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

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. ABC VIATICALS, INC., C. KEITH LAMONDA, and JESSE W. LAMONDA, JR., Defendants, and LAMONDA MANAGEMENT FAMILY, LIMITED PARTNERSHIP, STRUCTURED LIFE SETTLEMENTS, INC., BLUE WATER TRUST, and DESTINY TRUST, Relief Defendants.	§ §	Civil Action No. 3:06-CV-2136-P **ECF** MATTER PREVIOUSLY REFERRED TO MAGISTRATE JUDGE IRMA RAMIREZ UNDER 28 U.S.C. § 636(B)

EMERGENCY MOTION OF SETTLEMENT GROUP, INC.
(1) FOR RECONSIDERATION OF ORDER GRANTING IN PART AND DENYING IN PART EMERGENCY MOTION OF ANGELO DIAZ GONZALEZ AND AGENCY AND
(2) APPROVING THE SALE CLOSING FOR $33.5 MILLION

COMES NOW, Settlement Group, Inc. ("SGI"), and pursuant to, *inter alia*, FED. R. CIV. P. 59(e), files this Emergency Motion for Reconsideration of the Court's Order of November 6, 2008 (Docket No. 199), granting in part and denying in part the emergency motion (Docket No. 197) of Angelo Diaz Gonzalez and Agency (collectively, the "Agency"), and in support respectfully shows the Court as follows:

I.
INTRODUCTION AND SUMMARY

The historical standard regarding the finality of auction sales conducted under judicial supervision was summarized by Justice Learned Hand in *Knight v. Wertheim & Co.*: "[e]xcept upon *the extremist provocation*, courts will not upset a judicial sale at auction on the grounds that a new bidder has appeared who offers more than the knock-down price."[1] Here, the Court should reconsider its November 6, 2008 Order for several reasons, including the lack of any "extremist provocation" or even the presence of an identified new bidder, the absence of any newly discovered evidence that would probably change the outcome of the Courts' prior rulings, and, as described below, the $36,000-a-day prejudice SGI suffers from a delay of closing this transaction.

First, in making its ruling the Court seemingly relied on a factually inaccurate and subsequently withdrawn motion for stay and for reconsideration. On November 5, 2008, the Agency filed two emergency motions, both seeking to stay Magistrate Judge Ramirez's order permitting the sale of millions of dollars in assets held by the Court-appointed receiver and reconsideration of this Court's October 30, 2008 order declining to stay Judge Ramirez's sale order. In the original emergency motion (Docket No. 197) (the "Original Motion"), the Agency argued that newly discovered evidence required the Court to reconsider prior the orders that permitted the asset sale to go forward. Specifically, the Agency unequivocally contended that a third party, Highland Capital Management, LP ("Highland"), would submit a "firm offer …to the Receiver within 48 hours [for] substantially more than [ABC Viaticals investors] stand to recover under the current sale to SGI." (Original Motion at 2.)

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[1] 158 F.2d 838 (2d Cir. 1946) (emphasis added).

Later that day, the Agency withdrew this Original Motion by filing an amended emergency motion (Docket No. 198) (the "Amended Motion") seeking the same relief. The Amended Motion did not explain the differences between the two motions filed only hours apart. Instead, the Agency merely claimed it "misunderstood some aspects of the reorganization plan" and "this amended motion better reflects their intentions." (Amended Motion at 1, n. 1.)

The differences were significant. As set forth in the Amended Motion, there was no firm offer coming from Highland within two days; indeed, Highland's name was removed from the Agency's factual assertions. Instead, the "newly discovered evidence" relied upon by the Agency in its Amended Motion was that an unnamed Dallas asset manager was merely "interested" in "exploring" a "possible offer" for the receivership assets at an undisclosed time. (*Id.* at 2.)

On November 6, 2008, the Court, referencing the Original Motion only, entered its Order partially granting the relief sought in the Agency's motion. Based on the contents of the Order, it does not appear that the Court had the opportunity to review the Amended Motion before its ruling. On that basis, the Court should reconsider its Order on the Original Motion – subsequently superseded by the Amended Motion – and render a new order based on the amended set of facts asserted in the Amended Motion, not the original and subsequently withdrawn motion.

Second, the Agency's "newly discovered facts" – as stated in the Amended Motion – plainly fail to satisfy the prerequisites of FED. R. CIV. P. 59(e) per the Fifth Circuit's decision in *Infusion Resources, Inc. v. Minimed, Inc.*, 351 F.3d 688, 696-97 (5th Cir. 2003). The Agency did not proffer any newly discovered facts that are probable to

change the outcome of the rulings it seeks to set aside. Instead, the Agency has only outlined mere "possibilities," all of which were previously known to the parties, that are insufficient to set aside the Courts' prior rulings based on new and probable facts. The Agency also failed to establish that these allegedly newly discovered facts – a re-mapping of the premiums – could not have been done earlier with the proper diligence, also as required to set aside the prior rulings.

Third, the November 6, 2008 Order substantially prejudices SGI. At present, $33.5 million in funds received from SGI sit in an escrow account ready to close this transaction. Each day of delay costs SGI more than $35,000. For November 2008 alone, the premium load on the 55 policies is $1.1 million. Upon closing, SGI intended to strategically cancel a certain handful of policies to better manage the premium load and, in turn, to make this $33.5 million transaction economically viable. That is also a cost above and beyond the $250,000 in hard, out-of-pocket expenses that SGI *already* incurred as part of the nine-month bid and sale process and the significant costs incurred to liquidate other assets in a down market to timely close this transaction. SGI and the Receiver are parties to a valid and enforceable 26-page written purchase and sale agreement, an agreement which unmistakably provides that "time is of the essence in all things pertaining to the performance of this Agreement." Accordingly, SGI reserves all its rights and remedies for breach of that agreement now.

In sum, for the past nine months, SGI, along with other many other parties, relied on and followed this Court's specific procedures and orders for the sale of ABC Viaticals, Inc.'s ("ABC") policies, including the Court's previous denials of the Agency's similar objections and motions. The Court should honor those earlier procedures and orders,

which did not envision supplemental bids, and should respect the parties' written agreement. Otherwise, the Court risks setting an uncertain, "anything goes" precedent in court-supervised auctions. Accordingly, the Court should vacate its Order of November 6, 2008, and order the parties to close the transaction at the earliest practicable time.

II.
STANDARD

The Fifth Circuit has held that a motion to reconsider should not be granted unless all of the following conditions are satisfied:

1. The facts discovered are of such a nature that they would probably change the outcome;

2. The facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and

3. The facts are not merely cumulative or impeaching.

Infusion Resources, Inc., 351 F.3d at 696-97, citing *English v. Mattson,* 214 F.2d 406, 409 (5th Cir. 1954). Consistent with that high standard, a court ruling on a motion based on claims of newly discovered evidence must be allowed to "enforce some limits on the timely submission of appropriate evidence. " *Ford v. Elsbury,* 32 F.3d 931, 937 (5th Cir. 1994), quoting *Bernhardt v. Richardson-Merrell, Inc.,* 892 F.2d 440, 444 (5th Cir. 1990). Here, the Agency failed to satisfy this burden in the Original Motion or Amended Motion. Instead of offering evidence of facts that "probably" would change the outcome, the Agency asserted vague, conclusory facts discussing possibilities that may occur only if certain events transpire.

III.
A NINE-MONTH SALE AND BID PROCESS WITH COURT-ORDERED SPECIFIC PROCEDURES

On February 1, 2008, more than nine months ago, Michael J. Quilling (the "Receiver") first filed an unopposed motion to solicit bids for the purchase of policies and the approval of bid procedures ("Bid Motion") (Docket No. 114). The Bid Motion delineated specific procedures for the bid and sale process of the 55 life insurance policies constituting the primary assets of ABC Viaticals, Inc. ("ABC"). The proposed procedures established, among other things, the creation of a web site, a means of conducting due diligence, the manner of submitting written bids, selection of an initial high bidder, and a subsequent auction to determine the "highest and final" bidder. The approved procedure did *not* provide for more than one auction or the possibility of subsequent bids.

On February 4, 2008, the Court granted the Receiver's motion, specifically ordering that, "the procedures suggested [were] approved in all respects" (Docket No. 115).

The initial bids were to be submitted on or before April 30, 2008. Only three bids were received for the policies. The initial high bidder was Silver Point Capital Fund, L.P. ("Silver Point"). Silver Point submitted a bid for $27.1 million. The Receiver and Silver Point entered into a purchase and sale agreement, which provided for an auction mechanism to determine the "highest and final bidder."

On June 30, 2008, four months later, the Receiver filed a motion to sell all insurance policies and approve the purchase and sale agreement ("Sale Motion") (Docket No. 146). Like the Bid Motion, the Sale Motion delineated specific procedures for the

auction process. The Securities and Exchange Commission (the "Commission") and Steven A. Harr (the "Examiner"), whom the Court appointed to represent the interests of ABC investors, endorsed the Sale Motion and its procedures.

This Court referred the Sale Motion to Magistrate Judge Irma C. Ramirez for an evidentiary hearing and determination (Docket No. 150). Judge Ramirez set a two-day evidentiary hearing for September 23 and 24, 2008.

On September 17, 2008, less than seven days before the scheduled evidentiary hearing, the Agency, claiming "new" facts, requested a continuance of the hearing and filed an objection (Docket No. 165). The Agency contended that the Receiver failed to obtain updated life estimates of the insureds and otherwise failed to adequately market the sale of the policies. Judge Ramirez denied the Agency's motion to continue the hearing.

On September 23 and 24, 2008, Judge Ramirez conducted the evidentiary hearing ("Sale Hearing"). The Sale Hearing began with an auction of the policies, which was attended by three bidders, including Silver Point and SGI.

After several rounds of bidding, SGI emerged as the highest and final bidder, submitting an approved bid of $33.5 million plus reimbursement to the Receiver for all premiums paid since July 1, 2008. This represented a $6.4 million increase from the initial bid made by Silver Point.

Judge Ramirez then heard testimony and evidence concerning the sale of the policies to SGI, including testimony from the Agency's valuation expert, Scott Gibson. On October 6, 2008, Judge Ramirez issued a 10-page order (Docket No. 179) approving the sale to SGI and overruling the Agency's objection on the merits.

Judge Ramirez's findings included, *inter alia,* that "[t]he Court finds that the solicitation process utilized by the Receiver was designed to solicit the maximum sale price for the Policies" and "... the fact that the current bidders have conducted their own valuations like the one proposed by [the Agency]; the additional expense to the receivership of a new valuation; the number of potential buyers who initially expressed interest versus the number who actually submitted bids; the lack of bids for only portions of the portfolio; the existence of a current highest bid; the uncertainty that would be caused by any additional bidding not contemplated by the agreed and ordered bid procedures; the lack of certainty that a higher valuation will result in more bids, the Court finds that the proposed sale is the only viable option and is in the best interests of the investors at this time."

On October 13, 2008, a week later, the Agency filed a motion for reconsideration (Docket No. 180). Another week later, on October 21, 2008, the Agency filed an emergency motion for a stay of Judge Ramirez's order of October 6, 2008 (Docket No. 187) and the closing of the sale to SGI. Similar to its assertions in the present motions, the Agency contended that it "has identified a party with interest in possibly submitting a bid for substantially more than the $33.5 million purchase price currently offered by SGI and approved under the Sale Order." To date, no such party – Highland Capital or any other – has come forward to submit any higher bid.

On October 30, 2008, this Court, in a 16-page order, denied both the Agency's motion for reconsideration and its emergency motion for a stay (Docket No. 195). This Court was "of the opinion that Magistrate Judge Ramirez's findings of fact are not clearly erroneous and that reversal of the Magistrate's Order will not prevent manifest injustice."

IV.
ARGUMENT

A. The Court should vacate its November 6, 2008 Order because the Agency withdrew its original motion.

On November 5, 2008, one week after this Court's October 30, 2008 order, the Agency filed, once again, an (1) emergency motion to stay and, later that same day, (2) an amended emergency motion for a stay of Judge Ramirez's order of October 6, 2008 and the closing of the sale to SGI (Docket Nos. 197 and 198). In its Original Motion seeking an emergency stay, the Agency contended that there were "newly discovered facts" that merited the requested stays. Specifically, the Agency contended that Highland, a previous bidder at the auction, would provide the Receiver with a substantially higher offer "within 48 hours." (Original Motion at 2.) The Agency further claimed that, "Highland intends to make a firm offer to the Receiver no later than Monday of next week." (*Id.*)

Despite serving as the source of the pending firm offer on which the emergency motion was based, neither Highland nor its principal, Robert Hughes, submitted an affidavit or other evidence in support of the Original Motion. Instead, the Agency's only "evidence" – wholly unauthenticated – supporting the motion amounted to four unexplained and incomprehensible charts from unknown sources entitled "life settlement cash flow illustration." (*Id.* at 3 and exhibits A – D.)

Later that same day, in the Amended Motion, the Agency changed its story dramatically. In the Amended Motion, the Agency effectively withdrew all of the factual assertions on which it based its claims of "newly discovered evidence" in the Original Motion. The Agency did not explain the differences between this Original Motion and

Amended Motion, and, instead, merely contended that the Agency "misunderstood some aspects of the asset manager's reorganization plan" and "this amended motion better reflects their intentions." (Amended Motion at 1, n. 1.) The Agency then contended that an unnamed "Dallas asset manager is interested in *exploring* a *possible* offer to the Receiver, *subject to satisfactory* premium mapping results" (*Id.* at 2) (emphasis added). "The asset manager is *endeavoring* to complete the mapping of premiums over the next *several* days" (*Id.* at 3) (emphasis added). Again, no affidavit or other competent evidence supported the Agency's claims.

On November 6, 2008, the Court granted in part and denied in part the relief sought by the Agency (Docket No. 199). The Court: (i) stayed the sale closing through the close of business on Thursday, November 13, 2008; (ii) authorized the Receiver to evaluate any offer during the stay period and to determine whether such offer was superior to SGI's proposal; and (iii) scheduled a conference call for Friday, November 14, 2008, to further discuss the matter.

The Court's November 6, 2008 Order references the Original Motion rather than the Amended Motion. Accordingly, it appears that the Court issued its Order without having had the opportunity to review the facts submitted by the Agency, as significantly modified by its Amended Motion. The Court should thus reconsider its November 6, 2008 Order and issue its ruling, based on the highly speculative and wholly unsupported claims advanced in the Agency's re-pled motion.

B. The amended motion for reconsideration fails to satisfy the requirements of FED. R. CIV. P. 59.

Rule 59(e) motions for reconsideration may not be used to relitigate issues that were resolved to the movant's dissatisfaction. *Forsythe v. Saudi Arabian Airlines Corp.*,

885 F.2d 285, 289 (5th Cir. 1989). Nor may a Rule 59 motion be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to entry of the order or judgment at issue. *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir. 1990). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

As the Fifth Circuit has cautioned, this is particularly true with respect to movants who claim "newly discovered evidence." As noted above, a district court may not grant such a motion unless the movant meets its burden to establish that: "(1) the facts discovered are of such a nature that they would *probably change the outcome*; (2) the alleged facts are actually newly discovered and could not have been discovered earlier by *proper diligence*; and (3) the facts are not merely cumulative or impeaching." *Infusion Resources, Inc.*, 351 F.3d at 696-97 (emphasis added). A district court must appreciate the strong interest and "need for finality." *Id.* Indeed, the Fifth Circuit has recognized that Rule 59(e), "*favor[s]* the *denial* of motions to alter or amend a judgment." *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993) (emphasis added).

The Agency's allegedly "newly discovered facts" plainly fail to satisfy the prerequisites of a Rule 59(e) motion. First, the Agency does not (and cannot) claim or establish that the new facts are "probable" to change the outcome of the Courts' earlier rulings. Instead, as re-pled in the Amended Motion, the most the Agency asserts as "newly discovered facts" is that an unidentified Dallas asset manager is "interested" in "exploring" a "possible" future offer to the Receiver for the assets that SGI has contracted

to purchase for a specified amount. Under Rule 59(e), possibilities are wholly insufficient.

Second, the Agency does not proffer any explanation for why the mapping of premiums could not have been done earlier, with the "proper diligence" as required under applicable law. The Receiver's sale of the policies has been conducted over the past nine months. The premium data has been electronically available for months now. The Agency, or the Dallas asset manager for that matter, cannot opt to wait to see what happens and then hope to re-jig numbers to "possibly" construct a better bid if that decision is reached in the future.

At a minimum, the Agency's motion must put forth admissible evidence of probable facts to establish: (1) that a bid was forthcoming; (2) the nature and amount of the bid; (3) when the bid could be expected; and (4) a reasonable explanation for the Agency's failure to provide such a bid any earlier with the exercise of proper due diligence. Instead, the Agency put forth *no* evidence of any of these facts in support of its motion – there is not a single affidavit by any party or other competent evidence, much less evidence obtained from the "Dallas assert manager" as the alleged new bidder. The motion, as an unsupported and late restatement of arguments previously rejected by the courts in this case, accordingly should be reconsidered and denied.

C. <u>The November 6, 2008 Order substantially prejudices SGI</u>.

As described above, SGI's agreement with the Receiver provided, in addition to the $33.5 million, that SGI would reimburse the Receiver for all premiums paid since July 1, 2008. The 55 insurance policies that constitute the assets of ABC do not exist in a vacuum. Instead, there is a significant premium load associated with those policies. For

November 2008 alone, the premium load is $1.1 million, amounting to premium payments of approximately $36,666 for each day in November. Upon closing this transaction, SGI anticipated strategically cancelling a certain handful of those policies (with sizable premiums) to better manage the premium load and, in turn, make this transaction economically viable. Instead, SGI is now unnecessarily and unfairly incurring those premium costs based on the belated and sheer speculation that some unnamed party may be interested in exploring a possible offer for the assets in the future.

SGI also invested significant time, money, and effort into this nine-month sale and bid process. SGI incurred more than $250,000 in out-of-pocket expenses and, indeed, has suffered extensive damages to liquidate certain assets in a down market to have sufficient cash to close this transaction. At present, $33.5 million of SGI's monies sit in an escrow account ready to close this transaction, as the parties negotiated and this Court previously approved twice.

On or about October 3, 2008, after Judge Ramirez first overruled the Agency's similar objections and argument, SGI and the Receiver entered into a valid and enforceable 26-page written purchase and sale agreement. The agreement provided, *inter alia,* that "[t]ime is of the essence in all things pertaining to the performance of this Agreement." Accordingly, SGI reserves all its rights and remedies for breach of that agreement now.

In sum, SGI invested significant resources in reliance on the Courts' previous orders governing the auction procedure and the certainty afforded thereby, including this Court's prior denials of the Agency's objections and motions based on very similar grounds as those advanced in its amended motion. Those procedures and orders did not

envision, by letter or spirit, supplemental auctions, supplemental bids, or, as the Agency now suggests, a "reorganization plan" at the eleventh hour. If SGI knew such vagaries could derail or delay the sale and bid process, SGI's resources may have more wisely spent in pursuit of other opportunities. In sum, the "anything goes" approach to court-supervised auctions that serves as the foundation of the Agency's argument for reconsideration would lack the requisite certainty necessary for participation of sophisticated parties.

V.
CONCLUSION

For the foregoing reasons, SGI respectfully prays that the Court: (i) vacate its Order of November 6, 2008; (ii) deny the Agency's amended emergency motion to stay and for reconsideration; (iii) order the parties to close this transaction at the earliest practicable time; and (iv) grant such other and further relief to which SGI may show itself entitled to receive.

Respectfully submitted,

Dated: November 10, 2008.

BRACEWELL & GIULIANI LLP

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ATTORNEYS FOR SETTLEMENT GROUP, INC.

CERTIFICATE OF CONFERENCE

I certify that on November 10, 2008, I attempted to confer with John Brannon, counsel of record for Angelo Diaz Gonzalez and Agency, regarding the relief sought by this motion, but was unable to reach him. The motion is therefore submitted to the Court for determination.

/s/ Jeff Ansley
Jeffrey J. Ansley

CERTIFICATE OF SERVICE

I certify that on November 10, 2008, I electronically filed the foregoing document with the Clerk of Court for the United States District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system will send a "Notice of Electronic Filing" to all counsel of record who have consented in writing to accept service if this document by electronic means.

/s/ Jeff Ansley
Jeffrey J. Ansley