

U.S. District Court
Southern District of Ohio

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Case Name: Davis v. Lifetime Capital Inc

Case Number: [3:04-cv-59](#)

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Document Number: [436](#)

Docket Text:

DECISION AND ORDER: The highest and best bid is that of SilverPoint; and a final hearing is set for 5/9/06 to conclude the sale of the LifeTime Portfolio. Signed by Judge Sharon L Ovington on 4/21/06. (rp1,)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1040326259 [Date=4/21/2006] [FileNumber=969676-0]
[95e45d593e8c87552b0f70656d449ad32c6a52837b84821944637ae4ab2b95aba8dc
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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

H. THAYNE DAVIS, :
 :
 Plaintiff, : Case No. 3:04CV0059
 :
 vs. : Magistrate Judge Sharon L. Ovington
 : (By Consent of the Parties)
 LIFETIME CAPITAL, INC., *et al.*, :
 :
 Defendants. :

DECISION AND ORDER

I. INTRODUCTION

LifeTime Capital, Inc. (“LifeTime”) was a corporation created at the direction of David W. Svete and was engaged in the viatical insurance business. Svete and others have been convicted of several federal crimes in the United States District Court for the Northern District of Florida, Pensacola Division in Case No. 3 04cr10/MCR. These federal crimes included Conspiracy to Commit Mail Fraud, Wire Fraud, and Interstate Transportation of Money Taken by Fraud. The massive scope of the fraud perpetrated by Svete and other is perhaps best understood by the \$100,722,605.34 restitution order in the underlying criminal case.

In the instant case, at the time that the Receiver was appointed in February, 2004, the books and records of LifeTime were in complete disarray. Insurance policies were in immediate danger of lapsing. Since that time, the Receiver has taken all necessary steps to preserve the assets of the Receivership in the hopes of realizing at least some return to the defrauded investors of LifeTime.

The unfortunate reality, however, is that it is impossible for LifeTime Investors to re-coup their losses.

II. THE BIDDING PROCEDURES

On March 8, 2006, the Receiver filed his Motion to Approve Bidding and Portfolio Sale Procedures (Doc. #393). The Court granted that Motion and established Initial Bidding Procedures by which bidding was to occur. The Receiver thereafter offered for sale 176 insurance policies holding an approximate face value of \$139,000,000.

Pursuant to the Initial Bidding Procedures, interested parties were required to comply with the requirements of the Initial Bidding Procedures and submit bids by 5:00 p.m. Central Standard Time on March 24, 2006.

On March 10, 2006, the Receiver filed his Motion To Authorize The Sale of the LifeTime Portfolio (Doc. #399), arguing as follows that the LifeTime Portfolio sale is in the best interest of the Receivership:

Several considerations indicate that this is an appropriate time to attempt a sale of the LifeTime Portfolio. First, as of April 2005, the Receiver had determined that of the over 3,000 LifeTime investors, approximately 2800 were 60 or older. These elderly investors, many of whom invested their life savings in LifeTime, have received absolutely no return on their investments because of the fraud practiced by Svete and other LifeTime insiders. The LifeTime investors ought to be able to recover at least a portion of their investments as soon as possible.

Another factor to consider is that premium and administrative costs will likely increase over time. Of the policies currently in the LifeTime Portfolio, approximately 41% were issued in or prior to 1995 and 59% were issued in or after 1996. The total premium expense for the LifeTime Portfolio is approximately \$4,600,000.00 annually. Even though premium expenses are expected to decrease with policy maturities, the decrease will likely be offset by increased premium costs on the universal life and term life policies remaining in the LifeTime Portfolio.

(Doc. # 399 at 12).

On March 24, 2006, the Court conducted a hearing to consider the bids submitted pursuant to the Initial Bidding Procedure. SPCP Group, LLC (“SilverPoint”), Lorenzo Tonti, Ltd. (“Tonti”), All Settled Group, Inc., and HBK Master Fund, L.P. submitted bids, which were deemed by the Receiver to have complied with the Initial Bidding Procedure.

After hearing testimony and argument, the evidence surprisingly established that the Receiver communicated with Tonti after the close of the bidding process and allowed Tonti to submit an enhanced bid after the deadline set forth in the bidding procedures. The Receiver failed to accord any other bidder with the same opportunity. Consequently, the other bidders objected asserting that Tonti had impermissible contact with the Receiver, to the detriment of the other bidders, and had access to the Receiver and information that was not accorded to the other bidders. The Court concluded that there were irregularities in the bidding process due to actions by the Receiver and refused to accept any bids presented. Instead, the Court issued an Order and Supplemental Order reopening the bidding process and setting forth the procedures to be followed.

Tonti objected to the Court’s Orders as it perceived itself to have the highest and best bid. Apparently the Receiver advised Tonti that in his opinion, Tonti had the highest and best bid. Tonti, through counsel, sent a letter to the Court (Doc. #424, Exhibit XI), wherein it requested the Court to suspend bidding and accept its enhanced bid. Tonti thereafter participated in the further bidding process under protest and stated that it intended not only to seek injunctive relief but also to notify the issuing life insurance companies that there is a cloud on the title to the policies in the LifeTime Portfolio and that the policies should not be transferred or paid upon maturity pending outcome of the litigation.

The Court held a hearing on Thursday, April 13, 2006 to consider the highest and best bid

for the sale of the LifeTime Portfolio. At the hearing SilverPoint and Tonti each argued that it had the highest and best bid.

SilverPoint has submitted an all cash bid of \$19,375,000.00 and has agreed to pay the March and April 2006 premiums on the policies, thereby increasing the value of the bid to approximately \$20,000,000.00. This is a one-time payment, and it offers certainty and finality to the Investors. Although the Receivership will incur additional expenses mainly due to the pendency of other litigation, if the Court accepts the SilverPoint bid, the costs associated with managing the LifeTime Portfolio would be eliminated.

In support of its final bid, Tonti indicated that it was "...submitted under protest, and without waiving its right to assert that its previous bid be declared the highest and best bid." (Doc. # 422 at 1). The final Tonti Bid consists of an immediate payment of \$12,000,000.00 cash; 100% of all net cash flow exceeding \$2,000,000.00 generated by maturities for the next seven years; and a payment of \$6,500,000.00 at the end of seven years.

It is undisputed that the final bids by the remaining bidders was less than the bids offered by Tonti and SilverPoint. The issue, then, simply put is which final bid – SilverPoint's or Tonti's – constitutes the highest and best bid.

III. THE HIGHEST AND BEST BID

"A general receivership of a corporation contemplates the ultimate sale of the property, the payment of debts in full or pro rata, and the distribution of the balance to those held by the appointing court to be entitled to the same." 3 Ralph E. Clark, A Treatise on the Law and Practice of Receivers §711 (3rd ed. 1959). With these general purposes in mind – and with the ensuing goal of maximizing the benefits of the receivership in favor of the Investors – the Court concludes that

the SilverPoint final bid is the highest and best bid.

Both bids are attractive. SilverPoint's final bid is certain and creates finality. Tonti's final bid is certain for a total of \$18,500,000.00 and provides an opportunity to share in maturities if they occur within the next seven years. The significant downside in Tonti's final bid is that it lasts for seven years and involves speculative future cash flows and expenses. Although Tonti supported its final bid with testimony of an actuarial expert regarding possible large returns to investors from potentially maturing policies during the seven-year period, the actuarial expert's testimony was based on probabilities, not certainties. These probabilities attempted to provide a reasonable prediction for a question for which there is no known answer: When will the individuals insured by the LifeTime Policies die, thereby causing the Policies to mature?

The actuarial expert's testimony did little to assuage the uncertainties inherent in the Tonti bid, particularly since this same expert's predictions concerning the likelihood of the Policies to mature during the first and second year of the Receivership were vastly overestimated. Indeed, the actuarial expert overestimated the likely numbers of policies that would mature by approximately 760% over the number of policies that actually matured. *See* Doc. #424 at 10. This level of inaccuracy reinforces the conclusion that Tonti's final bid is simply too unpredictable to warrant its acceptance in the face of the certainty created by acceptance of SilverPoint's final bid. While it is likely true, that over time the actuarial expert's predictions regarding when the LifeTime Policies will likely mature will become more accurate than his predications have initially been – due the inevitable fact that the insureds, like all of us, will eventually die thus maturing the LifeTime Policies – this does little to bolster the reliability of the actuarial expert's predictions. The fact remains that many, if not most, of the LifeTime insureds could and might possibly die after the

seven-year period proposed by Tonti's final bid. If that occurs the LifeTime Investors will obtain less return on their investment than they would by acceptance of SilverPoint's final bid. Indeed, in the end, the present and certain gain to the many elderly LifeTime Investors definitively created by acceptance of SilverPoint's final bid overwhelms the unreliability of Tonti's final bid.

The fact that Tonti reserves the right to argue that its final bid is the enhanced bid also creates concern. If the Court were to accept the Tonti bid, which bid would Tonti argue is in effect? In addition, significant details remain absent from Tonti's final bid, such as those related to servicing fees and other expenses during Tonti's proposed seven-year period. While these terms and conditions would be subject to a final purchase agreement to be negotiated, these terms and conditions could have a drastic effect on whether the Investors would be entitled to participate in any maturities during the seven year period.

The Receiver testified that the maturities would have to reach "big numbers" before the Investors would be able to participate at all. While such an outcome is possible, it is also possible that millions of dollars in maturities will not occur. The Receiver also testified that substantial servicing fees would need to be paid (estimated at \$66,000.00 annually), and that if these servicing fees exceeded 15% of \$66,000.00, the Receiver would seek Court approval. Not included in the \$66,000.00 annual servicing fees are fees for medical tracking, acquiring life expectancies and updated medical records. While the Receiver testified that no specific arrangement or deal had been made regarding who would service the Lifetime Portfolio or who would pay these fees during Tonti's proposed seven-year period, it is uncertain how this is contemplated to occur. If Tonti is to pay these fees to the Receiver, a conflict of interest arises because the Receiver would no longer be dedicated solely to the interests and goals of the Receivership; he would also be serving Tonti's

interests. No similar potential conflict of interest exists under SilverPoint's all-cash bid.

For the reasons stated above, the Court finds that SilverPoint's final bid is the both the highest and best bid. As a result, the Court accepts SilverPoint's final bid and rejects Tonti's final bid.

IT IS THEREFORE ORDERED THAT:

1. The highest and best bid is that of SilverPoint; and,
2. A final hearing is set for May 9, 2006 to conclude the sale of the LifeTime Portfolio.

April 21, 2006

s/ Sharon L. Ovington
Sharon L. Ovington
United States Magistrate Judge