FILED: 6/7/2023 3:30 PM
Vermont Superior Court
Washington Unit
175-3-18 Wncv

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

COMMISSIONER OF THE DEPARTMENT OF FINANCIAL REGULATION PLAINTIFF, v. ELITE TRANSPORTATION RISK RETENTION GROUP, INC., RESPONDENT.	**CIVIL DIVISION** DOCKET NO. 175-3-18 Wncv

LIQUIDATOR'S MOTION FOR APPROVAL TO MAKE CORRECTIVE ASSESSMENTS UNDER SHAREHOLDER AGREEMENTS

Kevin J. Gaffney, Commissioner of the Vermont Department of Financial Regulation ("Commissioner"), in his capacity as Liquidator ("Liquidator") of Elite Transportation Risk Retention Group, Inc. ("ETRRG" or the "Company"), hereby moves for an order authorizing him to make corrective assessments under the Second and Third Amended and Restated Shareholder Agreements for ETRRG ("Shareholder Agreements") in the total amount of $7,512,879 for the purpose of complying with the Shareholder Agreements and correcting the inequities that resulted from three rounds of premium assessments conducted prior to liquidation in a manner that was not compliant with the Shareholder Agreements. The Liquidator's plan to seek corrective assessments at the end of the liquidation was discussed with stakeholders in 2018 and described in the Liquidator's Second Status Report filed with the Court on October 31, 2018. The Liquidator files this motion in accordance with that plan.

I. INTRODUCTION

1. On March 29, 2018, the Court entered an order finding ETRRG was insolvent, placing the Company in rehabilitation, and appointing the Commissioner as Rehabilitator. One of the first issues presented was whether to continue the Company's efforts to collect $2.4 million in premium assessments from certain ETRRG members. The Rehabilitator reviewed the governing Shareholder Agreements and discussed the assessments with management, representatives of the ETRRG board of directors ("Board"), the Company's collections counsel, ETRRG members, and their counsel. The Rehabilitator concluded that there were reasons to doubt the enforceability of the premium assessments and placed collections efforts "on hold" pending further investigation. See Affidavit of Special Deputy Liquidator in Support of Motion for Approval to Make Corrective Assessments under Shareholder Agreements, ¶ 1 (hereinafter, Leslie Aff., ¶ __).

2. While this investigation was ongoing, the Commissioner filed a Petition for Order of Liquidation for ETRRG which was granted on May 15, 2018. The Court's Order of Liquidation appointed the Commissioner as Liquidator, vested him with title to all of the property, contracts, and rights of action of ETRRG, and directed him to administer those assets under the general supervision of the Court. Continuation of the premium assessment investigation was one of the Liquidator's highest priorities given that successful collection of $2.4 million would have materially improved the Company's claims-paying ability. Leslie Aff., ¶ 2.

3. The Liquidator ultimately concluded that the Company's historical premium assessments had been conducted in a manner that was inconsistent with the Shareholder Agreements, that the calculation methodology improperly advantaged then-current members

over former members, and that the resulting inequities were compounded through partial collections prior to liquidation. The Liquidator circulated a memorandum to the ETRRG members in September of 2018 ("2018 Assessment Analysis") that explained the basis for his concerns and described a proposed solution. Specifically, the Liquidator advised that he intended to file a motion with the Court as the liquidation process approached its end seeking authority to make "corrective assessments" pursuant to the Shareholder Agreements. The Liquidator's memorandum explained that the corrective assessments would supersede the historical assessments, distribute the financial burdens caused by ETRRG's insolvency in the manner contemplated by the Shareholder Agreements, and eliminate (to the extent possible) the inequities caused by the historical assessment process. Leslie Aff., ¶ 3.

4. The Special Deputy Liquidator discussed the findings and analysis with the members during a conference call. The 2018 Assessment Analysis was then submitted to the Court as an exhibit to the Second Status Report that was filed on October 31, 2018. In that status report, the Liquidator described the plan for imposing corrective assessments based on ETRRG's actual results and that, as a result, a formal motion for approval of that plan would not be filed until the liquidation process had reached a point where distributions could be considered. See Second Status Report, ¶¶ 7-10. The Liquidator posted the 2018 Assessment Analysis and the Second Status Report on the liquidation website (www.etrrg.com). Leslie Aff., ¶ 4.

5. In the Ninth Status Report and Fourth Report of Claims filed on January 31, 2023, the Liquidator advised that all proofs of claim would be finally determined or reserved for before April 30, 2023, and that the long-promised motion would be filed shortly thereafter. This is that motion.

II. BACKGROUND

6. Incorporation. ETRRG was originally incorporated in the State of Arizona on April 14, 2005. The Company was formed for the purpose of operating as a risk retention group and was authorized to do so by the State of Arizona Department of Insurance on May 10, 2005. Federal statutes governing risk retention groups required complete overlap between the Company's owners and policyholders, meaning that ETRRG could not insure the risks of non-members or have members who were not also insureds. See 15 U.S.C.A. § 9301(a)(4)(E). To become an insured of ETRRG, a trucking company was required to apply and, upon approval, make an investment in the Company and subscribe to the governing shareholder agreement. Upon becoming ETRRG members, trucking companies received standard form commercial auto liability insurance policies that were "participating" (i.e. they included endorsements entitling the policyholder to receive distributions of underwriting profit) but which did not include any provision for premium assessment.[1] Leslie Aff., ¶ 5.

7. Re-Domestication & Capital Call. In 2015, Arizona regulators advised the Company that it needed to increase its capital. During the same time period, the Company sought authority to re-domesticate to Vermont. The Vermont Department of Financial Regulation ("Department") investigated the Company's financial condition and advised that, among other things, an infusion of additional capital would be required as a condition to re-domestication. In response, ETRRG assessed its members for additional capital in May of 2015

[1] Insurers operating on an assessment model typically include assessment language in the insurance policies issued. See, e.g., 8 V.S.A. §§ 3926 (Cooperative insurance policies to disclose assessment plan in bold type on the face of the policy); 4848 ("Each assessable policy issued by the [reciprocal] insurer shall contain a statement of the contingent liability…"); and 4204 (prohibiting the issuance of policies that purport to make any portion of a bylaw or charter controlling on a policy "unless such portion of the charter… or bylaws is set forth in full in the policy.") Because ETRRG did not issue such policies, statutes addressing how they are to be handled in liquidation are inapplicable. See 8 V.S.A. §§ 4850 (regarding assessable policies of reciprocal insurers) and 7070 (regarding insolvency of insurers issuing assessable policies).

with the contributions being made primarily through letters of credit provided by the members. Following this investment, ETRRG was authorized to re-domesticate to Vermont effective July 30, 2015. At that point, the Company filed its Amended and Restated Articles of Incorporation with the Vermont Secretary of State pursuant to 11A V.S.A. § 10.07, becoming a Vermont domestic general corporation with one million shares of authorized common stock in a single class. The Company adopted its Second Amended and Restated Shareholder Agreement ("2nd Shareholder Agreement") in connection with the re-domestication. Leslie Aff., ¶ 6.

8. The Shareholder Agreement. The 2nd Shareholder Agreement is a contract "entered into by and amount [ETRRG] and those shareholders of the [Company] executing th[e] agreement." Id., Introductory Paragraph. The 2nd Shareholder Agreement governed the rights and obligations of the ETRRG members and controlled eligibility to become a shareholder (¶ 1), voting rights (¶ 2), initial capital investments (¶ 3.1), distributions (¶ 4), transfer and redemption of shares (¶¶ 5 and 6), the insurance program to be offered (¶ 7), and other matters of corporate governance. Leslie Aff., ¶ 7.

9. The 2nd Shareholder Agreement provided two mechanisms for the Company to make extraordinary collections from the members. First, the agreement included an option for requiring additional capital contributions:

> 3.2 Additional Capital Contributions.
>
> 3.2.1 In the event that the Corporation requires additional capital investment… the Board of Directors of the Corporation shall be authorized to require that the Shareholders make additional capital contributions… The Board shall determine the total amount of the additional capital contributions [and] [e]ach Shareholder shall be liable to the Corporation for a fraction of such total amount determined as follows: the numerator of such fraction shall be the number of Shares held by each such Shareholder and the denominator of such fraction shall be the total number of issued and outstanding Shares…

(Similar language contained in the original ETRRG shareholder agreement governed the 2015 capital contribution.) Second, the agreement authorized the Board to collect additional premium from the members in the event of adverse policy year experience:

> 7.6.2 Premium Assessments. At the conclusion of each policy year, the Board shall determine whether to assess the Policyholders for additional premium, and shall make any such assessment, in accordance with the formula set forth in Appendix B hereto.
>
> ....
>
> **Appendix B**
> **Calculation of Premium Assessments**
>
> Should it become necessary to assess members additional premium for a particular year, the formula will be based on their relative premium size as follows:

$$\frac{\text{Member's Audited Premium}}{\text{Group Total Premium}} \times \text{Total assessment required} = \text{Member's portion owed}$$

The 2nd Shareholder Agreement also required the Board to conduct annual reviews to determine whether a policy dividend can be issued to policyholders/members. See id., ¶ 7.6.3 ("At the conclusion of each fiscal year of the Corporation, the Board shall determine whether to make a policy dividend to the Policyholders... Any such dividend shall be calculated and distributed... in accordance with the formula set forth in Appendix A [to the Agreement].") (emphasis added). Leslie Aff., ¶ 8.

10. The 2nd Shareholder Agreement remained in-force until November of 2017 when the Third Amended Shareholder Agreement for ETRRG ("3rd Shareholder Agreement") was adopted. The 3rd Shareholder Agreement (see ¶ 7.6.2 and Appendix B) contained identical provisions regarding capital contributions and premium assessments so the 2nd Shareholder Agreement and 3rd Shareholder Agreements are referenced collectively as the "Shareholder Agreements". Leslie Aff., ¶ 9.

11. First Premium Assessment. In April of 2016, Department representatives met with management to discuss examination findings that had raised concerns regarding a tax recoverable asset reported on the Company's balance sheet as well as ETRRG's overall financial condition. The Department advised that it would not accept the Company's statutory financial statements without a 100% allowance against the questionable tax recoverable asset, effectively negating its value for purposes of calculating capital and surplus.[2] The Department also directed ETRRG to increase its capital and surplus by $2.5 million to comply with the statutory minimum amount and the re-domestication plan. Leslie Aff., ¶ 10.

12. In May of 2016, management reported to the Department that the need for additional capital had been discussed at a combined meeting of the Board and shareholders and that the members were willing to contribute additional funds, preferably in the form of a premium assessment for the 2013 policy year.[3] (Meeting minutes indicate that a motion was made, seconded, and adopted "to assess members for the 2013 year based on the formula in the Shareholder Agreement subject to further clarification with Vermont.") Board representatives then met with the Department in June of 2016 and presented a premium assessment plan applicable to policy years 2012, 2013, and 2014. The Department raised a number of concerns including the fact that the Company had not issued assessable insurance policies, that a retroactive endorsement and assessment might present risk transfer problems, and that premium assessments might present reinsurance and tax implications. In response to these concerns, the Company circulated a corrective action plan on July 12, 2016. The corrective action plan was

[2] ETRRG had proposed to carry the tax recoverable as an asset worth more than $800,000. The ultimate recovery for the ETRRG estate was less than $45,000. See *Liquidator's Motion for Approval of Settlement with the Internal Revenue Service*, filed October 9, 2020.

[3] There may be tax advantages to characterizing an assessment as a payment of premium (which is deductible as a business expense) rather than a capital contribution (which is a non-deductible investment).

supported by a calculation demonstrating how the assessment would improve ETRRG's capital and surplus as well a memorandum asserting that the Shareholder Agreement allocation formula (see, supra, ¶ 9) should alleviate the Department's risk transfer concerns. Leslie Aff., ¶ 11.

13. On July 19, 2016, while the Department was considering the corrective action plan, the Company issued invoices to its members presenting premium assessments for the 2012, 2013, and 2014 policy years in the total amount of $2,264,770. The Company's invoices were accompanied by different forms of cover letter depending on whether the policyholder was then a former or current member. The letter sent to current members advised that the Board had issued a premium assessment for policy years 2012-14 and provided a detailed explanation:

> "The losses from policy years 2012, 2013, and 2014 have produced an underwriting loss. An underwriting loss is achieved when losses and expenses are more than the premium collected. When this occurs a premium assessment must be collected to fund the losses. ETRRG needs to keep each policy period isolated and assess or issue a dividend based on a specific policy period. Until recently we failed to issue assessment. However, the transition to Vermont brought this issue to the forefront..."

The letter noted that current members would be required to pay assessments calculated on a "without IBNR" basis and enclosed a number of attachments including "assessment calculations by policy year with and without IBNR" and twelve monthly invoices permitting payments in installments over the coming year.[4] The assessments calculated with IBNR (i.e. charges imposed on former members) were dramatically higher than the assessments calculated without IBNR (i.e. charges imposed on current members). For example, the current member premium assessment for 2013 was 66.6% of the assessment imposed on former members while the current member premium assessment for 2014 was 3.5% of the assessment on former members. The letter concluded with a discussion of certain "considerations and conditions" including a warning

[4] IBNR is an acronym for claims that have been "incurred but not reported". IBNR is an estimate of the value of claims for incidents that have happened but which have not yet been reported to the insurer. IBNR can also include further development on claims that have been reported but for which ultimate loss amounts remain uncertain.

that "[i]f a member leaves the Group, the full balance of the assessment, along with IBNR, is due immediately". The letter sent to former members was shorter and contained less explanation. Notably, it included a table showing assessments calculated for all members (current and former) on a "with IBNR" basis and an invoice seeking payment of the member's assessment in full by August 15, 2016. The letter sent to former members did not advise that a different methodology had been applied to current members or that current members enjoyed more favorable payment terms. See Leslie Aff., ¶ 12.

14. The Department disapproved the corrective action plan on August 1, 2016, noting that the Company had not yet provided adequate support for its proposed accounting and tax treatment or verification of its authority to impose the contemplated premium assessments. In response, the Company provided the Department with additional information regarding the basis for its calculations and advised that it had already issued invoices and collected nearly all of the premium assessments. (Prompt collection was possible largely due to the availability of setoffs against former members amounts otherwise payable.) Eventually, the Company collected $2,173,720 in respect of the First Premium Assessment with approximately $91,000 outstanding when the Order of Liquidation entered. Leslie Aff., ¶ 13.

15. Second Premium Assessment. In the spring of 2017, as the Company prepared its financial statements for the year ending December 31, 2016, management identified a potential capital deficiency. The Board considered various options for addressing the deficiency and eventually settled upon seeking $1,000,000 in voluntary investments from current members (to be repaid with a first call upon anticipated proceeds of a lawsuit against the Company's former claims administrator) and a second premium assessment. Leslie Aff., ¶ 14.

16. A shareholders meeting was called on May 4, 2017, to discuss the Company's financial condition, solicit support for the litigation financing investment, and explain the additional premium assessment. The members were informed that unaudited financial statements showed approximately $900,000 in surplus, that Vermont required $2.1 million, and that the Department had requested action from the Company to improve capital by $1.3 million. Management then presented a slideshow explaining the proposed $1 million litigation investment and a "performance assessment" of $380,000. In explanation of the assessment, management presented detailed policy year accountings showing significant losses for policy years 2013 and 2014, deterioration of experience for those policy years over the last twelve months, and an assessment plan for policy years 2013, 2014, and 2015 that would generate $380,000. As shown in Table 1, there is no clear correlation between the assessments for these policy years and any of the policy year experience figures that were presented.

Table 1 – Figures Presented at May 4, 2017 Shareholders' Meeting

	2013	2014	2015	Total
Policy Year Profit/(Loss)[5]	(789,802)	(915,105)	Not reported	(1,704,907)
Year on Year change	(386,280)	(282,490)	Not reported	(668,770)
Proposed Assessment	258,868	88,314	33,530	380,712

The Company described these figures as "contain[ing] IBNR for **PAST MEMBERS ONLY**" (emphasis in original) and, while the mechanics of the calculations are not clear, it was noted expressly that the burden would fall primarily on former members. Specifically, the presentation shows the entire 2014 and 2015 assessment falling on former members who were also expected to bear the majority (54%) of the 2013 assessment. Invoices were mailed shortly after the

[5] These figures reflect policy year loss after accounting for the first premium assessment. The policy year losses without assessment would have been $2.28 million for 2013 and $1.24 million for 2014 – a total of $3.52 million.

meeting and the Company collected a total of $133,262 in respect of the second assessment. Leslie Aff., ¶ 15.

17. Third Premium Assessment. In December of 2017, the Board met to consider a further capital improvement plan that involved investment from the program manager, an increase in the required investment necessary for membership in the coming calendar year, and a "capital call plus assessment". The assessment plan -- totaling $2,035,020 for policy years 2013 through 2016 -- was circulated to the membership for consideration and a consultative vote. Again, the plan calculated assessments on a more favorable basis for current members than for former members. After polling the members, the Board voted to implement the assessment plan and invoices were sent on December 22, 2017. The Company collected a total of $372,101 in respect of this assessment.[6] Leslie Aff., ¶ 16.

18. Liquidator's Investigation and Concerns. When the Order of Liquidation was entered on May 15, 2018, the Company's unaudited balance sheet included a "premium receivable" of $2.4 million relating to the three premium assessments. Reducing the receivable to cash would have materially strengthened ETRRG's claims-paying ability so the First Status Report filed in this proceeding on July 13, 2018 identified investigation of collectability as "one of the Liquidator's highest priorities". Over the following months, the Liquidator reviewed the process by which the premium assessments had been calculated, allocated, and collected. This review raised significant concerns as to the validity of the pre-liquidation premium assessments and the inequities resulting from their partial collection:

[6] The First and Second Premium Assessments were conducted while the 2nd Shareholder Agreement was in effect. The 3rd Shareholder Agreement was adopted shortly before imposition of the Third Premium Assessment. As noted above, the premium assessment provisions in the two Shareholder Agreements are identical. See, supra, ¶ 10.

a. *It did not appear that the assessment provisions were applied appropriately to all policy years*. Specifically, the Shareholder Agreements contemplate that each year will stand on its own producing either an assessment (¶ 7.6.2) or a dividend (¶ 7.6.3). This annual evaluation process was followed to some extent with regard to dividends which the Company declared every year -- apparently to ensure that no earnings would be retained from one policy period to the next -- and distributed in some years prior to re-domestication.[7] In contrast, the Company never applied the annual evaluation process with regard to assessments until 2016. See, supra, ¶ 12 (The Company's cover letter to current members noted that "ETRRG needs to keep each policy period isolated, and assess or issue a dividend based on a specific policy period. Until recently we failed to issue assessments.") Even then, the Board did not actually calculate and assess the amount necessary for each policy year to stand on its own. Instead, the Board identified the funds it would need to collect to achieve Vermont's minimum capital standards and then collected it on an ad hoc basis from some policy years but not others.[8] This introduced an element of subjectivity where the Board selected individual years for assessment rather than applying a consistent standard to all years. This, in turn, created risk that assessments might be imposed selectively on older policy years (i.e. those including former members) by a Board elected by the current membership.

[7] Minutes of a November 2017 joint meeting of the shareholders and Board, for example, include a vote to declare a dividend for the year (before it had ended) in the amount of any profit earned with the objective that "surplus funds that arose during the year should be recorded as an expense on the income statement" creating "binding, enforceable, and unconditional obligations to return the monies to the policyholders" so that the Company "will never retain any surplus".

[8] The Second Premium Assessment, for example, sought $33,530 in respect of policy year 2015. See, supra, ¶ 16. Management's presentation did not explain why policy year 2015 had been selected for assessment or why policy year 2016 had not been selected. The presentation similarly did not include any discussion of 2015 year policy experience or tie the experience that was presented for 2013 and 2014 to the assessment being imposed.

b. *It is not clear that the assessment amounts were determined in a supportable manner*. The Shareholder Agreements requires that the Board consider whether to impose an assessment at the end of each policy year and then to collect it from members with coverage active in that year. See id., ¶ 7.6.2 ("At the conclusion of each policy year, the Board shall determine whether to assess the Policyholders for additional premium and shall make such assessment, in accordance with the formula set forth in Appendix B"). The Board advised current members that it interpreted this language as requiring it to impose a "break even" assessment for each policy year in which the Company suffered an underwriting loss. See, supra, ¶ 13 (Cover letter to First Capital Assessment noting that "ETRRG needs to keep each policy period isolated and assess or issue a dividend based on a specific policy period.") This is a clear and supportable interpretation of the Shareholder Agreements that would have produced uniform and equitable results for the members. In practice, however, it appears that the Board did not set premium assessments on the basis of the underwriting loss for any particular year but, instead, determined the Company's capital shortfall then imposed premium assessments for multiple policy years in an amount calculated to eliminate the shortfall. See, supra, ¶¶ 12 (First Premium Assessment), 16 (Second Premium Assessment), and 17 (Third Premium Assessment). The Liquidator was unable to find an articulated basis for allocating portions of the capital shortfall to particular policy years. This raised concerns that the Liquidator would be unable to demonstrate a non-arbitrary basis for the amount of assessment levied on any particular policy year.

c. *It does not appear that the assessments were calculated in a permissible manner.* The Shareholder Agreements clearly contemplate that, in years where a premium assessment is required, there will be a singular assessment allocated proportionally amongst the members. See, supra, ¶ 8. For example, the allocation formula set forth in Appendix B provides that a single figure -- the "Total assessment required" – is to be multiplied by each member's proportionate share of the total policy year premium to generate the "Member's portion owed". See id. This formula does not admit the possibility that different assessments will be imposed on different classes of members. Nevertheless, the Board clearly calculated two different assessments for each policy year – one for current members (based on experience excluding IBNR) and one for former members (based on experience including IBNR). See, supra, ¶¶ 13 (First Premium Assessment), 16 (Second Premium Assessment), and 17 (Third Premium Assessment). The use of two methodologies permitted the Company to place a much heavier premium assessment burden on former members than on current members and this differential was presented and understood as creating a deterrent to defection from ETRRG.

Because of these potential legal infirmities, the Liquidator concluded that it was unlikely the invoices associated with the First, Second, and Third Premium Assessments could be enforced in collections actions. Leslie Aff., ¶ 17.

19. In addition to concerns regarding the assessment calculations themselves, the Liquidator also noted that they had been only partially collected. This meant that some members had made very significant payments (in many instances, through setoffs applied by the Company rather than as the result of voluntary payment), other members had made little/no payment, and that the remaining members had made only partial payments. The resulting disparity of treatment compounded the inequities resulting from the original selection of years for assessment, the calculation of total assessment amounts, and the disparate treatment of current

versus former members. The Liquidator found that the resulting status quo was unfair and unreasonable but that it was also effectively frozen because it was not possible to either complete the historical assessments (as discussed above) or unwind them by returning the funds previously paid because doing so would violate the statutory priorities.[9] See 8 V.S.A. § 7081 ("The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment."). Leslie Aff., ¶ 18.

20. The Liquidator's Proposal and Report. The Liquidator evaluated various options for addressing the inequities of the status quo and determined that most courses of action were either ineffective or were not procedurally viable. It appeared possible, however, that the situation could be addressed through additional assessments that were conducted in conformity with the Shareholder Agreements and would supersede the historical assessments. There were a number of practical concerns, however, including whether such assessments could be collected and whether they would be large enough to effectively "wash out" the results of the prior assessments. Leslie Aff., ¶ 19.

21. To evaluate the feasibility of this corrective assessment plan, the Liquidator engaged consulting actuaries to assist in calculating assessments for each policy year consistent with the Shareholder Agreements and the expectation of the "break even" assessments that had been described to the members as the general objective of the agreements.[10] See, supra, ¶ 13

[9] A claim for return of a premium assessment falls to priority class 9. See, infra, p. 21, note 15. ETRRG's current assets are insufficient to make full payment on policy-related claims falling in priority class 3 so, if the status quo prevails, it will not be possible to return funds collected in respect of the historical premium assessments. See 8 V.S.A. § 7081.

[10] The Liquidator first engaged the Company's longstanding consulting actuary -- Casualty Actuarial Consultants ("CAC") – to leverage that firms' experience with ETRRG operations. The Liquidator also engaged Merlinos &

(describing assessments as being set at a level that would "fund the losses" for each policy year). This required the actuaries to project ultimate experience for the Company, apply historically consistent expense loads, and estimate the assessment level that would be appropriate under those circumstances to produce a "break even" result. Leslie Aff., ¶ 20.

22. The actuaries' projections suggested both that the Company's historical assessments ($5.07 million) had been inadequate and that none of the members had actually paid as much in historical assessments as would have been generated by true "break even" assessments. This meant that corrective assessments could exceed the historical assessments and that if credit were given to such historical payments, it would be possible to "wash out" the effects of the prior assessments. The actuaries' projections also suggested that most assessments could be collected by setoff (rather than requiring ETRRG to pursue members for collections) such that the concept was likely to be procedurally feasible. Finally, the calculations suggested that the mechanics of corrective assessments could work and that it may would be possible to place the members in largely the same position (relative to each other) as if assessments had been imposed, calculated, assessed, and collected on a basis consistent with the Shareholder Agreements. Leslie Aff., ¶ 21.

23. The Liquidator prepared a memorandum (the 2018 Assessment Analysis) explaining why he did not believe the historical assessments were enforceable, why the status quo was inequitable, and how corrective assessments might redress those inequities. The Liquidator used estimates prepared by one of the actuaries -- Merlinos -- to generate an illustration that was used in the memorandum. The Liquidator then circulated the 2018 Assessment Analysis to the ETRRG members and scheduled a call to discuss his findings, his

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Associates, Inc. ("Merlinos") -- an actuarial firm that has done significant work for insurance regulators -- to provide a fresh look and alternative view. Their conclusions were generally consistent with one another.

intentions, and any member questions/concerns. The discussion with members was constructive and produced important information. (For example, the Liquidator learned that one member, as a condition to joining ETRRG, had been exempted from both dividend and premium assessment calculations.) After the members' call, the Liquidator submitted the 2018 Assessment Analysis to the Court as an exhibit to the Second Status Report filed on October 31, 2018. The Liquidator specifically advised that no action was contemplated until close to the end of the proceeding (when final claim values would be available) and that the Liquidator would then file a suitable motion seeking approval to make corrective assessments for those policy years requiring them. Leslie Aff., ¶ 22.

24. Since submitting the Second Status Report, the Liquidator has regularly reminded members and other claimants of his intention to seek authority for corrective assessments prior to a distribution from the ETRRG estate. See id. In the Ninth Status Report filed on January 31, 2023, the Liquidator advised that the work of determining claims was nearly complete and that he intended to file a motion for corrective assessments after April 30, 2023.

25. Liquidation Status. Detailed information regarding the status of the proceeding and the determination of claims is included in the Liquidator's Tenth Status Report, Annual Accounting, and Fifth Report of Claims filed herewith. As noted in that report, 541 of the 567 claims filed in this proceeding have now been finally determined and the Liquidator has established reserves reflecting his "best estimate" of the value of each remaining claim. These figures suggest that ETRRG's policy-related claims have been resolved on a very favorable basis in liquidation such that, even in the absence of corrective assessments, it should be possible to make distributions of more than 90% on allowed priority class 3 claims.[11] The Liquidator

[11] For context, the consulting actuaries' projections from 2018 suggested a distribution on policy-related claims of 70% or less. See Exhibit C to the 2018 Assessment Analysis.

believes that the total value of ETRRG obligations is now sufficiently certain to permit calculation of premium assessments. Leslie Aff., ¶ 23.

Calculation of "Break Even" Assessments

26. Merlinos' Calculations. Because the work of claim valuation has been substantially completed and the value of ETRRG's obligations effectively crystalized, the Liquidator asked Merlinos to calculate "break even" assessments for the policy years 2012-18 using the same methodology as in the 2018 example (i.e. the amount necessary to produce a combined ratio of 100% for each year) but this time using ETRRG's actual paid and reported loss experience reported by the Liquidator as of April 30, 2023.[12] Merlinos' prepared the requested calculations and its report is attached as Exhibit A to the Leslie Affidavit. The results, summarized in Table 2, show that an assessment of $7,512,879 would have been needed to "break even" from 2012-18. Leslie Aff., ¶ 24.

Table 2 – Summary of "Break Even" Assessment Calculation ($ million)

Components Presented as % of Gross Premium

Component	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
Net Loss & LAE	51.9%	70.9%	82.1%	50.4%	73.3%	59.4%	162.1%
ULAE	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%	3.0%
Reinsurance Cost	35.0%	35.0%	35.0%	32.0%	32.0%	32.0%	38.2%
Expense Provision	22.0%	21.0%	21.0%	22.0%	22.0%	22.0%	22.0%
Investment Income	-3.0%	-3.0%	-3.0%	-3.0%	-3.0%	-3.0%	-3.0%
Other Income	-2.0%	-1.0%	-1.0%	-2.0%	-2.0%	-2.0%	-2.0%
Combined Ratio	106.9%	125.9%	137.1%	102.4%	125.3%	114.4%	220.3%
Gross Audited Prem.	5,097,814	5,779,233	5,407,265	5,776,386	5,743,684	6,505,619	1,100,226
Indicated Assessment	349,792	1,496,580	2,007,034	140,900	1,451,689	743,815	1,323,069

27. Comparison with Historical Assessments. A comparison between the "break even" assessment and the Company's historical assessments is set forth in Table 3.

[12] Merlinos also updated its 2018 analysis regarding policy years 2005-11 and concluded that they were generally profitable (an estimated 93% estimated combined ratio) such that no assessment was indicated.

Table 3 – Historical vs. "Break Even" Assessments (2012-2016) [13]

Policy Year	"Break Even" Assessments	Historical Assessments	Ratio (%)	Difference ($)
2012	349,792	451,508	129%	101,716
2013	1,496,580	2,205,338	147%	708,758
2014	2,007,034	2,007,579	100%	545
2015	140,900	36,195	26%	(104,705)
2016	1,451,689	373,766	26%	(1,077,923)
Total	5,445,995	5,074,386	93%	(371,609)

These figures show that on a relative basis (comparing the historical assessments to a "break even" assessment), the historical assessments for older policy years were substantially larger than the historical assessments for more recent policy years. The historical assessment for policy year 2012 and 2013, for example, were significantly greater than Merlinos calculates would have been necessary for the policy year to "break even".[14] In contrast, the assessment for policy years 2015 and 2016 were only 26% of a "break even" level. This confirms the Liquidator's concerns regarding the weighting of historical assessment to years with "former members" rather than "current members" (see, supra, ¶ 18.a). Results are similar when viewed at the individual member level. For example, five members received premium assessment invoices that were greater than 125% of what they would have been charged for assessments at a "break even" level allocated in conformity with the shareholder agreements. All of these members had left the Company prior to the First Premium Assessment conducted in 2016. In contrast, all of the members that remained active with ETRRG in 2018 received premium invoices that were 75% or less of the "break even" level for policy years 2012-16. Leslie Aff., ¶ 25.

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[13] There was no opportunity for the Company to have conducted assessments for 2017 and 2018 prior to the Order of Liquidation. Merlinos calculates that while "break even" assessments for these years would not have been as large as for some of the earlier years, they would still have been substantial – approximately $750,000 for 2017 and $1.32 million for 2018.

[14] This does not necessarily imply that the Company calculated a greater assessment than was indicated using the data available in 2016 and 2017. Instead, the Liquidator believes this result primarily reflects the fact that claim handling results in liquidation were substantially more favorable than had been initially anticipated.

28. The inequity of the status quo may be demonstrated most clearly by comparing the amount that ETRRG members actually paid on the historical assessments (whether voluntarily or through setoff) to the amount they would have owed under a "break even" assessment allocated in conformity with the Shareholder Agreements. See Table 4. For example, there are four members that have paid more than 50% of a "break even" assessment while there are seven members that have paid 5% or less of their allocated share of a "break even" assessment.

Table 4 – Historical vs. "Break Even" Assessments (Member Effects)

Member	Assessment Paid	"Break Even" Assessment	Paid as % of "Break Even"
Transtech Leasing Inc.	5,578	3,802	147%
J.P. Donmoyer Inc.	267,999	237,181	113%
Zimmerman Truck Lines	289,902	333,882	87%
A&S Services Group†	558,907	668,385	84%
H.M. Kelly, Inc.	97,366	201,334	48%
Paul Miller Trucking, Inc.	202,205	422,441	48%
Hoffman Transport Inc.	235,780	534,555	44%
Pleasant Trucking, LLC	95,231	276,176	34%
Clark Transfer, Inc.	98,884	326,669	30%
Metropolitan Trucking, Inc.	373,050	1,270,390	29%
Frock Bros. Trucking	102,424	360,823	28%
Indian Valley Bulk Carriers	97,175	344,120	28%
Fox Transportation	53,085	199,791	27%
Calex Express, Inc.	161,120	662,063	24%
Star Freight, LLC	23,258	424,673	5%
Bolus Freight Systems, Inc.	11,580	292,888	4%
Road Scholar Transport, Inc.	2,454	286,794	1%
Finster Courier, Inc.	3,085	377,863	1%
Bulls Eye Express Inc.	-	80,977	-
Inter-Coastal, Inc.	-	53,257	-
H&H Transportation, Inc.	-	154,816	-
Total	2,679,083	7,512,879	36%

† Figures presented for A&S Services Group include figures for a former member – Kinard Trucking – that was acquired by A&S Services prior to ETRRG's liquidation.

The members that made minimal payments in relation to the "break even" assessment benefit substantially from the status quo because other members contributed funds (the $2.68 million shown in Table 4) that are now available to fund distributions from the ETRRG estate. In contrast, members that made significant payments (again, relative to what they would have paid if the Company had proportionally allocated "break even" assessments), are injured by the status quo because they are subsidizing the other members. Leslie Aff., ¶ 26.

III. THE LIQUIDATOR'S PLAN FOR CORRECTIVE ASSESSMENTS

29. The Liquidator's Plan. The Liquidator requests that the Court authorize him to impose corrective assessments pursuant to the Shareholder Agreements (¶ 7.6.2) and in the manner described in the Plan for Corrective Assessments ("Plan") that is attached hereto as Exhibit A. Under the Plan, the Liquidator would:

a. *Levy corrective assessments on each policy year.* Consistent with the process set forth in the Shareholder Agreements (¶ 7.6.2), the Liquidator would make an assessment on each policy year in the amount necessary to achieve "break even" results (i.e. a 100% combined ratio) for each policy year. These amounts – totaling $7,512,879 for the period 2012 through 2018 – are shown above in Table 2.

b. *Allocate the corrective assessments among the members.* Pursuant to the formula set forth in Appendix B to the Shareholders Agreements, the Liquidator would allocate the corrective assessment for each policy year in proportion to the members' proportionate shares of audited premium for that policy year. The 2012-18 totals for each member are shown above in Table 4 and the premium information necessary to verify the allocation calculation is presented in the data tables attached to the Plan.

c. *Collect the corrective assessments.* The Liquidator would credit each member with the amount of any payments made on the First, Second, and Third Premium Assessments prior to liquidation. The Liquidator would then collect the balance owed by setting if off against amounts otherwise payable by ETRRG – primarily distributions on allowed priority class 3 claims.

d. *Return a portion of the premium assessments.* The Liquidator would recognize that the imposition of premium assessments under the Shareholder Agreements creates a priority class 9 claim against ETRRG for return of such assessments.[15] The Liquidator would deem each member to have filed such a claim, would issue a notice of determination, and would report those determinations to the Court. Estate assets would be sufficient (after imposition of the corrective assessments) to permit a partial distribution on allowed priority class 9 claims. This means that the Liquidator could request authority from the Court to make such distributions – mostly likely at a rate of approximately 40% -- which would provide further opportunity for setoff and would result in nearly all members bearing an equal portion of the premium assessment burden (approximately 60%). See Leslie Aff., ¶ 27.d.

e. *Report to members.* The Liquidator would provide each member with an accounting statement reporting the corrective assessments levied, the setoffs applied, and the distributions made.

30. Effects of Corrective Assessments. If the Plan is approved and corrective assessments are imposed at a "break even" level, this would create both a new asset for the estate

[15] Priority class 9 includes "[s]urplus or contribution notes, or similar obligations, and premium refunds on assessable policies." 8 V.S.A. § 7081. ETRRG premium assessments are imposed under the terms of the Shareholder Agreements rather than pursuant to "assessable policies". Premium assessments serve the same function, however, whether imposed under one form of contract (a policy) or another (Shareholder Agreements) so they are appropriately placed in the same priority class. Further, there is no other priority class in which shareholder agreement premium assessments might more logically fit and placing them in priority class 9 avoids creating irrational or unfair results. See In re Ambassador Ins. Co., 184 Vt. 408, 418-19 and 420 (2009) (Construing the priority statute and noting that "[w]e favor interpretations of statutes that further fair, rational consequence", "we presume that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences", and "[w]hen evaluating the priority of claims [] during liquidation, the critical question is the character of the claim…").

(a receivable for the corrective assessments less the premium assessments previously paid) and a new set of priority class 9 obligations (claims for return of the corrective assessments). The Liquidator calculates that the ETRRG estate could collect more than 95% of the assessment through setoff against amounts owed that the Company owes to the members. This would permit a 100% distribution on all claims falling in priority classes 1-8 as well as a distribution on priority class 9 claims (primarily, the members' new claims for return of premium assessments) of approximately 40%. Leslie Aff., ¶ 28.

31. The $7.5 million in corrective assessments contemplated by the Plan would have a modest effect on non-member creditors (additional payment to such creditors of approximately $461,000) but its principal purpose and result would be to shift funds between the ETRRG members. This is both expected and intended because the effect of the historical assessments was to improperly shift funds between members (e.g. imposing larger assessment on former members than on current members) and the purpose of the corrective assessments would be to eliminate that inequitable result. The Liquidator's projections as to how corrective assessments would affect each member (in comparison with a distribution from the estate without assessment) are presented in Table 5 on the following page. Comparison of Table 4 and Table 5 demonstrates that the members who benefit from corrective assessments are those that made large pre-liquidation premium assessment payments (either voluntarily or through setoff). In contrast, the members that benefit from maintenance of the status quo are those that were not subject to the improper historical assessments or were able to avoid paying them. Leslie Aff., ¶ 29.

Table 5 – Projected ETRRG Distributions with and without Corrective Assessments†

Member	Dist. w/o Assessment	Dist. w/ Assessment	Difference
A&S Services Group	941,000	1,188,000	247,000
J.P. Donmoyer Inc.	-^	137,000	137,000
Zimmerman Truck Lines	146,000	260,000	114,000
Grocery Haulers, Inc.*	847,000	899,000	52,000
H.M. Kelly, Inc.	350,000	357,000	7,000
Transtech Leasing Inc.	-^	3,000	3,000
Frock Bros. Trucking	-	-	-
Bulls Eye Express Inc.	-	-	-
Clark Transfer, Inc.	250	-	(250)
Paul Miller Trucking, Inc.	171,000	150,000	(21,000)
Inter-Coastal, Inc.	35,000	7,000	(28,000)
Hoffman Transport Inc.	211,000	164,000	(47,000)
Fox Transportation	119,000	69,000	(50,000)
Pleasant Trucking, LLC	73,000	20,000	(53,000)
H&H Transportation, Inc.	518,000	463,000	(55,000)
Finster Courier, Inc.	2,448,000	2,391,000	(57,000)
Indian Valley Bulk Carriers	310,000	236,000	(74,000)
Calex Express, Inc.	1,860,000	1,768,000	(92,000)
Metropolitan Trucking, Inc.	3,626,000	3,517,000	(109,000)
Road Scholar Transport, Inc.	498,000	372,000	(126,000)
Bolus Freight Systems, Inc.	223,000	86,000	(137,000)
Star Freight, LLC	651,000	479,000	(172,000)
Total	13,027,250	12,566,000	(461,250)

† Distribution figures are presented in rounded terms (in most cases, to the nearest thousand) due to the fact that there remains some potential for variability with regard to estate assets (e.g. increased/decreased reinsurance receivable) and estate liabilities (e.g. increased/decreased administrative expense and claims for which reserves have been established). The Liquidator anticipates that any changes are likely to have moderate effects on the ultimate distribution percentages.

^ JP Donmoyer and Transtech Leasing did not have any allowed policy level claims in the ETRRG proceeding and would therefore receive $0 distributions in the absence of corrective assessments. These members did, however, make payments of pre-liquidation assessments and would therefore receive distributions in priority class 9 if corrective assessments were ordered.

* Grocery Haulers joined ETRRG on a pass-through basis (its deductible was equal to the reinsurance retention) and subject to the condition that it be exempt from assessment. Grocery Haulers was therefore excluded from the prior assessment-related tables. Grocery Haulers would benefit from corrective assessments due to the fact that they would permit a 100% distribution on policy-related claims falling in priority class 3.

32. In relation to the members benefiting from the status quo, the Liquidator notes that there was no impropriety in refusing to pay invoices for non-compliant assessments. At the same time, however, it would be improper to permit those members to retain the benefit of payments made by (or obtained by setoff from) other members in respect of the non-compliant

assessments. If the Plan is approved and the corrective assessments imposed, the impermissible assessments and the inequities they created will be largely "washed out" by the corrective assessments because credit would be given for historical assessment payments, material portions of the new corrective assessments would be returned through distributions on new class 9 claims, and nearly all members would end up bearing an equal share (approximately 60%) of the premium assessment burdens contemplated by the Shareholder Agreements.[16] Leslie Aff., ¶ 30.

IV. THE LIQUIDATOR'S AUTHORITY TO IMPOSE ASSESSMENTS

33. The Liquidator seeks authority to impose premium assessments in the manner contemplated by the Shareholder Agreements to which the ETRRG members have subscribed. In doing so, the Liquidator will exercise -- under the general supervision of the Court -- powers expressly enumerated by the insolvency laws or reasonably inferred therefrom.

34. The Liquidator's Role. The liquidator of an insolvent insurance company is vested by operation of law with title to all the property, contracts, and rights of action of ETRRG. See 8 V.S.A. § 7057. Generally speaking, a liquidator has the powers that management and the board of directors exercised prior to liquidation (e.g. hiring employees/agents and fixing their compensation; gathering, dealing in, and disposing of property; opening accounts and investing assets; and, participating in litigation). See 8 V.S.A. § 7060(a)(2), (3), and (6) through (20). Liquidators are not, however, merely successors to management and boards of directors and are instead "officers of the state who are required to protect policyholders, other creditors, and the public interest in the administration of an estate in liquidation." In re Ambassador Ins. Co., 198 Vt. 341, 351 (2015). To fulfill this public role,

[16] There are three members from which corrective assessments could not be fully collected by setoff. These members had minimal claims against the ETRRG estate (collectively, less than $300) such that such that collections would be effectively limited to the funds they previously paid in respect of the historical assessments (collectively, approximately $201,000).

liquidators are vested with authority not available to private actors. See 8 V.S.A. § 7060(a)(5) (A liquidator may "hold hearings, subpoena witnesses to compel their attendance, administer oaths, examine any person under oath… and in connection with such proceeding, require the prosecution of any books, papers, records, or other documents…"). In sum, the statutes provide that a liquidator shall "[e]xercise all powers now held or hereafter conferred upon receivers by the law of this State not inconsistent with the provisions of this chapter" (8 V.S.A. § 7060(a)(23)) with the understanding that:

> The enumeration… of the powers and authority of the liquidator shall not be construed as a limitation upon him or her, nor shall it exclude in any manner the liquidator's right to do such other acts not herein specifically enumerated or otherwise provided for, as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation.

8 V.S.A. § 7060(c).

35. In construing the liquidation statutes, the Vermont courts "aim to implement the intent of the Legislature and… presume the Legislature intended the plain, ordinary meaning of the statute. In re Ambassador Ins. Co., 184 Vt. 408, 418-19 (2008) (quotations omitted). The courts "favor interpretations of statutes that further fair, rational consequences, and… presume that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences" while "interpret[ing] the statute as a whole, looking to the reason and spirt of the law and its consequences and effects to reach a fair and rational result." Id. at 420 (quotations omitted).

36. The Shareholder Agreements. The Shareholder Agreements state that "[a]t the conclusion of each policy year, the Board shall determine whether to assess the Policyholders for additional premium, and shall make any such assessment, in accordance with the formula set forth in Appendix B." Shareholder Agreements, ¶ 7.6.2. The authority to impose assessments is, therefore, clearly vested in the Board. The Shareholder Agreements do not specify the amount

of any such assessment but, in 2016, the Board interpreted the agreement as requiring that each policy year stand on its own with assessments being imposed (or dividends declared) such that no earnings would be retained or loss carried over to a subsequent policy year. See, supra, ¶ 13 (The Board's letter stated that "[a]n underwriting loss is achieved when losses and expenses are more than the premium collected" and, "[w]hen this occurs a premium assessment must be collected to fund the losses. ETRRG needs to keep each policy period isolated and assess or issue a dividend based on a specific policy period.") The Liquidator believes that this is a reasonable interpretation of the Shareholder Agreements.

37. Authority to Implement the Plan. The Liquidator is authorized to impose premium assessments pursuant to the Shareholder Agreement.

a. First, the Liquidator is vested with "title to all the property, contracts, and rights of action" of the insolvent insurer and directs that these be administered "under the general supervision of the Court," 8 V.S.A. § 7057(a), and he is authorized to "[c]ollect all debts and moneys due and claims belonging to the insurer." 8 V.S.A. § 7060(a)(7). ETRRG is a party to and beneficiary of the Shareholder Agreements such that the Liquidator is entitled to exercise the Company's rights under the agreements, including the right to pursue collections. With regard to policy years 2012 through 2016, the need for assessment was determined by ETRRG's Board prior to insolvency. While the Liquidator concluded that the invoices issued subsequent to those determinations were unenforceable, this was merely because they had been improperly calculated and allocated. Those were ministerial errors – a failure to properly calculate the "break even" assessment and to allocate it on a premium proportional basis – that are mathematically corrected in the Plan. Accordingly, acting under the general supervision of the

Court, the Liquidator may issue corrected invoices and pursue existing causes of action under the Shareholder Agreements. See 8 V.S.A. § 7057(a).

b. Second, the Liquidator is authorized to "[e]xercise all powers now held or hereafter conferred upon receivers by the laws of this State not inconsistent with the provisions of this chapter." 8 V.S.A. § 7060(a)(23). This grant of powers reflects the fact that, prior to codification, insurers were liquidated by equitable receivers acting under common law. The statutory liquidator is the successor to these equitable receivers and the legislature expressly intended for the traditional common law powers to continue unless there are inconsistent statutory provisions. There are no inconsistent statutory provisions so the question is whether an equitable receiver could have levied premium assessments under the Shareholder Agreements.

While there are no Vermont cases addressing the question, the power of equitable receivers to impose assessments in conformity with by-laws, charters, and other organizing documents of an insolvent insurer was clearly established at common law. See, e.g., Palmer v. Central Mut. Ins. Co. of Chicago, 39 N.E.2d 400, 406-410 (Ill. Ct. App. 1942) (Evaluating a liquidation statute that was silent regarding assessments, reviewing the common law, and finding/collecting "numerous cases... which hold that, acting under the authority and sanction of the court, the receiver of a company has the same power to make assessments as had the directors before insolvency."); 44 C.J.S. Insurance, § 220 ("Acting under the authority, sanction, and direction of the court, a receiver of a mutual insurance company ordinarily has the same power to make assessments as had the directors before insolvency."); Couch on Insurance, § 70:12 ("The receiver of a corporation ordinarily has the power, apart from statutory authorization, to levy an assessment and an assessment made by him has the same force and effect as if made by the proper officers of the insurer before insolvency.")[17] Here, the Plan would authorize the Liquidator to impose assessments consistent with the Board's understanding of its duty under the Shareholder Agreements – "ETRRG needs to keep each policy period isolated and assess or issue a dividend based on a specific policy period." (see, supra, ¶ 13) – and allocated in conformity with those agreements. The Plan is, accordingly, an exercise of the power to make assessments that was held by the Board prior to insolvency. This is a power that was widely recognized as within the authority of an equitable receiver and it is therefore within the authority of the Liquidator acting under the general supervision of the Court. See 8 V.S.A. § 7060(a)(23).

c. Third, the liquidation statute confers general authority to "do such... acts not herein specifically enumerated... as may be necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation." 8 V.S.A. § 7060(c). This statutory catchall is consistent with the fact that the insurance liquidations were traditionally heard by courts sitting in equity and exercising "a wide range of discretion to mold equitable decrees to the circumstances of the case before them." Richardson v. City of Rutland, 164 Vt. 422, 427 (1995); see also In re Beach Properties, 200Vt. 630, 641 (2015) ("The essence of equity is that it applies only in those exceptional cases wherein the law (by reason of its universality) is deficient"); Huard v. Henry, 188 Vt. 540, 542 ("[T]rial courts have wide discretion to fashion fair and just equitable relief."); Brown v. Rock , 133 A.245, 246 (Vt. 1926) ("It is axiomatic that equity supplements but does not supplant legal remedies.") Here, the Board created a situation that unfairly and improperly

[17] Because of ETRRG's unusual structure – providing for premium assessments in a Shareholders Agreement – it is also worth noting that, for corporations where stock was liable to assessment or capital calls, the authority of a receiver to collect or request the imposition of such assessments was well-established at common law. See, e.g., *Clark on Receivers*, § 308, at 371 (1918 ed.) (A receiver may "[b]ring suit to enforce an assessment... already made by the directors" or, if the directors had failed to make an assessment, "apply to the appointing equity court and that court may itself make the call" on grounds that "[t]he court will do what it is the duty of the company to do" and "[i]t is the duty of the company to make the calls where the funds are needed to pay debts.")

benefits some members (who were under-assessed or declined to pay the historical assessments) and unfairly disadvantages others (those that were over-assessed and paid the associated invoices either voluntarily or through the imposition of setoffs). See, supra, ¶ 18. If the Board had acted in conformity with the Shareholder Agreements – that is, imposed a single assessment on all members for each policy year and then allocated it pursuant to the agreement's formula – then the historical assessments would have been valid, the Liquidator could have enforced the associated invoices, and all members would have been treated equally and fairly. A resort to equity is therefore appropriate here to provide fair, just, and reasonable relief under the catchall provision. See 8 V.S.A. § 7060(c); In re Ambassador Ins. Co., 184 Vt. 408, 420 (2008) (The courts "favor interpretations of statutes that further fair, rational consequences.").

WHEREFORE, the Liquidator requests that the court enter an order:

(a) Granting this Motion for Approval to Make Corrective Assessments under Shareholder Agreements;

(b) Authorizing the Liquidator to implement the Plan for Corrective Assessments; and,

(c) Granting such other and further relief as justice may require.

Dated in Montpelier, Vermont, this 7th day of June 2023.

KEVIN J. GAFFNEY, COMMISSIONER
DEPARTMENT OF FINANCIAL REGULATION
AS LIQUIDATOR OF ELITE TRANSPORTATION
RISK RETENTION GROUP, INC.

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A proposed form of order accompanies this Motion

Courtesy copies of the Motion, the Leslie Aff., and the Liquidator's Tenth Status Report have been provided to the ETRRG members

Exhibit A

Plan for Corrective Assessments

The Second and Third Amended and Restated Shareholder Agreements ("Shareholder Agreements") for Elite Transportation Risk Retention Group, Inc. ("ETRRG") provide for the imposition of premium assessments at the conclusion of each policy year to be apportioned amongst ETRRG's policyholders based on their relative premium size. Prior to liquidation, ETRRG imposed certain premium assessments on its policyholders in a manner that was not consistent with the Shareholder Agreements and which were then only partially collected. To eliminate the improper and inequitable impacts arising from this situation and place the members in the position they should have enjoyed had the Shareholder Agreements been implemented in accordance with their terms, the Liquidator proposes the following Plan for Corrective Assessments ("Plan").

1. Calculation of Corrective Assessments. The Liquidator has calculated the premium assessment necessary for each policy year from 2012 through 2018 to achieve "break even" results (i.e. a combined ratio of 100%). These amounts are as follows:

	2012	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
Combined Ratio	106.9%	125.9%	137.1%	102.4%	125.3%	111.4%	220.3%
Indicated Assessment	349,792	1,496,580	2,007,034	140,900	1,451,689	743,815	1,323,069

2. Allocation of Corrective Assessments. The Shareholder Agreements require that premium assessments for each policy year be allocated among the members in accordance with the following formula:

$$\frac{\text{Member's Audited Premium}}{\text{Group Total Premium}} \times \text{Total assessment required} = \text{Member's portion owed}$$

The Liquidator has therefore gathered member's audited premium data for policy years 2012 through 2018 which is shown in Table 1 (see, infra, p. iii). Using this premium data, the indicated policy year assessments shown in ¶ 1, and Shareholder Agreement formula, the Liquidator has calculated the "Member's portion owed" for each policy year with the results shown in Table 2 (see, infra, p. iv). The total amount shown for each member shall be the "Member's Corrective Assessment".

3. <u>Recognition of Priority Class 9 Claims</u>. Because the corrective assessments under the Shareholder Agreements fulfill the same functions as a premium assessment under an assessable policy and because such premium assessments give rise to priority class 9 claims -- see 8 V.S.A. § 7081(9) -- the Liquidator shall recognize each of the Member's Corrective Assessments as giving rise to a priority class 9 claim against the ETRRG estate. The Liquidator shall deem each member to have filed such a claim and shall promptly issue notices of determination allowing them in priority class 9 and report such determinations to the Court pursuant to 8 V.S.A. § 7082.

4. <u>Collection of Corrective Assessments</u>. The Liquidator shall credit each member with the value of any historical premium assessment payments then collect the balance of the Member's Corrective Assessment by means of setoff against such distributions as the Court may order from the ETRRG estate. See 8 V.S.A. § 7069. Setoff shall be applied on a proportional basis to all claims on which a distribution may be ordered. The Liquidator shall provide each member with an accounting statement identifying the Member's Corrective Assessment, any credits for historical premium assessment payments, the setoff collected with regard to each distribution from the ETRRG estate, and the net distribution to be made.

<u>Illustration 1</u> -- Member A is entitled to distribution of $500,000 in respect of claims falling in priority class 3, has a Member's Corrective Assessment of $120,000, and paid $20,000 in premium assessments prior to liquidation.

The Liquidator will credit the historical assessment payment ($120,000 - $20,000 = $100,000 balance) and then apply a 20% setoff ($100,000 balance / $500,000 distribution = 20%) to the distribution from each priority class 3 claim and will make payments totaling $400,000. If the Court orders a 50% distribution on priority class 9 claims, the member will receive a distribution of $60,000 (the $120,000 Member's Corrective Assessment * 50% = $60,000).

<u>Illustration 2</u> – Same as above except Member B is entitled to receive only $90,000 in respect of claims falling in priority class 3.

The Liquidator will credit the $20,000 historical assessment payment and will apply a 100% setoff to the priority class 3 claims, leaving $10,000 left to collect (i.e. $120,000 - $20,000 credit - $90,000 setoff = $10,000 remaining to collect). If the Court orders a 50% distribution on allowed priority class 9 claims, Member B will be entitled to receive $60,000 (the $120,000 Member's Corrective Assessment * 50%), and the Liquidator will setoff the $10,000 outstanding assessment then issue a distribution check to Member B in the amount of $50,000 on the priority class 9 claim.

Plan for Corrective Assessments

Data Tables

Table 1 – ETRRG Members' Audited Premium (2012-2018)

Member	2012	2013	2014	2015	2016	2017	2018
A&S Services Group	724,699	848,370	993,839	680,916	-	-	-
Bolus Freight Systems, Inc.	-	-	-	-	478,807	454,311	99,729
Bulls Eye Express Inc.	183,650	186,513	46,079	-	-	-	-
Calex Express, Inc.	442,213	463,418	453,940	497,152	468,332	474,359	125,572
Clark Transfer, Inc.	322,528	267,050	282,594	283,650	317,566	338,830	-
Finster Courier, Inc.	-	-	-	254,990	505,316	498,150	155,480
Fox Transportation	145,149	135,949	140,104	147,344	137,521	142,921	37,982
Frock Bros. Trucking	244,157	243,802	262,891	274,639	266,009	252,066	63,710
Grocery Haulers, Inc.[1]	256,496	261,032	6,499	-	-	-	-
H&H Transportation, Inc.	-	-	-	-	70,197	421,185	73,942
H.M. Kelly, Inc.	121,298	122,461	146,296	160,285	152,300	154,072	37,397
Hoffman Transport Inc.	311,104	323,414	319,769	364,624	369,727	429,867	128,098
Indian Valley Bulk Carriers	230,144	233,070	243,328	249,341	247,478	266,288	62,184
Inter-Coastal, Inc.	-	-	-	-	-	138,284	31,140
J.P. Donmoyer Inc.	535,257	553,554	130,186	-	-	-	-
Metropolitan Trucking, Inc.	497,835	1,194,804	1,187,954	1,305,276	1,159,109	1,260,467	-
Paul Miller Trucking, Inc.	322,259	298,209	332,820	489,770	492,118	509,652	-
Pleasant Trucking, LLC	198,869	206,948	224,541	246,355	170,100	185,658	43,250
Road Scholar Transport, Inc.	-	-	-	346,180	399,009	435,968	106,155
Star Freight, LLC	-	-	158,622	475,865	510,092	543,541	135,587
Transtech Leasing Inc.	52,615	-	-	-	-	-	-
Zimmerman Truck Lines	509,541	440,640	477,804	-	-	-	-
Total	**5,097,814**	**5,779,233**	**5,407,265**	**5,776,386**	**5,743,684**	**6,505,619**	**1,100,226**

[1] Grocery Haulers joined ETRRG on a pass-through basis (its deductible was equal to the reinsurance retention) and subject to the condition that it be exempt from assessment.

Table 2 – Member's Portion Owed (Corrective Assessment)

Member	2012	2013	2014	2015	2016	2017	2018	Total
A&S Services Group	52,361	230,085	369,330	16,609	-	-	-	668,385
Bolus Freight Systems, Inc.	-	-	-	-	121,016	51,943	119,928	292,888
Bulls Eye Express Inc.	13,269	50,584	17,124	-	-	-	-	80,977
Calex Express, Inc.	31,951	125,683	168,693	12,127	118,369	54,236	151,006	662,063
Clark Transfer, Inc.	23,303	72,426	105,018	6,919	80,263	38,740	-	326,669
Finster Courier, Inc.	-	-	-	6,220	127,716	56,956	186,971	377,863
Fox Transportation	10,487	36,870	52,066	3,594	34,758	16,341	45,675	199,791
Frock Bros. Trucking	17,641	66,121	97,696	6,699	67,233	28,820	76,614	360,823
Grocery Haulers, Inc.[1]	-	-	-	-	-	-	-	-
H&H Transportation, Inc.	-	-	-	-	17,742	48,156	88,918	154,816
H.M. Kelly, Inc.	8,764	33,212	54,367	3,910	38,493	17,616	44,972	201,334
Hoffman Transport Inc.	22,478	87,712	118,833	8,894	93,447	49,149	154,043	534,555
Indian Valley Bulk Carriers	16,628	63,211	90,426	6,082	62,549	30,446	74,779	344,120
Inter-Coastal, Inc.	-	-	-	-	-	15,811	37,447	53,257
J.P. Donmoyer Inc.	38,673	150,128	48,380	-	-	-	-	237,181
Metropolitan Trucking, Inc.	35,969	324,040	441,468	31,839	292,959	144,114	-	1,270,390
Paul Miller Trucking, Inc.	23,284	80,877	123,683	11,947	124,381	58,271	-	422,441
Pleasant Trucking, LLC	14,369	56,126	83,444	6,009	42,992	21,227	52,010	276,176
Road Scholar Transport, Inc.	-	-	-	8,444	100,848	49,846	127,656	286,794
Star Freight, LLC	-	-	58,947	11,607	128,923	62,145	163,049	424,673
Transtech Leasing Inc.	3,802	-	-	-	-	-	-	3,802
Zimmerman Truck Lines	36,815	119,505	177,562	-	-	-	-	333,882
Total	349,792	1,496,580	2,007,034	140,900	1,451,689	743,815	1,323,069	7,512,879