

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

SEP - 8 2010

PATRICIA PRESLEY, COURT CLERK

by _____
HEBHTV

Oklahoma Department of Securities,)
<u>ex rel. Irving L. Faught, Administrator,</u>)
)
Plaintiff,)
)
v.)
)
Accelerated Benefits Corporation, a Florida)
Corporation, <i>et al.</i> ,)
)
Defendants.)

Case No. CJ-99-2500-66
Judge Daniel L. Owens

**CONSERVATOR'S RESPONSE TO ACHERON PORTFOLIO TRUST'S
MOTION FOR AUTHORIZATION TO OFFER TO PURCHASE
ABC INVESTORS' INTEREST IN CONSERVATORSHIP ASSETS**

September 8, 2010

Respectfully submitted,

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I. INTRODUCTION.

The Department of Securities ("Department") brought this action in 1999 to protect the interests of the investors ("Investors") in Accelerated Benefits Corporation ("ABC"). In 2002, the Court entered its Order thereby establishing the Conservatorship and appointing H. Thomas Moran, II to act as Conservator. Since his appointment, the Conservator has worked with the Court and the Department to act in the best interests of the Investors.

In 2006, the Court approved the Option Purchase Agreement ("OPA") between the Conservator and Acheron Portfolio Trust ("Acheron"). Under the terms of the OPA, Acheron agreed to pay the ABC Investors a total purchase price of \$38,050,000 ("Purchase Price") for their interest in the policies in the Conservatorship Estate ("Policies" or "Portfolio").¹ The Court's approval of the OPA was based on its determination that the OPA with Acheron was in the best interest of the ABC Investors.

Acheron is a hedge fund with its own set of investors. Acheron's investors would benefit from paying the least amount possible for the Portfolio. To enhance the rate of return to the Acheron investors, Acheron again proposes a lump sum payment to the ABC Investors that would significantly reduce its payment obligations under the OPA and the amount it would otherwise be required to pay the ABC Investors.

Acheron frames its "offer" as one to purchase the ABC Investors' "interest...in the proceeds of the Policies which are the subject of this Conservatorship proceeding." Acheron's

¹ The Conservator, with the Court's approval, entered into two previous OPA's with different purchasers. The first OPA was with Infinity Capital Services, Inc. ("Infinity"). The Infinity OPA was executed in March of 2003 and had a purchase price of \$56,500,000. Prior to Infinity's default in November of 2004, the Investors had received \$14,498,299 of the purchase price under the Infinity OPA. The Conservator executed a second OPA with SIG Partners I, LP ("SIG") in May of 2005. The purchase price for the SIG OPA was \$42,061,771. Prior to SIG's default in January of 2006, it had reduced the balance of the purchase price to approximately \$38,000,000.

description ignores the fact that it has already agreed to purchase the ABC Investors' interest in the Policies and is bound by the terms of the OPA approved by the Court in 2006. Acheron currently owes \$30,837,908 of the Purchase Price. Acheron is offering to pay \$11.5 million to satisfy its outstanding obligation of nearly \$31 million that it owes the ABC Investors. In reality, Acheron's "offer" is simply another attempt to modify the payment terms of the OPA.

Acheron first attempted to modify the terms of the OPA with its MOTION FOR ORDER APPROVING SALE OF CONSERVATORSHIP ASSETS ("Prior Motion") filed on January 16, 2010. With its Prior Motion, Acheron disregarded the recommendation of the Department and Conservator and appealed directly to this Court for relief from the OPA. Acheron, now concerned about the Court's position on its quest for relief from the OPA, seeks to circumvent the Court as well and submit an offer directly to the ABC Investors. Acheron seeks to bypass those who are charged with the responsibility of protecting the best interests of the Investors – the Court, Department and Conservator – and be allowed to market its self-serving offer directly to the ABC Investors in the manner Acheron deems most effective at gaining Investors' acceptance.²

It is apparent from Acheron's repeated attempts to reduce its contractual obligations under the OPA that it no longer believes the OPA adequately benefits the Acheron investors. However, Acheron's reevaluation of its obligations and the return its investors are receiving under the terms of the OPA is neither a proper, fair nor reasonable basis to grant Acheron the relief it seeks. The interests of the ABC Investors are best served by receiving the maximum

² In 2008, when Acheron was initially unsuccessful in persuading the Department and Conservator to recommend its offer to the Court, Acheron attempted to circumvent the Court, the Department and the Conservator by contacting the ABC Investors directly. However, concerned that Acheron was not providing the Investors with adequate information to make an informed decision, the Department intervened and directed Acheron to cease its efforts to solicit agreements directly from individual investors.

return on the Portfolio. Acheron's proposed payment significantly reduces what Acheron would pay and what the ABC Investors would otherwise realize under the terms of the OPA.

As discussed in detail below, Acheron's current offer (like its previous one) does not fairly compensate the Investors for what they are owed under the OPA. Further, the "Notice of Offer to Purchase" proposed by Acheron is misleading. The Conservator cannot recommend to the Court or the ABC Investors that they accept Acheron's offer and urges the Court prohibit Acheron from submitting its proposed Notice to the Investors.

If the Court should determine a lump sum payment might be appropriate at this time, the Conservator recommends that he be allowed to market the Policies remaining in the Conservatorship Estate to obtain the best possible price for the ABC Investors, rather than limiting the ABC Investors to only what Acheron is willing to pay. This would, of course, require that Acheron agree to release the Conservator and the Conservatorship Estate from any obligations under the OPA should an acceptable bid for the Policies be approved by the Court. It would also require Acheron to pay the full market value for the Policies in order to be released from its current obligations under the OPA.

II. RESPONSE TO ACHERON'S "BACKGROUND AND FACTS."

A. Acheron's Prior Attempt to Reduce Its Payment Obligations to the ABC Investors under the Terms of the OPA.

In its Prior Motion, Acheron asked the Court to change the terms of the OPA to allow Acheron to "prepay" the outstanding Purchase Price for a fraction of what Acheron owed under the OPA. Acheron asked the Court to lower the Purchase Price, change the payment terms of the OPA and relieve Acheron of its contractual obligations to pay the premiums and servicing costs for the Portfolio.

Although Acheron repeatedly represented to the Court that it was offering a \$12.7 million "lump sum cash payment," this was misleading for several reasons. \$2.5 million of this amount was the premium reserve account ("PRA") that had been established in 2002 as part of the OPA with the original purchaser of the Portfolio. The PRA, then and now, is owned by the Investors. In fact, the Conservator, as a result of a reduction in premium requirements, distributed \$700,000 of the PRA as part of the year-end distributions to the ABC Investors in 2009, leaving a current balance of \$1.8 million. The only cash payment by Acheron, under its own proposal, to the Investors amounted to \$10.2 million. At the time, Acheron owed approximately \$31 million to the Investors under the terms of the OPA.

The Conservator objected to the proposed prepayment because it was not in the best interest of the ABC Investors.³ At the March 12th hearing on the Prior Motion, the Court expressed concern that the amount being offered was not acceptable. Rather than proceed with the hearing at that point, Acheron asked the Court to recess the hearing to allow Acheron the opportunity to discuss a possible resolution of Acheron's proposal with the Department and the Conservator.

During this discussion, which took place in the Court's jury room, Acheron did not increase its offer as it claims. The Conservator did not, as Acheron claims, "offer to sell for \$14 million in cash, plus the funds in the PRA." While the Conservator has a duty to make his recommendations to the Court, the decision to "to sell" is solely within the discretion of the Court. And although there were various prepayment scenarios discussed, these scenarios were posed along the lines of "if Acheron would agree to pay...." This included what Acheron now claims was a new offer of \$11.5 million, which was presented as "what if Acheron would

³ The Conservator's Objection to Acheron's Prior Motion, and Supplement to Objection, is incorporated herein by reference.

increase its offer...." Also, everyone at the meeting acknowledged that the PRA funds already belonged to the ABC Investors and that the \$1.8 million in the PRA was, in fact, not part of the Purchase Price being paid by Acheron.

B. The Conservator's Recommendation for Prepayment Terms.

Following the March 12th meeting in the Court's jury room, the Conservator formulated his recommendation for prepayment terms that would best serve the interests of the ABC Investors, which his counsel forwarded to Acheron's counsel by letter dated March 26, 2010.⁴ Acheron's representation in its Motion that "counsel for the Conservator completely ignored the discussions, and perfunctorily rejected the terms of Acheron's prior Offer" is neither fair nor accurate. The Conservator took into account what was said by Acheron's representative during these discussions. Because Acheron's offer did not fairly compensate the ABC Investors and was not a fair prepayment of the remaining Purchase Price, however, the Conservator did not agree with the payment proposed by Acheron.

Acheron repeatedly characterizes the Conservator's responses to Acheron's attempts to renegotiate the Purchase Price as "unrealistic," "galling," adding "insult to the process" and refusing "to bargain fairly and openly." Acheron generously credits itself with acting "in the spirit of good faith" and attempting "to engage in a meaningful negotiation aimed at resolving the differences between the Conservator and Acheron." Acheron overlooks the fact that the Conservator already negotiated the terms of Acheron's purchase of the Portfolio, and the ABC Investors have benefited and continue to benefit from the terms of the OPA. It is Acheron that is unhappy with the terms it agreed to in 2006, presumably because it has failed to deliver the returns to its investors as promised or expected.

⁴ A copy of counsels' letter is attached as Exhibit B to the Supplemental Affidavit, Vol. II, filed by Acheron.

Despite Acheron's lofty characterization of its own motives and conduct, it is clearly seeking to improve its financial position to the detriment of the ABC Investors by renegotiating the Purchase Price. Here, the Conservator's duty is to the ABC Investors and his response to Acheron's offer is based on what is in their best interest.

In his response to Acheron's offer, the Conservator advised that he would be willing to recommend to the Court that an offer by Acheron to prepay the balance of the purchase price for \$21.7 million be submitted to the Investors for their consideration. In determining the present value of the ABC Investors' share in future maturities, the Conservator discounted the future value by the interest rate that a prepayment of the Purchase Price could earn over the projected period of time. In making this determination, the Conservator assumed that the ABC Investors could realistically achieve an average annual return of five percent (5%). The Conservator's recommendation – regardless of how galling or insulting Acheron found it to be – was based solely on his desire to see the Investors receive the full present value of the payments due under the OPA.

The Conservator did not discount the present value of the payments due under the OPA at the much higher discount rates favored by Acheron. These discount rates are contained in a report prepared by Lewis & Ellis ("L&E") at Acheron's request. These higher discount rates were based, in large part, on "liquidity issues" that Acheron would face if it were in a position to sell the Portfolio.⁵ L&E deemed liquidity to be a "major issue since relatively few buyers exist for viatical portfolios" and "[a]s such, buyers use very high discount rates in evaluating such portfolios...." Liquidity is not a factor for the ABC Investors because the ABC Investors do not have to sell the Portfolio; Acheron has bought the Portfolio and is contractually bound to pay the

⁵ At present, Acheron cannot sell the Policies for the simple reason that it does not own the Policies. Title to the Policies remains with the Conservator until the entire Purchase Price is paid.

entire Purchase Price in accordance with the terms of the OPA. The higher discount rates were also based on a "risk" component for future cash flow that is not applicable here. L&E defined "future cash flow" as being comprised of policy maturities less premiums. Acheron, not the ABC Investors, has the obligation of paying premiums for the Policies; the risk of being forced to make premium payments on the Policies that were projected to mature, but have not, is Acheron's.

If the ABC Investors were selling the Portfolio, the liquidity issues and risk component for potential purchasers would be factors for a potential purchaser to consider in formulating an offer. But this is not the case. The ABC Investors should not be forced to discount the value of the payments due under a binding OPA by factors that have no bearing on the value of those payments over time.

C. Acheron's Rejection of the Conservator's Proposed Recommendation.

Acheron did not submit its current offer of a lump sum payment of \$11.5 million and participation in 2010 maturities (which the Investors are entitled to receive under the terms of the OPA in any event) to the Conservator until April 16, when the Department, Conservator, Acheron and their respective counsel met. Acheron had previously submitted this revised offer to the Department in a memorandum addressed to the Department, but had not sent it to the Conservator or his counsel until after the April 16th meeting and only then at the request of the Conservator when he learned of the memorandum at the meeting.

The April 16th meeting was not productive since Acheron's revised offer was not significantly more than its original offer and Acheron refused to increase it. Although Acheron trumpets its "good faith," Acheron has done nothing more than fix a price that it is willing to pay

to accelerate its purchase of the Portfolio, then insist that the Conservator, Department and Court accept this price.

III. THE CONSERVATOR'S RESPONSE TO AND RECOMMENDATIONS CONCERNING ACHERON'S CURRENT OFFER.

A. The Purported Amount of Acheron's Offer is Misleading.

1. Acheron's "lump sum payment."

Acheron characterizes its current offer as an offer to "purchase the interest of the investors...in the proceeds of the Policies." (Motion, p. 1) Acheron is already obligated under the terms of the OPA to pay the ABC Investors for their interest in the proceeds of the Policies. Acheron's new offer is essentially another offer to re-purchase the ABC Investors' interest in the Policies for less than Acheron currently owes under the terms of the OPA. Unlike its previous offers, however, Acheron is not offering to pay a determinate amount to the Conservatorship, which would then be distributed to the ABC Investors under the Court's authority. Instead, Acheron is offering the ABC Investors the opportunity to "participate" in a "fund" that may have "up to \$15,100,000.00 available for distribution." (Motion, p. 5)

In describing the "Economics of Acheron's Offer," Acheron states that "Acheron's Offer will create a fund (the 'Fund') through which ABC Investors participate should they elect to sell their respective interest(s) in the Conservatorship Assets." (Motion, p. 5) Acheron makes an identical statement in its proposed NOTICE OF OFFER TO PURCHASE CONSERVATORSHIP INTEREST ("Proposed Notice").

In its Motion, Acheron states:

The Fund will consist of the following:

Up to \$11,500,000.00: Lump sum payment from Acheron for the Fund should all ABC Investors elect to participate.

....

In the Proposed Notice, Acheron describes its offer in nearly identical terms, but with two significant differences. In the Proposed Notice, Acheron omits the phrase "up to" before the \$11.5 million amount it states that it would be paying into the Fund. Acheron also omits the qualifying phrase "should all ABC Investors elect to participate" from this same section. The Proposed Notice states:

The Fund will consist of the following:

\$11,500,000.00: Lump sum payment from Acheron for the Fund.

....

For the ABC Investors receiving the Proposed Notice, there would appear to be no doubt that Acheron would be paying the entire \$11.5 million into the Fund. The Proposed Notice goes on to state that "**[y]our potential recovery depends on a number of variables, including the amount of your original investment, the number of ABC Investors choosing to participate and accepting Acheron's Offer, and the amount of maturities in 2010.**" While noting that the amount of maturities in 2010 is an amount that would fluctuate, Acheron does not reflect the amount of its lump sum payment as a variable as it does in the Motion. Acheron also includes the number of ABC Investors choosing to participate in the Fund as a variable. Acheron, however, fails to inform the ABC Investors how or why the number of participants would affect the amount of an individual Investor's recovery from the Acheron Fund. The ABC Investors are left to assume that their recovery will be greater if there are fewer participants to share in the Fund, including the \$11.5 million lump sum payment that Acheron states it will be making to the Fund.

However, in its Motion Acheron qualifies its proposed lump sum payment as being "up to" \$11.5 million and conditioned on all ABC Investors participating in the Acheron Fund. Acheron's Proposed Notice clearly contemplates that not all ABC Investors would choose to

participate in the Acheron Fund.⁶ It would be nonsensical for Acheron to pay the entire \$11.5 million that it previously offered as a prepayment of the remaining Purchase Price to purchase the interests of some, but not all, of the ABC Investors in the Policies.

The sole purpose of Acheron's various offers has been to reduce its obligations under the OPA. If Acheron were truly agreeing to pay \$11.5 million into its proposed Fund, without regard to how many ABC Investors choose to participate in the Fund, Acheron would increase its obligations to the Investors. Acheron would be paying \$11.5 million into the Fund, which would be paid to those Investors choosing to participate in the Fund. However, creating the Fund would not extinguish the OPA nor Acheron's obligation to pay the remaining Purchase Price to the Conservatorship. The non-participating ABC Investors would, therefore, continue to receive 60% of the proceeds from future maturities until the remaining Purchase Price is paid.

It thus appears that Acheron is merely offering to pay "up to" \$11.5 million into its proposed Fund. Acheron has not revealed how much of the \$11.5 million it would actually pay or how this amount would be calculated. In fact, Acheron has not committed itself to pay any amount into the Fund. Acheron's representation that it would in fact be paying \$11.5 million is misleading.

2. *Acheron's offer is to use the Investors' own assets to finance the Fund.*

The "offer" that Acheron proposes to submit to the ABC Investors is based on a Fund that "will consist" of Conservatorship Assets, the PRA. In both its Motion and its Proposed Notice, Acheron states that the "Fund will consist of the following...\$1,800,000.00: Release of the funds held by he Conservator in the Premium Reserve Account." (Motion, p. 5; Proposed

⁶ In its Proposed Notice, Acheron states that "[i]f you accept Acheron's Offer you will be entitled to the payment contemplated by the proposed Offer...even if 60% of the ABC Investors voting do not accept Acheron's Offer." (Proposed Notice, p. 3)

Notice, p. 1.)(Emphasis in original.) The Court has not released the \$1.8 million in the PRA to Acheron. There is no provision in the OPA that would either obligate or authorize the Conservator to release the PRA funds to Acheron. Nor does Acheron reveal how it proposes to obtain this "release" of the PRA to Acheron for its Fund. Acheron's proposal that it be allowed to offer the ABC Investors the opportunity to "participate" in a "fund" that would consist of Conservatorship Assets that are not Acheron's to offer should be rejected for several reasons.

First, it is absurd to suggest that the Court transfer Conservatorship and Investor Assets to Acheron so that Acheron could then offer those Assets back to the ABC Investors. In its Prior Motion, Acheron inflated the amount it was offering to "accelerate" payment of the Purchase Price by including the PRA in the Purchase Price. The PRA is the property of the ABC Investors and is not Acheron's to offer. Nonetheless, Acheron argued that the amount of its offer should include the amount being held in the PRA because Acheron's "prepayment" of the Purchase Price would result in the termination of the Conservatorship and release of the PRA funds to the Investors. Based on this rationale, Acheron credited the amount of the PRA to the actual amount Acheron was offering to pay.

Under its current proposal, Acheron is not content to merely burnish its real offer by including the money in the PRA that already belongs to the ABC Investors. Acheron would now have the Court actually transfer the \$1.8 million in the PRA to Acheron so that Acheron could transfer the Investors' money into Acheron's Fund, then offer the Investors' money back to them through participation in the Acheron Fund. The notion that Conservatorship Assets be transferred to an overseas hedge fund that owes the Investors over \$30 million, so that the hedge fund could create a fund and offer the ABC Investors the opportunity to "participate" in the fund in lieu of the \$30 million that is owed them, is simply ridiculous.

The sheer absurdity of giving Acheron \$1.8 million of the Conservatorship Assets to create its Fund is compounded by the fact that only those ABC Investors who accept Acheron's offer would receive any compensation from the PRA funds. As discussed above, Acheron's new offer contemplates that not all of the ABC Investors would choose to participate in the Acheron Fund. Yet under Acheron's new proposal, Acheron would take *all* of the money in the PRA to establish a fund from which Acheron would pay only those ABC Investors who choose to participate in the Acheron Fund. Although in its Motion Acheron carefully qualifies its obligation to make a lump sum payment, Acheron does not qualify its proposed acquisition of the PRA as being "up to" the amount in the PRA. Nor does Acheron condition the release of the entire PRA on all ABC Investors electing to participate in the Fund. On this point Acheron is unequivocal: Acheron expects the Court to release the entire \$1.8 million in the PRA to Acheron to purportedly transfer it to its proposed Fund.

Acheron's proposed acquisition of the Conservatorship/Investor Assets to finance its offer to the Investors should be rejected.

3. *Acheron's offer to pay the ABC Investors their share of the 2010 maturities.*

In both its Motion and Proposed Notice, Acheron states that its Fund would also consist of "[u]p to \$1,800,000.00" of the ABC Investors' share of the 2010 maturities. The Investors will receive these monies regardless of whether Acheron is allowed to accelerate the Purchase Price. Although Acheron states in its Motion that it agrees to make up the difference, if any, should the ABC Investors' share of the 2010 maturities be less than \$1.8 million (Motion, p. 5), this statement is contradicted by Acheron's repeated statements that the ABC Investors would receive "up to" \$1.8 million for the 2010 maturities.

Even if Acheron were unequivocally guaranteeing that the ABC Investors would receive no less than \$1.8 million for their share of the 2010 maturities, 2010 has not concluded and it remains to be seen if Acheron would actually be paying anything at all to the ABC Investors. The Conservator made mid-year distributions totaling \$380,000.00 to the ABC Investors. Following these mid-year distributions, the Conservator received additional maturities. As of August 1, the additional maturities total \$377,448.00. The ABC Investors' share of these additional maturities is \$226,468.80, bringing their year-to-date share to \$606,468.80. In all likelihood there will be additional maturities in the remaining five months of 2010.

The amount that Acheron would actually pay to the ABC Investors for their share of the 2010 maturities is impossible to determine at this time and could very well be nothing.

B. Acheron's Offer Would Not Fairly Compensate the Investors for the Remaining Purchase Price Under the Terms of the OPA.

The vague, confusing and misleading nature of Acheron's proposed offer makes it difficult to assess what the ABC Investors would actually receive through participation in the Acheron Fund. Assuming that the lump sum payment offered by Acheron would actually total \$11.5 million, the fact remains that Acheron would be offering to pay the ABC Investors little more than a third of the \$30,857,908 that is currently due under the terms of the OPA, and nothing more. This would not fairly compensate the ABC Investors.

- 1. Acheron's offer would limit the Investors' recovery to what they will receive under the OPA within the next five (5) years and prevent them from receiving the remaining Purchase Price that Acheron is contractually obligated to pay.*

According to the L&E projections, the ABC Investors' share of maturities will exceed \$11.5 million by the end of 2015. Thereafter, under the terms of the OPA the ABC Investors will continue to share in the maturities until the balance of the Purchase Price is paid. Under Acheron's proposal, it would pay the ABC Investors what they are entitled to receive over the

next 5 years and nothing more, saving Acheron the balance of the Purchase Price. Acheron's savings, and the amount that the ABC Investors would be relinquishing, would total \$19,357,908. This is, in the opinion of the Conservator, an unreasonable premium for the ABC Investors to pay to accelerate 5-years of payments under the OPA.

2. *The "discount rate" that Acheron's proposed prepayment represents is unreasonable.*

According to the L&E report prepared at the request of the Conservator in August 2009, \$11.5 million represents a nearly 15% discount rate. The L&E report sets forth an estimation of the present value of the remaining payments due under the OPA, using discount rates ranging from 2 to 18%. The L&E report does not, however, state that 15% or any other discount rate is a reasonable discount rate for the ABC Investors. To the contrary, L&E specifically did not make any findings of an appropriate discount rate for the ABC Investors' share of future maturities.

Acheron states, near the end of its Motion, that L&E concluded that a 22% discount rate would be reasonable. Acheron is referring to a statement made in the valuation that L&E prepared for Acheron, which sets forth estimated valuations of Acheron's interest in the Portfolio. In the report prepared for Acheron, L&E used a 22% discount rate to estimate the value of the Portfolio to *potential buyers*, not to estimate the present value of the ABC Investors' participation share in maturities. The value of the Portfolio to potential buyers is irrelevant because the ABC Investors have a buyer for the Portfolio – Acheron.

3. *Acheron's offer does not represent a potential recovery to the Investors of 43% of their originally invested amount.*

The Investors' initial investment in ABC totaled \$107,514,742. Since the Conservatorship was established in 2002, the ABC Investors have received distributions totaling \$29,480,596. Acheron's proposed payment of \$11.5 million, together with Investor distributions

to date, would provide a total return to the ABC Investors of \$40,908,596. Under this scenario, the ABC Investors would receive back 38% of their originally invested amount, not the 43% return touted by Acheron. According to the L&E projections, the ABC Investors will reach this same percentage of return under the terms of the OPA in 2015 and thereafter will still be able to collect the remaining \$19,357,908 due from Acheron.

Further, Acheron compares this fictitious "43% return" to what Acheron claims is the Investors' "total projected recovery of 50%." (Motion, p. 7) The Investors' distributions to date (\$28,197,000) together with the remaining Purchase Price to be paid by Acheron (\$30,857,908) will total \$59,054,908. Even without factoring in the distribution of the PRA to the Investors, this amount represents a return of 54.9% of the \$107,514,742 they originally invested in ABC. When the PRA is included in the total distributions, the percentage of return to the Investors is 56.6% of their original investment.

Although Acheron's comparison of "43% to 50%" makes Acheron's offer appear more favorable, it ignores reality. It would be economically irrational for the ABC Investors to drastically reduce the return they will receive on their original investment by accepting Acheron's offer.

4. *Acheron's threat of default is not a valid reason to modify Acheron's obligations under the OPA.*

The ABC Investors' interests would not be harmed by a default by Acheron under the OPA. When the Conservator established the PRA, the maturities were not sufficient to fund the premiums for the Policies. Today, however, the maturities are more than sufficient to do so. The current balance in the PRA, together with a conservative projection of future maturities, would indicate that there should be sufficient funding to manage the Portfolio without the assistance of another purchaser and with the opportunity for the ABC Investors to retain 100% of

maturities in the future. In the event any funding concerns developed, the Court could always authorize the Conservator to seek bids to sell the Portfolio on essentially the same terms and conditions as the Portfolio has been sold in the past.

In the event the Court deems a default by Acheron to pose a threat to the Investors, the Court could consider measures to protect the Investors' interests. For instance, the Court could consider entering an order directing that Acheron's share of maturities be placed in an account to be used to offset future premium and servicing costs in the event of default or an order directing Acheron to post a bond to secure its obligations under the OPA.

VI. ACHERON'S PROPOSED NOTICE TO INVESTORS IS INAPPROPRIATE AND MISLEADING.

As discussed in detail above, Acheron's representations concerning the amount it would actually be paying into its proposed Fund are misleading, as are Acheron's statements concerning how its offer compares with what the ABC Investors will receive through the Conservatorship. The Proposed Notice is also deficient in numerous other respects.

Whether by design or through inadvertence, Acheron's Proposed Notice fails to address exactly how the ABC Investor would "participate" in the Acheron Fund. Who would determine each participating Investor's "proportionate share"? The Conservator with the Court's approval? Or does Acheron intend to make this determination outside of the Court's review? If so, how exactly would Acheron determine each Investor's proportionate share? If an ABC Investor has concerns about how Acheron administers the Fund or disagrees with the amount of his or her share, who would address these concerns or settle these disagreements? Acheron? If so, Acheron should have disclosed that it would be the only and final authority on whether Acheron itself appropriately administers the Fund. As it is, any ABC Investor could easily conclude that

the distributions from the Acheron Fund would be subject to the same oversight and protection as the distributions made by the Conservator over the past seven years with the Court's approval.

Although Acheron is unclear as to how it would administer its Fund and how ABC Investors would actually "participate" in the Fund, Acheron is exceedingly clear in warning the ABC Investors that the Court could force them to accept Acheron's offer:

Closing of the Conservatorship Proceeding:

If at least 60% of the ABC Investors voting submit Election Forms accepting Acheron's Offer, then all ABC Investors will be required to participate and to accept Acheron's Offer. Accordingly, the Oklahoma District Court will enter a judgment dismissing the Conservatorship Proceeding with prejudice and permanently closing the Conservatorship.

....

As set forth above, if at least 60% of the ABC Investors who submit their Election Forms elect to accept Acheron's Offer, even if you vote 'No' or are indifferent to Acheron's Offer, you will be required to participate in Acheron's Offer.

(Proposed Notice, p. 4)(Emphasis in original.)

The 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. Acheron clearly believes that it is critical for its purposes that the ABC Investors believe that the Court will absolutely require all of the Investors to participate in the Acheron Fund even if 40% are opposed. These statements suggest to the ABC Investors that the Court has approved Acheron's current offer and believes that it is in the best interests of the Investors. The statements also suggest to the ABC Investors that their participation in the Acheron Fund is practically inevitable.

While Acheron informs the ABC Investors that the Court is prepared to force them to participate in the Acheron Fund, Acheron wholly fails to inform the ABC Investors as to what

would happen if less than 60% of those submitting election forms chose to participate in the Fund. According to the Proposed Notice, those who accept Acheron's offer would participate in the Acheron Fund. But Acheron does not inform the non-participating ABC Investors what would happen with their interest in the Policies. Instead, the ABC Investors would be left to wonder whether they would continue to receive payments from the Conservator.

The OPA is a valid and binding contract by which the Conservatorship continues to hold title to the Policies until Acheron has paid the entire Purchase Price. The proceeds from maturities are paid to the Conservator, who then distributes the proceeds to the ABC Investors. The ABC Investors would presumably continue to receive their distributions from the Conservator if they chose not to participate in the Acheron Fund. Acheron's Proposed Notice, however, is silent on this point. As read by the ABC Investors, Acheron's offer presents them with the opportunity to participate in the Acheron Fund. Period.

Acheron would further advise the ABC Investors that "Acheron believes that the proposed Offer is fair, reasonable and in the best interest of the ABC Investors." But Acheron would not provide the Investors with any of the information regarding what the Conservator believes to be in their best interest. Acheron's proposed Notice is devoid of any mention that the Conservator considers Acheron's offer to be less than what they should receive as a prepayment for the Purchase Price due under the OPA. It is likewise silent as to what amount the Conservator believes would be a fair prepayment of the Purchase Price due under the OPA.

Then there is Acheron's attempt to scare the ABC Investors by threatening default, without also advising them that they might actually benefit from any such default, which is designed to take advantage of the ABC Investors' fears. If default is truly a possibility, this

should be addressed immediately with the Court so that it can consider appropriate action to protect the Investors in the event Acheron does decide to default on its obligations.

In the event the Court determines that Acheron's current offer should be submitted to the ABC Investors for their consideration, communication of the offer should not be made by Acheron. Any notices to the Investors should be prepared by the Department and Conservator for the Court's approval and an opportunity for Acheron to respond. This remains the responsibility of the Department, the Conservator and the Court.

IV. THE CONSERVATOR'S RECOMMENDATION IN THE EVENT THE COURT DETERMINES THAT A LUMP SUM PAYMENT FOR THE PORTFOLIO IS APPROPRIATE FOR THE ABC INVESTORS' CONSIDERATION.

The paramount consideration before the Court is what is in the best interest of the ABC Investors. The ABC Investors may want to consider a lump sum payment at this time. However, Acheron's argument that its "offer," which was made without the threat of competition but in the most self-serving way, necessarily represents the best offer for the Portfolio is not credible. It defies basic economic and business principals to restrict the ABC Investors to one solitary offer that would reduce their future payments to one-third of what they are entitled to receive under the terms of the OPA.

If the Investors are presented with the option of accepting a lump sum payment at this time, it is in their best interest to ensure that any such payment is the highest a purchaser is willing to pay in the current life settlement market. Before submitting Acheron's offer to the Investors for their consideration, the Court should allow the Conservator to use his best efforts to market the Portfolio and obtain offers from any interested purchasers.

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. As

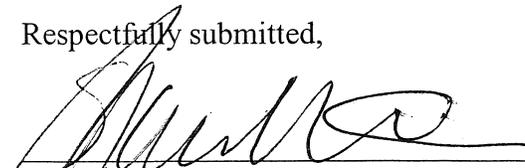
a condition for future consideration of the offer that Acheron now makes, the Court should require that Acheron stipulate as follows: In the event the Court determines that an offer from another purchaser best serves the Investors' interests, Acheron will release the Conservator from the OPA and will waive any right, title or interest in the Policies remaining in the Portfolio and/or future maturities.

V. CONCLUSION.

The Court, the Department and the Conservator know and understand what the ABC Investors have experienced and what is at stake for them. The same is not true for Acheron. Its concern is not for the ABC Investors; Acheron is concerned about its own investors. Acheron's proposal would benefit the Acheron investors at the expense of the ABC Investors. The Conservator is mindful that it may be appropriate at this time to consider whether a lump sum payment would best serve the ABC Investors' interests. However, the amount offered by Acheron would not fairly compensate the ABC Investors for the payments that they are entitled to receive under the OPA.

For these reasons, the Conservator respectfully requests that the Court deny Acheron's Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 8th day of September, 2010, a true and correct copy of the foregoing was mailed, first-class with postage prepaid, to:

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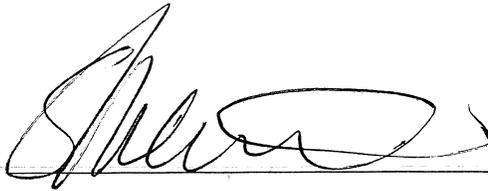
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A handwritten signature in black ink, appearing to be 'Richard A. Mildren', is written over a horizontal line. The signature is cursive and somewhat stylized.