



1 **MOT**
MARK E. FERRARIO, Bar No. 1625
2 KARA B. HENDRICKS, Bar No. 7743
GREENBERG TRAUERIG, LLP
3 10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
4 Telephone: (702) 792-3773
Facsimile: (702) 792-9002
5 Email: ferrariom@gtlaw.com
ferrariom@gtlaw.com
6 hendricksk@gtlaw.com

7 *Attorneys for the Plaintiff*

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9 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **CLARK COUNTY, NEVADA**

11 STATE OF NEVADA, EX REL.
COMMISSIONER OF INSURANCE, IN HER
12 OFFICIAL CAPACITY AS STATUTORY
RECEIVER FOR DELINQUENT DOMESTIC
13 INSURER,

14 Plaintiff(s),

15 vs.

16 LANCET INDEMNITY RISK RETENTION
17 GROUP, INC., a Nevada Domiciled
Association Captive Insurance Company,

18 Defendant.
19

Case No. A-19-791409-B
Dept. No. 16

Hearing Requested

MOTION FOR INSTRUCTIONS

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21 COMES NOW, Barbara D. Richardson, Commissioner of Insurance (“Commissioner”) and
22 Receiver (“Receiver”), and CANTILO & BENNETT, L.L.P., Special Deputy Receiver (“SDR”), by and
23 through the undersigned counsel of record, and respectfully moves this Court for instructions to
24 resolve outstanding issues in advance of the Receiver seeking approval of claims distributions.

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1 This Motion is made and based on the memorandum of points of authorities filed herewith
2 and any oral argument at a hearing on this matter.

3 Dated this 5th day of May 2022.

4 /s/ Kara B. Hendricks

5 MARK E. FERRARIO, Bar No. 1625
6 KARA B. HENDRICKS, Bar No. 7743
7 GREENBERG TRAUERIG, LLP
8 10845 Griffith Peak Drive, Suite 600
9 Las Vegas, NV 89135

10 *Attorneys for Plaintiff*

11 **MEMORANDUM OF POINTS OF AUTHORITIES**

12 **A. Introduction**

13 As this Court is aware, Lancet Indemnity Risk Retention Group, Inc. (“Lancet” or the
14 “Company”) is an insolvent risk retention group that previously provided medical malpractice
15 insurance to physicians and medical groups. After appointing the Commissioner as permanent
16 receiver of Lancet, this Court approved a claims process and procedure by which creditors and
17 claimants of Lancet could submit claims to the Receiver by and through the SDR. The SDR has
18 processed all the Proofs of Claim (“POCs”) received and sent out Notices of Claim Determination
19 (“NCD”). The purpose of this Motion is to seek the Court’s guidance and instructions to resolve four
20 outstanding issues in advance of the Receiver seeking approval of claim distributions.¹

21 **B. Background**

22 Lancet was an association captive insurance company organized under the insurance laws of
23 Nevada and the Liability Risk Retention Act of 1986. Lancet received its Amended Certificate of
24 Authority on November 19, 2008, and operated under the authority of NRS Chapter 694C. Lancet
25 was focused on the medical professional liability line and was formed to insure the medical
26 professional liability of its physician and medical group members. Pursuant to NRS 679A.160,

27 ¹ Based on the limited funds available in the Lancet estate, the Receiver does not anticipate any claims
28 received will be paid in full and will subsequently request a pro-rata distribution to approved Class B claimants.

1 Lancet was subject to Nevada laws in Chapters 694C and 695E that pertain to captive insurers (as
2 “captive insurer” is defined in NRS 694C.060) and risk retention groups (as “risk retention group”
3 is defined in NRS 695E.110) that have a Certificate of Authority from the Division of Insurance.
4 Lancet was considered an association captive insurer (as “association captive insurer” is defined in
5 NRS 694C.050). As a risk retention group (“RRG”), Lancet was subject to the federal Liability Risk
6 Retention Act of 1986. RRGs domiciled in Nevada do not participate in the Nevada Insurance
7 Guaranty Association. Pursuant to NRS 695E.140(1)(a), Lancet was also subject to all laws that
8 pertain to traditional liability insurers (with exceptions given in Bulletin 14-008).

9 The Commissioner filed her Verified Petition for Appointment of Commissioner as Receiver
10 and Other Permanent Relief on March 19, 2019. On April 12, 2019, this Court entered its Permanent
11 Injunction and Agreed Order Appointing Commissioner as Permanent Receiver of Lancet Indemnity
12 Risk Retention Group (the “Permanent Receivership Order”). The Commissioner, in her capacity as
13 Receiver for Lancet, appointed the firm of CANTILO & BENNETT, L.L.P. as the SDR of Lancet, in
14 accordance with NRS 696B. The term “Receiver” herein refers collectively to the Receiver and SDR.

15 This Court also approved a claims process and procedure by which creditors and claimants of
16 Lancet could submit claims to the Receiver for review and evaluation. In total, one hundred nine
17 (109) timely POC submissions were received by the Receiver by the April 1, 2021, Claims Filing
18 Deadline. After processing the same, one hundred seven (107) NCDs were sent to claimants.
19 Notably, one POC was withdrawn by the claimant and POC LI-00038 remains unresolved pending
20 Court instruction (as explained below).² A matrix showing the claim determinations made to date is
21 attached as **Exhibit A** to this Motion. Pursuant to the Receivership Appeal Procedure, each NCD
22 recipient had sixty (60) days to object in writing to the SDR’s determination(s). Seven objections
23 have been received. A matrix showing the objections received to date is attached as **Exhibit B** to
24 this Motion.

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26 ² A third claim for which no NCD has been sent, LI-00088, involves a claim for premium adjustment
27 filed by Lancet’s reinsurer – the Receiver is still making collections on this reinsurance treaty for Lancet and
28 anticipates that this POC will be resolved by mutual agreement upon closing the collections for the treaty. The
Receiver will continue to report on this matter in her quarterly status reports.

1 **C. Grounds for Motion and Instructions Requested**

2 This Court has original jurisdiction of the subject matter of this action pursuant to NRS 696B
3 which governs delinquent insurers, conservation, rehabilitation, and liquidation. At this time, it is
4 necessary to seek instructions from this Court to move things forward and to allow for a distribution
5 to be made to claimants. Specifically, the Receiver seeks by this Motion: (1) the setting of a hearing
6 for certain appeals filed by Lancet claimants; (2) a court order specifying if claimants fail to cooperate
7 with the Receivers' request for data needed to meet the Centers for Medicare & Medicaid Services
8 ("CMS") Report requirements that the Receiver has grounds to withhold distribution of payment for
9 that claim; (3) an order approving a proposed settlement where a policyholder failed to consent to the
10 same; and (4) an order specifying that if the United States and related entities do not file a claim in
11 the Lancet estate, and/or bring forward any relevant legal arguments by a date certain, the Lancet
12 Receiver is authorized to move forward with a distribution plan.

13 **1. Appeals Hearing Request**

14 The Receiver requests that a hearing be set by this Court for certain appeals. Pursuant to NRS
15 696B.330, "the receiver shall submit to the court a report on the determination of the receiver on each
16 claim to which an objection has been filed," and "the court shall fix a time for a hearing on such
17 claims and shall direct the receiver to give notice of the hearing." In keeping with NRS 696B.330(4),
18 the Receiver requests that hearings be set first for those claims shown in **Exhibit B** which would
19 qualify for Class B priority status if any amount were to be allowed for the claim upon appeal. This
20 will allow the Receiver to complete the processing of the Class B claims and determine the total
21 liability for these claims and thus the pro rata percentage which can be paid to claimants based on the
22 available assets in the estate. There are a total of four claims that fall into this category which include
23 POC number LI-00022, LI-00027, POC LI-00076, and LI-00082. *See*, Ex. B.

24 The Receiver requests that the Court fix a time, place, and date for a hearing on the referenced
25 claims and direct the Receiver to give notice of such hearing pursuant to NRS 696B.330(8)(a-b). "A
26 hearing may be conducted by the court or by a master or referee appointed by the court. If a hearing
27 is conducted by a master or referee, the master or referee shall submit findings of fact and
28

1 recommendations to the court.” NRS 696B.330(9). Additionally, it is requested that claimants and/or
2 their counsel be allowed to participate in the appeal process *via* electronic means such as Bluejeans
3 or Zoom as they do not reside in the state of Nevada. Because there are only four such claims, the
4 Receiver believes it is appropriate for the Court to hear the appeals directly, which will speed up the
5 process and adjudication of the same, and avoid the costs and fees of retaining a special master and
6 avoid delay associated with the review process. A brief summary of such claims and the appealed
7 issues is set forth in **Exhibit C**. However, should the Court desire to appoint a Special Master, the
8 Receiver will submit proposed recommendations for the same. Regardless of the party that hears the
9 appeal, ultimately the Court shall enter an order approving or denying, in whole or in part, a claim
10 filed against an insurer. Any such order is an appealable order.” NRS 696B.330(9).

11 **2. CMS Concerns**

12 Some policy claim determinations (*i.e.*, “Class B” claims pursuant to NRS 696B.420(1)(b))
13 are contingent on the claimant’s further cooperation with the Receiver’s efforts to comply with federal
14 Medicare reporting requirements pertaining to 42 U.S.C. § 1395y(b)(7) and (8). The Receiver will
15 need to coordinate with Medicare and meet Medicare Secondary Payor regulations by and through
16 the CMS. The failure to meet these requirements could lead to additional liability for the estate.
17 Claimants have been requested to provide certain data that is needed to meet the CMS reporting
18 requirements and have been warned that the failure to provide the requested data could prevent them
19 from receiving any distribution for their claim from the estate. The Receiver requests that the court
20 confirm that failure to cooperate with the Receiver’s efforts in this regard is a reasonable basis for
21 withholding the distribution payment for the claim.

22 Once a distribution percentage is determined for the Class B claims, the Receiver will submit
23 a proposed plan of distribution for the estate and will include details regarding the CMS reporting to
24 be completed for the Lancet estate.

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3. Policyholder Refusal to Consent to Claim Settlement

The Receiver has requested policyholder consent, as required by the Lancet policies, to resolve a POC submitted by a third-party claimant for malpractice coverage under a Lancet policy.³ The Receiver seeks the Court’s further instruction to resolve a matter in which the policyholder has failed, or refused, to provide consent to the Receiver’s proposed resolution of the claim. Accordingly, the Receiver requests that the Court approve the proposed settlement notwithstanding the lack of policyholder consent. Here, two claims were submitted to the Receiver for consideration relating to the same incident. One, by a claimant that seeks recovery based on wrongful death allegations as a result of treatment and/or care provided by Lancet insured, and a second claim was submitted by the insured doctor. The Receiver denied the insured’s claim and the denial was not appealed. However, because the insured did not consent to the proposed settlement with the claimant, Court approval is warranted. Additionally, because the claimant asserted that the Receiver should make a payment in excess of policy limits, out of an abundance of caution, the Court should address the same. Accordingly, the Receiver requests that the Court approve the Receiver’s proposed resolution of LI-00038, as detailed further in **Exhibit E**, which is being submitted for *in camera review*, and further specify that Lancet’s liability does not exceed the \$1M policy limits.

The Receiver requests that the Court approve the Receiver’s proposed resolution of this claim and further specify that Lancet’s liability does not exceed the policy limits.

4. Federal Claims Resolution in Order to Expedite Distribution Payments

The Receiver is requesting that service of this Motion on the United States, any federal agency and/or the Department of Justice, be deemed a final notice to the same of the Lancet receivership claims and appeals procedures. The Receiver requests the Court’s approval to move

³ Lancet policies contained clauses that state that Lancet will not settle claims without the policyholder’s consent, which the policyholder shall not unreasonably withhold. One such policy states that Lancet:

will not settle any claim without your consent. If you refuse to consent to any settlement recommended by us or our representatives . . . our liability for such claim shall not exceed the amount for which we could have settled the claim plus defense costs incurred as of the date you withheld consent to such settlement.

1 forward with Lancet distributions in the event that no late claim or other response is received from
2 the United States and/or any federal agency within thirty (30) days of the entry of any Final Order
3 on this Motion.⁴

4 As a preliminary matter, the United States did not file a POC in the Lancet estate, though the
5 SDR sent notices of the claims procedure and filing deadline to various federal agencies and the
6 Department of Justice. At this time, further instruction is needed from this Court to resolve potential
7 issues relating to federal claims, and to allow distributions to Lancet claim holders to proceed.
8 Notably, the Federal Priority Act, 31 U.S.C. § 3713, gives first priority (“shall be paid first”) to the
9 United States for its claims against, *inter alia*, an insolvent entity’s estate. For insolvent insurance
10 companies in state insurance receivership proceedings, the primacy of federal claims over
11 administrative expenses of the Receiver and insurance policy claims was addressed in *U.S. Dep’t of*
12 *Treasury v. Fabe*, wherein the court held that a state statute governing the priority of claims against
13 an insolvent insurer was a “law enacted . . . for the purpose of regulating the business of insurance,”
14 within the meaning of Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), so that the
15 state statute, rather than the Federal Insolvency Act, would govern priority of claims—but only to the
16 extent that it benefited policyholders. *U.S. Dep’t of Treasury v. Fabe*, 113 S. Ct. 2202, 124 L. Ed.
17 2d 449 (1993). Here, NRS 696B.420 specifies the order in which distributions of claims must be
18 made and was clearly enacted for the purpose of regulating insurance and specifying the order in
19 which claims can be paid for the benefit of policyholders. *See*, NRS 696B.420(1)(b) prioritizing
20 claims against the insured for liability for injury above all other claims. Lancet does not have

21 ⁴ The Receiver requests this authority but is not seeking a formal extension of the claims filing deadline
22 for the U.S. government or any other claimant. The Receiver is without knowledge of U.S. government claims
23 against Lancet. In addition, the Receiver does not waive any assertion or relinquish any right that the U.S.
24 government is subject to Nevada state insurance receivership laws, the Nevada insurance law claims priority
statute for receivership claims, and the requirement that claims be submitted to the Receiver before any
distribution from receivership assets may be made on any proper U.S. government claims.

25 Notwithstanding the foregoing, if receivership assets are distributed to Lancet’s claimants and the U.S.
26 government thereafter submits claims to the Receiver, then the Receiver should be legally justified in having
27 made Lancet claim distributions in the absence of beforehand knowledge of such U.S. government claims. The
28 Lancet receivership estate has to be wound down and liquidated, that costs of receivership administration will
increase if the estate is kept open longer, and claimants should not be harmed by waiting longer for a
distribution of the receivership’s assets.

1 sufficient assets to pay any portion of claims prioritized below Class B. If the United States had
2 filed a timely POC, it would almost certainly have been assigned priority as a Class D claim of the
3 federal government pursuant to NRS 696B.420(1)(d).

4 Without a waiver of rights and out of an abundance of ultra-due diligence, receivers for
5 insolvent insurance companies will sometimes seek a waiver of federal claims from the United States
6 as to which there may be some priority in a state insurance receivership that is subject to state
7 insurance receivership laws. This is particularly the case when the United States has not filed a claim
8 and had it determined by the Receiver in the state insurance receivership proceeding. Indeed, the
9 Department of Justice has established an informal⁵ procedure for seeking such a waiver. However,
10 as it is an informal procedure, there is no deadline by which the United States is required to respond
11 to a waiver request. The process can take multiple months and sometimes in excess of a year before
12 a waiver can be obtained and would delay distributions to Lancet claimants. *See, Exhibit D,*
13 *Declaration of Mark Bennett, ¶ 8.*

14 In this case, not only has the United States not filed a proof of claim,⁶ but the only potential
15 federal claims the Receiver is aware may possibly exist are IRS claims or CMS claims, and these
16 are generally carved-out of any waiver that would be provided by utilizing the Department of Justice
17 Procedure referenced above. Ex. D, ¶ 9. As such, attempting to obtain a waiver will have little or
18 no value and will only delay the distribution process. *Id.* Moreover, the Receiver has already put
19 procedures in place to require any applicable Medicare liens (CMS liens) to be resolved before
20 related distributions are paid. *Id.* at ¶ 10. Additionally, there is no concern regarding an IRS claim
21 because the Receiver’s proposed plan of distribution will include a reserve for Lancet’s potential tax
22 liability and the necessary tax filings for the estate (*i.e.*, the proposed pro rata claim distribution to
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25 ⁵ The Department of Justice provides, on request, a list of items that should be provided with a request for a
26 federal waiver of priority—but states that the list is provided as guidance only and does not have any force or effect of
law.

27 ⁶ Often, the United States will file a “protective” POC that notifies the Receiver that the federal government may
28 have claims against the insurer that are “not currently known” but nonetheless must be paid prior to any other distributions
from the estate. Here, the United States has not filed such a “protective” POC. Ex. D, ¶ 7.

1 policy claimants will take into account the necessary administrative expenses of the estate –
2 including those pertaining to tax matters). Id.

3 Based on the forgoing, the Receiver is seeking to provide a final notice to federal entities *via*
4 an order that provides thirty days for the United States, any federal agency and/or the Department of
5 Justice, if they should so decide,⁷ to file a claim in the Lancet estate and/or bring forward any legal
6 arguments pertaining to the above-referenced matters, which would allow the Receiver to move
7 forward with a distribution plan if a claim or response is not received. To ensure full disclosure and
8 an opportunity to respond to this request, a copy of this Motion and any related hearing notice will
9 be provided to the Department of Justice, the IRS, and CMS. This will allow such entities the
10 opportunity to bring forward a claim, and/or challenge the Receiver’s position(s) in regard to the
11 applicability of the receivership claim and appeal procedures to the United States, including the
12 priority of approved claims under state insurance receivership laws in Nevada.

13 **E. Conclusion**

14 Based on the foregoing, it is appropriate for this Court to: (1) set a hearing for appeals filed
15 by Class B Lancet claimants identified herein; (2) enter an order that specifies if claimants fail to
16 cooperate with the Receivers’ request for data needed to meet CMS reporting requirements that the
17 Receiver has grounds to withhold distribution of payment for that claim; (3) approve the proposed
18 settlement of POC number LI-00038 where the policyholder failed to consent to the same, including
19 the SDR’s determination that Lancet’s liability for the claim does not exceed the policy limits for the
20 claim; and (4) Order that service of this Motion constitutes final notice to the United States, and all
21 federal agencies and subdivisions thereof, of the Lancet receivership claims and appeal procedures,
22 and that the Receiver shall proceed with a plan of distribution (subject to further Receivership Court
23 approval) for the Lancet claims if the United States does not file a late claim in the Lancet estate
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27 ⁷ The Receiver reserves all rights should the United States or its instrumentalities decide to file any claim with Lancet in
28 receivership.

1 and/or bring forward any legal arguments pertaining to the above-referenced matters within thirty
2 (30) days of the entry of any final order on this Motion.

3 Due to the nature of the issues raised herein, in addition to filing and serving this Motion via
4 the Court's Electronic Filing System upon all parties registered to this action, the Receiver will also
5 mail and/or e-mail a copy of this Motion and any subsequent order scheduling a hearing relating to
6 the same to all claimants affected by the four categories of relief requested.

7 Dated this 5th day of May 2022.

8 */s/ Kara B. Hendricks*
9 _____
10 MARK E. FERRARIO, Bar No. 1625
11 KARA B. HENDRICKS, Bar No. 7743
12 GREENBERG TRAUERIG, LLP
13 10845 Griffith Peak Drive, Suite 600
14 Las Vegas, NV 89135
15 *Attorneys for Plaintiff*

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Exhibits are available upon request, and can be obtained by contacting the Special Deputy Receiver at (512) 478-6000.