

THE TEXAS DEPARTMENT OF INSURANCE, <i>Plaintiff,</i>	§ § § §	IN THE DISTRICT COURT OF
v.	§ §	TRAVIS COUNTY, TEXAS
BRIGHT HEALTHCARE INSURANCE COMPANY OF TEXAS <i>Defendant.</i>	§ § §	455th JUDICIAL DISTRICT

**SPECIAL DEPUTY RECEIVER’S PLEA TO THE JURISDICTION AND, ALTERNATIVELY, RESPONSE TO BRIGHT HEALTH MANAGEMENT, INC.’S CROSS-MOTION FOR ENTRY OF ORDER GOVERNING ELECTRONICALLY STORED INFORMATION**

CANTILO & BENNETT, L.L.P., the Special Deputy Receiver of Bright Healthcare Insurance Company of Texas (the “SDR” and “BHICOT,” respectively), files its *Plea to the Jurisdiction and, Alternatively, Response to Bright Health Management, Inc.’s Cross-Motion for Entry of Order Governing Electronically Stored Information* (the “BHM ESI Motion”).

**I. INTRODUCTION**

1.1 The SDR files this Response to the BHM ESI Motion. As more fully described below, the Court lacks jurisdiction to reduce or limit Texas Insurer Receivership Act, Chapter 443 of the Texas Insurance Code (“TIRA’s”) express statutory mandates that the SDR<sup>1</sup> holds title to all of BHICOT’s business records and that Bright Health Management, Inc. (“BHM”) is required to turn over all of BHICOT’s business records in its possession, custody, and control. BHM’s motion is untimely to the extent that it seeks to modify a permanent injunction against it entered on November 29, 2023, whose writ was served on it on December 6, 2023. To the extent BHM’s

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<sup>1</sup> While the statute and the Permanent Injunction grant certain powers and property rights to the “Liquidator,” Tex. Ins. Code §443.154(a) provides that the Liquidator may appoint a Special Deputy Receiver to “act for the Liquidator.” The appointed Special Deputy Receiver has “all powers of the liquidator.” See Tex. Ins. Code §443.154(a). Accordingly, the SDR may exercise all powers of the Liquidator and will be referenced as the owner/holder of those rights for convenience.

motion could be characterized as a motion for *relief* from stay (since it seeks to retain property of the estate), BHM does not and cannot meet the statutory requirements for such relief. Finally, BHM's ESI Motion is wrong as a matter of fact and law and should be denied if it has not already been dismissed.

1.2 The SDR incorporates, by reference, the *Motion to Enforce Permanent Injunction Against Bright Health Management, Inc.* (the "Motion to Enforce"), including but not limited to SDR Exhibits 1 through 7.

1.3 While the Court lacks jurisdiction to grant the BHM ESI Motion, the motion falls under the subject matter that has been referred to the Special Master appointed in this proceeding in accordance with the Order of Reference to Master entered on November 29, 2023.

## II. PLEA TO THE JURISDICTION

2.1 The SDR denies that this Court has jurisdiction over BHM's ESI Motion. TEX. INS. CODE § 443.151(a) vests ownership and title of BHICOT records in the SDR. BHM's ESI Motion seeks to breach this express statutory mandate by limiting the SDR's recovery of BHICOT records to those allegedly convenient and inexpensive to find and not commingled. BHM's motion further seeks to limit the SDR's property rights in all privileges, including but not limited to the attorney-client communication privilege, held by BHICOT and now held by the SDR. This Court has no jurisdiction to change the Legislature's instruction that the entry of the order of liquidation vests title to all of BHICOT books and records in the SDR.

2.2 Likewise, this Court lacks jurisdiction to change BHM's express statutory obligations under TIRA. The BHM ESI Motion seeks to narrow and limit its statutory obligations as a party in interest, named enjoined party, fiduciary, and holder of property of the estate to immediately turn over BHICOT's books and records, to cooperate with the SDR in the recovery

of the records and related information, and to turn over all records that relate to or pertain to BHICOT in its possession.

2.3 The Court lacks jurisdiction to enter an “ESI” order that in any way limits the SDR’s right to ownership and control of BHICOT’s records. The SDR denies that the Texas Rules of Civil Procedure govern any aspect of the SDR’s right to ownership, possession, and control of BHICOT’s records.

### **III. RESPONSE TO THE BHM ESI MOTION**

Pleading solely in the alternative and expressly subject to its Plea to the Jurisdiction, the SDR responds to BHM’s ESI Motion, as follows:

3.1 The SDR denies that the Texas Rules of Civil Procedure govern any aspect of its right to possession and control of BHICOT’s records. TIRA and the Permanent Injunction clearly vest the SDR with control of books and records of the BHICOT estate. TIRA also expressly requires all parties in interest to cooperate with the SDR, including the obligation to turn over all records of, or pertaining to, BHICOT. Nothing in TIRA or the Permanent Injunction subjects these obligations to limitations applicable in civil discovery in litigation. The methods and procedures of civil discovery simply do not apply to turnover of property (including records) owned by the estate.

3.2 The SDR denies that BHM has standing to seek to limit the SDR’s property rights in BHICOT’s records. TIRA clearly provides that books and records are property of the BHICOT estate and vests the SDR with title to them. *See, e.g.*, TEX. INS. CODE §§ 443.010(a)(2)(B) (requiring cooperation with the SDR including turnover of records of or pertaining to the insurer); 443.017(a) (the SDR may immediately take possession of all records of insurer and persons holding such records required to release them to the SDR); 443.151(a) (liquidation order vests ownership of records in Liquidator); and 443.154(n) (the SDR is entitled to take possession of

records). Moreover, the Management Services Agreement (the “MSA”) between BHM and BHICOT expressly defined what constituted records of BHICOT. *See* SDR Exhibit 2 at ¶¶ 5, 9. BHM cannot complain about the breadth of that definition now, after it has received millions of dollars to create and maintain those records.

3.3 The SDR denies that BHM has any right to limit or control documents that are held in any alleged joint privilege with BHICOT. While Texas law recognizes joint privileges vis-a-vis third parties, such privileges are not effective as between the joint privilege holders. Moreover, BHM has failed to support its allegation that any non-joint privilege exists.

3.4 The SDR denies that it has authorized BHM or its counsel to review any document that is privileged solely to BHICOT and denies that it has authorized any of its former counsel to take any action in conflict with BHICOT or the SDR, as the successor, the BHICOT’s attorney-client relationships.

3.5 The SDR denies that BHM is a non-party. It is a “party in interest” that was expressly named and enjoined in the Permanent Injunction, served with this Court’s writ of injunction, and appeared in this proceeding without objection to personal or subject matter jurisdiction, process, or citation. It is before the Court for all purposes.

3.6 The SDR denies that BHM’s ESI Motion is timely. The Receivership Court entered the Permanent Injunction on November 29, 2023. BHM was served with a Writ of Injunction for the Permanent Injunction on December 6, 2023. *See* SDR Exhibit 3 Return of Service on BHM. The time to file a motion for new trial or notice of appeal has expired. Accordingly, the BHM ESI Motion constitutes an improper attempt to collaterally attack a final judgment.

3.7 The SDR denies that BHM has complied with all conditions precedent; no conditions precedent have been waived.

3.8 BHM's conduct violates the automatic stay arising under TEX. INS. CODE § 443.008(c)(3) because it is an "act to obtain or retain possession of property of the insurer or of property from the insurer or to exercise control over property or records of the insurer." To the extent not already dismissed for lack of jurisdiction, the motion should be handled as a motion for relief from stay under TEX. INS. CODE § SDR 443.008(h) since it is an act to retain property of the estate. BHM cannot meet its burden of proof of "clear and convincing evidence" on each issue. *See* TEX. INS. CODE 443.008(j). The SDR denies that there is "cause" for relief from the stay. The SDR asserts and BHM admits that the BHICOT has "equity" in the property in question, since sole right and title to, and possession of, was awarded to the Liquidator in the Permanent Injunction.

3.9 The SDR asserts that BHM's ESI Motion should be denied under the defenses of estoppel, unclean hands, and for violations of its fiduciary obligation. BHM created its own alleged burden by failing to comply with its fiduciary duties under the MSA. From the MSA's execution, BHM had a fiduciary duty to maintain BHICOT's books and records in a way that allowed BHM to turn over these books and records immediately to the receiver upon request. BHM's failure to maintain separate books and records is not an excuse for its failure to turn over BHICOT's books and records. All BHM's alleged issues with turning over the records are caused by its own wrongful conduct.

#### **IV. NOTICE**

4.1 The SDR served this Response to BHM's ESI Motion on all known parties in interest, including the affected guaranty association, and all other individuals and entities identified by the SDR in the Certificate of Service by e-mail and as noted, by mail or overnight delivery to certain government agencies.

## V. OFFER OF PROOF AND VERIFICATION

5.1 The Motion to Enforce is verified by the Affidavit and certification pursuant to TEX. INS. CODE § 443.017(b) by Michael P. Marcin, Partner in CANTILO & BENNETT, L.L.P., SDR of BHICOT.

## VI. NOTICE OF ELECTRONIC SERVICE REQUIREMENT

6.1 All pleadings filed in response to the Motion to Enforce or regarding this estate shall be served by e-mail on the undersigned counsel and all parties shown in the attached Certificate of Service.

## PRAYER

WHEREFORE, PREMISES CONSIDERED, CANTILO & BENNETT, L.L.P., solely in its capacity as SDR of BHICOT, prays that this Court sustain the SDR's Plea to the Jurisdiction, alternatively, deny BHM's motion for relief from stay, deny BHM's ESI Motion, grant the Motion to Enforce, and grant the SDR such other and further relief to which it may justly entitled.

Respectfully submitted,

/s/ Greg Pierce  
Gregory A. Pierce  
State Bar No. 15994250  
P.O. Box 40  
Austin, Texas 78767  
Tel: (512) 474-2154  
[gpierce@gpiercelaw.com](mailto:gpierce@gpiercelaw.com)

-and-

Christopher Fuller  
State Bar No. 07515500  
FULLER LAW GROUP  
4612 Ridge Oak Drive  
Austin, Texas 78731  
Telephone: (512) 470-9544  
[cfuller@fullerlaw.org](mailto:cfuller@fullerlaw.org)

**Attorneys for CANTILO & BENNETT, L.L.P.,  
Special Deputy Receiver of  
Bright Healthcare Insurance Company of Texas**

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the *Plea to the Jurisdiction and, Alternatively, Response to Bright Health Management, Inc.'s Cross-Motion for Entry of Order Governing Electronically Stored Information* was sent in accordance with TEX. INS. CODE § 443.007(d) on August 12, 2024 to:

*Via Email:* [SpecialMasterClerk@tdi.texas.gov](mailto:SpecialMasterClerk@tdi.texas.gov)

Tom Collins, Receivership Master  
c/o Special Master's Clerk RLO MC-FRD  
1601 Congress Avenue  
Austin, Texas 78701

*Via Email:* [Edwin.Hartsfield@tdi.texas.gov](mailto:Edwin.Hartsfield@tdi.texas.gov)

Edwin Hartsfield  
TEXAS DEPARTMENT OF INSURANCE  
RLO MC-FRD  
PO Box 12030  
Austin, TX 78711-2030

*Via Email:* [John.Walker@tdi.texas.gov](mailto:John.Walker@tdi.texas.gov)

John Walker  
TEXAS DEPARTMENT OF INSURANCE  
RLO MC-FRD  
PO Box 12030  
Austin, TX 78711-2030

*Via Email:* [Vane.Hugo@tdi.texas.gov](mailto:Vane.Hugo@tdi.texas.gov)

Vane Hugo  
TEXAS DEPARTMENT OF INSURANCE  
RLO MC-FRD  
PO Box 12030  
Austin, TX 78711-2030

*Via Email:* [Sandra.Salazar@tdi.texas.gov](mailto:Sandra.Salazar@tdi.texas.gov)

Sandra Salazar  
General Counsel Division  
Office of Financial Counsel  
TEXAS DEPARTMENT OF INSURANCE  
PO Box 12030  
Austin, TX 78711-2030

*Via e-Service:* [Shawn.Martin@tdi.texas.gov](mailto:Shawn.Martin@tdi.texas.gov)

Shawn Martin  
General Counsel Division  
Office of Financial Counsel  
TEXAS DEPARTMENT OF INSURANCE  
PO Box 12030  
Austin, TX 78711-2030

*Via e-Service:* [Zachary.Rhines@oag.texas.gov](mailto:Zachary.Rhines@oag.texas.gov)

Zachary L. Rhines  
Assistant Attorney General  
General Litigation Division  
OFFICE OF THE TEXAS ATTORNEY GENERAL  
P.O. Box 12548, Mail Stop 01901  
Austin, Texas 78711-2548  
*Counsel for Texas Department of Insurance*

*Via e-Service:* [jrixen@rixenlaw.com](mailto:jrixen@rixenlaw.com)

Jacqueline Rixen  
RIXENLAW  
8500 North Mopac Expy, Suite 605  
Austin, Texas 78759  
*Counsel for the Texas Life and Health  
Insurance Guaranty Association*

*Via e-Service:* [sstrickland@mwlaw.com](mailto:sstrickland@mwlaw.com)

Stanton Strickland  
MITCHELL, WILLIAMS, SELIG, GATES &  
WOODYARD, P.L.L.C.  
500 W. 5th Street, Ste. 1150  
Austin, Texas 78701  
*Counsel for Bright Healthcare Insurance  
Company of Texas*

*Via First Class Mail*

INTERNAL REVENUE SERVICE  
Special Procedures Branch  
300 East 8<sup>th</sup> Street, Suite 352  
Mail Stop 5026AUS  
Austin, Texas 78701



*Via e-Service:* [Milan.Shah@cms.hhs.gov](mailto:Milan.Shah@cms.hhs.gov)  
*Via e-Service:* [Kelly.Drury@cms.hhs.gov](mailto:Kelly.Drury@cms.hhs.gov)  
Milan Shah  
Kelly Drury  
Centers for Medicare & Medicaid Services  
Center for Consumer Information and  
Insurance Oversight  
7501 Wisconsin Ave  
Bethesda, MD 21814

*Via Email:* [ASimon@fmdlegal.com](mailto:ASimon@fmdlegal.com)  
*Via Email:* [Bgould@fmdlegal.com](mailto:Bgould@fmdlegal.com)  
Adrienne J. Simon  
Blake Gould  
Fultz Maddox Dickens PLC  
101 South Fifth Street, 27th Floor  
Louisville, KY 40202  
*Counsel for THC Houston, LLC d/b/a Kindred  
Hospital Houston Northwest*

*Via e-Service:* [csoltero@maynardnexsen.com](mailto:csoltero@maynardnexsen.com)  
*Via e-Service:* [lalcantar@maynardnexsen.com](mailto:lalcantar@maynardnexsen.com)  
Carlos R. Soltero  
Lisa Poole Alcantar  
Maynard Nexsen  
2500 Bee Caves Road  
Building 1, Ste 150  
Austin, Texas 78746  
*Counsel for Bright Health Management, Inc.*

*/s/ Greg Pierce*  
\_\_\_\_\_  
Gregory A. Pierce

**SPECIAL DEPUTY RECEIVER'S VERIFICATION AND CERTIFICATION  
PURSUANT TO TEX. INS.CODE ANN. §443.017(b)**

**AFFIDAVIT OF MICHAEL P. MARCIN**

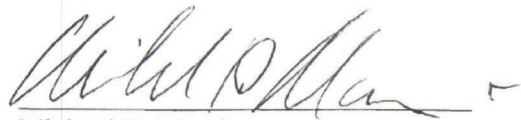
State of Texas

County of Travis

BEFORE ME, the undersigned authority appeared Michael P. Marcin, who after being by me duly sworn, stated the following under oath:

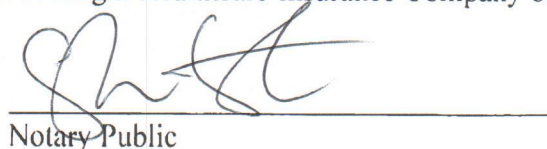
1. "My name is Michael P. Marcin. I am of sound mind, capable of making this affidavit, and am competent to testify to the matters contained in this affidavit.
2. I am a partner in CANTILO & BENNETT, L.L.P., the Special Deputy Receiver of Bright Healthcare Insurance Company of Texas (the "SDR" and "BHICOT" respectively). I am duly authorized to make this Affidavit on behalf of the SDR.
3. I have reviewed the *Plea to the Jurisdiction and, Alternatively, Response to Bright Health Management, Inc.'s Cross-Motion for Entry of Order Governing Electronically Stored Information* (the "Response"), and the facts stated therein are true and correct based on my personal knowledge, my review of estate records and my consultation with the staff and subcontractors.
4. I certify that SDR Exhibits 1 through 7 incorporated by reference in the Response were produced pursuant to TEX. INS. CODE § 443.017, are true and correct copies of the originals and are true and correct records of BHICOT and were received from the custody of BHICOT or found among its effects, or were created by and filed with the Receiver's office in connection with the receivership of this delinquent company, and are held by the Special Deputy Receiver in its official capacity."

By:



Michael P. Marcin

**SUBSCRIBED AND SWORN TO BEFORE ME** on August 5, 2024, by Michael P. Marcin, Special Deputy Receiver of Bright Healthcare Insurance Company of Texas



Notary Public

