CAUSE NO. D-1-GN-23-008361

| | | |
|---|---|---|
| THE TEXAS DEPARTMENT OF INSURANCE, *Plaintiff,* | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| BRIGHT HEALTHCARE INSURANCE COMPANY OF TEXAS, *Defendant.* | § | 455th JUDICIAL DISTRICT |

**MEMORANDUM RECOMMENDATION AND REPORT OF SPECIAL MASTER REGARDING SPECIAL DEPUTY RECEIVER'S MOTIONS TO ENFORCE PERMANENT INJUNCTION AGAINST BRIGHT HEALTH MANAGEMENT, INC. AND TO SRTIKE THE TESTIMONY OF ANGELA O'NEAL AND BRIGHT HEALTH MANAGEMENT, INC.'S CROSS-MOTION FOR ENTRY OF ORDER GOVERNING ELECTRONICALLY STORED INFORMATION**

Currently before the Special Master for report and recommendation to the District Court are three motions: CANTILO & BENNETT, L.L.P., Special Deputy Receiver ("SDR") for Bright Healthcare Insurance Company of Texas' Motion to Enforce Permanent Injunction Against Bright Health Management (the "Motion to Enforce"), its Motion to Strike the Testimony of Angela O'Neal (a witness presented by Bright Management), and Bright Health Management's Cross-Motion for Entry of Order Governing Electronically Stored Information (the "ESI Motion"). After consideration of the controlling law, briefing, testimony, and documentary evidence offered by the SDR and Bright Health Management, Inc., the Special Master recommends as follows:

## I. Introduction

The motions before the Texas Insurance Receivership Court raise issues of first impression for this Court. Frankly, these issues may be relatively new as well with regard to insurance receiverships nationwide.

The State of Texas through its Department of Insurance placed the insurance company, Bright Healthcare Insurance Company of Texas ("Bright Healthcare" or "the Estate") into receivership approximately one year ago. One of the fundamentals of a receivership is that the receiver, here the SDR, suddenly charged with taking over a business has as one of its first orders of business the duty to take immediate possession of all the books and records of the company. For obvious reasons, this is an essential and critical first step. In the days of hard copies in files and filing cabinets for the company's books and records typically physically maintained in its offices and/or at storage locations, taking possession and control of all the receivership estate's books and records was and is a "no brainer."

Here, however, Bright Healthcare was a "virtual insurance company," meaning it had no offices, employees, furniture, etc. It also did not maintain hard copies of most all, if not all, of its books and records generated in operating its business. Rather, all is in an electronic format. If this one company stood alone, that fact in and of itself would not be problematic.

However, such is not the case here. Bright Healthcare and at least 13 other virtual companies operating in 14 states in the United States (Bright Management refers to almost two dozen affiliated companies) were operated under the corporate umbrella of the Bright Health Group by Bright Health Management, Inc. ("Bright Management"). Bright Management used its employees and offices located in Minneapolis, Minnesota, to manage and run the day-to-day operations of not only Bright Healthcare but also the 13 other virtual subsidiary companies under its corporate umbrella (primarily appearing to be insurance companies in other states).

The obvious advantage of such an arrangement, made much easier by modern technology, is the economies-of-scale that are achieved by one set of offices, employees, officers, directors, etc., overseeing and operating at least 14 subsidiary and affiliated companies. As Bright

Management notes in its proposed Memorandum Recommendation at page 1: "[F]or operational efficiencies and economies of scale, Bright Healthcare utilized an affiliated administrative entity, Bright Management, to provide services described in the Master Services Agreement ("MSA")."

In and of itself, saving money by having one entity run at least 14 subsidiary or affiliated companies would not cause a problem. But here, Bright Management maintained one single electronic platform(s) where all the books, records, emails, and the other information of all the subsidiary and affiliated companies were and are kept. There was one email box per employee, and an employee might work on matters for all the affiliated companies. But emails were not kept separated by company under the Bright Management umbrella. Because the records were not maintained separately and earmarked by company (whether possible to do that or not, and whether now common in the insurance industry to do that or not), they thus are commingled. Thus, emails of Bright Management employees, officers and directors that relate to the business of Bright Healthcare are embedded in Bright Management's general email servers (with one box per employee) and cannot be retrieved easily as might be the case if they were somehow separately earmarked and stored for easy retrieval by company, including the Bright Healthcare Estate.

The evidence at the hearing made clear that the system that Bright Management set up has caused a practical and costly nightmare to now (1) search for and retrieve off the Bright Management electronic system all the books, records, documents and information that relate to or pertain to or concern Bright Healthcare, and (2) separate them from the records of the other companies. This one key fact plagues this Estate and the turnover to the SDR by Bright Management of all the records and information in its possession, custody or control related to or pertaining to or concerning the receivership estate of Bright Healthcare. The instant motions and relief sought by each side all flow from Bright Management's commingling of the records and

information of all the companies it was managing and running when Bright Healthcare was placed into the instant liquidation proceeding by the State of Texas.

There are three main issues. First, the SDR by its Motion to Enforce Permanent Injunction seeks from Bright Management a number of categories of books, records and information. In response, Bright Management seeks protection primarily against turning over records that do not relate in any way to Bright Healthcare and/or are covered by a privilege held by another company. Second, given the acknowledged substantial challenges of searching for, reviewing and turning over documents (and portions of documents) that relate solely to Bright Healthcare versus unrelated or privileged documents belonging to other companies, Bright Management moves the Court to enter an Electronically Stored Information ("ESI") Order compelling the SDR to work with Bright Management to agree on a process including search terms, etc., to try to retrieve all the records related to Bright Healthcare that are commingled with the numerous other virtual companies that Bright Management has operated. And third, Bright Management requests that the Court order the Estate to reimburse it for the extremely substantial cost associated with the search, review, separation and production of the Estate's books, records and information from Bright Management.

## II. Procedural Background

Bright Healthcare is a Texas-domiciled insurance company. It sold individual health coverage (under the federal Affordable Care Act as well as off the Federal exchange) in the State of Texas during calendar year 2022. As noted above, Bright Management managed Bright Healthcare and a number of other subsidiary companies as "virtual" insurance companies. This was done pursuant to a Management Servies Agreement ("MSA") effective January 1, 2022, that was not actually signed by representatives of the two affiliated companies until May 2, 2022. As

already discussed, Bright Healthcare had no employees, offices, fixtures, furniture or equipment. It relied solely on Bright Management to perform all the functions necessary to run the company, including managing its records and data. Bright Healthcare did have officers and directors (who apparently also served in capacities for Bright Management): Jeff Craig, Jay Matushak, Eric Halverson and Jeff Scherman.

The Texas Department of Insurance ("TDI") placed Bright Healthcare into an interim step of Supervision in October 2022. However, on November 15, 2023, TDI filed its Plaintiff's Original Petition, Application for Order Appointing Liquidator, and Request for Permanent Injunction to ultimately place Bright Healthcare into liquidation under the Texas Insurance Code. On November 29, 2023, the Court entered its Permanent Injunction placing Bright Healthcare into receivership. Bright Management is expressly named and enjoined in the Permanent Injunction. Bright Management was served with the Writ for Permanent Injunction on December 6, 2023.

This matter thus arises under the Texas Insurer Receivership Act, Chapter 443 of the Texas Insurance Code ("TIRA"). Movant, the SDR, was appointed by the Commissioner of Insurance in her capacity as the Liquidator of Bright Healthcare. Under TEX. INS. CODE § 443.154 (a), the SDR "has all powers of the liquidator granted by this section, unless specifically limited by the liquidator, and serves at the pleasure of the liquidator."

Bright Management is a "party in interest" in this receivership because it owns one hundred percent of the equity of Bright Healthcare. TEX. INS. CODE § 443.004 (a)(17).

After entry of the Permanent Injunction, the SDR requested that Bright Management turn over the books and records of Bright Healthcare. Bright Management has provided a number of categories of Bright Healthcare books and records to the SDR. The evidence also suggests some earlier delays or lack of cooperation as to certain categories of records (such as certain records of

third-party administrators as testified by the SDR representative Mr. Marcin). Bright Management makes clear that it does not dispute the SDR's entitlement to the Estate's books and records, and agrees not all records have been produced. As summarized above, the dispute centers on how a search for all additional records, especially emails, is to be conducted; what role, if any, the SDR should play in such efforts as an active participant coordinating with Bright Management in formulating search terms, etc.; and whether the Estate should pay the very substantial cost ahead for Bright Management to do a full, thorough review, sorting out and turning over all books, records, documents, communications and information related to or pertaining to or concerning Bright Healthcare.

The parties spent months starting at the end of 2023 discussing how to resolve these electronic document issues, but to no avail. The SDR eventually filed its Motion to Enforce Permanent Injunction on June 28, 2024. Bright Management responded by filing its Response and ESI Cross-Motion on July 12, 2024. After conferring with the Special Master, the parties agreed to a briefing schedule.

Following briefing, the Special Master heard the competing motions at an evidentiary hearing on September 30, 2024. At this hearing, the Special Master admitted into evidence all the parties' offered exhibits and received into evidence the testimony of four witnesses. The SDR called Michael Marcin and Brian Falligant as witnesses. Bright Management called Jeff Craig and Andrea O'Neal as witnesses. All proffered testimony by the four witnesses was received into evidence. The SDR does now urge by motion that the testimony of Ms. O'Neal be striken (addressed below).

The parties each submitted at the end of October a proposed Memorandum Recommendation for consideration and entry by the Special Master.

## III. Legal Basis for the Turnover of the Estate's Records and Information Relating to or Pertaining to or Concerning Bright Healthcare to the SDR

The SDR's right to recover all books, records and information in Bright Management's possession, custody or control that pertain to, relate to or concern Bright Healthcare is established by three sources: (1) **legislatively** by the Texas Insurance Code, and in particular the provisions of TIRA; (2) **judicially** by the Court's Permanent Injunction; and (3) **contractually** by the Management Services Agreement between Bright Healthcare and Bright Management. Bright Management does not challenge the applicability or scope of the provisions in TIRA or the Permanent Injunction, but it nonetheless is important to set out the numerous provisions that the Texas Legislature and the Receivership Court in its Permanent Injunction devote to the receiver's entitlement to the Estate's books, records and information, as well as the duties of compliance and cooperation placed on Bright Management. Bright Management places too much emphasis on particular definitions with urged narrow readings. In so doing, it misses the mark because the Texas law set forth in Section 443.010 of TIRA addresses and emphasizes the special **cooperation** that Bright Management, as the prior owner and manager of Bright Healthcare, and its management and employees must provide the SDR as the SDR takes over the business that had been run by Bright Management. Going forward, the Special Master intends to closely monitor evidence of cooperation or any lack thereof---as further discussed below.

### A. Legislatively The Texas Insurer Receivership Act Requires Bright Management to Turn Over the Records

Texas law applicable to this dispute is straightforward. TIRA governs the receivership of insurance companies in Texas. *See* TEX. INS. CODE §443.001, *et seq.* This Court "has exclusive jurisdiction of all property of the insurer, wherever located, including property located outside the territorial limits of the state." TEX. INS. CODE §443.005(c). The Act explicitly addresses Bright

Management's obligation to turn over records of the Bright Healthcare to the SDR. The scope of the obligation to provide "books and records" to the SDR pursuant to the statute is expansive. TEX. INS. CODE §443.004 broadly defines "property of the estate" to include:

> all records and data that are otherwise the property of the insurer, **in whatever form maintained**, within the possession, custody, or control of a ... management company.... (emphasis added).

Thus, "records or data" that are the property of the insurer, in whatever form, are "property of the estate" regardless of who holds them.

Additionally, TEX. INS. CODE §443.017(a) provides:

> Upon entry of an order of rehabilitation or liquidation, the receiver is vested with title to all of the books, documents, papers, policy information, and claim files, and all other records of the insurer, of whatever nature, in whatever medium, and wherever located, regardless of whether the records are in the custody and control of a third-party administrator, managing general agent, attorney, or other representative of the insurer. The receiver may immediately take possession and control of all of the records of the insurer, and of the premises where the records are located. A third-party administrator, managing general agent, attorney, or other representative of the insurer shall release all records described by this subsection to the receiver, or the receiver's designee, at the request of the receiver.

The Act's command that Bright Management turn over records pertaining to or concerning Bright Healthcare to the SDR is broader than merely the turnover of the "business records" of the Bright Healthcare Estate. Section 443.010 of TIRA is a particularly important statute as applies to Bright Management. Given this statutory provision's special relevance to the relationship and dealings between the SDR, on the one hand, and Brright Management, on the other, the Special Master sets forth this critical provision in full:

**"Cooperation of Officers, Owners, and Employees"**

> (a) Any present or former officer, manager, director, trustee, owner, employee, or agent of any insurer, or any other persons with authority over or in charge of any segment of the insurer's affairs, shall cooperate with the commissioner or receiver in any proceeding under this chapter .... For purposes of this section:

(1) "person" includes any person who exercises control directly or indirectly over activities of the insurer through any holding company or other affiliate of the insurer; and

(2) "cooperate" includes:

(A) replying promptly in writing to any inquiry from the commissioner or receiver requesting the reply; and

(B) **promptly** making available to the commissioner or receiver any books, accounts, documents, or other records or information or property of **or pertaining to the insurer and in the person's possession, custody, or control.**

(b) A person may not obstruct or interfere with the commissioner or receiver in the conduct of any delinquency proceeding or any preliminary or incidental investigation.

(c) This section may not be construed to abridge otherwise existing legal rights, including the right to resist a petition for liquidation or other delinquency proceedings, or other orders.

(d) Any persson described by Subsection (a) who fails to cooperate with the commissioner or receiver, or any person who obstructs or interferes with the commissioner or receiver in the conduct of any deliquency proceeding or any preliminary or incidental investigation, or who violates any order validly issued under this chapter:

(1) commits an offense; and

(2) is subject to the imposition by the commissioner of an administrative penalty not to exceed $10,000 and subject to the revocation or suspension of any licenses issued by the commissioner in accordance with Chapters 82 and 84.

(e) An offense under Subsection (d) is punishable by a fine not exceeding $10,000 or imprisonment for not more than one year, or both fine and imprisonment. (emphasis added).

The Special Master emphasizes the following. First, the seriousness of this statutory obligation to cooperate legislatively placed on an entity such as Bright Management and its officers, directors, and employees is made clear by the Texas Legislature's inclusion of fines and even the surprising possibility of imprisonment. Second, Texas law requires the "prompt" making available of books, records or information. Third, the covered "books, accounts, documents, or other records or information or property" include those "pertaining to" Bright Healthcare that are in Bright

Management's possession, custody, or control. In other words, the required turnover is not limited to Bright Healthcare's business records. Fourth, as contemplated by subsection (c) above, the Special Master in this Report does address and affirm rights held by Bright Management regarding unrelated or privileged documents of other companies.

Given that the evidence establishes that Bright Management operated every aspect of Bright Healthcare's business prior to receivership, the Special Master in its oversight of hundreds of estates over the past thirty years has never seen an estate where active cooperation by Bright Management and its former and present officers, directors, and employees with the SDR is as essential as it is in this Estate Bright Management's counsel wisely has generally and more recently sought by its briefing and proferred evidence to show efforts at cooperation. Based on Section 443.010, Bright Management must be able to establish throughout the course of this proceeding its cooperation with the SDR, including producing all the information relating to or pertaining to or concerning Bright Healthcare.

**B. Judicially the Permanent Injunction Requires Bright Management to Turn Over Bright Healthcare's Books and Records**

The Permanent Injunction, which specifically named and enjoined Bright Management, provides the following:

> The Liquidator shall be vested by operation of law with title to all of Defendant's property as defined in Section 443.004(a)(20). Such property shall include property of any kind or nature, whether real, personal, or mixed, including but not limited to ... books, records, documents and insurance policies, ... intangible assets, whether owned individually, jointly, or severally, wherever located, and all right ... belonging to Defendant, whether asserted or not, .... The Liquidator's title shall extend to Defendant's property regardless of the name in which such items are held, or where such items are located.
>
> Pursuant to Section 443.151(a), the Liquidator shall be directed to take possession and control of Defendant's property, wherever located.
>
> The Liquidator may act as it deems necessary or appropriate to perform the Liquidator's duties pursuant to Section 443.151(a). The Liquidator shall have all the powers of

Defendant's directors, officers and managers, and the authority of such persons is suspended except as specifically permitted by the Liquidator or the Liquidator's designees.

Defendant and Defendant's present or former officers, managers, directors, trustees, owners, employees, agents, and any other persons with authority over or in charge of Defendant's affairs **shall be required to cooperate with the Liquidator and the Liquidator's designees pursuant to Section 443.010** (emphasis added).

....

Pursuant to Section 443.151(a), title to all of Defendant's property, including but not limited to all the assets and rights described in this Order, is vested in the Liquidator. The Liquidator is authorized to take control and possession of Defendant's property, wherever located, and remove all such property from Defendant's premises.

....

The Clerk of this Court shall issue a Permanent Injunction against the persons and entities named below, with the following force and effect:

TO: Defendant and its agents, including but not limited to:

Defendant's **current and former officers, directors,** underwriters, **managers** and employees, **including but not limited to, Jeff Craig and Jay Matushak**; owners and affiliates, including but not limited to, Bright Health Group, Inc.; **Bright Health Management, Inc.;** . . . .

Each of you are hereby RESTRAINED and ENJOINED from taking any and all of the following actions:

....

Wasting, disposing of, converting, dissipating, or concealing, in any manner, any of Defendant's property;

Using, releasing, transferring, selling, assigning, canceling, hypothecating, withdrawing, allowing to be withdrawn, offsetting, asserting ownership of, concealing, in any manner, or removing from this Court's jurisdiction or from Defendant's place of business, any of Defendant's property, . . . .

....

Doing anything to prevent the Liquidator or the Liquidator's designees from gaining access to, acquiring, examining, or investigating any of Defendant's property or any other property, books, documents, records, or other materials **concerning Defendant's business, under whatever name they may be found** (emphasis added);

....

EACH OF YOU ARE FURTHER SPECIFICALLY ORDERED to make available and disclose to the Liquidator or the Liquidator's designees the nature, amount, and location of Defendant's property, and promptly surrender all such property to the Liquidator or the Liquidator's designees.

> DEFENDANT AND DEFENDANT'S PRESENT OR FORMER OFFICERS, MANAGERS, DIRECTORS, TRUSTEES, OWNERS, EMPLOYEES, AGENTS, AND ANY OTHER PERSONS WITH AUTHORITY OVER OR IN CHARGE OF DEFENDANT'S AFFAIRS ARE FURTHER ORDERED to cooperate with the Liquidator, or the Liquidator's designees as required by Section 443.010(a).

Again, the Court's Order and Permanent Injunction directing that Bright Management and the other above-named entities and individuals **cooperate** with the SDR is paramount in this Estate.

One final note regarding TIRA and the Permanent Injunction. TIRA in discussing records uses the phrase "pertaining to;" the Permanent Injunction uses the phrase "concerning" Bright Healthcare's business. The Special Master thus is employing the phrase "relating to or pertaining to or concerning" throughout this Report to include both the statutory and judicial duties placed on Bright Management.

**C. Contractually the Management Services Agreement Requires Bright Management to Produce Bright Healthcare's Books and Records Immediately**

Bright Management's obligation to turn over the records sought by the SDR is further supported by the MSA which it signed with Bright Healthcare. The MSA broadly defines "books and records" as follows:

> "Books and Records" shall mean all books and records developed or maintained pursuant to or related to this Agreement.

This definition is expansive and not limited to any type of document or record.

Furthermore, the remainder of ¶ 5 of the MSA makes clear that Bright Management was required to keep "sufficient" books and records for the "express purpose of recording therein" the "nature and details of the management services and financial transactions undertaken for [Bright

Healthcare]" as well as the "nature and details of the transactions." MSA ¶ 5]. This broad obligation is echoed by the MSA's recitation of Bright Management's obligations under the MSA, which include:

> The establishment and maintenance on behalf of Insurer of complete and accurate books and records of all Insurer's transactions in form and substance determined by Insurer provided that such form is in all material respects as required by applicable insurance laws and regulations, all other applicable laws and regulations, financial accounting standards and the requirements of federal, state and local taxing authorities;
>
> ....
>
> The maintenance for Insurer of all financial and business records required by applicable laws and regulations and generally accepted insurance and statutory accounting practices, and the preparation for and on behalf of Insurer of all reports required by governmental and nongovernmental regulatory and supervisory authorities with adherence to risk based capital requirements;
>
> ....
>
> The monitoring of the legal affairs of Insurer, and in each case on behalf of Insurer, complying with applicable legal requirements and making required filings with the Texas Department of Insurance (the "TDI") and all other governmental authorities having jurisdiction over Insurer;

MSA ¶¶ 1.2, 1.4, 1.7.

The MSA further specifies that all such "books and records" are and shall remain the "property" of Bright Healthcare and shall be maintained by Bright Management in a "fiduciary capacity." MSA¶ 5. The broad definition of "books and records" in the MSA echoes that provided in TIRA.

Finally, the MSA expressly incorporates Bright Management's legal obligation to "immediately" turn over records to the SDR upon receivership. Paragraph 9 of the MSA provides:

> If [Bright Healthcare] is placed into Rehabilitation or Liquidation by the Texas Insurance Commissioner ... then:
>
> ....

All books and records developed or maintained under and related to this Agreement will **immediately** be made available to the receiver or Commissioner and must be turned over to the receiver or Commissioner immediately upon the receiver's or Commissioner's request (emphasis added).

MSA ¶ 9. Frankly, there is no evidence in this record that Bright Management made any meaningful effort at all after the MSA was signed to be able to comply with its obligation to **immediately** make available and turn over the books and records. Based on the electronic system maintained by Bright Management, and its own evidence presented at the hearing, it was and is a practical impossibility for Bright Management to comply with its promise.

## IV. Special Master Recommendations Regarding Various Issues Pertaining to the Required Turnover of the Estate's Books, Records and Information by Bright Management to the SDR

First of all, Bright Management does not contest that the SDR has the right to all of Bright Healthcare's books and records held by it. Based on that acknowledgement, Bright Management has turned over, and as of the evidentiary hearing, is continuing to turn over records in many categories.

The SDR by its motion seeks an Order requiring Bright Management to deliver to the SDR (in ten days) certain categories of documents. Before addressing as necessary these categories, the Special Master recommends the following guidelines should apply (which guidelines address various issues teed up by the parties in their briefing).

### A. Emails

There can be no doubt that emails, generally being the means for corresponding in our modern world, are part of the books and records of a company and are covered by the "books and records" definitions discussed above. The TIRA describes the covered records and data "in whatever form maintained." The internal policies and procedures of Bright Management (as part of the Bright Health Group) defines "records" as "any recorded information, regardless of format

or medium." At times it is unclear whether Bright Management is contending that an email per se is not a business record of Bright Healthcare, or whether emails that do not relate to or pertain to or concern Bright Healthcare—but rather relate solely to another company or are otherwise privileged under a privilege umbrella of another company---are not books and records of Bright Healthcare. For now, and subject to the discussions that follow below, suffice it to say that the Special Master recommends that there is no exclusion for emails per se.

**B. Scope of the Documents to be Turned Over**

The parties to some extent pass each other in the night arguing past each other what is required to be produced. The Special Master recommends the following general guidelines and rules. There are two general categories of documents that are to be delivered to the SDR. First, any document generated or received by any person or entity in connection with the business of Bright Healthcare constitutes a book/record of the Estate, and is to be turned over. Secondly, whether an actual business record of Bright Healthcare or not, if a document in Bright Management's possession, custody or control (including on its electronic data storage system(s)) "pertains to" Bright Healthcare, regardless of the email's author, purpose, content or whether written for the benefit or detriment of Bright Healthcare from a financial or other standpoint, that document is to be turned over to the SDR based on the legislative edict in Section 443.010(a)(2)(B) previously discussed. Additionally, as noted above, this Court's Permanent Injunction at Paragraph 4.6 enjoins Bright Management and all former and current officers, directors, managers and employees of Bright Healthcare from "[d]oing anything to prevent the Liquidator or the Liquidator's designees [the SDR] from gaining access to, acquiring, examining, or investigating any of Defendant's [Bright Healthcare] property or any other property, books, documents, records, or other materials **concerning Defendant's business, under whatever name they may be**

**found."** (emphasis added). These two applicable provisions expand Bright Management's duty to provide documents in its possession beyond documents that would be defined as the typical business books and records of Bright Healthcare. In other words, given the entities and persons associated with the receivership estate who are named in the Permanent Injunction, the SDR is not required to launch a separate document discovery effort to obtain from the enjoined parties all information that pertains to or concerns Bright Healthcare. Thus, for example, an email between two Bright Management officers/directors discussing in any way Bright Healthcare would be turned over because it "pertains" to or "concerns" Bright Healthcare, whether it is an actual business record of Bright Healthcare or not (subject to any valid claim of privilege).

Any document, including any document relating solely to the business of Bright Management or any of its affiliated entities, that falls outside the above provisions and thus in no way relates to or pertains to or concerns Bright Healthcare is not required to be turned over.

The Special Master recommends that Bright Management be ordered to turn over all documents and information in its possession consistent with the guidelines set forth above, regardless of whether they are covered by the specific categories the SDR seeks by its motion.

**C. Privileged Documents**

The SDR succeeds to and holds all privileges held by Bright Healthcare. Bright Management correctly does not contest that the SDR owns and holds all such privileges and is entitled to all of Bright Healthcare's privileged information.

Bright Management has not waived any privilege that applies to its information or that of any affiliated company. The fact that records are commingled in electronic storage does not constitute a waiver of privilege. Any argument by the SDR to that effect should be denied. Bright Management uses the example of an attorney who maintains all his privileged information for all

his or her clients on a single email site, and that the attorney does not waive the privilege as to all the information because it is commingled in his single server. The Master agrees.

The Special Master anticipates that issues may arise as to what, if any, privileges apply regarding certain documents. Given the Bright Health overall corporate organization, certain individuals—particularly officers and directors---have worn multiple hats on behalf of multiple companies in the corporate umbrella. Thus, officers/directors of Bright Management apparently also served in similar capacities for Bright Healthcare. And at least one such person, Jeff Craig, has a law degree and would have had an attorney-client relationship with both entities. This creates challenges based on fiduciary obligations. This challenge, for example, is highlighted here by the fact that the receivership estate of Bright Healthcare is shown to be owed by a Neuehealth-related entity, a Bright-affiliated company, an amount over $124,000,000.00. However, there are documents in the record reflecting that the Chief Accounting Officer of Neuehealth indicates the receivable owed to the Estate by a related company is not collectible because there is "0 cash for the Neuehealth RBE to pay it." Clearly the circumstances surrounding this debt, its creation, and its status are important questions that the SDR must assess and answer---and promptly. And there may be issues of privilege that arise relating to this debt.

To the extent Bright Management withholds information from turnover to the SDR based on an assertion of privilege, it is to maintain a detailed privilege log regarding same. This log must be regularly updated and provided to SDR counsel at least every twenty (20) days from entry of a Court Order confirming same. To the extent the SDR briefly has argued that Bright Management and its representatives are not authorized to view any privileged document of Bright Healthcare, this argument (while it may be based on undisputed legal principles) certainly must be denied here

based on common sense because documents must be reviewed to determine if they are to be turned over or not.

In the process ahead, counsel should confer as to how to best "tee up" before the Special Master any disputes regarding documents being withheld in whole or in part by way of redactions because of an assertion by Bright Management or other company of privilege.

## V. Specific Categories of Information Sought by the SDR in its Motion to Enforce

The SDR seeks the following:

A. All Bright Healthcare-related emails to or from Bright Healthcare officers and directors Jeff Craig, Jay Matushak, Eric Halverson and Jeff Scherman;

B. All records maintained in the Office 365 data suite: SharePoint, OneDrive, and Teams for all Bright Healthcare officers and directors;

C. All Bright Healthcare-related emails from any Bright Management employee, affiliate, agent or vendor;

D. All books and records relating to all debts owed to Bright Healthcare by Bright Management affiliate, Neuehealth Partners Texas RBE, LLC;

E. All books and records relating to all debts owed by Bright Healthcare to the federal government;

F. A complete set of the Bright Healthcare Board of Directors minutes, resolutions, and all other corporate books and records; and

G. An organizational chart identifying those individuals, including job titles, dates of employment, and email account(s), and a separate list of all email accounts, including individual accounts and accounts associated with a business unit or function such as "claims" or "potential security incident"; who provided services under the Bright

Healthcare and Bright Management Management Services Agreement, regardless of what entity/entities employed the person.

Most of the disputes arising under these categories are addressed above by the Special Master. Bright Management states that it has produced to the SDR the information sought in categories D, E and F. Obviously the duty to turn over documents is a continuing one.

All the categories are reasonable, relevant requests. To the extent information and documents have not been produced based on the disputes addressed above, the process must now commence in earnest to produce and provide all information and documents in all these categories that relate to or pertain to or concern Bright Healthcare---subject to the discussions above as to unrelated and privileged documents.

Category C includes the terms "affiliate, agent or vendor," and it is appropriate for the SDR to require Bright Management to cooperate with it by seeking all Bright Healthcare-related emails from these persons/entities based on the information within the possession of Bright Management. The Permanent Injunction expressly covers "agents" with an extensive listing of persons and entities that might qualify as agents, and thus use of the terms "affiliates, agents and vendors" cannot properly be objected to as inappropriate vague terms. The SDR may, but is in no way required, to provide lists of afffiliates, agents and vendors to Bright Management as it may discover them during the course of this proceeding.

Regarding Category F and Board of Directors minutes and any other records relating to actions of the Board, Bright Management's witness, Mr. Craig, testified that all of these records had been turned over and were admitted into evidence in SDR Exhibit 19. However, he confirmed that much of the work done by Bright Healthcare directors was conducted informally in emails, which have not been turned over to the SDR. It is essential (as to this and all other categories

sought by the SDR) that Bright Management conduct a thorough review of all the materials in its possession to confirm that all the Board of Director-related materials, including any emails or other informal discussions, have been turned over to the SDR. Also, it is essential that Bright Management's review of all documents be based on the test of whether the document relates to or pertains to or concerns Bright Healthcare.

Proper and legally-required cooperation by Bright Management with the SDR pursuant to TIRA §443.010 includes producing (and even preparing) information consistent with the SDR's understandable requests in category G for organizational charts and a list of email accounts of employees. Bright Management in its initial Objection and Cross-Motion argued it did not have to create any documents for the SDR, citing a discovery case not relevant to the issue here. Fortunately, Bright Management at the hearing dropped this improper opposition and apparent lack of cooperation as now reflected in its Exhibits 3, 8 and 9. Bright Management is to continue its efforts to cooperate with the SDR and provide the SDR all the information sought by category G.

## VI. Bright Management's Cross-Motion for Order Governing the Production of Electronically Stored Information ("ESI")

Bright Management essentially seeks two things: (a) that the SDR be directed to cooperate and coordinate with Bright Management in the process of identifying and producing the documents and information on Bright Management's integrated system "without impinging upon the protected rights of third parties not before this Court," (Bright Management proposed Memorandum Recommendation at p.11), and (b) a determination as to which party is to bear the costs associated with such review and production.

**A. Who is Responsible for the ESI Search, Review, and Production?**

The fundamental premise is as follows: Bright Management made the decision to set up a single electronic system for the numerous companies it operated, including Bright Healthcare. Given this fact that we now have the Estate's records and information commingled with numerous other companies, and given Bright Management's legal duty to provide to the SDR all documents and information related to or pertaining to or concerning Bright Healthcare, Bright Management understandably seeks to protect from disclosure information and documents on its system that do not relate to Bright Healthcare and/or is covered by an asserted privilege(s) that applies to a company other than Bright Healthcare. The review that has been necessary thus is to protect and benefit Bright Management, and not the Estate.

Accordingly, it is the sole responsibility of Bright Management to undertake expeditiously this search, review and production process. The SDR is not required to assist Bright Management in its effort to retrieve the documents and information off its commingled system that it created for its own economic benefit. Rather, Bright Management alone is to undertake---or continue to undertake---whatever process insures that every single document or piece of information in its possession, custody or control that relates to or pertains to or concerns Bright Healthcare is turned over. The SDR may voluntarily provide information to Bright Management to assist, but there is no duty on the SDR at all to do so. Bright Management created the system that now regretably confronts us; it must deal with the consequences flowing from the single system it established.

**B. Cost**

As to cost, Bright Management's argument that its MSA with Bright Healthcare obligates the Estate to pay the cost of this very substantial review and search effort is without merit. Whether common in the industry or not, Bright Management created and benefitted financially by the single

electronic system it created. Having created this fact of commingled records, and now confronted with the fact that one of its managed companies has been placed by the State of Texas into receivership, Bright Management now must comply with the judicial, legislative and contractual duties placed on it no matter the very substantial time and expense that will be required to turn over all the Estate's records it holds. In other words, having established an electronic system(s) of commingled records, it must now pay for the time and expense required to "un-commingle" the Estate's separate records and information that relates to or pertains to or concerns Bright Healthcare, protect unrelated or privileged records from disclosure, and turn over all the Estate's documents and information to the SDR as soon as possible. In addition, no provision of the Permanent Injunction or the Texas Insurance Code entitles Bright Management to be reimbursed for the cost of searching for and separating Bright Management's records and those of other affiliated companies from those of Bright Healthcare.

In sum, Bright Management created the substantial problem on records we now have notwithstanding its admitted knowledge of the MSA's terms. Bright Healthcare's policy holders and creditors do not pay for a situation of Bright Management's own making. The Special Master accordingly recommends that Bright Management's Cross-Motion should be denied.

## VII. The SDR's Motion to Strike the Testimony of Angela O'Neal

The SDR's Motion to Strike the Testimony of Angela O'Neal is denied because, whether meritoriuos or not, her testimony has not been relied upon by the Special Master in any manner adverse to the SDR for purposes of weighing the evidence and making this Recommendation. If anything, it simply makes clear the extremely substantial effort and expense now required of Bright Management to retrieve and produce all the records and information as directed in this

Memorandum Recommendation and Report while preserving its right not to produce commingled records of other companies, including any privileges that would apply for other companies.

## VIII. The Timetable for a Completed Turn Over of Records and Information

The timetable for Bright Management's required turn over is an extremely problematic issue because Bright Management clearly cannot comply with what the law requires. As discussed, Bright Management in the MSA promised in Section 9(a)(ii) that if Bright Healthcare were placed in Liquidation by the Texas Insurance Commissioner, "all books and records developed or maintained under and related this Agreement will **immediately** be made available to the receiver or Commissioner and must be turned over to th [sic] receiver or Commissioner immediately upon the receiver's or Commisioner's request." The Texas Insurance Code and the Permanent Injunction also express and direct **prompt** compliance with Bright Management's turnover obligations.

But the reality given how Bright Management opted to maintain and store records for all the companies it operates on a single electronic platform is that this promised and ordered performance is impossible in a timely manner. The evidence introduced by Bright Management itself clearly establishes this fact.

The SDR seeks a turnover of all the categories of records and information within ten (10) days of the date of the Court's Order on its Motion to Enforce. While legally supported, it simply cannot be done and would be an exercise in futility.

This Estate now is over one year old. Claims are being filed. The Court has set a claims filing deadline of February 3, 2025. Precious time has been lost regarding turning over the required information. Time thus is of the essence for the categories of records described above to be turned over.

The Special Master appreciates the very substantial time, effort, manpower and cost required for Bright Management to retrieve and sort the Estate's records and information from that of all its other subsidiary companies. Frankly, any time limit recommended and set by the Special Master will appear impractical and naïve given what all has to be done. BUT that time and effort must now occur---and promptly. The Special Master therefore recommends that, no matter the voluminous cost and the amount of manpower in likely short-term hires required, all the records and information addressed in this Memorandum Recommendation and Report be turned over to the SDR within ninety (90) days of the date of entry of a Court Order consistent with this recommendation. Bright Management cannot be heard to complain that this ninety (90) day deadline is unrealistic, because that deadline far exceeds the "immediate" turnover that Bright Management promised, and that the Texas Insurance Code and Permanent Injunction contemplate.

The Master further recommends that Bright Management be ordered to file a Status Report with the Court and Special Master every twenty (20) days during this ninety (90) day period updating the Court in detail of the efforts made in the prior twenty-day period and for the next twenty-day period to comply with the terms of the Court's Order.

## IX. Procedural Process and Timetable Regarding this Memorandum Recommendation and Report

The Order of Reference to Master in this cause contemplates that any objection to this Memorandum Recommendation and Report is to be filed within ten (10) days of the submission of this recommendation and a proposed order to the Court. The Special Master is not at this time submitting a proposed Order to the Court. Rather, given the approaching holidays the procedure will be as follows: (1) the ten (10) day period to object is not triggered because a proposed Order is not now being submitted to the Court; (2) any objection to this Memorandum Recommendation and Report by either or both sides is be filed by on or before Monday, January 6, 2025; (3) if an

objection is filed, the Court will take the motions and this Memorandum Recommendation and Report up in due course and, pursuant to Texas Rule of Civil Procedure 171, the Court may confirm, modify, correct, reject, reverse or recommit the Master's report; (4) if no objections are filed, then counsel for both parties shall work to prepare an Agreed Order as to form consistent with this report and submit it to the Special Master in Word Format by on or before Friday, January 10, 2025, for his review, comment and submission to the Court.

SIGNED this 17th day of December, 2024.

Tom Collins, Special Master