The Conservator's counsel advised that he would discuss the revised offer with the Department, but that it would most likely still want to see the Investors receive a percentage of the maturities for two (2) years. See, Emails between Mel McVay and Steven L. Schreckinger, dated May 1 and May 12, 2008, Ex. 9.

Acheron responded with an "alternative bid of \$10 Million US cash for the policies plus 1/3 of the maturities proceeds that occur with the first two years of the acquisition." See, Email from Jean-Michel Paul to Mel McVay, dated May 13, 2008, Ex. 9. After further discussions between the Conservator and Department, the Conservator's counsel informed Acheron:

I have spoken with Tom and based upon our discussion with the Oklahoma Securities Department we believe that it will take an offer of 13 million for the policies plus 30% of the maturity proceeds that occur within the first 2 years of the acquisition for the Department and the Court to seriously consider a sale of the portfolio at this time.

See, Email from Mel McVay to Jean-Michel Paul, dated June 6, 2008, Ex. 10.

Acheron's offer was not summarily rejected. Nor did the Conservator, at any point, make any prepayment of the Purchase Price contingent on "Heritage providing servicing for the Policies for an additional two years." (Motion, p. 8) Acheron did not submit any exhibits to support this contention and, as shown by the exhibits submitted by the Conservator, this statement is simply not true.

2. The Conservator did not refuse to negotiate in good faith when Acheron again offered to purchase the Policies for \$10 million in 2009.

When Acheron later made the same offer to purchase the Policies for \$10 million, the Conservator did not reject Acheron's purported "good faith attempts to negotiate." (Motion, p. 8) When Acheron was unsuccessful in convincing the Conservator and the Department to recommend its offer to the Court, Acheron attempted to circumvent the Court, the Conservator and the Department by contacting Investors directly and asking them to assign their interests to Acheron. Concerned that the Investors were not getting adequate information to make an informed decision, the Department intervened and directed Acheron to cease its efforts to solicit agreements from individual Investors until such time that adequate disclosures could be prepared and submitted to the Department for its review.

It was not until July of 2009 that Acheron again contacted the Conservator concerning its proposal to prepay the Purchase Price. Acheron offered again to pay a lump sum payment of \$10 million for the Policies:

Briefly, Acheron proposes to accelerate the OPA by paying a lump sum payment of \$10.3 million dollars. The amount will be split into two parts:

- a) \$10 million to the Conservatorship to accelerate the OPA for distribution to Investors
- b) \$300,000 to the Heritage Group to close the receiver termination fee.

See, Letter from Jean-Michel Paul to Moran, July 27, 2009, Ex. 11.

Even though Acheron was essentially offering the same \$10 million payment to the Investors as it had originally, neither the Conservator nor the Department rejected the offer without reevaluation. The relevant inquiry from the Investors' standpoint was and remains whether the value of the payment offered by Acheron is comparable to or

greater than the present value of Purchase Price under the current OPA payment structure. See, Moran Affidavit, ¶10, Ex.6.

To help assess whether the \$10 million being offered was a fair value for the future payments due under the OPA, the Conservator requested that an actuarial firm, Lewis & Ellis ("L&E"), prepare a valuation of future payments to the Conservatorship under the terms of the OPA. See, Valuation of Receiver's Portion of Portfolio Maturities ("Investor Valuation"), Ex. 12. L&E estimated the present value of the future payments due from Acheron using the following discount rates:

2%	\$28,651,000
4%	\$23,965,000
6%	\$20,363,000
8%	\$17,544,000
10%	\$15,303,000
12%	\$13,497,000
13%	\$12,723,000
14%	\$12,022,000
15%	\$11,384,000
18%	\$ 9,784,000

L&E did not make a finding as to the appropriate discount rate to determine the present value of the outstanding balance of the Purchase Price. See, Email from Roger Annin to Tom Moran and Sheri Townsend, dated August 14, 2009, Ex. 13. However, the \$10 million offered by Acheron represented a nearly 18% discount rate, which was unacceptable to the Conservator and the Department.

In August, the Conservator again discussed the Acheron offer with the Department. Following this meeting, the Department advised Acheron's Oklahoma counsel:

As previously communicated to counsel for Acheron, it is the position of the Department that any change to the existing arrangement previously considered and approved by the Oklahoma County District Court can only be made by the Court. At this time, the Department will not recommend to

the Court that the current offer from Acheron be accepted. In light of maturities in 2009 that will result in significant amounts going out the investors, the Department believes that Acheron would need to make a more sizeable offer before any further discussion would be beneficial. Since the Court will likely require that notice of any offer be circulated to investors, the expense to give such notice to investors does not appear to be warranted by the offer under consideration. The Department recognizes that this position does not impact Acheron's right to present the offer to the Court for its approval.

See, Letter from Patricia A. LaBarthe to Richard A. Mildren, Ex. 14.

On October 5th the Conservator and his counsel met with a representative of Acheron, two of Acheron's New York attorneys and its local counsel to discuss the \$10 million offer. See, Moran Affidavit, ¶11, Ex. 6. The Conservator and his counsel again informed Acheron and its attorneys that the offer was insufficient. *Id.* Acheron declined to increase its offer. *Id.*

Unwilling to increase its offer in any significant way, Acheron instead filed this Motion asking the Court to force the Conservator, the Department and the Investors to accept \$10.2 million for the Purchase Price that Acheron currently owes under the OPA.

IV. ARGUMENT.

A. Acheron Is Acting in Its Own Best Interests, Not Those of the ABC Investors.

Acheron's current lament that it wants to change the terms of the OPA to "liberate the Investors" from "the ABC nightmare" is absurd. Acheron is a foreign hedge fund operating out of London and Luxembourg. Its objective is to maximize the return on its investments and its efforts here are aimed at serving the best interests of its investors, not those of the ABC Investors. Acheron's only relationship to the ABC Investors is as purchaser of the Policies. As the purchaser, Acheron owes the Investors the balance of the Purchase Price and is, until the Purchase Price has been paid, responsible for the payment of premiums and servicing costs.

Acheron is not acting out of any sense of altruism. As Acheron's counsel stated when Acheron first offered a lump sum payment of \$10 million, the "current payment structure under the Purchase Agreement is generating negative cash flow and is not sustainable." See, Letter from Edward S. Brewer to Melvin R. McVay, Jr., dated December 10, 2007, Ex. 8. The current pay structure is not causing the Conservatorship negative cash flow. To the contrary, the cash flow from this payment structure allows the Conservatorship and the Investors to retain 60% of the Policy maturities, while bearing no expense for the payment of premiums and servicing costs. In 2009, this payment structure allowed the Conservator to distribute approximately \$3.7 million to the Investors. See, Moran Affidavit, ¶12, Ex. 6.

In addition to the negative cash flow that Acheron is experiencing, Acheron is apparently dissatisfied with the effect current market conditions have had on the value of the Portfolio it agreed to purchase. Since agreeing to purchase the Portfolio in 2006, the value of Acheron's investment has (according to Acheron) declined and Acheron has obviously reevaluated its decision to purchase the Policies under the terms of the OPA. Acheron cannot change the current value of the Portfolio; this is determined by market forces beyond Acheron's control. Thus, the only way Acheron can bring the diminished value of the Portfolio in line with what Acheron is paying for the Policies is to reduce the Purchase Price.

To accomplish this, Acheron is asking the Court to redraft the terms of the OPA to reduce the Purchase Price. That Acheron is acting in its own self-interest is not surprising. It is a foreign hedge with its own investors. However, the Conservator's duty is to protect the interests of our Investors. As discussed in the following sections, allowing Acheron to revise the payment terms of the OPA and pay the remaining

balance of the Purchase Price for a total payment of \$10.2 million is not in their best interests.

B. Acheron Is Contractually Bound to Pay the Purchase Price and Its Motion Is a Self-Serving Attempt to Repurchase the Portfolio at a Much Reduced Price.

Paying no heed to the fact that it is bound by the terms of the OPA, Acheron is asking the Court to allow Acheron to re-bid on the Portfolio, with Acheron as the only bidder, and to accept its offer despite the concerns of the Conservator and the Department. It should go without saying that *if* the Court should determine that it is in the Investors' best interests to re-sell the Portfolio at this time, Acheron should not be the only bidder and its offer should not be the only one that the Court considers.

More to the point, however, Acheron's own arguments demonstrate why it would not be in the best interests of the Investors to relieve Acheron of its obligations under the OPA and attempt to re-sell the Portfolio. In its Motion, Acheron states that "[t]he market for viaticals and life settlements relating to HIV policies has deteriorated significantly since the last quarter of 2008." (Motion, p. 12) Acheron goes on to state that "[t]he effect of these changes can be seen in reduced amounts offered and accepted in the actual transactions involving the purchase and sale of life settlement/viatical portfolios (especially those involving policies for persons with HIV)." (Motion, p.13)

The Investors have a contract under which Acheron is obligated to pay an agreed-upon and Court-approved Purchase Price. The Purchase Price reflects market conditions in 2006, before the life settlement market apparently "deteriorated significantly." It defies logic and basic business common sense to suggest that the Investors release Acheron from its obligations under the OPA and attempt to re-

negotiate the sale of the Portfolio in a market that has deteriorated and would yield offers, like Acheron's, for "reduced amounts."

The Conservator is mindful that it may be in the best interests of the Investors to consider a lump sum payment of the balance of the Purchase Price. However, as discussed in the next section, Acheron's offer of \$10.2 million would not compensate the Investors for the payments that they are entitled to receive under the OPA.

C. Acheron's Offer Would Not Compensate the Investors for the Present Value of the Cash Flow They Are Entitled to Receive under the Terms of the OPA.

In July 2009, L&E prepared a valuation of the Investors' 60% participation in the Portfolio maturities, *i.e.*, the cash flow they are entitled to receive under the terms of the OPA. See, Investor Valuation, Ex. 12. Acheron's then \$10 million offer represented a discount rate of nearly 18%. *Id.* Acheron's current offer of \$10.2 million represents an only marginally better discount rate. *Id.* Acheron has offered no evidence that a discount rate this steep is either reasonable or appropriate for the Court to consider.

To the contrary, Acheron contends that a discount rate of 13.30% would be appropriate. Acheron goes so far to represent to the Court that L&E's "conclusions again confirm the fairness and reasonableness" of a 13.30% discount rate." (Motion, p. 16) However, L&E did not make a finding as to the appropriate discount rate to determine the present value of the outstanding balance of the Purchase Price. In fact, L&E stated that "whether [a 13.03%] discount rate will meet with the investors interest is an issue that lies outside this report." See, Ex. 13. L&E did not make any recommendations concerning the appropriate discount rate and specifically acknowledged that a 13.30% discount rate would not necessarily serve the interests of the Investors.

Acheron further argues that its purported offer of \$12.7 million employs a discount rate of 13.30%. Acheron's offer is not for \$12.7 million, but for \$10.2 million. As previously stated, the \$2.5 million that Acheron adds to the \$10.2 million Acheron would actually be paying is not Acheron's property. The PRA is the property of the Conservatorship, and the balance is being held for the benefit of the Investors. The only payment being offered by Acheron amounts to no more than \$10.2 million. That Acheron felt compelled to attempt this slight-of-hand to inflate the value of its proposed payment shows that not even Acheron believes that the Court should approve a lump sum payment that represents a nearly 18% discount rate. If, as Acheron contends, a 13.30% discount rate is appropriate, according to the L&E report it should be offering to pay \$12.7 million not \$10.2 million.

D. Acheron's Offer Is Based on the Reduced Market Value of the Portfolio, Not the Present Value of the Agreed-Upon Purchase Price.

Acheron's primary argument in favor of changing the Purchase Price is that the life settlement market has deteriorated and that, as a result, Acheron's offer "is competitive to the pricing of non-HIV related portfolios [and] significantly better than the most recent HIV-related portfolio transactions executed since 2008." (Motion, p. 14) The Court approved the sale of the Portfolio to Acheron in 2006. Acheron is contractually obligated to pay the Purchase Price regardless of what the Portfolio might sell for in the current market. The "lack of liquidity in the market for potential purchasers of portfolios like the Policies" (Motion, p. 13) is immaterial. Acheron is not a "potential" purchaser; it is *the* purchaser of the Portfolio and has already agreed to pay the Purchase Price for the Portfolio.

In arguing the reasonableness of its offer, Acheron provides the Court with a "price/face analysis" for sales of other portfolios that Acheron claims are similar to the ABC Portfolio. (Motion, pp. 13-14) Similar or not, the prices paid for these portfolios have no bearing on whether the amount Acheron is offering for this Portfolio is in the Investors' best interests. The Investors are not seeking to sell the Portfolio. Moreover, as is clear from Acheron's dire view of the market for the Portfolio, it would be folly for the Investors to abandon the OPA with Acheron, relinquish the balance of the Purchase Price due from Acheron and re-sell the Portfolio in today's market. Although this was not Acheron's intent, its bleak analysis of the current market shows how fortunate the Investors are to have sold the Portfolio when the market was up and to have Acheron contractually bound to pay the Purchase Price the Court approved in 2006.

Acheron further argues the reasonableness of its preferred purchase price by looking at the value of the Portfolio in the market place under discount factors that would be a consideration *if* the Investors were trying to sell the Portfolio. Acheron relies on a report that was prepared by L&E in April of 2009 at Acheron's request. See, Viatical Portfolio Valuation (the "Acheron Valuation"), Ex. 1 to Acheron's Motion. Although Acheron fails to distinguish between the Acheron Valuation and the Investor Valuation, the two reports analyze two very different values. As discussed above, the Investor Valuation analyzed the present value of future payments to the Conservatorship under the terms of the OPA. By contrast, the Acheron Valuation analyzed the total value of the Portfolio in the current life settlement market, as if the Portfolio were for sale. It is not.

The Acheron Valuation, and the discount rates utilized there (including the much-ballyhooed 22% rate), are immaterial. The Conservator has a valid and binding contract

with Acheron under which Acheron is responsible for payment of the Purchase Price in the amount and under the terms set forth in the OPA approved by the Court. Acheron's backward-looking valuation of its investment is clearly the impetus for its offer and may be the basis for the amount of the offer. However, the current market value of Acheron's investment does not provide any basis for concluding that the best interests of the Investors lie in allowing Acheron to re-negotiate the Purchase Price. To the contrary: it demonstrates that the Investors benefited by obtaining Acheron's commitment to the Purchase Price, prior to the market's decline, and underscores the value of the payment terms the Court approved in May of 2006 to the Investors.

The only relevance of the current life settlement market is that it explains Acheron's almost frantic attempts to force the Investors to accept \$10.2 million for the Policies. Acheron no longer values the Portfolio to be worth what it was when Acheron purchased it in 2006. Acheron now values the Portfolio to be worth \$10.2 million. And it is asking the Court to reduce the Purchase Price to relieve Acheron of the consequences of its investment decision. While this provides insight into Acheron's motives, it does not provide the Court with a reasonable basis to redraft the terms of the OPA.

E. Acheron's Claim that Its Offer Would Provide the Investors with a Better Overall Rate of Return Is Baseless.

Acheron claims that its offer would provide the Investors with a greater rate of return than payment of the Purchase Price under the terms of the OPA. Acheron offers no evidence to support its calculations. But even from the face of the calculations, it appears that there are a number of flaws. Acheron bases its calculations on a payment by it of \$12.7 million, rather than \$10.2 million. Also, its calculations are based on

projected timetables that have already proven to be inaccurate. For instance, the Acheron Valuation projected 2009 maturities to be \$2,996,000. In fact, 2009 maturities totaled \$4,568,755. See, Moran Affidavit, ¶13, Ex. 6.

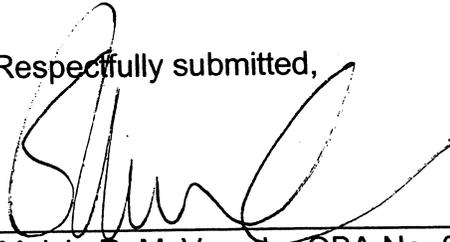
These are just two examples. Before the Court considers Acheron's calculations, the Conservator and Department should be allowed the opportunity to discover what the calculations are based on.

V. CONCLUSION.

Essentially, Acheron asks the Court to force the Investors to resell the Portfolio to Acheron at a price established by Acheron and based upon Acheron's assessment of current market conditions – at a time when Acheron itself acknowledges the life settlement market is depressed – without allowing any other potential purchasers to bid on the Portfolio, without any input from the Investors and against the recommendations of the Conservator and Department. Acheron argues that its offer is a fair valuation of the Investor's present interest in the proceeds of the Policies because similar portfolios are selling in today's market for what Acheron is offering. However, the value of the Portfolio in the current market is immaterial. The Investors do not need to sell the Portfolio. They have a purchaser, a binding purchase agreement and an agreed-upon purchase price that was negotiated before the life settlement market deteriorated.

The Conservator respectfully requests that the Court reject Acheron's efforts to void the OPA and deny its Motion to re-purchase the Portfolio for a reduced amount.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned certifies that on the 17th day of February, 2010, a true and correct copy of the foregoing Notice of Hearing was mailed, first-class with postage prepaid, to:

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