

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 INTERIM DISTRIBUTION

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 submits this Motion for Interim Distribution requesting that the Court enter an order establishing a 100% interim distribution rate on priority classes 1, 3, and 6; authorizing an interim distribution on allowed claims in priority classes 1, 3, and 6; and directing that he implement the Plan for Interim Distribution attached hereto as Exhibit A.

Background

1. On March 15, 2018, the Commissioner filed an *ex parte* Petition for Seizure Order pursuant to 8 V.S.A. § 7042(b), seeking, among other things, authorization to take possession and control of ETRRG. The Court granted the Commissioner's petition by entering the requested order ("Seizure Order") on March 29, 2018. Following entry of the Seizure Order, the Commissioner further investigated the Company's condition, concluded that rehabilitation

would be futile, and filed a Petition for Order of Liquidation on April 20, 2018. On May 7, 2018, the ETRRG board of directors voted unanimously to assent to the proposed Order of Liquidation. On May 15, 2018, the Court entered its Order of Liquidation (“Liquidation Order”) that, among other things, appointed the Commissioner as Liquidator (“Liquidator”), authorized him to appoint a special deputy liquidator, and approved the Plan of Liquidation. See Affidavit of J. David Leslie, Special Deputy Liquidator, in Support of Motion for Interim Distribution, ¶ 1 (hereinafter, “Leslie Aff, ¶ ___”).

2. Since the Liquidation Order entered, the Liquidator has investigated and issued notices of determination addressing more than 98% of the proofs of claim filed in the ETRRG liquidation and established reserves for the estimated value of the claims that are not yet fully determined. The Liquidator has also prepared a Plan of Corrective Assessments which the Court approved by its June 12, 2023, Order Approving Corrective Assessments Under Shareholder Agreements. The Liquidator now believes that the proceeding has reached a point at which substantial distributions can be made to estate creditors. Leslie Aff, ¶ 2.

Proposed Interim Distribution Rates

3. The Liquidator is charged with making distributions from estate assets, under the direction of the Court, “in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims.” 8 V.S.A. § 7083. This means that “[e]very claim in each [priority] class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment.” 8 V.S.A. § 7081.

4. ETRRG’s current assets and liabilities are reported on a simplified balance sheet in the Liquidator’s Eleventh Status Report and Sixth Report of Claims, filed herewith (“Status

Report”). That balance sheets is reproduced as Table 1. That balance sheet shows that ETRRG’s assets will be sufficient to pay all allowed/reserved claims in priority classes 1, 3, and 6 such that priority class 9 will be the residual class.

Table 1 – Simplified ETRRG Balance Sheet as of August 31, 2023

ASSETS	
Cash & Cash Equivalents	\$ 11,862,862
Assessments Receivable ¹	4,600,000
Reinsurance Receivable	<u>1,975,000</u>
Total Assets	\$ 18,437,862
LIABILITIES	
Priority Class 1	
Administrative Expense Reserve	\$ 133,298
Approved or Finally Determined	<u>9,204</u>
Subtotal (Class 1)	142,502
Priority Class 3	
Approved or Finally Determined	13,482,147
Reserved or Estimated	<u>1,300,00</u>
Subtotal (Class 3)	14,782,147
Priority Class 6	
Approved or Finally Determined	225,963
Reserved or Estimated	<u>32,595</u>
Subtotal (Class 6)	258,558
Priority Class 9	
Approved or Finally Determined	400,000
Reserved or Estimated	<u>7,512,879</u>
Subtotal (Class 9)	<u>7,912,879</u>
Total Liabilities	\$ 23,096,086

5. The liquidation statutes require that claim be paid in full for a class (or that adequate funds be retained as reserve) before claims in subsequent classes receive any payment. See 8 V.S.A. § 7081. For purposes of making a distribution, therefore, the Liquidator proposes to consider only assets that are currently liquid or can be realized (through setoff) during the

¹ The Plan for Corrective Assessments, contemplates that the Liquidator will impose assessments totaling \$7,512,879. Approximately \$2.65 million of the corrective assessments has already been converted to cash (i.e. funds contributed by members pursuant to improper pre-liquidation assessments) and the Liquidator anticipates that an additional \$4.6 million can be collected by setoff.

course of a distribution. Applying this premise, the Liquidator has prepared various “waterfall” calculations showing the cash that would be disbursed, retained in reserves, and available for distribution to lower priority classes based on different distributions percentages. These calculations indicate that it will be possible to make 100% distributions on claims falling in priority classes 1, 3, and 6 but that the cash & cash equivalents remaining after making such distributions (and funding associated reserves) would be approximately \$548,000 and therefore insufficient to make a material distribution on the estimated \$7.9 million value of claims falling in priority class 9. A summary of the “waterfall” calculation assuming these distribution percentages is presented as Table 2. Leslie Aff, ¶ 3.

Table 2 – ETRRG Claim Distribution Waterfall as of August 31, 2023

Cash & Cash Equivalents	\$ 11,862,862
Priority Class 1	
Dist. on Allowed Claims	(9,204)
Admin. Expense Reserve	<u>(133,298)</u>
Remaining Cash	\$ 11,720,360
Priority Class 3	
Dist. on Allowed Claims	\$ (13,482,147)
Claim Reserve	(1,300,000)
Setoff Recoveries	<u>3,868,689</u>
Remaining Cash	\$ 806,902
Priority Class 6	
Dist. on Allowed Claims	\$ (225,963)
Claim Reserve	<u>(32,595)</u>
Remaining Cash	\$ 548,345
Priority Class 9	
Approved or Finally Determined	\$ 400,000
Reserved or Estimated	<u>7,512,879</u>
Total	\$ 7,912,879

6. *Priority Class 1 (100% proposed distribution)* – Priority Class 1 includes the cost and expenses of administration, including the actual and necessary costs of preserving or recovering the assets of the insurer as well as compensation for all services rendered in

rehabilitation and liquidation. See 8 V.S.A. § 7081. Pursuant to the Plan of Liquidation approved by the Court on May 15, 2018, the Liquidator has paid most administrative expenses in the normal course. There are, however, a handful of proofs of claim that have been allowed in the proceeding as priority class 1 claims. In addition, the Liquidator has established an administrative expense reserve that he has drawn down as costs are paid in the normal course pursuant to the Plan of Liquidation (§ 2.a). The ETRRG estate held cash and cash equivalents of \$11,878,614 in its accounts as of August 31, 2023. This is well in excess of the \$9,204 in allowed priority class 1 claims and remaining \$133,298 administrative expense reserve. The Liquidator therefore proposes to establish a 100% interim distribution rate on priority class 1 claims. This would leave \$11,720,360 available for distribution on claims falling in lower priority classes. Leslie Aff, ¶ 4.

7. *Priority Class 2 (empty)* -- Priority class 2 includes “[t]he administrative expenses of guaranty associations.” 8 V.S.A. § 7081(2). ETRRG is a risk retention group and therefore prohibited by federal law from participating in the guaranty association system such that priority class 2 is empty in this proceeding so there is no need to establish an interim distribution rate. See 8 V.S.A. § 6054(a); 15 U.S.C.A. § 3902(a).

8. *Priority Class 3 (100% proposed distribution)* -- Priority class 3 includes “[a]ll claims under policies”. 8 V.S.A. § 7081. The Liquidator has resolved more than 98% of the proofs of claim filed in this proceeding that seek payment under ETRRG policies. The value of these claims – either allowed by the Court or reported by the Liquidator for allowance in the Sixth Report of Claims filed as Exhibit A to the Status Report – is \$13,482,147. The Liquidator has also established reserves totaling \$1.3 million for the remaining open claims asserting policy-related liabilities. The total value of policy-related claims therefore exceeds the cash and cash

equivalents on hand as of August 31, 2023. The Liquidator calculates, however, that if a 100% distribution percentage were established for priority class 3 claims, approximately \$3.87 million of the “Assessments Receivable” could be collected through setoff. The combination of cash, cash equivalents, and setoffs is therefore sufficient to permit a 100% distribution on priority class 3 claims. This would leave \$806,902 available for distribution on claims falling in lower priority classes. Leslie Aff, ¶ 5.

9. *Priority Class 4 (empty)* -- Priority class 4 includes “[c]laims of the federal government other than those included in Class 3.” 8 V.S.A. § 7081(4). The federal government has not submitted any POCs so priority class 4 is empty in this proceeding and there is no need to establish an interim distribution rate. Leslie Aff, ¶ 6.

10. *Priority Class 5 (empty)* -- Priority class 5 includes “[d]ebts due to employees for services, benefits, [etc...] for services performed...”. 8 V.S.A. § 7081(5). No ETRRG employees have submitted POCs seeking compensation for services performed so priority class 5 is empty in this proceeding and there is no need to establish an interim distribution rate. Leslie Aff, ¶ 6.

11. *Priority Class 6 (100% proposed distribution)* -- Priority class 6 includes “[c]laims of any person... except those specifically classified elsewhere” in the priority statute. 8 V.S.A. § 7081. In this proceeding, priority class 6 consists primarily of ETRRG’s general unsecured pre-liquidation obligations. The value of allowed priority class 6 claims is \$225,963. The Liquidator has also established a reserve of \$32,595 in respect of pre-liquidation assessments paid by two ETRRG members that exceed the value of the corrective assessments and, as a result, may not fit within any of the other priority classes established by statute. The cash and cash equivalents available after paying or setting aside reserves for claims falling in

priority classes 1 through 5 is sufficient to permit a 100% distribution on priority class 6 claims. This would leave \$548,345 available for distribution on claims falling in lower priority classes. Leslie Aff, ¶ 7.

12. *Priority Class 7 (empty)* -- Priority class 7 includes “[c]laims of any state or local government for a penalty or forfeiture...”. 8 V.S.A. § 7081(7). No state or local government has submitted a POC asserting such obligations so priority class 7 is empty in this proceeding and there is no need to establish an interim distribution rate. Leslie Aff, ¶ 8.

13. *Priority Class 8 (empty)* -- Priority class 8 includes “[c]laims filed late or any other claims” other than those in priority classes 9 and 10. 8 V.S.A. § 7081(8). A number of POCs were filed after the claim filing deadline but all were received early enough in the proceeding that they did not prejudice the orderly administration of the estate and could be treated, pursuant to 8 V.S.A. § 7074, as if they were not late. There are, accordingly, no claims requiring distribution in priority class 8 and no need to establish an interim distribution rate. Leslie Aff, ¶ 8.

14. *Priority Class 9 (consideration deferred)* – Priority class 9 includes “[s]urplus or contribution notes, or similar obligations, and premium refunds on assessable policies.” 8 V.S.A. § 7081(9). The value of allowed priority class 9 claims is \$400,000. This reflects a very small portion (approximately 5.1%) of the anticipated priority class 9 claims which are expected to total more than \$7.9 million.² Further, only \$548,345 in cash and cash equivalents would be available to fund a distribution on priority class 9 after 100% disbursements on claims in the preceding priority classes. That would be sufficient only for a 6.9% distribution. The Liquidator believes that under these circumstances, it would not be productive to establish a

²The Plan for Corrective Assessments (¶ 3) provides that the Liquidator shall recognize each of the member’s corrective assessments -- \$7.5 million in total -- as giving rise to a priority class 9 claim.

distribution percentage for priority class 9 and that proceeding to make disbursements would be inefficient. In addition, because substantial work remains to be performed in this proceeding retaining the funds within the ETRRG estate would be reasonable and prudent to provide cushion against any unexpected developments. The Liquidator therefore proposes to defer establishment of a distribution percentage for priority class 9 and to periodically re-evaluate the possibility as assets are collected and the final claims are determined.³ Leslie Aff, ¶ 9.

15. For the foregoing reasons, the Liquidator requests that the Court establish a 100% interim distribution rate on priority classes 1, 3, and 6 while deferring action on priority class 9.

Proposed Interim Distribution

16. Distributions are to be made “in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditions completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims.” 8 V.S.A. § 7083. The Liquidator has calculated -- as shown in the “waterfall” presented above in Table 2 -- that a 100% distribution on allowed claims in priority classes 1, 3, and 6 would result in an actual disbursement of approximately \$9.85 million. This would leave the estate with cash & cash equivalents of approximately \$2.03 million, \$1.47 million of which would be held as reserves for claims in priority classes 1, 3, and 6. See, supra, Table 1 (reporting reserve figures). The Liquidator believes that, under the circumstances, distributions at the proposed rates would assure the proper recognition of priorities, balance the expeditious completion of the liquidation against the protection of unliquidated and undetermined claims, and otherwise be reasonable,

³ For informational purposes, the Liquidator notes that the ETRRG estate anticipates receipt of substantial additional reinsurance proceeds and assessments (through setoff) such that it is reasonable to anticipate that the ultimate distribution on priority class 9 may be in the range of 40-45%.

appropriate, and in the best interests of policyholders, creditors, and the public. See 8 V.S.A. §§ 7056, 7081, 7083; Leslie Aff, ¶ 10.

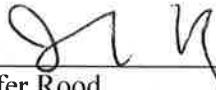
17. The attached Plan for Interim Distributions (Exhibit A) describes the Liquidator's proposed methodology for conducting the proposed interim distributions.

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

- (a) Granting this Motion for Interim Distribution;
- (b) Establishing a 100% interim distribution rate on priority classes 1, 3, and 6;
- (c) Authorizing an interim distribution on claims allowed in priority classes 1, 3, and 6;
- (d) Directing the Liquidator to implement the Plan for Interim Distributions; and,
- (e) Granting such other and further relief as justice may require.

Dated in Montpelier, Vermont, this ^{10th} day of October, 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

EXHIBIT A

Plan for Interim Distribution

The Commissioner of the Vermont Department of Financial Regulation, in his role as Liquidator of Elite Transportation Risk Retention Group, Inc. ("ETRRG"), has proposed making an interim distribution consisting of a 100% distribution on allowed claims in priority classes 1, 3, and 6. Distributions may be made, under the supervision of the Superior Court of Washington County ("Court"), "in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditions completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims." 8 V.S.A. § 7083; see also 8 V.S.A. § 7081 ("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.") The Liquidator's proposed distributions will be made in accordance with the following plan:

1. Distribution on Allowed Priority Class 1 Claims. The Liquidator will:
 - Maintain the existing administrative expense reserve;
 - Request payment instructions from each claimant with an allowed priority class 1 claim;
 - Make a 100% distribution on allowed priority class 1 claims;
 - Pay additional administrative expense as they are incurred; and,
 - Draw down the administrative expense reserve as payments are made.

2. Distribution on Allowed Priority Class 3 Claims. The Liquidator will:
 - Establish a Priority Class 3 Claim Reserve in the amount of \$1,300,000;
 - Request payment instructions from each claimant with an allowed priority class 3 claim
 - Make a 100% distribution on allowed priority class 3 claims;
 - Apply to that distribution the corrective assessments contemplated by the Plan for Corrective Assessments approved by the Court on June 12, 2023;
 - Report future claim determinations to the Court;
 - Make 100% distributions if and when additional claims are allowed in priority class 3, applying any remaining corrective assessments; and,
 - Draw down the Priority Class 3 Claim Reserve as claims are determined and disbursements made.

3. Distribution on Allowed Priority Class 6 Claims. The Liquidator will:
 - Establish a Priority Class 6 Claim Reserve in the amount of \$32,594.68;
 - Request payment instructions from each claimant with an allowed priority class 6 claim;
 - Make a 100% distribution on allowed priority class 6 claims;
 - Report future claim determinations to the Court;
 - Make 100% distributions if and when additional claims are allowed in priority class 6; and,
 - Draw down the Priority Class 6 Claim Reserve as claims are determined and disbursements made.

4. Priority Class 9. The Liquidator will:

- Defer requesting authority to make a distribution on allowed priority class 9 claims;
- Periodically re-evaluate whether ETRRG's liquidity and the level of uncertainty surrounding ultimate distributions will permit an interim distribution to be ordered on priority class 9 claims; and,
- Make proposals for interim and final distributions when he deems such distributions could be made in a manner that would "assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims." 8 V.S.A. § 7083.

5. Competing Claims for Policy Limits. In cases where there are competing claims for policy limits, "each claim as allowed shall be reduced in the same proportion so that the total equals the policy limit. 8 V.S.A. §7077(d). In cases where all such competing claims have been allowed, the Liquidator will divide the policy limits by the total amount in which the relevant claims have been allowed. The resulting quotient will then be applied to the allowed value of those claims relating to the incident to produce an initial claim distribution. In cases where one or more of the potential competing claims remains "open", the Liquidator shall conduct the same calculation using the conservative assumption that any such "open" claims could be allowed for policy limits. The Liquidator shall then conduct fresh calculations and make supplemental distributions as each potentially competing claim is allowed by the Court.