

IN THE DISTRICT COURT OF OKLAHOMA COUNTY THE DISTRICT COURT  
STATE OF OKLAHOMA OKLAHOMA COUNTY, OKLA.

OKLAHOMA DEPARTMENT OF )  
SECURITIES *ex rel.*, IRVING L. )  
FAUGHT, ADMINISTRATOR )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
ACCELERATED BENEFITS )  
CORPORATION, *et al.*, )  
 )  
Defendants. )

MAR - 4 2003  
PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
Deputy

Case No. CJ-99-2500-66

**CONSERVATOR'S RESPONSE TO DEFENDANTS' MOTION TO STAY  
ENFORCEMENT OF SALE ORDER AND BRIEF IN SUPPORT**

In response to the Motion of Defendants Accelerated Benefits Corporation ("ABC") and American Title Company of Orlando ("ATCO") (collectively, the "Defendants") to Stay Enforcement of Sale Order, Conservator Tom Moran ("Conservator") hereby submits the following:

**INTRODUCTION**

Defendants urge this Court to stay enforcement of its Order dated January 16, 2003, as modified January 24, 2003 (the "Sale Order"), pending the outcome of Defendants' appeal of the Sale Order that was filed with the Oklahoma Supreme Court on February 12, 2003. Defendants further ask that this Court not require them to post a supersedeas bond to secure the rights of the parties during the requested stay on the basis "that would be financially impossible given the amount of money involved" and "it is reasonably likely that the Sale Order will be set aside by the Oklahoma Supreme Court." Neither of these reasons is compelling.

More than a year ago, on February 6, 2002, this Court entered its Order Appointing Conservator and Transferring Assets (the "Conservatorship Order"). The Conservatorship Order

was signed and agreed to in form and substance by Jess LaMonda, ABC's president, and Keith LaMonda, on behalf of ABC; ABC's escrow agent, ATCO; and ATCO's president, David Piercefield. Under the Conservatorship Order, the Conservator is authorized, among other things, as follows:

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' interests 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;

Defendants did not appeal the Conservatorship Order, and the time for appealing that order has passed.

Since the entry of the Conservatorship Order, the Conservator believes that Defendants have failed or refused to transfer to the Conservator funds they held in escrow for the payment of the annual premiums on the Viatical Policies, which are currently estimated at approximately \$2.2 million. Further, Defendants have failed to abide by various Court orders directing them to reimburse the Conservator for Conservatorship expenses. As a result, the Conservator has only limited funds to continue to pay premiums on and otherwise maintain the Viatical Policies. *See Affidavit of H. Thomas Moran* attached as Exhibit "A" (the "Moran Affidavit").

Based on the authority granted by the Conservatorship Order, the Conservator contacted numerous potential institutional buyers to determine the marketability of the portfolio. Of the buyers contacted, only three offered to purchase the portfolio. After reviewing those offers and hearing arguments of counsel for the Conservator and Defendants, this Court entered the Sale Order authorizing the sale of the viatical life insurance policies (the "Viatical Policies") to Infinity Capital Services, Inc. ("Infinity"). The Conservator has since drafted an Asset Purchase Agreement that has been signed by Infinity and which provides for a purchase price of approximately \$59 million plus Infinity's ongoing payment of all policy premiums. Infinity has deposited \$2.5 million of the purchase price in an escrow account and these escrowed funds will become non-refundable at such time as this Court authorizes the Conservator to sign the Asset

Purchase Agreement. In the Conservator's opinion, the Infinity offer has the highest probability of obtaining the maximum value for the investors.

For the reasons stated below, the Conservator believes that a stay of the Sale Order will almost certainly cause Infinity to withdraw its offer to purchase the policies and is not, therefore, in the investors' best interests. Should, however, this Court decide to stay the Sale Order pending Defendants' appeal, the Conservator urges this Court to require Defendants to post a supersedeas bond in an amount equal to the contractual sales proceeds.

### **ARGUMENT AND AUTHORITIES**

#### **I. A Stay of the Sale Order is Not in the Investors' Best Interests.**

Defendants have asked this Court to stay the Sale Order under 12 Okla.Stat. § 990.4(D).

That Section provides:

*In any action not provided for in subsections A, B or C, the court may stay the enforcement of any judgment, decree or final order during the pendency of the appeal or while any post trial motion is pending upon such terms as to bond or otherwise as it considers proper for the security of the parties. (emphasis added).*

Unlike stays made mandatory under 12 Okla.Stat. § 990.4(A)-(C) by the required filing of a supersedeas bond, a stay under § 990.4(D) is not a matter of right, it is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case. The investors that filed claims with this Court (representing a majority of all investors) voted overwhelmingly to accept the proposed sale. In direct contradiction to Defendants' allegations, the investors clearly believe that a sale of the portfolio is in their best interests. Accordingly, they will not suffer irreparable harm if the sale is consummated pending Defendants' appeal, and no stay should issue.

Defendants' argument that the Sale Order violates the writ of prohibition entered in connection with the Six Percent Order is not compelling. The "settled-law-of-the-case" doctrine, which provides that where an appellate court rules upon an issue that ruling becomes the law of

the case for all subsequent proceedings, is not controlling where the facts and issues are different in subsequent proceedings. *See In re Appl. of Eaton Enterprises to Vacate*, 2003 OK 14; *Lockhart v. Loosen*, 943 P.2d 1074 (Okla. 1997); *Wilson v. Harlow*, 860 P.2d 793, 797 (Okla. 1993).

To cure the due process issues raised by the Supreme Court in its Writ of Prohibition, the Conservator sent notice of the application to sell the Viatical Policies by certified mail to all 4,477 investors. Receipt of the certified mail was returned by 4,331 of the investors. Only 120 pieces of the certified mail were returned unclaimed, one was refused and three were returned with a note that the addressee was deceased.

Included in the certified mailing was an investor claim form which asked investors to indicate their preference with regard to the proposed sale of the Viatical Policies. Approximately 55.4% (2,480) of the investors returned their claim form to the Conservator prior to the hearing on the Conservator's motion to sell the Conservatorship assets.<sup>1</sup> Approximately 87% on the investors who returned a claim form voted in favor of the sale (this represents approximately 42% of all investors), 10% voted against the sale and 3% returned blank claim forms.

The enforceability of the Sale Order has not been decided on appeal. Further, nothing in the Supreme Court's denial of the Conservator's Application for Rehearing indicates that, being fully-apprised of the existence of the Sale Order, the steps taken by the Conservator to remedy the procedural due process issues raised by the Oklahoma Supreme Court, and Defendants' stated intent to file an appeal to the Sale Order, the Supreme Court intends to vacate the Sale Order. Conversely, the Conservator believes, as this Court surely believed in issuing the Sale Order, that the investors received due process as evidenced by the fact that 97% of them acknowledged

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<sup>1</sup> The Conservator received several hundred investor claim forms after the Court's ruling, and in fact, is still receiving claim forms from investors. These claim forms have not been tabulated because they were received after the Court's ruling on the motion to sell.

receipt of the notice of the proposed sale. Accordingly, based on *Wilson*, the Defendants' previous appeal to the Oklahoma Supreme Court does not control the enforceability of the Sale Order.

## **II. Defendants Must Post Bond to Protect the Security of the Investors Pending Appeal**

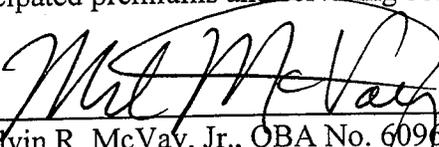
If the Sale Order is stayed it is a virtual certainty that Infinity will withdraw its offer to purchase the Viatical Policies. Without cash to pay the ongoing premiums, the Viatical Policies will begin to lapse within 30 days and many, if not all, of the investors will lose their entire investments. *See Moran Affidavit* attached as Exhibit "A." Consequently, the Conservator urges this Court to exercise its discretion and to set the appeal bond in an amount equal to the contractual sale proceeds based on the following factors:

- (1) value of the viatical policies subject to the Sales Order: approximately \$140 million, all of which will be lost if the sale of the policies is not consummated and the premiums on such policies lapse;
- (2) purchase price of the viatical policies: approximately \$58 million of which \$2.5 million has been paid by the purchaser and is currently held in escrow and will become non-refundable at such time as this Court approves the Asset Purchase Agreement; and
- (3) premiums and servicing fees to be paid by the buyer: approximately \$2.5 million per year to be paid until such time as the full purchase price has been paid and all policies have been conveyed to the buyer.

Defendants have represented to this Court that ABC has no money. Without a bond or a buyer, the premiums on the Viatical Policies cannot be paid, and the \$140 million portfolio of Viatical Policies will leave the victims of Defendants' fraud with nothing. For the security of the investors, this Court must require Defendants to post a bond to effect the stay of the Sale Order.

## CONCLUSION<sup>2</sup>

For the reasons stated herein, the Conservator respectfully requests that this Court deny Defendants' Motion for Stay, or in the event this Court grants a stay of the Sale Order, the Conservator urges this Court to require the Defendants to post a supersedeas bond in an amount equal to the anticipated sales proceeds, plus anticipated premiums and servicing costs.

  
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T. Ray Phillips, III, OBA No. 7128  
Thomas P. Manning, OBA No. 16117  
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ATTORNEYS FOR CONSERVATOR  
TOM MORAN

<sup>2</sup> Defendants argue that if the Sale Order is not stayed they will seek a writ of mandamus. However, because Defendants have an appeal pending, no writ may issue because there is a plain legal remedy. 12 Okla. Stat. § 1452. Further, a writ of mandamus will only issue where the refusal to perform a plain legal duty does not involve the exercise of discretion, unless the refusal to act is capricious, arbitrary or unreasonable. *Draper v. State*, 621 P.2d 1142, 1147 (Okla. 1980); *Nat'l Collegiate Athletic Ass'n v. Owens*, 555 P.2d 879, 882 (Okla. 1976). Because this Court has the discretion to grant or deny Defendants' Motion to Stay, it is highly unlikely that a writ of mandamus would issue to compel a stay of the Sale Order.

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on this 4th day of March, 2003, a true and correct copy of the foregoing was mailed by first class U.S. Mail, postage prepaid thereon to the following:

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Wanda B. Hinkle



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STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF )  
SECURITIES *ex rel.*, IRVING L. )  
FAUGHT, ADMINISTRATOR )

Plaintiff, )

v. )

Case No. CJ-99-2500-66

Judge Daniel L. Owens

ACCELERATED BENEFITS )  
CORPORATION, *et al.*, )

Defendants. )

AFFIDAVIT

STATE OF OKLAHOMA )  
 ) SS:  
COUNTY OF OKLAHOMA )

The undersigned, of lawful age, being first duly sworn, deposes and states as follows:

1. That I am H. Thomas Moran, Conservator of Certain Assets of Accelerated Benefits Corporation pursuant to the Court's Order Appointing Conservator and Transferring Assets dated February 6, 2002 (the "Conservatorship Order"). I have personal knowledge of the matters set forth herein.

2. Since the entry of the Conservatorship Order, I believe that Defendants have failed or refused to transfer to the Conservator funds they held in escrow for the payment of the annual premiums on the Viatical Policies, which are currently estimated at approximately \$2.2 million.

3. Defendants have also failed to abide by various Court orders directing them to reimburse the Conservator for Conservatorship expenses.

4. As a result, the Conservator has only limited funds to continue to pay premiums on and otherwise maintain the Viatical Policies.

5. If the Sale Order is stayed it is a virtual certainty that Infinity will withdraw its offer to purchase the Viatical Policies.

6. Without cash to pay the ongoing premiums, the Viatical Policies will begin to lapse within 30 days and many, if not all, of the investors will lose their entire investments.

FURTHER AFFIANT SAITH NOT.

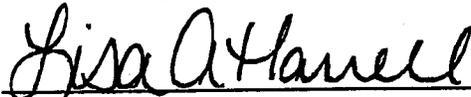
By:   
H. Thomas Moran  
Conservator of Certain Assets of  
Accelerated Benefits Corporation

Subscribed and Sworn to before me this 4th day of March, 2003, by H. Thomas Moran, Conservator of Certain Assets of Accelerated Benefits Corporation.



Lisa A Harrell  
My Commission DD014437  
Expires May 29, 2005

(SEAL)

  
Notary Public

My Commission Expires: 5/29/05

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MAY 29 2005