

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

COMMISSIONER OF THE
DEPARTMENT OF FINANCIAL
REGULATION

PLAINTIFF,

v.

NEELEY INCORPORATED CELL,
DEFENDANT.

CIVIL DIVISION

DOCKET NO. 24-CV-00275

**PETITION FOR ORDER OF LIQUIDATION FOR THE NEELEY INCORPORATED
CELL**

Now comes the State of Vermont Department of Financial Regulation (the “Department”), by its Commissioner Kevin J. Gaffney (the “Commissioner”), pursuant to 8 V.S.A. § 7055(a) and petitions the Court for an Order of Liquidation for the Neeley Incorporated Cell (“Neeley” or the “Cell”) in the form filed herewith and approval of the Plan of Liquidation attached hereto as Exhibit A. As grounds therefor, the Commissioner relies on the affidavits of J. David Leslie, Special Deputy Commissioner and Leslie Kaderavek, Vice President of Marsh McLennan Agency Third-Party Administration Services (“MMA TPA”), and states as follows:

Background

1. This Court has exclusive jurisdiction of this action pursuant to 8 V.S.A. § 7032(e).

2. Petitioner is the Commissioner of the Vermont Department of Financial Regulation and is currently acting pursuant to a seizure order entered on January 27, 2024 by this Court concerning Neeley. The Commissioner appointed J. David Leslie as Special Deputy Commissioner and his designee pursuant to that seizure order. Pursuant to 8 V.S.A. § 7032(a), the Commissioner has sole authority to commence a delinquency proceeding under Chapter 145 of the Vermont Statutes. Affidavit of J. David Leslie, Special Deputy Commissioner, filed herewith, at ¶ 1 (hereinafter, “Leslie Aff., ¶ ___”).

3. Neeley is an incorporated protected cell within AssureCap Indemnity, LLC (the “Sponsor”), a sponsored captive insurance company pursuant to Title 8, Chapter 141 of the Vermont Statutes Annotated. Marsh McLennan Agency is the Sponsor’s beneficial owner. Leslie Aff. ¶ 2.

4. Pursuant to 8 V.S.A. §§ 6031-6039, a Vermont sponsored captive insurance company may establish protected cells within the Sponsor through participation agreements whereby the assets and liabilities of any one cell are financially and legally protected from the assets and liabilities of other cells. Should any individual cell become insolvent, its creditors will only have access to the assets of that specific cell and have no recourse against the assets of other cells within the sponsored captive insurance company. Neeley was formed to provide general and professional liability insurance to Petersen Health Care LLC (“Petersen” or “Participant”) and its affiliates and subsidiaries, primarily assisted living facilities and nursing homes in Illinois. Leslie Aff. ¶ 3.

5. The records of the Department of Financial Regulation (the “Department”) show that the Cell was incorporated by the Vermont Secretary of State effective January 8, 2021, and on January 12, 2021, was authorized by the Department to conduct the business of an

incorporated protected cell pursuant to its business plan and Title 8, Chapter 141 of the Vermont Statutes Annotated. The Cell's sole shareholder is Neeley, LLC, a Delaware limited liability company created by Peterson for the sole purpose of the ownership of the Cell. The Cell itself is a "domestic insurer" within the meaning of 8 V.S.A. §§ 7055(a) and 7056. Leslie Aff. ¶ 4.

6. The Department's records show that the Sponsor and Cell utilize the services of third parties in the normal course of operation. AIG Insurance Management Services, Inc., Burlington, Vermont, is the captive management firm, whose responsibilities include but are not limited to, accounting, reporting, and compliance matters. Michael Maglaras, Michael Maglaras & Company, is the program consultant and has been a board member of the Cell. Marsh McLennan Agency is the program administrator and insurance co-broker. HUB International is an insurance co-broker, M&T Bank and Wilmington Trust provide cash and investment services. Paul Frank + Collins, Burlington, Vermont, has provided legal services. Leslie Aff. ¶ 5.

Reasons for Liquidation of Neeley

7. On December 13, 2023, the Department was notified by the Cell's consultants that Petersen failed to pay the premium due in accordance with the terms of the insurance policy issued by the Cell for the policy year January 1, 2023 through December 31, 2023, after repeated requests, including attempts to impose a payment schedule. The outstanding premium balance as of December 31, 2023 was \$1,401,947.60. Accordingly, the Cell did not issue a policy to Petersen for the policy year January 1, 2024 through December 31, 2024, so no coverage has been afforded to Petersen after December 31, 2023. Leslie Aff. ¶ 6.

8. The Department was also advised on December 13, 2023 that Petersen had been generally non-responsive in matters related to the management and governance of the Cell. For example, Mark Petersen, the President of the Cell, failed to attend the Cell's annual Board of

Directors meeting which had been scheduled for December 7, 2023. The original Board of Directors meeting was scheduled for November 28, 2023, and was rescheduled to December 7, 2023, at the request of Mark Petersen through HUB International. In addition, documents in preparation for the original meeting were sent to directors on November 20, 2023, with no response. Petersen's non-participation in the governance and administrative processes of the Cell has resulted in the inability to constitute a quorum or conduct any business related to corporate governance. Michael Maglaras resigned his Board position on December 7, 2023, when Mark Petersen did not attend the annual Board of Directors meeting of the Cell. Leslie Aff. ¶ 7.

9. AIG Insurance Management Services, Inc. provided the Special Deputy Commissioner with unaudited financial statements for the Cell as respects the period ending December 31, 2023 ("2023 Financial Statements"). (The 2023 Financial Statements are attached as Exhibit A to the Leslie Affidavit.) The 2023 Financial Statements treat the \$1,401,947.60 of unpaid 2023 Petersen premium as uncollectable and it is therefore written off as a bad debt. The 2023 Financial Statements report Total Shareholder Equity of \$339,960.45 as of December 31, 2023, which compares to \$1,448,173.47 as of December 31, 2022. Pursuant to its capital management plan, the Cell is required to maintain Total Shareholder Equity in a ratio of total loss reserves to Total Shareholder Equity of 5:1. The ratio of Total Shareholder Equity to total loss reserves reported in the 2023 Financial Statements is 8.5:1 and therefore significantly noncompliant with the capital plan. Leslie Aff., ¶ 8.

10. The Special Deputy Commissioner consulted with Leslie Kaderavek, Vice President of MMA TPA Services ("MMA TPA"), who is responsible for managing the professional and general liability claims for the Cell. Leslie Aff., ¶ 9. As described in the

Affidavit of Leslie Kaderavek, which is also submitted herewith in support of the Commissioner’s “Petition for Order of Liquidation for the Neeley Incorporated Cell” (hereinafter, “Kaderavek Aff., ¶__”), the policies issued by the Cell to Petersen had limits of \$500,000 per occurrence, subject to a \$100,000 indemnity only self-insured retention. Kaderavek Aff. ¶ 3. There are twenty-one active professional liability claims and one active general liability claim under the Neeley policies. Kaderavek Aff. ¶ 4. Petersen has been non-cooperative in authorizing reserve increases, granting settlement authority or funding an agreed settlement. Kaderavek Aff. ¶¶ 7-14. Petersen’s conduct severely inhibited MMA TPA’s ability to effectively manage claims. Kaderavek Aff. ¶13. Petersen has in the past submitted at least one new Neeley claim (lawsuit) to MMA TPA per month but it has not submitted any claims since October 30, 2023. Kaderavek Aff. ¶¶ 15-16.

11. For the reasons described above, the Special Deputy Commissioner concluded that Neeley is in an impaired financial condition and that it is not presently possible to determine whether it is solvent due to Petersen’s non-cooperation in facilitating the timely adjustment and resolution of claims. He is also concerned that there may well be unreported claims which means that the universe of Neeley’s claim obligations is at present unknowable. A single new claim could exhaust the reported Total Shareholder Equity if it was in an amount equal to the policy per occurrence limit. There is also risk of adverse development beyond the loss reserve amounts carried at December 31, 2023. In general, the current situation prevents the timely determination of claims and the consequent calculation of Neeley’s liabilities. Leslie Aff., ¶10.

12. While a Seizure Order grants the Commissioner broad authority to investigate an insurer’s financial and operational circumstances and prevent the dissipation of assets, it does not empower the Commissioner to take the proactive steps that are necessary in this situation –

enjoin claims against Neeley and channel them into a Vermont liquidation proceeding, set a deadline for the submission of claims against Neeley, determine those claims, and distribute the available assets in accordance with the statutory priorities based on claims as allowed by the Court. It is possible that Neeley's assets may be adequate to fully fund all its obligations but that can only become known after its claim obligations are determined. Leslie Aff., ¶ 11.

13. An effort to rehabilitate Neeley would be futile because it would not cause a crystallization of the Cell's liabilities; this would only occur in a liquidation. Also, a rehabilitation would not be in the best interest of Neeley's creditors because it would not resolve the claim administration and resolution "logjam" that currently exists. A liquidation proceeding will afford third-party claimants, who hold the principal claims against Neeley, an opportunity to have their claims adjudicated followed by a distribution of assets. Leslie Aff., ¶ 12.

Plan of Liquidation

14. In order to facilitate the efficient determination of Neeley's obligations, the Commissioner is proposing a Plan of Liquidation. Pursuant to the Plan of Liquidation, the liquidator would issue notice in the manner specified by statute and set a claim filing deadline not more than six months after entry of the liquidation order. The policyholder will be responsible for defending claims against it and paying all claims and defense costs. The policyholder may file a proof of claim for such claim and defense costs. The third-party claimants may submit their claims directly to the liquidator who would investigate and make a recommendation. As proofs of claim are received, the liquidator would review them and make determinations as to priority.¹ (The intention would be to have MMA TPA continue to adjust such claims but on behalf of the liquidator.)

¹ A proposed Proof of Claim form and Notice of Liquidation are attached to the Plan of Liquidation.

15. In light of the Cell's condition and relatively small number of claims, the Commissioner anticipates that the liquidation process can be a relatively brief with a material distribution being made very early in the process. This will permit estate creditors to promptly benefit from the liquidation process. The Plan of Liquidation, attached as Exhibit A, is designed to accomplish these objectives.

16. Pursuant to the Plan of Liquidation, the liquidator would issue notice in the manner specified by statute and set a claim filing deadline not less than three months after entry of the liquidation order. See 8 V.S.A. § 7061. The Cell's sole policyholders will be responsible for defending its claims and paying all claims and defense costs. Third-party claimants may file claims directly against Neeley in the liquidation proceeding. As proofs of claim are received, the liquidator would review them and make determinations as to priority. See 8 V.S.A. §§ 7074 (filing of claims with liquidator and establishment of deadline); 7075 (proof of claim); and 7081 (defining priority classes). Claimants receiving notices of determination would have the standard statutory rights to request reconsideration and to file objections with the Court. See 8 V.S.A. § 7078.

17. The proposed liquidation order provides for a stay of proceedings involving claims heretofore defended by Neeley for a period of sixty days from the date of the entry of the order for liquidation. See 8 V.S.A. § 7033(a)(6) and (a)(11). Such a brief stay will facilitate the orderly transition of the defense of claims to the Cell's sole policyholder.

18. As proofs of claim are received and determined, the liquidator will determine whether an interim distribution is prudent and, if so, make a recommendation to the Court.

19. As discussed above, the Commissioner believes grounds exist for entry of an order of liquidation. The Commissioner therefore requests entry of such an order and files

herewith a proposed form of order appointing him as liquidator, vesting him with the authority provided for by statute, and directing implementation of the Plan of Liquidation.

20. The President of AssureCap Indemnity, LLC and representing Marsh McLennan Agency as the sponsored captive program's beneficial owner, has no objection to entry of the proposed Order of Liquidation submitted herewith.

WHEREFORE, the Commissioner requests that this Court enter an order in the form filed herewith:

- A. Finding that, pursuant to 8 V.S.A. § 7055, attempts to rehabilitate Neeley would be futile and would substantially increase the risk of loss to creditors, policyholders, or the public;
- B. Appointing the Commissioner of the Department of Financial Regulation and his successors in office as liquidator of Neeley pursuant to 8 V.S.A. § 7057;
- C. Vesting the liquidator with the powers and authority contemplated by 8 V.S.A. ch. 145; and,
- D. Approving the Plan of Liquidation attached hereto as Exhibit A.

Dated in Montpelier, Vermont, this 15th day of February 2024.

VERMONT COMMISSIONER OF THE
DEPARTMENT OF FINANCIAL
REGULATION AS REHABILITATOR OF
EMERGENCY PHYSICANS INSURANCE
EXCHANGE RISK RETENTION GROUP

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