UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60573-CIV-MORENO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

MUTUAL BENEFITS CORP., et. al.,

Defendants,

VIATICAL BENEFACTORS, LLC, et. al.,

Relief Defendants.

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Horo Holding's Memorandum of Law in
Support of its Bid Award to Purchase Viatical Services, Inc.

Horo Holdings S.A. ("Horo") and Litai Assets, LLC ("Litai") submit this brief in support of their winning bid for the purchase of Viatical Services, Inc. ("VSI") and in opposition to the submission of Silver Point Capital, L.P. ("Silver Point").

INTRODUCTION

Horo submitted the highest and best bid and won the bidding for the right to purchase VSI. Horo also played by the rules by submitting timely bids that conformed to the Receiver's biding requirements and the Orders of this Court, including submitting a business plan that met the requirements of the Court, the Receiver, and VSI management for protecting the Keep Investors.[1] Horo's bid has been accepted and supported wholeheartedly by both the Receiver, by management, and by the largest of MBC's Keep Investor's, the Acheron Portfolio Trust ("APC"). *See* Declaration of Jan-Eric Samuel ¶14 ("Samuel Dec."); Declaration of Jean-Michel

[1] Horo submitted the bid through VSI Acquisition Services, LLC, now known as Litai Assets, LLC, which is wholly-owned by Horo.

Paul, ¶ 42 ("Paul Dec.").

Silver Point, in contrast, is supported by nobody. Silver Point never submitted any bid as required by the Court's Order of April 3, 2009 (the "Bidding Order"), has never complied with the bidding procedures, never became a qualified bidder, failed to object to the bidding procedures, failed to move for reconsideration of this Court's orders and now lacks standing to object to the bidding procedures or to submit a late bid. Despite being asked to address all these issues at the hearing on July 14, 2009, Silver Point's submission addresses none of these threshold issues. That alone is sufficient reason to rule against Silver Point. Instead of addressing these threshold issues, Silver Point acts as if this Court were conducting a new auction and argues it has submitted a bid after the bid process has ended. But, Silver Point's latest salvo still is lacking. It still has failed to perform adequate due diligence as demonstrated by its facially inadequate business plan, which contains basic mistakes resulting from its lack of due diligence and fails to demonstrate how it can operate VSI on a stable, long term basis in a manner that protects the Keep Investors.

The Court should enter an Order granting the Receiver's Motion to Approve the Sale in conformity with the Court's Bidding Order. Alternatively, but only if the Court determines that there is sufficient legal basis to permit Silver Point to object and submit a late bid, the Court should reaffirm its Bidding Order, approving the bidding procedures relied on by Horo and agreed to by the Receiver, including the expense reimbursement and last look provisions, and should provide Horo the opportunity to submit an overbid in compliance with those Court-approved procedures.

FACTUAL BACKGROUND

VSI is one of the Receivership entities. It "is responsible for administering the payment of policy premiums, tracking the medical status and whereabouts of the insureds, and, upon the death of an insured, submitting claims to insurance companies to facilitate the distribution of death benefits." (DE 2047). As the Receivership winds down, it needs to find a buyer for VSI. On May 6, 2008, the Court authorized the Receiver to pursue the sale of VSI. (DE 2092).

Throughout the entire sale process, the Receiver repeatedly emphasized that, in selling VSI, he would "seek to ensure that the interests of investors in the Keep Policies would continue to be protected." (See Invitation to Bid, July 29, 2008). To do that, the Invitation to Bid required bidders to submit "a business plan reflecting the bidder's anticipated fee and cost structure to reflect anticipated costs to the holders of interests in Keep Policies and the financial viability of the bidder's proposed operations." *Id.* The Receiver stressed that it would examine "the viability of the bidder's anticipated business model," and "the impact on the holders of interests in Keep Policies," as well as any bid incentives requested by the bidder, such as minimum overbids and reimbursement of the stalking horse's due diligence expenses. *Id.*

Horo did all of this. It performed a thorough due diligence and developed a detailed business plan that demonstrated its ability to limit the fees to investors while growing the business to provide more safety, stability and security to the investors. (Samuel Dec. ¶¶ 9-12). Horo's bid also was then and is now supported by key players in the industry. Horo has secured the commitment of Acheron Portfolio Corporation, which is the largest owner of life policies serviced by VSI. Acheron is currently invested over 5600 policies with a face value in excess of $650 million. Acheron Portfolio Trust currently has about 2200 non-fractional and 1200 fractional (MBC Keep Policies) at VSI. Three separate entities that bid on VSI, including

Silver Point, approached Acheron seeking its support in the process. After becoming concerned about the plans and the ability of those bidders to operate the servicing business, Acheron submitted a letter to the Receiver stating: "We have come to the conclusion that the [Horo] bid is the only bid that will provide strong long-term protection for the ultimate owners of life insurance policies serviced by VSI." Acheron has agreed that if Horo is selected, it will keep with VSI the 3,400 (including 1,200 fractional policies) policies that Acheron purchased from the Receivership and has also committed to transfer to VSI 2,000 additional policies that are currently serviced by another servicer and to have any additional policies it buys in the future serviced by VSI. (Samuel Dec. ¶¶ 13-15; Paul Dec.¶ 44). These additional policies will make VSI the largest servicer of life settlement policies in the United States, which will make VSI cost effective and help unsure its long term viability. On the other hand, if Silver Point is selected, Acheron states it will remove all polices from VSI. (Paul Dec. ¶ 26).

The Receiver also asked the potential stalking horse bidders to address bid incentives for undertaking the burden of being the stalking horse. Horo and Silver Point both submitted bids that requested commonly approved bid incentives. Horo requested that the ultimate auction for VSI contain certain common bid procedures, including: (a) a requirement that competing bidders submit a detailed business plan (b) expense reimbursement with a cap of $200,000 in the event Horo is outbid, (c) last right to overbid by Horo either by paying more cash or by paying a combination of cash and cash benefits, to be agreed upon with the Receiver. (Samuel Dec.¶ 22-24).

Silver Point accepted and participated in this portion of the bidding process, submitting its own bid to become the Stalking Horse bidder and including provisions for bid incentives, such as expense reimbursements if it were outbid. (Tr. at 33). Silver Point, however, did very

little due diligence on VSI prior to submitting that bid. In fact, at the hearing on July 14, 2009, the Receiver highlighted the fact that Silver Point had not performed adequate due diligence and did not comply with the bid procedures by submitting a business plan. (Tr. at 35-36).

On or about October 15, 2008, the Receiver determined that Horo's bid was the highest and best bid and notified Horo that it had been selected to be the Stalking Horse bidder. By selecting Horo, the Receiver agreed to the Stalking Horse bid procedures, including the expense reimbursement and last look provisions. In reliance on the Receiver's selection of Horo, and in reliance on the Receiver's agreement to the Stalking Horse Bid procedures, as well as on this Court's orders, Horo thereafter devoted substantial resources towards conceptualizing a deal structure that would provide adequate protection for the Keep Investors, and then negotiating and drafting the legal documents. Horo also devoted substantial resources towards additional due diligence, negotiating employment agreements with VSI's key management and other matters.

Once the Purchase Agreement and the related documentation were finalized, the Receiver moved the Court for an Order Approving Purchase Agreement and Bidding Procedures. (DE 2266). In that motion, the Receiver described the process it had followed in the selection of Horo as the highest and best initial offer. The Receiver also explained "the substantial effort and expense that [Horo] has undertaken to investigate the VSI business, formulate a business plan, and negotiate the proposed transaction described herein," and explained that the expense reimbursement provision intended to partially compensate Horo if another bidder was selected after Horo expended substantial time, effort and resources. The Receiver emphasized that any bidders would have to follow the bidding procedures by submitting their highest and best bid by no later than May 14, 2009, complete with a viable business plan. The Receiver also noted that the Stalking Horse would have the right to submit a final, higher and better bid.

On April 3, 2009, the Court entered an order approving Horo as the Stalking Horse bidder and approving the bid procedures that had been agreed to by the Receiver and Horo, including the expense reimbursement and last look provisions (the "Bidding Order"). (DE 2267). The Bidding Order approved the Bidding Procedures, which state expressly that: "No person other than an Overbidder will be allowed to participate in the Bidding Process" It then specified the process by which to become an Overbidder. That included delivering: (a) confidentiality agreement, (b) current financial statements, and (c) a current business plan. The business plan had to "demonstrates to Seller and to the existing management" the Overbidder's ability to "provide a level of service that is equal to or better than the level of service currently being provided by the Receiver for an on behalf of the Keep Policy Investors."

The Bidding Procedures then specified that "within two (2) Business Days after a Pootential Bidder delivers all of the material described . . . Seller shall determine and notify the Potential Bidder and Buyer whether or not such Potentil Bidder qualified as an Overbidder. If a person qualified as an Overbidder, then it was required to submit a bid by the Bid Deadline, which was May 14, 2009. The Bid had to be accompanied by, among other things, payment of not less than Thirty Percent (30%) of the Purchase Price. The Bidding Order stated that Bids had to be at least $1,300,000 and that the "Stalking Horse Bidder shall then have the option (the 'Last Overbid Option')" to outbid the Overbidder.

The Court's Bidding Order approving these Bidding Procedures was entered on April 3, 2009. Neither Silver Point nor anyone else ever filed any objections to the Court's Bidding Order or moved for reconsideration of that Order. The Receiver then advertised the auction and solicited bids. It received numerous inquiries but no other bidders qualified. Silver Point, which had participated, but lost in the bidding to become the Stalking Horse bidder, dropped out and

abandoned the bidding process. After the bid deadline of May 14, 2009, the Receiver informed Horo that it again had submitted the highest and best offer. (Samuel Dec. ¶ 30-31).

Horo -- again in reliance on this Court's Bidding Order -- and having won the bid in accordance with the Bidding Order, continued devoting substantial time and resources to the purchase of VSI. This included working with VSI's management on marketing and marketing concepts, designing logos, opening bank accounts, getting tax identification numbers, developing a pricing structure for the new commercial policies expected to be serviced, and improving VSI's software and information technology infrastructure. (Samuel Dec. ¶ 31).

On June 16, 2009, the Receiver moved the Court to enter an order approving the sale to Horo, noting that Horo had submitted the best and highest bid and that Horo "has acted in good faith and is a good faith purchaser . . . that the solicitation of competing bids pursuant to the Court approved Bidding Procedures was at all times conducted in good faith, and that the consummation of the proposed sale is in the best interest of the receivership and the holders of interests in Keep Policies." (DE 2291). The Receiver also informed the Court that Silver Point had sent a private letter to the Receiver stating that it was "unwilling to participate in the bidding process as it is currently structured," essentially stating that they refused to comply with the Court's Bidding Order. The Receiver properly noted, however, that "no bid was submitted by said party in accordance with the Court-approved Bidding Procedures." (DE 2291 at 7).

From June 16, 2009 through July 14, 2009, Silver Point never filed any objections with the Court or made any motions asking the court to reconsider its prior orders. Instead, on the day of the hearing on the Receiver's motion to approve the sale, Silver Point filed a one page objection, merely attaching its prior letters to the Receiver. In court, Silver Point's counsel did not dispute that Silver Point: (a) had not submitted any bid, let alone a qualified bid, (b) had not

conducted sufficient due diligence, (c) had never prepared a business plan, and (d) had never objected to or moved to reconsider the Court's Orders. He offered no legitimate excuse and instead merely stated: "I want to have Your Honor allow me to buy the assets for more than the stalking-horse purchase bid right now." (Tr. at 3). Silver Point's only explanation for having done nothing to bid or object to the Court's orders was that it "disagreed" with the bidding procedures approved by the Court. (Tr. at 4). Still, to this day, Silver Point has never asked the Court to reconsider its Bidding Order. That is because Silver Point has no legal basis to seek reconsideration.

ARGUMENT

I. Silver Point Waived Any Objections to the Bidding Order by Failing to Seek Reconsideration of that Order

The only recourse available to a party aggrieved by a non-final court ruling is to move for reconsideration of that ruling. *See e.g., Horowitch v. Diamond Aircrafts Indus.*, 2009 WL 1537896 *2 (M.D. Fla. 2009). The purpose of a motion for reconsideration is to correct "manifest errors of law," to present newly discovered evidence, or to prevent manifest injustice. *Burger King Corp. v. Ashland Equities, Inc*., 181 F.Supp. 2d 1366, 1369 (S.D. Fla. 2002). Reconsideration of a previous order "is an extraordinary remedy," and there must be strong justification for a court's reconsideration of prior decision. *Horowitch*, 2009 WL 1537896 at * 3 (citing *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D.Fla. 1994).

Because Silver Point never moved for reconsideration of the Court's Bidding Order, it is barred from doing so now. *See In re Gulf Estates Steel Inc. of Alabama*, 285 B.R. 497 (N.D. Ala 2002). In that case, the court entered a bidding procedures order for the disposition of the assets of a steel mill. After the order was entered, two parties submitted their bids, and the trustee accepted the highest bid received at the auction, which conformed with the bidding procedures

order. 285 B.R. 497, 504. Thereafter, the City of Gadsden delivered to the trustee a letter objecting to the bidding procedures and the trustee filed that letter with the Court as an objection. Other bondholders also filed objections to block the sale to the successful bidder, claiming that the successful bidder's offer was inadequate. *Id.* No party, however, moved for reconsideration of the bidding procedures order. The Court rejected the objections because "no party had moved the Court to reconsider the rulings made in the Bidding Procedures Order, nor, to the Court's knowledge has any party commenced an appeal with respect to same." *Id*. at 514.

Just as in *Gulf States*, Silver Point's belatedly filed objections are insufficient to frustrate the bid award earned by Horo. The Court should not allow Silver Point to simply sit sat back and expect to be rewarded for its dilatory tactics by being permitted to file baseless objections to the Bidding Order at this stage in the process.

At the hearing on July 14, 2009, Horo's counsel emphasized that Silver Point "never moved to reconsider" the Bidding Order. The Court asked Silver Point's counsel: "Why didn't you do that?" Tr. at 43. Realizing that Silver Point had no basis to move for reconsideration, Silver Point's counsel simply stated: "we thought that, perhaps erroneously, that the receiver would realize that the appropriate procedure here would be to maximize the value of the receivership estate." (Tr. at 43). Then in its submission to the Court, and despite the Court's specific inquiry on this issue, Silver Point again refused to provide any valid justification for failing to move for reconsideration of the Bidding Order.

II. Silver Point Lacks Standing to Contest the Bid Award

In addition to not asking for reconsideration of the Court's Bidding Order, Silver Point Silver Point made a strategic decision not to participate in the bid process, not to qualify as an

Overbidder, and it submitted no bid for the business of VSI. At the hearing on July 14, 2009, the Court asked Silver Point:

Court:	Why didn't you participate?
Clemente:	We did participate, Your Honor.
Court:	By just what, talking to the receiver?
Clemente:	And we sent a letter to the receiver by the bid deadline . . .
Court :	And what does that mean?
Clemente:	We weren't hiding in the weeds, Your Honor. It was very clear what our issues were."
Rosendorf:	Your Honor, we didn't think it meant much because it wasn't a bid. It didn't have a deposit.
Clemente:	It didn't bind anybody?
Rosendorf:	It didn't' comply with the bid procedures.

Tr. at 56.

By not complying with the Court's Bidding Order, and by not submitting any bid, Silver Point has no basis and no standing to object to the process or the bid award to Horo. In *Squire v. Scher*, 282 Fed. Appx. 413, 416 (6th Cir. 2008), the bankruptcy court approved bid procedures that required bids to be submitted at a certain time in the form of a bill of sale. Instead of bidding, PSC submitted a letter to the trustee raising certain objections, but stating that it was willing to submit a late bid. The trustee rejected the letter because it was not a bid that complied with the bidding procedures. The court approved the sale to DBZ, which had fully complied with the bidding procedures and PSC appealed. The Sixth Circuit affirmed, holding that "PSC's letter stating that it wished to submit a bid did not meet the criteria for a 'qualified bid' pursuant to the terms of the Bid Order, [and] PSC was not a qualified bidder. Thus, PSC has no basis let alone standing, to challenge the structure of the bid procedures." *Id.* at 416; *accord, e.g., In re Planned Sys. Inc.* 82 B.R. 919, 922 (S.D. Ohio 1988).

Here, as in *Squire*, Silver Point did not submit a qualifying bid at any point but rather submitted only a letter to the Receiver claiming it wanted to submit a bid outside the bidding procedures. As the court in *Squire* held, sending a letter protesting the procedures is not

sufficient to give standing. Accordingly, Silver Point is not a qualified bidder and so it has no basis and no standing to challenge the bid procedures or to submit a late bid.

In *Sebert v. Opperman*, 2008 WL 686264 (E.D. Mich. 2008), the Court also rejected a late bid that was higher than the winning bid. The court rejected the bid because "the late bid was submitted by a bidder who was present and participated in the auction but chose not to submit his higher bid until four days after the auction had ended." Under these circumstances, "accepting the late bid would 'clearly undermine confidence in judicial sales and discourage prospective purchasers from making their best offers in a timely manner." 2008 WL 686264 at *2. The court noted that "accepting a late bid 'merely to gain a few extra dollars in one case . . . would be penny wise and pound foolish. Creditors in general would suffer if unpredictability discouraged bidders altogether."' *Id.*; *see also In re American Colonial Broadcasting Corp.*, 758 F.2d 794 (1st Cir. 1985) (dismissing appeal of order rejecting re-bid for much higher amount submitted *two days* after court-approved deadline). Similarly here, to allow Silver Point -- after it failed to follow any of the standard bid procedures approved by this court -- would unfairly reward Silver Point for its total disregard of this Court' Bidding Order.

In *Sebert*, the Trustee actually argued in favor of allowing the higher bid even though it was late. Here, in contrast, the Receiver has argued against allowing the bid from Silver Point. When the Court asked the Receiver whether he should allow Silver Point to submit a late bid, the Receiver said a late bid would not be "in the best interest of the Keep Investors nor frankly of the Sell Investors. I think what we have proposed to the Court is a good operation." (Tr. at 63).

Similarly, in *U.S. v. Arnold*, 2003 WL 697827, 2 (M.D. Fla. 2003), a Receiver conducted an auction and then moved the Court to approve the sale of property for $490,000. Thereafter, a competing bidder submitted a bid for $540,000. The Court held that: "The Court will not play

the role of auctioneer and, thus, will only consider the motion before it, the Receiver's Motion for Confirmation of Colman's original offer for $490,000." The Court explained that, "to hold otherwise would introduce unnecessary uncertainty into the private sales process by requiring the Receiver and Court to consider additional offers up to the time that the Court enters an order confirming a sale. This would wreak havoc on the integrity of the private sales process in the long run and predictably invite negative consequences." *Id.*, at *3. Here, likewise, the Court should not play the role of auctioneer, given the previously mandated bidding procedures, but rather should only consider the motion to approve the sale to Horo as the sole legitimate bidder. Silver Point chose not to participate in the Court ordered bidding process at its own peril. It cannot now be allowed to wreak havoc on the integrity of the sale process.

Numerous other cases involving bidding contests in various contexts similarly hold that a party who fails to timely submit a conforming bid, lacks standing to object to the bid award or the bidding process. *See Rex Serv. Corp. v. U.S.*, 448 F.3d 1305, 1307 (Fed. Cir. 2006) (plaintiff who failed to submit timely bid proposal lacked standing to challenge bid); *see also Conscoop-Consorzia FRA v. U.S.*, 62 Fed. Cl. 219, 242 (Fed. Cl. 2004) (higher bid properly rejected as untimely); *McRae Indus. Inc. v. U.S.* 53 Fed. Cl. 177 (Fed. Cl. 2002) (late bidder was not an "actual bidder" and so lacked standing to challenge award); *Ryan Co. v. U.S.*, 43 Fed. Cl. 646, (Fed. Cl. 1990) (bidder's failure to submit required information lacked standing to challenge award); *Howard v. U.S.*, 21 Cl. Ct. 475 (Fed. Cl. 1990) (untimely bid proposal rejected).

Moreover, the mere protesting of biding procedures is insufficient to confer standing to challenge a bid award. *See Shirlington Limousine & Transp., Inc. v. U.S.* 77 Fed. Cl. 157, 168 (Fed. Cl. 2007) (plaintiff's protest was "irrelevant" where plaintiff failed to file a timely bid); *Dismas Charities Inc v. U.S.*, 75 Fed. Cl. 59 (Fed. Cl. 2007) (no standing protest bid where

proposal did not conform to the solicitation requirement); *Brasfiled & Gorrie Gen. Contractors v. Ajax Construction*, 627 So. 2d 1200, 1203 (Fla. 1st DCA 1998) (party that never submitted a qualified bid lacked standing); *Ft. Howard Co. v. Dept. of Mgt. Servs*, 624 So. 2d 783 (Fla. 1st DCA 1993) (non bidder was correctly denied standing to protest auction).

At the hearing on July 14, 2009, when asked why it didn't participate, Silver Point made no effort to justify its actions. Instead of arguing that it had a legal basis to object, even though it failed to participate, Silver Point instead read from a transcript of a hearing last year where Credit Suisse had challenged one of Silver Point's bids and sought to submit a higher bid. But Credit Suisse's challenge illustrates precisely what Silver Point failed did do here. Credit Suisse actively participated in that auction from the beginning, followed the bidding procedures and was selected as the highest bidder. When the Receiver thereafter accepted a non-conforming, higher bid by Silver Point, Credit Suisse promptly filed *an emergency* motion for reconsideration of that order establishing the legal basis why it was challenging the subsequent award. (DE 2039). Here, in contrast, Silver Point admits it was not a qualified bidder, much less the winning bidder, did not participate in the bid process and did not move for reconsideration.

It would be fundamentally unfair to reward a late and noncompliant bidder by allowing it to submit a bid or object to the process, after the process has been completed. Acceptance of a new bid by Silver Point at this point will undermine the bidding process in court-ordered receivership actions because future interested bidders will lack confidence that their efforts in complying with predetermined, court approved procedures will be rewarded. *See Ryan*, 43 Fed. Cl. at 651 (noting the rationale for requiring conforming proposals is to "avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitations for bid").

III. Silver Point's Business Plan Is Inadequate to Protect the Keep Investorst

Silver Point admitted in open court that it had submitted no business plan regarding the long term operations of VSI. Tr. at 64. Apparently after getting an extra day to meet with the Receiver, Silver Point pieced together a 3-page business plan and submitted that to the Court. Silver Point's purported business plan, however, shows glaring inadequacies. First, Silver Point writes that its "first objective" will be "interacting with Life Settlement Insights . . . ." However, back in March 2009, VSI severed its relationship with Life Settlement Insights. In other words, that relationship was severed more than than four months before Silver Point met with the Receiver for the first time. The fact that Silver Point did not discover this basic information relating to its "first objective" demonstrates that Silver Point performed inadequate due diligence. (Samuel Dec. ¶ 42). As the Receiver's counsel noted at the January 14 hearing, two months after the bid period had ended: "I'm concerned because I'm still getting due diligence calls from Silver Point this morning asking me basic questions about the deal." (Tr. at 35). The Receiver noted that Silver Point has "never called me. I never met with them. I'm not sure if they intend to keep Mr. Peres or Mr. Fernstrom. I don't know what their intentions are with regard to the current VSI platform." (Tr. at 63).

Second, Silver Point's business plan materially overstates the revenues it will receive from the Keep Investors. It appears that Silver Point assumed that all Keep Investors pay the same fees no matter how many policies they own and that Silver Point was not aware that Keep Investors who own more than 10 policies pay lower administration fees.

Third, while Silver Point's business plan recognizes that, in order to maintain the VSI business, it must add a substantial number of new policies to be serviced, Silver Point does not detail any means of obtaining those new policies. In fact, Silver Point's data wrongly assumes

that Acheron's policies will remain with the VSI business. Yet Acheron has already told Silver Point that -- if Silver Point's bid is successful -- it will withdraw those policies from the VSI business for servicing elsewhere. If that occurs, the number of policies that VSI will be servicing will be too small for the business to make a profit. Silver Point has no business plan that shows that VSI can survive without Acheron's policies. (Paul Dec. ¶¶ 31-34).

In fact, the last sentence of Silver Point business plan acknowledges that even with without any withdrawal of policies, VSI is unprofitable. There shows is in fact a need for many more policies, let alone avoid any withdrawals, to make the business it profitable. Silver Point itself is not able to bring to VSI the thousands of additional policies needed to replace this lost business. Silverpoint does not own substantial numbers of life insurance policies. Acheron estimates that Silver Point owns approximately 400 life insurance policies. Even if Silverpoint provides all of its life insurance policies to be serviced by VSI, this new business would not make a significant difference to the revenues of the business of VSI. Silver Point does not specify how it could bring any additional policies to VSI. It is highly unlikely that any other owner of policies would transfer those policies to be serviced by Silver Point.

IV. Silver Point's Interests Are Not Aligned with the Keep Investors' Interests

Silver Point has purchased life insurance policies and sold most of those policies. In other words, Silver Point trades in life insurance policies, thereby earning short term profits. Silverpoint's own submission shows its intent to use VSI as a source of policies to buy. Included in its "first objective and priority in acquiring VSI" is "offer[ing] Keep Policy Holders an opportunity to sell their interests at a fair price." (Silverpoint Bus. Plan, at p. 2). The way Silverpoint plans to "turbo-charge the growth" of VSI is by partnering it with Silverpoint's "life settlement business," Lotus Life. As Silver Point itself explains on its website for Lotus Life:

"Lotus Life purchases life insurance policies . . . ." http://www.lotuslife.com. If Silver Point's first objective is to get access to the Keep Investors' policies so they can purchase those policies cheaply, then Silver Point is not the right entity to protect the interests of those Keep Investors. Again, Silver Point is a hedge fund with all the motivations of a hedge fund to buy and sell assets to make a short term return. Horo, on the other hand, is an experienced business operator.

V. Silver Point's Objections to the Stalking Horse Bid Incentives Lack Merit

Silver Point's objections to the bid procedures approved by this Court are legally baseless. It is a common practice in sales auctions to provide a stalking horse bidder with incentives, such as expense reimbursement and a right to a final bid, and courts approve these practices because they generate higher, more competitive bids. Silver Point not only never objected to the bid process, Silver Point actually submitted its own bid to become the stalking horse that, as we now know, included its own expense reimbursement fee of $250,000 plus an additional break up fee, and perhaps other incentives as well. In fact, Silver Point has recently signed the form of Asset Purchase Agreement approved by the Court and thereby has acquiesced to all of the bid incentives in that agreement, including the break up fee, the last look, and the over bid procedures, that it purportedly finds objectionable. (DE 2307. Ex. A). There is no change in the overbidding procedure, either in last look or cash benefits.

(a) The Expense Reimbursement is Common and Fair

Silver Point's objection to the expense reimbursement fee is disingenuous. Silver Point argues that "the $200,000 termination fee on a cash purchase price of $1,000,000 is excessive and unreasonable" because "termination fees typically range from 1% to 3% of the purchase price." (SP Brief at p. 2, n 4). But Silver Point knows the $200,000 is not a break up fee but an expense reimbursement provision. Silver Point at oral argument correctly referred to it as an

"expense reimbursement." (Tr. at 6). That is in fact the case. Section 8.3 of the Purchase Agreement specifies provides for reimbursement of "out-of-pocket costs and expenses incurred by Buyer . . . up to an aggregate amount of such costs and expenses not exceeding $200,000 . . . ." More damaging to Silver Point's credibility is the revelation that Silver Point's own proposed expense reimbursement fee was actually higher than Horo's. According to the Receiver, Silver Point's proposal "was for a $250,000 break up fee **plus** their out-of-pocket expenses." (Tr. at 35). Horo, on the other hand, sought only reimbursement of out-of-pocket expenses capped at $200,000, with no additional break up fee.

In addition, Silver Point has never cited a single case for the proposition that this expense reimbursement is in any way unfair or inappropriate. In fact, courts uniformly uphold expense reimbursement fees for stalking horse bidders, explaining their difference from pure break up fees. As explained by the Eight Circuit, "Depending on the circumstances and the terms of the transaction, an unsuccessful stalking horse bidder may seek reimbursement of its actual expenses or it may seek a break-up fee which is designed to compensate the unsuccessful bidder for the risk and costs incurred in advancing the competitive bidding process." The distinction is significant because break-up fees are usually limited to one to four percent of the purchase price, whereas there is no such cap for actual fees and expenses incurred. *In re Tampa Beef Packing, Inc.,* 321 B.R. 496, 497 (8th Cir. 2005). In *Tampa Beef*, the Court approved reimbursement of expenses of $50,000 on a $153,000 transaction, or more than 33% of the purchase price there.

Other courts follow this distinction. In *In re President Casinos, Inc.,* 314 B.R. 786, 789 (E.D. Mo. 2004), the Court held "that the amount of $250,000.00 is reasonable based upon the description of Penn's costs and expenses, and will be allowed as an administrative expense should the break-up fee be triggered." It further explained that a "break-up fee that is greater

than the actual cost and expenses of the prospective purchaser should constitute a fair and reasonable percentage of the proposed purchase price, and should be reasonably related to the risk, effort, and expenses of the prospective purchaser." *Id.*

Here, the parties agreed that, if terminated, the Stalking Horse would be reimbursed its actual expenses, capped at $200,000. Given the complicated nature of the transaction, $200,000 was reasonable and, in fact, does not cover those expenses. (Samuel Dec. ¶ 22). The Receiver has vouched for these expenses, and even Silver Point admitted that the "complexity" of the deal called for the expense reimbursement. (Tr. at 6). Here, the bidding procedures cap the expense reimbursement and do not call for any additional amount on top of the expenses to be paid.

(b) Last Look Provisions Promote High Bidding

Silver Point also complains that the "last look" provision deters bidding. That is not so. Last look provisions are intended to, and do, elicit the highest bid while deterring low ball bids. This procedure also shortens the bid process and the money and time invested by the Receiver. Here, the "last look" provision requires competing bidders to bid the maximum amount that they are willing and able to pay to win the auction, as this would be their best chance to win.

In contrast, an open auction allows bidders to submit low bids, and increase them incrementally until the other bidders drop out. This substantially lengthens the bid process and the expenses of the Receivership. The incremental bid process also results in the winning bidder having no incentive to offer the highest price it can offer. In contrast, the "last look" provision requires the bidder to offer its highest bid at the inception of the process, maximizing the price for that bidder. If the stalking horse then outbids, it again maximizes the price.

Courts have also rejected the argument that "last look" provisions deter bidding. As explained by the Delaware Chancery Court, a last look provision may "deter someone who

would want to make a bid that is trivially larger than the KKR Group's bid. But it is not the concern of our law to set up a system that promotes endless incremental bidding. To do so risks creating an incentive for lower initial deal prices because initial buyers will have less closing certainty." *In re Toys "R" Us*, 877 A.2d 975, 1018 (Del.Ch. 2005). The court explained that "there are actual examples that prove that a package of this kind would not deter a fervent bidder intent on paying a materially higher price for the Company. In the recent struggle for control of MCI, Qwest bid repeatedly to try to top Verizon, despite its possession of matching rights. In *Capital Re*, the case was triggered by a bid that topped an initial merger partner protected by a termination fee and matching rights. Examples like these are simply not that unusual." *Id.*

Last Look provisions have also been approved in the context of bankruptcy auctions. The Eighth Circuit held that: "The inclusion of this [last look] provision may well have enhanced the initial bidding, since it gave the high bidder some protection against an eleventh hour attack on its bid . . ." *In re Wintz Cos.* 219 F.3d 807, 813 (8th Cir. 2000); *see also, e.g. In re Table Talk, Inc.* 53 B.R. 937, 942 (Bkrtcy. Mass. 1985) (approving of last look provisions). In contrast, Silver Point has not cited a single case for the proposition that the last look provision is in any way unfair or inappropriate. Moreover, Silver Point never moved to reconsider the Court's Order approving this recognized bid process.

Here, the "last look" provision requires competing bidders to bid the maximum amount that they are willing and able to pay to win the auction, as this would be their best chance to win the process. This process saves the Receivership from funding an endless bidding process. This method also would maximize the offers received as bidders have no choice but to bid the highest level possible. The Receiver determined that this was the best way for the Receiver to maximize the amount to be paid to the Receivership. There is absolutely no evidence that the bid

procedures approved by the Court did not lead to the highest and best deal. If the last look and the contract entered with the receivership and the stalking horse bid process was not respected, this would have a chilling effect on all stalking horse bidders. Horo has worked for 18 months on this acquisition and all of the current contracts used by the Receiver have been designed and drafted by Horo. While Horo's expenses would be partially paid back, Horo itself would receive no compensation whatsoever for its work. This is why the Receiver offered Horo a last look, which does not damage the receivership. The ability to pay in cash benefits and have a last look were explicit conditions put in the offer of the Stalking Horse and were approved by the Court.

CONCLUSION

Silver Point's failure to address the key issues such as its lack of standing as a result of not participating in the bid process and its failure to move to reconsider the Court's order, are telling, as the law is well settled as to these issues and forbids strategies such as that employed by Silver Point, waiting in the weeds while Horo expends the time, effort and resources to comply with the Receiver's and this Courts bid process. Consideration of Silver Point's objection or bid would wreak havoc on court-ordered bid processes.

The Court should enter an Order granting the Receiver's Motion to Approve the Sale to Horo in conformity with the Bidding Order previously entered by this Court. Alternatively, but, only if the Court finds sufficient legal basis for Silver Point to claim standing as a qualified bidder, belatedly object to the Court's Bidding Order, and belatedly submit a non-conforming bid, the Court should reaffirm its Bidding Order of April 3, 2009, approving the bidding procedures relied on by Horo and agreed to by the Receiver, including the expense reimbursement and last look provisions, and allow Horo to submit an overbid in compliance with those Court-approved procedures. First and foremost, however, the Court should not countenance strategies such as that employed by Silver Point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2009, I filed the foregoing memorandum of law and served it upon all counsel and parties of record via the Court's CM-ECF System.

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