IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
VS.	§	
	§	**CIVIL ACTION NO.**
ABC VIATICALS, INC., C. KEITH LAMONDA, and JESSE W. LAMONDA, JR.,	§	**3:06-CV-02136-P**
Defendants,	§	**OBJECTIONS TO MATTER PREVIOUSLY REFERRED TO MAGISTRATE IRMA RAMIREZ UNDER 28 U.S.C. § 636(b)**
and	§	
LAMONDA MANAGEMENT FAMILY LIMITED PARTNERSHIP, STRUCTURED LIFE SETTLEMENTS, INC., BLUE WATER TRUST, and DESTINY TRUST,	§	
Relief Defendants.	§	

ANGELO DIAZ GONZALEZ AND AGENCY'S
MOTION FOR RECONSIDERATION
OF MAGISTRATE'S ORDER, DOCKET NO. 179

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COME NOW Angelo Diaz Gonzalez and Angelo Diaz Gonzalez and Agency[1] (collectively, the "Agency"), pursuant to Fed. R. Civ. P. 59(e), and 28 U.S.C. § 636(b)(1)(A), and submits the following Motion for Reconsideration of Magistrate's Order, Docket No. 179 (the "Magistrate's Order"), and would show the Court as follows:

[1] Angelo Diaz Gonzalez and Agency includes both Angelo Diaz and his hierarchy of agents within his company.

SUMMARY

ABC and its principals defrauded 3,500 investors of over $135 million, the life savings for most. The investors were left with a Portfolio of 55 life settlement policies with a face value of $235 million as their sole asset. A Receiver was appointed over the ABC assets, including the Portfolio. Unfortunately, the Receiver never valued the Portfolio, never updated the life estimates of the policies, engaged in limited marketing, and sold the Portfolio in "as-is" condition, where he knew he would receive a below market price. He did - $33.5 million.

At the sale hearing, the Receiver admitted that his testimony in support of the sale motion was influenced by his fear of being sued by the stalking horse bidder. A super-majority of the investors, supported by the Examiner and with no opposition from the SEC, sought a mere three week delay in which to have an valuation expert update the life estimates in the Portfolio, value the Portfolio, disseminate his updated data to potential buyers who were never contacted by the Receiver, and reconvene in three weeks for a final auction where the magistrate could declare the highest bidder and approve the sale. The evidence is undisputed that no additional non-recoverable premiums would have to be paid to accommodate the three week proposal, the cost of the entire engagement was a mere $50,000 to which the investors readily approved, and the engagement could easily be accomplished in the three week period with a virtual certainty of additional bidders and a substantially higher purchase price.

Notwithstanding all of this, the magistrate denied the three week period, disregarded the desires of 3,500 investors, disregarded the support of the Examiner, disregarded the unopposed stance of the SEC, adopted the testimony of a Receiver whose

testimony was admittedly tainted by his fear of suit, and granted the sale motion, thereby sealing the investors' fate to a substantially below-market purchase price on their sole asset. In the process, the magistrate committed manifest errors of law and fact, from which they seek reconsideration from this Court.

The Magistrate's Order is based upon findings of fact unsupported by any evidence, much less substantial evidence, in the record. One finding is directly contradicted by the record. As such, the findings are clearly erroneous and the Magistrate's Order, upon which such findings are based, should be reconsidered and set aside by this Court.

Further, the Magistrate's Order relies heavily upon the testimony of the Receiver, a party who admitted under oath that his testimony was strongly influenced by his fear of being sued by the stalking horse bidder with whom he had contracted. Such heavy reliance upon admittedly influenced testimony, to the detriment and disregard of the testimony and support of the overwhelming majority of defrauded investors, the Examiner, and the SEC, was clear error and provides an independent basis to reconsider and set aside the Magistrate's Order.

PROCEDURAL AND FACTUAL BACKGROUND

1. **The Sale Motion**. On June 30, 2008, the Court-appointed receiver, Michael Quilling (the "Receiver"), filed his Motion to Sell All Insurance Policies and Approve Purchase and Sale Agreement, docket no. 146 (the "Sale Motion"). (Receiver's Exh. 3).

2. **The Order of Reference**. On July 9, 2008, this Court issued an Order of Reference, docket no. 150 (the "Order of Reference"), wherein, the Court, pursuant to 28

U.S.C. § 636(b), referred the Sale Motion to United States Magistrate Irma C. Ramirez (the "Magistrate") "for hearing, if necessary, and determination."

3. **The Objection**. On September 17, 2008, the Agency, representing the interests of 400 defrauded investors from Puerto Rico, Portugal, and the Dominican Republic (the "Puerto Rican Investors"), timely filed an objection to the Sale Motion, docket no. 165 (the "Objection"), wherein the Agency objected to, among other things, (i) the Receiver's failure to value the Portfolio by updating the life estimates on the life insurance policies comprising the Portfolio; (ii) the Receiver's failure to adequately market the Portfolio; and (iii) the Receiver's failure to provide adequate notice to the investors of the Sale Motion and Sale Hearing.

4. **The Sale Hearing**. Beginning on September 23, 2008,[2] the Court held a hearing (the "Sale Hearing") to consider the Sale Motion and all objections thereto, including the Agency's Objection. Previously, on September 19, 2008, the Court issued its order (docket no. 169), denying the Agency's Motion for Continuance (docket no. 164).

5. **The Auction**. As the first matter of order at the Sale Hearing, the Court determined to allow the auction of the Portfolio[3] prior to the evidentiary hearing on the Sale Motion. (Trans., Vol. 1, at p. 4, lines 17 - 22). The Agency objected to the auction, asserting that the auction was premature, was destined to yield a below market high bid in light of the Receiver's failure to value and adequately market the Portfolio, and should await implementation of the 3 Week Proposal (as defined herein). (Trans., Vol. 1, at p. 4

[2] The hearing was held from September 23, 2008 through September 24, 2008.
[3] The Portfolio refers to the 55 insurance policies which were the subject of the Sale Motion.

(line 24) – p. 5 (line 18)). The Magistrate overruled the objection. (Trans., Vol. 1, at p. 4 (line 24) - p. 5 (line 19)).

6. Settlement Group, Inc. ("SGI") was the high bidder at the auction with a bid of $33.5 million, plus the reimbursement obligations for premiums from July 2008 through the date of closing. (Trans., Vol. 1, at p. 22 (line 17) - p. 25 (line 17)).

7. **The 3 Week Proposal**. At the conclusion of the auction, the Agency requested that the Magistrate adjourn the Sale Motion hearing for three weeks (i) to allow its valuation expert to update (within two weeks) the Portfolio; (ii) to value the Portfolio within the two week period at a cost of $50,000 total for both (i) and (ii); (iii) to allow the dissemination of the valuation results and updated life expectancies to all current bidders, as well as potential bidders who were never contacted in the prior marketing effort by the Receiver; (iv) to reconvene the Sale Hearing in three weeks to allow supplemental and final bidding to take place, starting at the $33.5 million high bid from the earlier auction; (v) to allow the Magistrate to declare the highest bid after the final auction was complete; and (vi) to approve the Sale Motion at that time (the "3 Week Proposal"). (Trans., Vol. 1, at p. 29 (line 12) – p. 33 (line 19)).

8. **The Overwhelming Support of the Investors**. The Puerto Rican and Taiwanese Investors, comprising over 82% of all investors in ABC, universally endorsed the 3 Week Proposal, noting that this is their money we are dealing with. (PR Exhs. 6 – 7; Trans., Vol. 1, at p. 53, lines 14 – 20; at p. 56 (line 20) – p. 57 (line 23); at p. 62, lines 12 – 21). The Receiver testified that the percentage of investors in support of the 3 Week Proposal was much higher since he is only aware of two investors who support the Sale Motion. (Trans., Vol. 2, at p. 65, lines 6 – 12).

9. **The Examiner Supports and the SEC Does Not Oppose the 3 Week Proposal**. The Examiner supports, and the SEC does not oppose, the 3 Week Proposal. (Trans., Vol. 1, at p. 36, lines 5 – 14; at p. 36, lines 24 – 25; Trans., Vol. 2, at p. 154, lines 16 - 18).

10. **The Receiver's Contractual Obligations to the Stalking Horse Bidder Prohibited Him From Supporting the 3 Week Proposal**. The Receiver admitted that his fear of being sued under the purchase and sale agreement he had signed with the stalking horse bidder precluded him from supporting the 3 Week Proposal. (Trans., Vol. 2, at p. 76, lines 3 – 19; at p. 46, lines 3 – 22).

11. Notwithstanding the overwhelming support from the parties in interest (who were not tainted by fear of suit), and after initially questioning why she should go forward with the Sale Hearing in light of the overwhelming support for the 3 Week Proposal, the Magistrate ultimately decided to take the 3 Week Proposal under advisement, pending the conclusion of the Sale Hearing. (Trans., Vol. 1, at p. 33, lines 22 – 24; at p. 39, lines 20 – 25).

12. **The Valuation Expert Testimony**. Scott Gibson testified as an actuary and valuation expert, retained by the Agency. (Trans., Vol. 2, at p. 95, lines 16 – 18). Mr. Gibson provided testimony establishing his expertise and training as a consulting actuary and valuator of life settlement insurance policies. (Trans., Vol. 2, at p. 91, line 7 – p. 135, line 13). Mr. Gibson is familiar with much of the data and information relating to the Portfolio which is contained on the disks that were provided by the Receiver to the potential bidders on the Portfolio. (Trans., Vol. 2, at p. 95, line 19 – p. 96, line 13). Mr Gibson opined that it was extremely important for the seller of the Portfolio (here, the

Receiver) to have some idea of the value of the Portfolio before selling it. (Trans., Vol. 2, p. 100, lines 2 – 5). He opined that the Receiver should have updated the life estimates in the Portfolio prior to its sale in order maximize the sale of the Portfolio and to be able to make an informed decision on whether to sell the Portfolio at the bid price received. (Trans., Vol. 2, at p. 100 (line 21) – p. 105 (line 5)). Mr. Gibson conservatively valued six (6), or 11%, of the 55 policies in the Portfolio at $29 million, or $2 million greater than the stalking horse bid and $4.5 million less than the high bid by SGI for 100% of the policies. (Trans., Vol. 2, at p. 105, line 19 – p. 109, line 7).

13. Mr. Gibson testified that he was ready, willing, and able to implement and complete the 3 Week Proposal by updating the life estimates of and valuing all 55 policies in the Portfolio within two (2) weeks of receiving the Court's approval of that engagement for the receivership at a cost of $50,000. (Trans., Vol. 2, at p. 110, lines 20 – 25; at p. 104, lines 20 - 24). There is no question that funds are available to pay the costs of the 3 Week Proposal with no negative impact to the investors. (Trans., Vol. 1, at p. 23 (line 21) – p. 24 (line 16)).

14. The Agency retained and paid Scott Gibson as an actuary and valuation expert on behalf of the Puerto Rican Investors. (Trans., Vol. 1, at p. 52, lines 4 – 9). Mr. Diaz made the 3 Week Proposal in order to provide the Puerto Rican Investors, and all other investors, with an opportunity to maximize their return on the sale of the Portfolio by updating the life estimates of the policies, obtaining a valuation, and supplementing marketing efforts, prior to the final auction. (Trans., Vol. 1, at p. 52, lines 10 – 17; at p. 91 (line 7) – p. 135 (line 13).

15. **The Receiver Failed to Properly and Fully Market the Portfolio**. When asked "what efforts did you make to market these policies," the Receiver testified that he was "receptive to people who contacted him about the possibility of . . . [purchasing] all or a portion of the portfolio." (Trans., Vol. 2, at p. 37, lines 19 – 24). This statement exemplifies the lack of proactive marketing of the Portfolio over the past two years which led to the below market stalking horse bid, as well as the below market high bid at the auction. The Receiver acknowledged that he received what turned out to be the stalking horse bid very soon after he was appointed. (Trans., Vol. 2, at p. 38, lines 6 – 11). The absence of a strong marketing effort by the Receiver supports the conclusion that the Receiver believed his marketing effort was done as soon as such stalking horse bid was received early on in the case.

16. The Receiver admitted that he "didn't think it was worth advertising [the Portfolio] in the USA Today or the Wall Street Journal because they cost a lot of money and he did not think it was necessary." (Trans., Vol. 2, at p. 38 (line 25) – p. 39 (line 2). He admitted that he was aware that the Sale Motion hearing was being conducted at the same time that the major buyers in the life settlement industry were meeting in Las Vegas at their annual conference. (Trans., Vol. 2, at p. 39, lines 9 – 15).

17. The Receiver acknowledged that life estimate updates on the 55 policies in the Portfolio had never been completed. (Trans., Vol. 2, at p. 64 (line 23) - p. 65 (line 2)).

18. At some point, the Receiver determined to sell the Portfolio in an "as-is" condition. (Trans., Vol. 2, at p. 65, lines 23 - 25).

19. The Receiver acknowledged that within the life settlement industry, life expectancy certificates are a desirable part of any portfolio, and that people who buy and

sell such policies utilize them in establishing their value. (Trans., Vol. 2, at p. 65, lines 17 - 22).

20. The Receiver never retained an expert to value the Portfolio and was unaware whether the Examiner ever did. (Trans., Vol. 2, at p. 66, lines 1 - 24).

21. Bidders on a portfolio in an "as-is" condition would reasonably be expected to discount their bidding based up, among other things, the uncertainty of what they're buying. (Trans., Vol. 2, at p. 67, lines 13 - 20). That rationale would apply to both Silver Point's initial stalking horse bid of $27.1 million, as well as SGI's high auction bid of $33.5 million on September 23, 2008. (Trans., Vol. 2, at p. 67 (line 21) - p. 68 (line 4)).

22. In response to the question "Aren't you in a better position to make an informed decision as to whether or not their bid is fair value," the Receiver responded, in part "I had a contract with Silver Point Capital [the stalking horse bidder] and my friends from Sidley Austin will not waste any time in suing me for breach of that contract if I do not try to get the sale ordered. That's my deal. That's what I have to live under." (Trans., Vol. 2, at p. 76, lines 3 - 12). The Examiner testified that he believed the Portfolio was worth far more than the high bid. (Trans., Vol. 2, at p. 149, lines 12 – 15).

ARGUMENT

I. The Magistrate's Order is Based Upon Clearly Erroneous "Findings" Without Substantial Evidentiary Support in the Record.[4]

23. Clearly Erroneous Finding # 1: The 3 Week Proposal Could Cause the Loss of the Current Bidders. At the conclusion of the Sale Hearing, the Magistrate stated that "the law requires that I consider the best interests of the investors in this case. And in doing that I have to weigh the potential benefits and gain of a three week delay versus the potential downside or losses that could result if I were to grant this delay." (Trans., Vol. 2, at p. 160, lines 2 – 7). The Magistrate went on to state "I considered very seriously Mr. Gibson's statements about how he thinks the process will allow a higher value and more bidders, but I also have to consider the fact that he agrees that the current bidders have already done essentially the same thing that he proposes to do, and I must balance that against the fact that the delay in the process could cause us to lose the current bidders." (Trans., Vol. 2, at p. 160, lines 12 – 19).

24. The record is devoid of any evidence supporting the Magistrate's "finding" that "the delay in the process [the 3 Week Proposal] could cause us to lose the current bidders." In fact, the evidence is to the contrary to this significant "finding." Joseph Lucent testified on behalf of SGI, the high bidder on the Portfolio at $33.5 million. (Trans., Vol. 1, at p. 23 (line 1) – p. 25 (line 17)). Mr. Lucent provided no testimony evidencing any risk that SGI would walk away from its bid of $33.5 million if

[4] The Magistrate made "findings" in the record at the conclusion of the Sale Hearing in support of her oral ruling, which she omitted from her "Findings of Fact" in the Magistrate's Order. *See* Trans., Vol. 2, at p. 160, line 1 – p. 161, line 9, versus Magistrate's Order, at pp. 1 – 7. Regardless of how these "findings" are couched, they remain "findings" in the record made by the Magistrate and upon which the Magistrate's Order is based. The Magistrate cannot avoid clearly erroneous findings made on the record merely by omitting them from the Order.

the Magistrate authorized the Agency's 3 Week Proposal. (Trans., Vol. 1, at p. 23 (line 1) – p. 25 (line 17)). No such testimony or evidence was presented by any party during the course of the hearing. (Trans., Vol. 1 – 2; Receiver's Exh. 1 – 68; PR Exh. 1, 6, 7). To the contrary, in response to the Court's question of "What is the downside to me delaying my decision or recessing for 21 days," the Receiver testified that "I believe that Mr. Lucent's company, Settlement Group [SGI], will be around to actually close." (Trans., Vol. 2, at p. 144, lines 12 - 24). The record is devoid of any evidence suggesting that the 3 Week Proposal would result in the loss of SGI's offer.

25. Likewise, the evidence is unequivocal that the original stalking horse bidder, Silver Point, indicated that they are still at their original bid of $27.1 million and will honor their bid. (Trans., Vol. 2, at p. 145, lines 5 – 7). Silver Point recognizes that their failure to honor their bid would result in their loss of a $1 million breakup fee. They are going nowhere. Finally, although there is a statement in the record that Highland Capital indicated that they do not intend to stand behind their bid (albeit said in haste), unlike Silver Point and SGI, Highland Capital was never a high bidder at any auction. More importantly, Highland Capital's statement related to their unwillingness to honor their $33 million bid in the event that SGI did not close. It did not relate to whether they would refuse to participate in a new auction after implementation of the 3 Week Proposal. (Trans., Vol. 2, at p. 145, lines 2 – 4). Thus, the statement is irrelevant to Finding # 1.

26. Findings not supported by substantial evidence are taken to be clearly erroneous in the Fifth Circuit. *Freeport Sulphur Co. v. The S/S Hermosa*, 526 F.2d 300, 307 (5th Cir. 1976) (reversing and remanding that portion of the district court's judgment

that was based upon a finding without support by substantial evidence in the record). The validity of the Magistrate's Order, denying the 3 Week Proposal and granting the Sale Motion, depends upon Finding # 1. Since Finding # 1 lacks substantial evidentiary support in the record, it is contrary to Fifth Circuit law, is clearly erroneous, and constitutes manifest error of law and fact. The Magistrate's Order, which is based upon Finding # 1, should, therefore, be set aside pursuant to *Freeport Sulphur*.

27. Clearly Erroneous Finding # 2: The Proposed Sale Is The Only Viable Option For the Investors At This Time. The Magistrate goes on to "find" that "the proposed sale [to SGI] is the only viable option . . . of the investors at this time." Magistrate's Order, at ¶ 40. This is clearly erroneous because it is not supported by substantial evidence in the record. To the contrary, it contradicts the record. The record is replete with undisputed evidence that the 3 Week Proposal is not only a viable option for the investors at this time, but that it is necessary in order to provide the investors with an opportunity to recover fair value on the Portfolio. (Trans., Vol. 2, at p. 91, line 7 – p. 135, line 13; at p. 100, lines 2 – 5; at p. 100 (line 21) – p. 105 (line 5); at p. 105, line 19 – p. 109, line 7; at p. 110, lines 20 – 25; at p. 104, lines 20 – 24; Vol. 1, at p. 23 (line 21) – p. 24 (line 16); at p. 52, lines 10 – 17; at p. 91 (line 7) – p. 135 (line 13); Vol. 2, at p. 37, lines 19 – 24); at p. 38, lines 6 – 11; at p. 38 (line 25) – p. 39 (line 2); at p. 39, lines 9 – 15); at p. 65 (line 23) – p. 65 (line 2); at p. 65 lines 17 – 22; at p. 65, lines 23 – 25); at p. 66, lines 1 – 24; at p. 67, lines 13 – 20; at p. 67 (line 21) – p. 68 (line 4)).

28. Finding # 2 is, in part, the result of and dependent upon the Magistrate's clearly erroneous Finding # 1. One error builds upon the other. The Magistrate erroneously equates the investors' inability to forecast the future and guarantee a higher

bidder under the 3 Week Proposal to lack of viability of the 3 Week Proposal. This is clearly erroneous. The record strongly supports the fact that the 3 Week Proposal is a very viable option. The Agency is aware of no authority which requires Option B to guarantee a result better than Option A in order to be viable, particularly where the evidence is undisputed that the beneficiaries of the option desire Option B and will not suffer any substantive downside from the exercise of such option.

29. Likewise, the Magistrate cites to the amount of premiums that have to be paid to keep the policies current as a basis for Finding # 2. Magistrate's Order, at p. 6, ¶ 40. This is error because the record is unequivocal that the 3 Week Proposal would not cause the investors to incur any additional non-recoverable premiums. (Trans., Vol. 1, at p. 23 (line 21) – p. 24 (line 16) (SGI confirming their understanding that they must reimburse the Receiver for all premiums from July 2008 through the date of closing, even if the closing occurred in October 2008). The record reflects that no additional borrowing would have to be incurred in order to implement the 3 Week Proposal. (Receiver's Exh. 56, at p. 5 (reflecting $3,008,885.59 in the Receiver's Accounts, more than enough to cover the $50,000.00 cost of the life estimate updates).

30. Findings not supported by substantial evidence are taken to be clearly erroneous in the Fifth Circuit. *Freeport Sulphur Co. v. The S/S Hermosa*, 526 F.2d 300, 307 (5th Cir. 1976) (reversing and remanding that portion of the district court's judgment which was based upon a finding without support by substantial evidence in the record). The validity of the Magistrate's Order, denying the 3 Week Proposal and granting the Sale Motion, depends upon Finding # 2. Since Finding # 2 lacks substantial evidentiary support in the record, it is contrary to Fifth Circuit law, is clearly erroneous, and

constitutes manifest error of law and fact. The Magistrate's Order, which is based upon Finding # 2, should, therefore, be set aside pursuant to *Freeport Sulphur*.

31. Clearly Erroneous Finding # 3: The Solicitation Process Utilized By the Receiver Was Designed to Solicit the Maximum Sales Price for the Policies. Amazingly, the Magistrate goes on to "find" that the solicitation process utilized by the Receiver was designed to solicit the maximum sales price for the policies. Magistrate's Order, at p. 10, ¶ 30. Nothing could be further from the truth. And, more importantly for present purposes, the record is devoid of substantial evidence to support Finding # 3.

32. Indeed, the record refutes Finding # 3. *See* Trans., Vol. 2, at p. 100 (line 21) – p. 105 (line 5)) (expert Gibson's testimony that the Receiver should have updated the life estimates in the Policy prior to its sale in order to maximize the sale of the Portfolio); Trans., Vol. 2, at p. 148, lines 14 – 19 (expert Gibson's testimony that the updated life estimates would result in a higher value for the Portfolio and higher bids after the 3 Week Proposal has been implemented); Trans., Vol. 2, at p. 37, lines 19 – 24) (Receiver's acknowledgment of not being pro-active in his marketing efforts); Trans., Vol. 2, at p. 38 (line 25) – p. 39 (line 2) (Receiver's admission that "he didn't think it was worth advertising [the Portfolio] in the USA Today or the Wall Street Journal because they cost a lot of money and he did not think it was necessary"); Trans., Vol. 2, at p. 39, lines 9 – 15) (Receiver's recognition that the Sale Hearing was taking place on the very same days that the major potential buyers for the Portfolio were at their annual convention in Las Vegas, Nevada); Trans., Vol. 2, at p. 64 (line 23) – p. 65 (line 2)) (Receiver's acknowledgment that he had never updated life estimates on the policies); Trans., Vol. 2, at p. 65, lines 77 – 22) (Receiver's acknowledgment that within the life

settlement industry, life expectancy certificates are a desirable part of any portfolio, and that people who buy and sell such policies utilize them in establishing their value) (Trans., Vol. 2, at p. 65, lines 23 – 25) (Receiver determined to sell the Portfolio in an "as-is" condition); Trans., Vol. 2, at p. 66, lines 1 – 24) (Receiver never retained an expert to value the Portfolio); Trans., Vol. 2, at p. 67, lines 13 – 20) (Receiver's admission that bidders on a portfolio in an "as is" condition would reasonably be expected to discount their bidding based upon, among other things, the uncertainty of what they are buying); Trans., Vol. 2, at p. 67 (line 21) – p. 68 (line 4)) (Receiver's admission that this rationale would apply to both Silver Point's initial stalking horse bid of $27.1 million, as well as SGI's high auction bid of $33.5 million on September 23, 2008); Trans., Vol. 2, at p. 67, lines 3 – 12) (Receiver's admission that his fear of being sued by Silver Point under the contract he signed with them shortly after he was appointed receiver negatively influenced his ability to maximize the value of the Portfolio). The record reflects that the 3 Week Proposal would cost the investors nothing. (Trans., Vol. 1, at p. 23 (line 21) – p. 24 (line 16) (SGI confirming their understanding that they must reimburse the Receiver for all premiums from July 2008 through the date of closing, even if the closing occurred in October 2008). The record reflects that no additional borrowing would have to be incurred in order to implement the 3 Week Proposal. (Receiver's Exh. 56, at p. 5 (reflecting $3,008,885.59 in the Receiver's Accounts, more than enough to cover the $50,000.00 cost of the life estimate updates).

33. The overwhelming evidence in the record refutes the magistrate's finding that the solicitation process employed by the Receiver was designed to solicit the maximum sales price for the policies. Indeed, as demonstrate above, the Receiver's own

testimony refutes this central finding of the magistrate. There is no evidence, much less substantial evidence to support Finding # 3. Findings not supported by substantial evidence are taken to be clearly erroneous in the Fifth Circuit. *Freeport Sulphur Co. v. The S/S Hermosa*, 526 F.2d 300, 307 (5th Cir. 1976) (reversing and remanding that portion of the district court's judgment which was based upon a finding without support by substantial evidence in the record). The validity of the Magistrate's Order, denying the 3 Week Proposal and granting the Sale Motion, depends upon Finding # 3. Since Finding # 3 lacks substantial evidentiary support in the record, it is contrary to Fifth Circuit law, is clearly erroneous, and constitutes manifest error of law and fact. The Magistrate's Order, which is based upon Finding # 3, should, therefore, be set aside pursuant to *Freeport Sulphur*.

II. The Magistrate Erroneously Cited to a Statement by Expert Gibson in Support for Her Order.

34. At the conclusion of the hearing, the Magistrate stated that "I also have to consider the fact that [Scott Gibson, the valuation expert for Angelo Diaz Gonzalez] agrees that the current bidders have already done essentially the same thing that he proposes to do. . . ." (Trans., Vol. 2, at p. 160, lines 12 – 17). Based upon the Magistrate's ultimate ruling, the Magistrate either misunderstood or misapplied the significance of Mr. Gibson's comments.

35. During the hearing, the Magistrate asked Mr. Gibson "as I understand your position you are telling me that by updating these life estimates that will provide, probably, a higher estimate and hopefully new bidders or higher bidders; is that

accurate?" (Trans., Vol. 2, at p. 148, lines 14 – 18). Mr. Gibson responded "Yes, ma'am." (Trans., Vol. 2, at p. 148, line 19).

36. The Magistrate then asked "[i]f the bidders here have already done a process as you described similar to what you expect to do, what incentive do they have to rely on your higher bid other than what they have already done?" (Trans., Vol. 2, p. 148, lines 20 – 23). At this point, Mr. Gibson responded in a manner in which the Magistrate either misunderstood or misapplied the significance of his response. Mr. Gibson stated that "I suspect that the ones in this room have probably done what I have done and it may not influence them , other than the fact they're going to now know that there's a parallel to what they have done and rather than show a number of 34 million or 27 million it might show 70 million and they may be held a little bit more accountability, and you may bring in some other additional bidders who see that basis that I've done it on and start out with a little bit different way of thinking, that it's not so much of a fire sale." (Trans., Vol. 2, at p. 148 (line 25) – p. 149 (line 9) (emphasis added).

37. To the extent that the Magistrate based its ruling (denying the 3 Week Proposal) based on its assumption that it would be a wasted exercise since the bidders in the room would probably not change their bid following the implementation of the 3 Week Proposal and Mr. Gibson's valuation of the Portfolio, such a conclusion would be clear error for at least three reasons.

38. First, whether the bidders in the room (i.e., the three bidders who participated at the auction) would change their bid based upon the implementation of the 3 Week Proposal is irrelevant to whether the 3 Week Proposal should have been approved. A significant purpose of the 3 Week Proposal was to disseminate Mr.

Gibson's updated valuation data to those potential buyers who were never contacted by the Receiver to allow them to participate in a final auction against the bidders in the room. Even if one were to assume that the bidders in the room would not change their bid, the evidence in the record supports the proposition that additional bidders would attend the final auction and submit bids higher than the current high bid. (Trans., Vol. 2, at p. 148 (line 25) – p. 149 (line 9); at p. 126 (line 8) – p. 128 (line 2).

39. Second, there is nothing in the record to suggest that, merely because the bidders in the room may have internally updated the Portfolio that they would not increase their bid in a subsequent auction in which new bidders (with the updated valuation numbers from Mr. Gibson) are threatening to acquire the Portfolio out from under them.

40. Third, when Mr. Gibson stated that the bidders in the room may have already done an internal valuation of the Portfolio, it does not follow from such statement that their internal valuation will be identical to Mr. Gibson's valuation. To the extent that the Court assumed that the bidders in the room would not further participate in a final auction because there would be no difference between the two valuations, or that they might not be influenced to increase their bid based upon Mr. Gibson's valuation, such assumption is not supported by anything in the record, and would be clearly erroneous.

41. The Magistrate's misunderstanding and/or misapplication of the statement by Mr. Gibson was clear error and is a basis to set aside the Magistrate's Order.

III. The Set Aside of the Magistrate's Order is Required by Law.

42. As stated above, findings not supported by substantial evidence are taken to be clearly erroneous in the Fifth Circuit. *Freeport Sulphur Co. v. The S/S Hermosa*,

526 F.2d 300, 307 (5th Cir. 1976). For the reasons set forth herein, Findings # 1, # 2, and # 3 are unsupported by substantial evidence, and constitute clearly erroneous findings and manifest error in law and fact. The Magistrate's Order, which is based upon such clearly erroneous findings, should be set aside.

43. In addition, 28 U.S.C. § 636(b)(1)(A) provides, in pertinent part, that "[a] judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." Here, the Magistrate's Order is clearly erroneous and contrary to Fifth Circuit law, since it is based upon "findings" unsupported by any evidence, much less substantial evidence, in the record. *See Freeport Sulphur Co. v. The S/S Hermosa*, 526 F.2d 300, 307 (5th Cir. 1976).

44. Fifth Circuit holds that the purpose of a Fed. R. Civ. P. 59(e) motion for reconsideration is, among other things, to correct manifest errors of law or fact. *See Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). For the reasons set forth above, the Magistrate's Order contains such manifest errors of law or fact.

45. Further, Fed. R. Civ. P. 59(e) provides authority to set aside the Magistrate's Order in order to prevent manifest injustice. *See Atlantic States Legal Found., Inc. v. Karg Bros., Inc.*, 841 F. Supp. 51, 53 (N.D.N.Y. 1993); *Mobil Oil Corp. v. Amoco Chems. Corp.*, 915 F. Supp. 1333, 1377 (D. Del. 1995); *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Wendy's Int'l, Inc. v. Nu-Cape Constr., Inc.*, 169 F.R.D. 680, 684-685 (M.D. Fla. 1996).

46. Here, the Magistrate's Order, if not set aside, will result in the unnecessary and manifestly unjust liquidation of the life savings of many of the 3,500 defrauded

investors for substantially less than fair value. This at a time when an available alternative (the implementation of the 3 Week Proposal) was readily at hand at no cost to the investors. Here, the Magistrate's Order, if not set aside, will result in the manifestly unjust result of the defrauded investors being deprived of fair value through the Magistrate's unwarranted reliance upon the testimony of a Receiver who failed to value or adequately market the Portfolio, and whose testimony was admittedly influenced by his fear of being sued. Finally, the Magistrate's Order, if not set aside, will result in this Court's blessing of the Magistrate's violation of Fifth Circuit law and her turning a deaf ear to the wishes of 3,498 of the 3,500 defrauded investors, the SEC, and the Examiner.

47. For all the foregoing reasons, the Court should set aside the Magistrate's Order, and order the implementation of the 3 Week Proposal, to prevent manifest injustice and to address the manifest errors of law and fact set forth herein.

Dated: this 13th day of October, 2008.

Respectfully submitted,
/s/ John S. Brannon

John S. Brannon
Texas Bar No. 0289550

Rachelle H. Glazer
Texas Bar No. 09785900

Will A. Pruitt
Texas Bar No. 24056165

THOMPSON & KNIGHT LLP
One Arts Plaza
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1700 Telephone
(214) 969-1799 Facsimile
ATTORNEYS FOR ANGELO DIAZ GONZALEZ AND AGENCY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following parties by fax and first class mail, postage prepaid on this 13th day of October, 2008.

/s/ John S. Brannon
John S. Brannon

Michael J. Quilling
Quilling Selander Cummiskey
& Lownds
2001 Bryan St., Suite 1800
Dallas, Texas 75201
Fax: 214.871.2111
Email: mquilling@qsclpc.com
COURT APPOINTED RECEIVER

Bruce S. Kramer
Borod & Kramer, PLC
Brinkley Plaza
80 Monroe Ave., Suite G-1
Memphis, TN 38103
Fax: 901.523.0043
Email: bkramer@borodandkramer.com
SPECIAL COUNSEL FOR THE RECEIVER

D. Dee Raibourn, III
Quilling Selander Cummiskey
& Lownds
2001 Bryan St., Suite 1800
Dallas, Texas 75201
Fax: 214.871.2111
Email: draibourn@qsclpc.com
COUNSEL FOR THE RECEIVER

Harold R. Loftin, Jr.
U.S. Securities & Exchange Commission
Fort Worth Regional Office
801 Cherry St., Suite 1900
Fort Worth, Texas 6102
Fax: 817.978.4927
Email: loftinh@sec.gov
LEAD COUNSEL FOR THE
SECURITIES & EXCHANGE COMMISSION

Dennis L. Roossien
Munsch Hardt Kopf & Harr, P.C.
3800 Lincoln Plaza
500 N. Akard St.
Dallas, Texas 75201
Fax: 214.855.7584
Email: droossien@munsch.com
COUNSEL FOR THE EXAMINER

Steven A. Harr
Munsch Hardt Kopf & Harr, P.C.
3800 Lincoln Plaza
500 N. Akard Street
Dallas, Texas 75201-6659
Fax: 214.855.7584
Email: sharr@munsch.com
COURT APPOINTED EXAMINER