IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST, Appellant, vs. SOUTH DAKOTA LIFE & HEALTH GUARANTEE ASSOCIATION Appellee	)	Appeal No. # 29895

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
CIRCUIT COURT JUDGE

BRIEF OF APPELLANT

Michael F. Shaw
Terra M. Larson
May, Adam, Gerdes
& Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501
Attorneys for the Appellant

Charles D. Gullickson
Mitchell A. Peterson
Michael A. Snyder
Davenport, Evans, Hurwitz
& Smith, LLP
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101
Attorneys for Appellee

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PRELIMINARY STATEMENT

Appellant will refer to itself, the South Dakota Bankers Benefit Plant Trust, as "the Trust." Appellee, South Dakota Life & Health Insurance Guaranty Association, will be referred to as "the Association." The Office of Hearing Examiners will be referred to as "the OHE."

References to the Settled Record will be indicated by "SR ___." Appellant's Appendix will be referred to as "AP ___." References to stipulated record entries will be referred to as "Record" followed by the applicable record letter.

JURISDICTIONAL STATEMENT

The Trust appeals an Order and Final Judgment issued by the Hughes County Circuit Court on December 30, 2021 reversing the OHE's decision and final order dated March 13, 2021 on an appeal of two assessments against the Trust by the Association. The Association filed a Notice of Entry of Order on January 5, 2022. SR 643. On February 2, 2022, the Trust filed a Notice of Appeal seeking review of the December 30, 2021 Order and Final Judgment. SR 644. The circuit court's Order and Final Judgment appealed from constitutes a judgment and order of the circuit court from which appeal of right may be taken pursuant to SDCL § 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. Whether the circuit court properly reversed the OHE decision by concluding that the Association's Plan of Operation obligated the Trust to pay its share of assessments arising from the Penn Treaty Liquidation after July 1, 2019 when the Trust was no longer a member of the Association?

2. Whether the circuit court properly concluded that the Trust is liable for future assessments made by the Association related to the Penn Treaty Liquidation?

3. Whether the circuit court properly concluded that the passage of Senate Bill 37, effective July 1, 2019, did not terminate the Trust's liability for future assessments made by the Association related to the Penn Treaty Liquidation?

To avoid duplication of arguments, issues one through three will be combined into one issue and phrased as:

Whether the Association possessed a legal basis to assess the Trust following the trust's statutory release from membership on July 1, 2019?

Supporting Authorities:

- SDCL Ch. 58-29C
- SDCL § 58-18-88(6)
- AP 121, Record R, Exhibit A

4. Whether the circuit court properly concluded that the Employee Retirement Income Security Act of 1974 (ERISA) did not preclude the Trust from paying the assessment to the Association in 2020 and 2021?

5. Whether the circuit court properly concluded that ERISA's exclusive purpose provision does not preempt the Association's assessment of the Trust?

To avoid duplication of arguments, issues four and five will be combined into one issue and phrased as:

Whether the circuit court erred when it concluded the Employee Retirement Income Security Act of 1974's (ERISA) exclusive benefit rule did not preclude the Trust from paying the assessment?

Supporting Authorities:

- 29 USC § 1103(c)
- 29 USC § 1104(a)(1)(A)
- SDCL Ch. 58-29C
- SDCL § 58-18-88(6)
- U.S. Department of Labor, *Advisory Opinion 90-18A*

6. Whether the Circuit Court erred when it ordered the Trust to pay prejudgment interest?[1]

Supporting Authorities:

- *S.D. Subsequent Injury Fund v. Homestake Mining Co.*, 1999 S.D. 159, 603 N.W.2d 527

STATEMENT OF THE CASE

The Association is South Dakota's guaranty fund intended to provide protections relating to impaired and insolvent life and health insurance companies. Its statutory framework is found in SDCL Ch. 58-29C. From 2014 to 2019 the Trust was required to be a member of the Association pursuant to a prior version of SDCL § 58-18-88(6). Notably, self-funded Multiple Employer Trusts ("METs") (also known under federal law as Multiple Employer Welfare Arrangements ("MEWAs")) like the Trust are specifically excluded from participation in or coverage under the Association by SDCL Ch. 58-29C, which has not changed from 2014 to the present. In 2019, the South Dakota legislature

[1] Appellant's docketing statement included a separate issue requesting appeal as to "Whether the Circuit Court erred when it issued its own findings of fact, after the parties had stipulated to the factual record and did not have a hearing before the Circuit Court?" Appellants are withdrawing this issue, because in cases involving stipulated facts and record, like this, the entire matter is reviewed *de novo*, regardless.

repealed the portion of SDCL § 58-18-88(6) that required the Trust to participate as a member of the Association. The repeal became effective on July 1, 2019 and the Trust left the membership of the Association on the same date. At the time of the repeal, the Trust was the only self-funded MET (also known as a MEWA) licensed by the State of South Dakota.

In December of 2019 the Association authorized an assessment pertaining to the Penn Treaty liquidation. That assessment, which was called in January of 2020, included the Trust, despite the fact that the Trust was no longer a member of the Association. The Trust paid the assessment under protest and commenced this current litigation. The Association assessed the Trust for the Penn Treaty liquidation again in 2021, which the Trust also paid under protest. The validity of the 2021 assessment was then consolidated into this appeal.

Review of this matter first requires consideration of SDCL Ch. 58-29C, which states nothing about a former Association member's on-going obligation to pay for insolvent insurers after membership ceases. Instead, the statutes discuss when a current member (distinct from the Association as a whole) becomes liable for an assessment to compensate for an insolvent or impaired insurer, which is after an assessment is both "authorized" and "called." *See generally* SDCL § 58-29C-52. Both the 2020 and 2021 Assessments were "authorized" and "called" after the Trust was statutorily exempted from Association membership. Therefore, under SDCL Ch. 58-29C, the Trust, as a former member, owes no on-going obligation to the Association.

This Court's review then shifts to the Association's Plan of Operation, which serves as the crux of the Association's argument that the Trust remains obligated with

respect to on-going Penn Treaty liabilities. The one provision on which the Association's entire argument relies, however, is self-defeating. While the Association claims that its Plan of Operation obligates the Trust to remain liable for assessments based on *insolvencies* occurring prior to the Trust ceasing membership in the Association, actual language of the Plan of Operation version applicable to the Trust[2] only permits the Association to assess former member insurers based on *impairments*. The statutory definitions covering impairments versus insolvencies specifically state that impairments and insolvencies are two different situations and are treated differently. *See* SDCL § 58-29C-48 (pertaining to definitions for "impaired insurer" versus "insolvent insurer"). As such, not even the Association's Plan of Operation allows it to make the 2020 and 2021 Assessments against the Trust.

Finally, this Court's review shifts to whether a state statute — applicable to a single ERISA plan — which authorizes a direct assessment against that plan for purposes of funding protections for persons other than that plan's participants and beneficiaries is preempted as "inconsistent with" ERISA's exclusive benefit rule. The answer must be yes for reasons more fully set forth herein.

This brief will provide a more extensive analysis of the above summary. This brief will then discuss how the repeal of the portion of SDCL § 58-18-88(6) that required the Trust to participate as a member of the Association, regardless of whether it was

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[2] There are two versions of the Association's Plan of Operation. *See* AP 111, Record R. The 2007 version, which was the version "in effect at all times relevant to the appeal which is subject to this proceeding," is the only version applicable to the Trust. AP 111, ¶ 4. The Association amended its Plan of Operation in 2020, after the Trust had already protested and appealed the 2020 assessment, to add language apparently fixing the very provision on which the Association relies in this appeal. See AP 111, Record R.

considered to be a substantive or procedural change to the statutes, merely relinquished the Trust's requirement for membership in the Association, and has little to no bearing on the current issues before this Court. Finally, this brief will discuss how ERISA preempts the Association's assessment against the Trust.

STATEMENT OF FACTS

The South Dakota Life & Health Guaranty Association ("Association") exists and is governed through SDCL Ch. 58-29C. *See* AP 038 ¶ 1. The Association exists to pay benefits and continue coverages of insolvent or impaired insurers through assessments levied by the Association upon its members. *Id.* ¶ 2.

The Trust maintains an employee welfare benefit plan for eligible employees of employers who are active members of the South Dakota Bankers Association. AP 038, ¶ 4. The Trust is a Multiple Employer Welfare Arrangement ("MEWA") pursuant to Section 3(40) of the Employee Retirement Income Security Act of 1974 ("ERISA") and a self-funded Multiple Employer Trust ("MET") pursuant to SDCL § 58-18-88. *Id.* ¶ 3.

The Trust was originally created in 2004 as a fully-insured plan under Blue Cross Blue Shield. In January of 2014, the Trust converted to a self-funded benefit plan, meaning that the Trust itself assumes the financial risk of providing health care benefits to its members by maintaining stop-loss coverage and adequate reserves to cover any potential losses, as well as making participating employers assessable in the event of insolvency. *See About Us*, South Dakota Bankers Association https://www.sdba.com/about-us (last visited March 10, 2022). As a result of this transition (beginning January 1, 2014 and up until July 1, 2019) the Trust was made subject to SDCL § 58-18-88, which previously read in applicable part:

> A self-funded multiple employer trust . . . may be authorized by the director [of Insurance] if the multiple employer trust meets all of the following conditions:
>
> (6) The multiple employer trust, upon authorization by the director [of Insurance], participates in the South Dakota Life and Health Insurance Guaranty Association pursuant to chapter 58-29C and is a member pursuant to subdivision 58-29C-48(12).

See AP 44-45, Record A, pp. 3-4.

On March 1, 2017, Penn Treaty Network American Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC" and collectively with PTNA, "Penn Treaty") were declared insolvent pursuant to an Order of Liquidation entered by the Commonwealth Court of Pennsylvania. *See* AP 049-060, Record B. The orders of liquidation required the liquidator to transfer policy obligations, including continued payment of claims and continued coverage arising under Penn Treaty policies, to state guaranty funds affected by the liquidation. AP 053, 059, Record B, pp. 5, 11. As a result of the orders, the Association issued Reserve Funding PGA Promissory Notes, dated March 1, 2017, in connection with the liquidation of PTNA and ANIC (collectively, the "Penn Treaty Liquidation"). AP 061-064, Record C. The Promissory Notes evidence future amounts due from the Association to the protected cells of LTC Reinsurance PCC ("LTC Re") pursuant to Reinsurance and Administrative Services Agreements dated as of March 1, 2017, between the Association and LTC Re whereby LTC Re agreed to reinsure the obligations to policyholders incurred by the Association as a result the liquidation of PTNA and ANIC. *Id.*

The Association authorized and called a 2017 Assessment in connection with the Penn Treaty liquidation against its members, including the Trust, on April 5, 2017, through a resolution approved by the Association's board. AP 065-68, Record D.

Thereafter, on January 9, 2018, the Association authorized and called a 2018 Assessment in the amount of $7,000,000. AP 069-70, Record E. On December 17, 2018, the Association authorized and called a 2019 Assessment in the amount of $7,135,000. AP 071-72, Record F. The Trust paid all Assessments authorized and called by the Association while the Trust was an Association member, in 2017, 2018, and 2019, without protest. AP 039 ¶ 10.

In 2019 the South Dakota Legislature passed Senate Bill 37, which, *inter alia*, relieved METs (the Trust was the only MET in existence in South Dakota at that time[3]) from the obligation to participate in the Association. *See* AP 045, Record A. p 4; *see also* SDCL § 58-18-88(6), as amended. Senate Bill 37 became effective on July 1, 2019.

After the effective date of Senate Bill 37, on December 20, 2019, the Association authorized a 2020 Assessment for PTNA and ANIC in the amount of $7,250,000. Record H. When the Association subsequently called upon its members to pay the 2020 Assessment on January 22, 2020, it included the Trust. AP 073, Record G.

The Trust paid the 2020 Assessment under protest and accompanied the payment with a letter dated February 21, 2020, explaining why it should not be obligated to pay the 2020 Assessment. AP 083-85, Record L. Thereafter, the appeal process commenced before the OHE. *See* AP 087-110, Records M-Q. While the 2020 appeal was pending, on January 5, 2021, the Association authorized its 2021 assessment and called it on January 11, 2021, prior to the OHE's decision as to the 2021 assessment, and the Association

[3] The only other MET in South Dakota was created in December of 2020, after Senate Bill 37 passed. South Dakota Department of Labor, Division of Insurance, "License Inquiry Service" https://dlr.sd.gov/insurance/license_inquiry_service.aspx (last visited March 17, 2022)

again included the Trust. AP 144, Record T. The Trust subsequently paid the 2021 assessment under protest on the same grounds as the 2020 assessment (AP 145, Record U), and the parties stipulated to consolidation of the two protests under one case. AP 149, Record X.

On March 13, 2021, the OHE issued its Final Decision, Findings of Fact, Conclusions of Law, and its Final Order siding with the Trust in this matter and ordering that the Association repay the Trust for the 2020 and 2021 assessments. AP 027-36. The Association thereafter appealed the OHE decision to the circuit court, the Honorable M. Bridget Mayer presiding, on April 16, 2021. SR 1. On December 13, 2021 the circuit court issued its memorandum decision where it reversed the OHE decision and *sua sponte* ordered that the Trust pay the Association prejudgment interest. AP 001-024. The circuit court's rationale, in part, found that the Association's Plan of Operation language which obligated insurers that ceased membership with the Association to remain liable for assessments based on impairments also applied to assessments based on insolvencies, calling the matter a "distinction without difference" because Penn Treaty was impaired before it was insolvent. *See* AP 011-12. It further found that the South Dakota law was not preempted by ERISA because it likened the assessments to a cost of doing business in the state. *See* AP 020.

STANDARD OF REVIEW

Factual questions in administrative appeals under SDCL § 1-26-37 are reviewed under the clearly erroneous standard and questions of law are reviewed *de novo*. *Wendell v. S.D. DOT*, 1998 S.D. 130, 587 N.W.2d 595, 597(citations omitted). However, when a case is "submitted by stipulation, . . . [the Court] review[s] the entire matter *de novo*

without deference to the findings of the circuit court or the [OHE]." *Id.* (citing *Muhlenkort v. Union County Land Trust*, 530 N.W.2d 658, 660 (S.D. 1995); *State v. Abourezk*, 359 N.W.2d 137, 142 (S.D. 1984); *State Auto. Cas. Underwriters v. Ruotsalainen*, 136 N.W.2d 884, 888 (S.D. 1965)).

ARGUMENT AND AUTHORITIES

I. THE ASSOCIATION POSSESSED NO LEGAL BASIS TO ASSESS THE TRUST FOLLOWING THE TRUST'S STATUTORY RELEASE FROM MEMBERSHIP ON JULY 1, 2019.

a. SDCL Ch. 58-29C expressly limits the funding obligations of a "member insurer" to assessments "authorized and called."

South Dakota Codified Laws § 58-29C-52.B(2) sets forth the primary obligation of a member insurer: the timely payment of assessments "*authorized and called* to the extent necessary to carry out the powers and duties of the association under Section 58-29C-51 with regard to an impaired or insolvent insurer." SDCL § 58-29C-52.B(2) (emphasis added). The term "authorized assessment" is defined as the date at which "a resolution by the board of directors has been passed whereby an assessment will be called immediately or in the future from member insurers for a specified amount. *An assessment is authorized when the resolution is passed.*" SDCL § 58-29C-48(3) (emphasis added). "Called assessment" or the term "called," when used in the context of assessments, means the date at which "a notice has been issued by the association to member insurers requiring that an authorized assessment be paid within the time frame set forth within the notice. *An authorized assessment becomes a called assessment when notice is mailed by the association to member insurers.*" SDCL § 58-29C-48(5) (emphasis added). Called assessments are due "not less than thirty days after prior written notice to the member insurers." SDCL § 58-29C-52.A.

The Trust ceased to be a member of the Association effective July 1, 2019. *See* Record A and SDCL § 58-18-88, as amended. The 2020 assessment was "authorized" at the December 20, 2019 Association board meeting, and the 2020 assessment was subsequently "called" through the written assessment notice issued to Association members dated January 22, 2020. *See* AP 073-75, Records G & H. The 2021 assessments were also authorized and called after July 1, 2019. *See* AP 144, Record T. Therefore, both the 2020 and 2021 assessments were authorized and called after the date on which the Trust ceased to be an Association member. The Association's attempt to impose a funding obligation on the Trust for an assessment authorized and called after the date on which the Trust ceased to be a member contravenes a plain reading of SDCL Ch. 58-29C.

Furthermore, contrary to the circuit court's conclusions, the Association's members did not become liable for the Penn Treaty liquidation in 2017. Member funding obligations do not accrue on the date another member insurer becomes insolvent. *See* SDCL § 58-29C-52.A & B. Based on a plain reading of SDCL Ch. 58-29C, nothing causes a member to incur any funding obligation with respect to the Association's liabilities until such time as the Association authorizes and calls an assessment. *See generally* SDCL Ch. 58-29C. Because the Trust was no longer a member of the Association on the date the 2020 and 2021 assessments were authorized and called, those assessments were improperly made against the Trust.

b. The Association's Plan of Operations does not permit it to assess the Trust.

The circuit court concluded that the Association's Plan of Operation permits it to continue to assess the Trust for the Penn Treaty liquidation even after it ceased to be an

Association member. In doing so, the circuit court relied upon the Association's Plan of Operation provisions pertaining to former insurers which states:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination of its license to transact the kinds of insurance covered by the Act. However, such insurer shall remain liable for any assessments based on *impairments* occurring prior to the termination of its license.

AP 121, Record R, Exhibit A (emphasis added). The circuit court incorrectly applied the above Plan of Operation provision for two main reasons.

First, the Trust has never been an "insurer" under SDCL Ch. 58-29C's definitions and was only required to be a member through a separate statute unrelated to Ch. 58-29C. In fact, South Dakota's MET statute expressly prohibits such treatment under Ch. 58-29C: "an authorized multiple employer trust may not be determined to be or considered to be an insurance company or association of any kind or character under this title." SDCL § 58-18-90. Moreover, the Trust did not "cease to be admitted" nor was its license terminated. It was made exempt from Association participation by statutory repeal. As a result, the above-quoted Plan of Operation provision is inapplicable to the Trust.

Secondly, the Plan of Operation, in effect "at all times relevant to the appeal of the 2020 assessment,"[4] by its terms, contained no mechanism whatsoever to obligate the Trust. The Plan of Operation states that an "insurer shall remain liable for any assessments based on *impairments* occurring prior to the termination of its license." AP 121, Record R, Exhibit A (emphasis added). Assessments related to the Penn Treaty

[4] *See* AP 111, ¶ 4; *see also supra*, note 2.

liquidation are assessments based on an *insolvency*, not an impairment. *See* AP 049, Record B; AP 067, Record D.[5]

Pursuant to SDCL Ch. 58-29C, "impairments" are not "insolvencies," and these terms are not interchangeable. In fact, the relevant statutory definitions specifically state that an impairment is not an insolvency. *See* SDCL § 58-29C-48. "Impaired insurer" is defined as "a member insurer which, after July 1, 2003, *is not an insolvent insurer*, and is placed under an order of rehabilitation or conservation by a court of competent jurisdiction." SDCL § 58-29C-48(10) (emphasis added). "Insolvent insurer" is defined as "a member insurer which after July 1, 2003, is placed under an *order of liquidation* by a court of competent jurisdiction with a finding of insolvency." *Id.*(11) (emphasis added). Thus, based on these statutory definitions, any assessments based on "impairments," as used in the Plan of Operation, cannot involve an assessment of an insurer that is insolvent and placed under an order of liquidation; but rather it must involve an assessment of an insurer placed under an order of rehabilitation or conservation. Yet, as of March 1, 2017, PTNA and ANIC were "insolvent" (not impaired) insurers under SDCL §59-29C-48(11). *See* AP 049, Record B ("**ORDER OF LIQIUDATION**") (emphasis in original); *see also* AP 067, Record D.

In fact, the Association's July 1, 2020 Amended and Restated Plan of Operation —*first implemented after the Trust ceased to be a member and very shortly after the*

[5] Which states: "RESOLUTION OF BOARD OF DIRECTORS OF SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTEE ASSOCIATION . . . WHEREAS the Commonwealth Court of Pennsylvania on March 17, 2017 entered Orders of Liquidation against Penn Treaty Network American Insurance Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC," and collectively with PTNA, "Penny Treaty"), with a finding of insolvency for each of PTNA and ANIC[]")."

Trust's June 2, 2020 protest and appeal to the OHE — demonstrates that the Association knew that the 2007 Plan of Operation version applicable to the Trust could not obligate the Trust for insolvencies. *Compare* AP 121, Record R, Exhibit A, 2007 Plan *with* AP 134, Record R, Exhibit B, 2020 Plan. The 2020 Amended and Restated Plan of Operation — which the Association unconvincingly claims is "substantively identical" to the 2007 iteration — adds two words that are absolutely critical to the Association's position. *See* AP 122; SR 589. The 2020 Amended and Restated Plan of Operation now states, in applicable part: "[h]owever, such insurer shall remain liable for any assessments based on impairments *or insolvencies* occurring prior to the termination of its license." AP 134, Record R, Exhibit B, 2020 Plan (emphasis added). Thus, the 2020 Amended and Restated Plan of Operation appears to be aimed at correcting the observed defect in the 2007 Plan of Operation; namely that the 2007 Plan of Operation (the only Plan of Operation applicable to the Trust) applied only to impairments and not insolvencies. *Compare* AP 121, Record R, Exhibit A, 2007 Plan *with* AP 134, Record R, Exhibit B, 2020 Plan.

Additionally, while this Court is not required to give any weight to the circuit court's rationale in this matter, the circuit court's rationale for its conclusion must be addressed. The circuit court acknowledged that the Association, per its own Plan of Operation, was only permitted to assess former member insurers for impairments, but then following the Association's reply brief arguments,[6] claimed that the fact that the Penn

[6] Interestingly, the Association's initial briefing this this matter painstakingly emphasized the fact that PNTA and ANIC were assessments based on insolvencies. *See, e.g.,* SR 383 ("obligated the Trust to remain liable for future assessments made based on insolvencies . . . such as the Penn Treaty Liquidation."); 384 "the Trust . . . was also *required* to be bound by the Association's Plan of Operation, which further obligated the Trust . . . to remain liable for future assessments made based on insolvencies . . . such as the Penn Treaty Liquidation.") (emphasis in original). It was

Treaty liquidation deals with an insolvency versus an impairment was a "distinction without a difference" because PTNA and ANIC were impaired before they were insolvent, and as such the liquidations were really assessments based on impairments. AP 011. In making such an assertion, the circuit court quoted the Penn Treaty *liquidation orders* which state: "The rehabilitation of PTNA [and ANIC] is hereby TERMINATED, and all orders entered during the rehabilitation, to the extend inconsistent with this Liquidation Order, are VACATED." AP 012; *see also* AP 049, Record B. The circuit court was notably correct on one level; the orders in place when PTNA and ANIC were impaired insurers in rehabilitation are now vacated, meaning that any assessments based on those impairments would have been completed as of March 1, 2017 (versus commenced March 1, 2017 as the Association argues), in favor of assessments based on the Liquidation Order, which is an insolvency by definition. *See* SDCL § 58-29C-48(11) ("Insolvent insurer" is defined as "a member insurer which after July 1, 2003, is placed under an *order of liquidation* by a court of competent jurisdiction with a finding of insolvency.") (emphasis added). As such, contrary to the Association's later arguments and the circuit court's agreement that PTNA and ANIC should be interpreted as assessments based on impairments, the assessments levied by the Association for PTNA and ANIC liquidations are assessments based on insolvencies, as evidenced by the Association's initial 2017 resolution and the Penn Treaty Liquidation Order itself. *See* AP 067, Record D; AP 049, Record B.

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not until the Association replied to the Trust's argument about the Plan of Operation language deficiencies that PNTA and ANIC suddenly transformed into "impaired" versus "insolvent" insurers by the Association's categorization.

The Association's own 2007 Plan of Operation provided no mandate that the Trust remain liable for any assessments — other than for impairments — that occurred prior to the termination of membership. *See* AP 121, Record R, Exhibit A. Thus, even assuming that the relevant provision of that Plan of Operation applies to the Trust as an entity other than an insurer, it nonetheless does not provide a mechanism allowing the Association to assess the Trust based on insolvencies occurring prior to the date the Trust ceased to be an Association member.

c. Senate Bill 37 relieved the Trust from its prior statutory obligation of membership within the Association; it was the Association's own, unchanged statutes and its own Plan of Operation that absolved the Trust from liability for future assessments.

The circuit court found that Senate Bill 37 included a substantive change to the statutes and, therefore, does not provide retroactive effect to absolve the Trust from future assessments. However, the Trust is not arguing that Senate Bill 37 has any bearing on the current matter before this Court, other than it absolved the Trust's membership requirement within the Association. It is the Association's own, unchanged statutes and its Plan of Operation, that prevent the Association from assessing the Trust after July 1, 2019. Whether Senate Bill 37 included procedural changes or substantive changes is not dispositive to the current appeal. Senate Bill 37 said nothing about the Association's ability or lack of ability to assess the Trust after it ceased to be a member; it simply fixed the issue of a MEWA (the Trust), which is explicitly excluded from Association coverage under Ch. 58-29C, from being assessable under that same statute.

d. Out-of-state caselaw is distinguishable from the present issue.

In the circuit court's decision, it sided with the Association based in part on its findings that the Association had provided case law supporting its arguments, while the

Trust had not (*see* AP 015[7]). However, these findings ignore the fact that almost every state in the nation, including the District of Columbia, exempts MEWAs such as the Trust from participation in their respective guaranty fund associations.[8] This matter is wholly novel, as South Dakota was the only state to require that a MEWA (a single MEWA for that matter) participate in the Association, in spite of its own statutory language excluding MEWAs from both participation in (*see* SDCL § 58-29C-48(12)) and coverage under the

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[7] "The Trust, although trying to distinguish both cases, has not cited any legal authority to the contrary."

[8] Guaranty association codes are relatively uniform and exempt MEWAs, such as the Trust, from participation. *See* Ala. Code § 27-44-3(b)(2)d.1; Alaska Stat. § 21.79.020(c)(5)(A); Ariz. Rev. Stat. § 20-682.D.5(a); Ark. Code Ann. § 23-96-106(4)(A); Cal. Ins. Code § 1067.02(b)(2)(E); Colo. Rev. Stat. § 10-20-104(2)(b)(IV); Conn. Gen. Stat. § 38a-860(f)(2)(D)(i); Del. Code Ann. tit. 18, § 4403(b)(2)d.1; D.C. Code § 31-5402(b)(2)(D)(i); Ga. Code Ann. § 33-38-2(C)(7)(A); HRS § 431:16-203(B)(2)(D)(i); Idaho Code § 41-4303(2)(b)(iv)1.; 215 Ill. Comp. Stat. Ann. 5/531.03(2)(b)(x)(A); Ind. Code Ann. § 27-8-8-2.3(e)(4); Iowa Code § 508C.3.4.o(1); Kan. Stat. Ann. § 40-3008(n)(4)(A); Ky. Rev. Stat. § 304.42-030 (2)(b)(4); La. Rev. Stat. Ann. § 22:2083.B.(2)(d); Me. Rev. Stat. tit. 24-A, § 4603 (2)(F); Md. Code Ann., Ins. § 9-403 (g)(2)(4); Mass. Ann. Laws ch. 175, § 146B (4)(B)(2)(e); Mich. Comp. Laws Serv. § 500.7704 (5)(d); Minn. Stat. Ann. § 61B.19 (Subd. 3)(7); Miss. Code Ann. § 83-23-205(2)(b)(iv); Mo. Rev. Stat. § 376.717 (3)(4)(a); Mont. Code Ann. § 33-10-224(2)(b)(iv)(A); Neb. Rev. Stat. Ann § 44-2703 (2)(b)(iv); Nev. Rev. Stat. Ann. § 686C.035 (1)(d)(1); N.H. Rev. Stat. Ann. § 408-B:5 II(b)(4); N.J. Stat. § 17B:32A-3.c.(4); N.M. Stat. Ann. § 59A-42-4.E.(4)(a); New York Department of Financial Services, *Re: N.Y.S. Guaranty Fund – Group Health Plans, Department of Finance*, https://www.dfs.ny.gov/insurance/ogco2002/rg020822.htm (last visited March 11, 2022) (concluding New York does not have a guaranty fund for health insurance); N.C. Gen. Stat. § 58-62-21 (c)(4); N.D. Cent. Code § 26.1-38.1-01.3.d.(1); Ohio Rev. Code Ann. § 3956.04 (B)(2)(d); Okla. Stat. tit. 36, § 2025 (B)(2)(d); Or. Rev. Stat. Ann. § 734.790 (3)(f); 40 Pa. Stat. Ann. § 991.1703 (b)(2)(iv); R.I. Gen. Laws Section 27-34.3-3 (b)(2)(iv); S.C. Code Ann. § 38-29-40 (2)(b)(v); Tenn. Code Ann. § 56-12-204 (b)(2)(D); Tex. Ins. Code § 463.203 (b)(4); Utah Code Ann. § 31A-28-103 (7)(d); Va. Code Ann. § 38.2-1700(C)(2)(d)(1); Vt. Stat. Ann. tit. 8, § 4153(b)(2)(D)(i); Wash. Rev. Code Ann. § 48.32A.025(2)(b)(iv)(A); W. Va. Code Ann. § 33-26A-3(b)(2)(D); Wyo. Stat. Ann. § 26-42-103(c)(iv)(A).

Association's insolvency protections.[9] While the legislature subsequently rectified the issue by passing Senate Bill 37, it did so only after the Trust had been forced to pay over $70,000 in assessments, per year, for three years, a charge for which neither the Trust nor its members would ever receive any benefit. *See infra* Section II.

The circuit court's reliance on out-of-state cases to support its Plan of Operation argument is misplaced. The *Liberty Mutual* case cited by the circuit court demonstrates that the present situation is distinguishable from that of a traditional disagreement over assessments from guaranty associations. *See generally Liberty Mut. Ins. Co. v. Superintendent of Ins.*, 689 A.2d 600 (Me. 1997). In *Liberty Mutual*, the suit arose when Liberty Mutual, a licensed insurer in Maine, voluntarily discontinued providing workers compensation insurance. *Id.* at 601. The insurer appealed an assessment the Maine guaranty association imposed upon it following the insurer's voluntary withdrawal of its insurance license. *Id.* "[Maine's Guaranty Association's] plan of operation provided that a withdrawn insurance carrier would remain liable for any assessments based on *insolvencies* that occurred prior to the termination of its license." *Id.* at 602 (emphasis added). The language of the South Dakota Association's Plan of Operation differs from Maine's language. South Dakota's Plan of Operation stated: "insurer[s] shall remain liable for any assessments based on *impairments* occurring prior to the termination of its license." AP 121, Record R, Exhibit A (emphasis added); *see also supra*, Section I, part b.

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[9] SDCL § 58-29C-46.B(2)(d)(i) expressly states: ("[T]his chapter may not provide coverage for . . . a portion of a policy or contract issued to a plan or program of an employer, association, or other person to provide life, health, or annuity benefits to its employees, members, or others, to the extent that the plan or program is self-funded or uninsured, including benefits payable by an employer, association, *or other person under . . . a multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1002(40))*[]") (emphasis added).

The Mississippi case cited by the circuit court is also distinguishable. *See Miss. Mfrs. Ass'n Workers' Comp. Grp. v. Miss. Workers' Comp. Grp. Self-Insurer Guar. Ass'n*, 281 So.3d 108 (Miss. Ct. App. 2019). First, the *Mississippi Manufacturers Association* case did not even address the general and relatively-uniform health and life insurance guaranty association statutes. *Compare* SDCL Ch. 58-29C *with* 24 A.M.R.S. Chapter 57, Subchapter 3 *and* Miss. Code Ann. Title 71, Chapter 3. It dealt with an entirely separate statutory concept developed to ensure workers compensation benefits were payable for self-insured workers compensation insurers. *Id.* at 110. However, even still, the *Mississippi Manufacturers* case involved plan of operation language different than South Dakota's Plan of Operation language. The *Mississippi Manufacturers* plan of operation stated that a withdrawing member "will continue to be liable for assessment for a period of three (3) years or until there are no liabilities outstanding under this previous self-insuring pooling status, which[ever] is greater." *Mfrs. Ass'n Workers' Comp. Grp.*, 281 So.3d at 115. If that had been the language in South Dakota, then the Trust may very well have been liable and would remain liable for any assessment based on the fact the language states nothing of "insurers" and requires liability for "assessments" versus "assessments based on impairments." *Compare Mfrs. Ass'n Workers' Comp. Grp.*, 281 So.3d at 115 *with* AP 121, Record R, Exhibit A. However, as discussed previously, South Dakota's Plan of Operation's language is different and speaks only to on-going liability for withdrawn insurers based on impairments; it says nothing of on-going liability for statutorily exempted MEWAs based on insolvencies.

This Court must rely upon the plain meaning of the statutes and the Plan of Operation. The Association's arguments to date, and the circuit court's reliance on such

arguments, focus on how the Association and the circuit court feel the language *should* be interpreted versus the plain meaning. *See generally* SR 588-89 (Association's Circuit Court Reply Brief); AP 011-12 (including the circuit court's almost verbatim recitation of the same). It is well settled that "[w]ords and phrases in a statute must be given their plain meaning and effect. When the language of a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Goetz v. State*, 2001 S.D. 138, ¶ 16, 636 N.W.2d 675, 681 (citing *In re Appeal of AT & T Info. Sys.*, 405 N.W.2d 24, 27 (S.D. 1987). This Court has "repeatedly stated that . . . it is the function of the court to give [the words] effect and not to amend the statute to avoid or produce a particular result." *Id.*

Ultimately, SDCL Ch. 58-29C is silent as to whether the Association may obligate former members for assessments authorized and called after the member ceases membership. *See generally* SDCL Ch. 58-29C. Silence, however, is by no means ambiguous. *See Reider v. Schmidt*, 2000 S.D. 118, ¶ 9, 616 N.W.2d 476, 479 (finding that court erred in abating child support in a pro-rated approach, when the statute made no mention of abating using a pro-rated portion of child support, even when an example issued in a publication by the Commission on Child Support has used a pro-rated approach). Simply put, the Plan of Operation also does not allow the Association to assess the Trust after it was no longer a member of the Association. *See* AP 121, Record R, Exhibit A. Contrary to the circuit court's conclusion that PTNA and ANIC assessments should be treated as assessments based on impairments, the plain language of the Association's own resolutions and the language of the liquidation orders demonstrate that

the assessments levied by the Association for PTNA and ANIC liquidations are assessments based on insolvencies. *See* AP 067, Record D; AP 049, Record B. The unambiguous, plain meanings of the provisions of SDCL Ch. 58-29C and the Plan of Operation demonstrate that the Trust is not liable for future assessment because such assessments were authorized and called after the Trust was no longer a member of the Association and the Association's applicable Plan of Operation does not permit the Association to assess former members based on insolvencies.

II. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA) DID NOT PRECLUDE THE TRUST FROM PAYING THE ASSESSMENT TO THE ASSOCIATION IN 2020 AND 2021.

The ERISA preemption question in this matter is straightforward: whether a state statute *applicable to a single ERISA plan* which authorizes a *direct assessment* against that plan for purposes of funding protections for persons *other than* that plan's participants and beneficiaries is preempted as "inconsistent with" ERISA's exclusive benefit rule. The answer must be yes.

a. ERISA's special preemption rule for MEWAs applies to this matter.

As a general rule, ERISA preempts state laws that are found to "relate to" ERISA-covered plans. 29 USC § 1144(a). The "relates to" question has been heavily litigated and a complex body of ERISA preemption case law now exists. There can be no question that the now repealed SDCL § 58-8-18(6) "relates to" an ERISA plan inasmuch as the statute itself applies expressly to "a self-funded multiple employer trust, as defined in section 3 of the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002, paragraph 40 … [.]" *See* SDCL § 58-18-88. With the question already answered, the

"relates to" preemption test, heavily relied upon by the Association and the circuit court, is simply not relevant to the matter at hand.

Recognizing that it was both appropriate and necessary for states to be able to establish, apply, and enforce state insurance laws with respect to MEWAs, the U.S. Congress amended ERISA in 1983, as part of Public Law 97-473, to provide an exception to ERISA's broad preemption provisions for the direct regulation of MEWAs such as the Trust under State insurance laws. In fact, the 1983 ERISA amendments were intended to remove Federal preemption as an impediment to State regulation of MEWAs. *See* U.S. Department of Labor, "*MEWAs: A Guide to State and Federal Regulation*" at page 17, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf (last visited on March 10, 2022). Following this amendment, ERISA preemption applies to a state insurance law directed at self-funded MEWAs only to the extent that such laws are "inconsistent with" Title I of ERISA. *See* 29 USC § 1144(b)(6)(A)(ii). While on-point case law is virtually nonexistent,[10] the U.S. Department of Labor has provided the following instruction as to application of this special preemption rule for MEWAs: "In general, a State law would be inconsistent with the provisions of Title I to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under Title I or would conflict with any provision of Title I, making compliance with ERISA impossible." *See* U.S. Department of Labor, "*MEWAs: A Guide to State and Federal Regulation*" at page 28,

[10] Very few self-funded MEWAs exist; at the time SDCL § 58-8-18(6) was repealed, the Trust was the only self-funded MEWA licensed by the state of South Dakota. *See supra,* note 3.

https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf (last visited on March 10, 2022).

b. The state insurance laws at issue are inconsistent with ERISA.

The now-repealed SDCL § 58-18-88(6) made the Trust a member of the Association for purposes of assessment under SDCL Ch. 58-29C, while SDCL § 58-29C-46 denied the Trust's participants and beneficiaries any of the Act's protective rights by excluding them as covered persons.[11] Essentially, the legislature granted the Trust permission to operate in the state in exchange for obtaining an additional source of revenue to support the state's guaranty fund (in the form of a direct assessment against an ERISA plan). The economic reality of this so-called "cost of doing business" (*see* SR 397) became apparent in 2017 when the Trust received its first Association assessment relating to the Penn Treaty liquidation. At that time, the Trust initiated conversations about the appropriateness of the requirement that it be assessable as an Association member. Shortly thereafter, Senate Bill 37 repealed that requirement.

c. ERISA preempts the state insurance laws at issue because the Association's assessments do not constitute regulatory or licensing fees.

ERISA requires that the above-referenced statutory scheme be preempted as inconsistent with ERISA's exclusive benefit rule. ERISA's exclusive benefit rule provides

[11] The stated purpose of the Act is "to protect, subject to certain limitations, the persons specified in subpart A of § 58-29C-46 against failure in the performance of contractual obligations, under life, health, and annuity policies, plans, or contracts specified in subpart B of § 58-29C-46, because of the impairment or insolvency of the member insurer that issued the policies, plans, or contracts." SDCL § 58-29C-45.A. To provide this protection, "members of the association are subject to assessment." SDCL § 58-29C-45.B.

that the assets of a plan "shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan." 29 USC §§ 1103(c), 1104(a)(1)(A). The circuit court concluded assessment pursuant to SDCL Ch. 58-29C-52 can somehow co-exist with ERISA's exclusive benefit rule, contending that such an assessment constitutes a reasonable expense of administering the Trust based on a theory that the assessment represents a regulatory or licensing fee. *See* AP 019-21. Through a mishmash of federal cases analyzing the propriety of the Association's assessment under the inapplicable ERISA "relates to" preemption test, the circuit court concluded that the assessments at issue were properly made against the Trust as regulatory or licensing fees. *See* AP 020-21.

While the Trust does not dispute that regulatory and licensing fees can be a legitimate administrative expense for purposes of ERISA's exclusive benefit rule, it strongly disputes the characterization of assessment under SDCL Ch. 58-29C-52 as such. As explained by the U.S. Department of Labor, "to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs," states must also have "the authority to require and enforce registration, licensing, reporting and similar requirements," to the extent "necessary to establish and monitor compliance with those laws." Advisory Opinion 90-18A, U.S. Department of Labor, available at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1990-18a.pdf (last visited March 12, 2022). However, no factual basis exists for such a convenient characterization of the SDCL § 58-29C-52 assessment as either a regulatory or licensing fee. The very purpose of the Association and its assessments — to protect certain persons (*other than* the Trust's participants and

beneficiaries) from an insurance company insolvency — refutes such a notion. *See* SDCL § 58-29C-45.

In addition, and perhaps more importantly, such an assessment has no obvious relationship to a state's legitimate objective in MEWA compliance or regulation.[12] The South Dakota legislature's repeal of the prior SDCL § 58-18-88(6) through Senate Bill 37 evidences agreement on this point.[13] Finally, to accept the Association's scheme of characterizing the assessment in question as either a regulatory or licensing fee would open the door for virtually any charge or assessment in any amount against a MEWA by a state or an agency thereof, which would be clearly inconsistent with ERISA's exclusive benefit rule. With no rational legal basis for characterizing assessment under SDCL Ch. 58-29C as a regulatory or licensing fee properly payable with ERISA plan assets, the Association's argument as to the propriety of the assessment on this basis must fail.

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[12] In this regard, the provisions of SDCL § 58-2-29 ("Fees, licenses and charges") sets forth the regulatory and licensing fees imposed upon MEWAs under South Dakota insurance law. Under this statute, a MEWA may be subject to various forms of regulatory and licensing fees, including for example: a $500 application fee for an original certificate of authority, a $25 fee for issuance of original certificate of authority ($25), and a $5 fee for filing bylaws or amendments thereto. The Trust strongly disputes the Association's attempt to categorize assessment under SDCL Ch. 58-29C (exceeding $70,000 annually for the years in question) as a regulatory or licensing fee akin to legitimate fees set forth in SDCL § 58-2-29.

[13] The Trust is unaware of any other self-funded MEWA subject to any other state's guaranty fund assessment. *See supra* note 10. In fact, the National Association of Insurance Commissioner's Life and Health Insurance Guaranty Association Model Act, adopted by the vast majority of states, expressly excludes MEWAs from participation. As the Proceedings of the NAIC explain: "It was suggested that the exception be expanded to clarify that certain types of contractual relationships are not covered by the Act. Clearly excluded would be self-funded and uninsured plans, multiple employer welfare arrangements, stop-loss plans, and administrative services only contracts." 1984 Proc. II 462.

d. SDCL § 58-29C-52 is not a statute of general applicability.

As an alternative or supporting theory, the Association argues that the former SDCL § 58-18-88(6) should be saved from preemption as a statute of general applicability. The circuit court curiously agreed, offering no justification beyond its citation to largely inapplicable case law offered by the Association in reference to the aforementioned ERISA preemption "relates to" test. *See generally* AP 020-22. While generally speaking ERISA preemption may not shield a plan from a statute of general application, it is entirely unclear how the former SDCL § 58-18-88(6) could be viewed as a statute of general application; instead, the former SDCL § 58-18-88(6) was a statute of discreet application, applicable to a single ERISA plan, the Trust, at all times it was in effect.

Unlike statutes of general application (*e.g.*, the employment discrimination law at issue in *Lane v. Goren,* 743 F.2d 1137 (9th Cir. 1984) on which the circuit court relied), application of all of the statutes involved in this case are of limited scope and purpose. Unlike the cases cited by the Association and relied upon by the circuit court, which involved taxes assessed for purposes of the general welfare,[14] SDCL Ch. 58-29C establishes a safety net for statutorily defined persons who are policyholders of statutorily-defined insurers who become impaired or insolvent. It is difficult to conceive of how a statute creating and governing a member-based insurance insolvency fund might be characterized as a statute of general application to the public at large. It is impossible

[14] *See Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645 (1995); *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647 (7th Cir. 1995).

to conceive of how the former SDCL § 58-18-88(6) — applicable directly to an ERISA plan and only to the Trust — might be viewed as a statute of general application.

In light of SDCL Ch. 58-29C's statutory scheme as well as a plain reading of former SDCL § 58-18-88(6), there is no rational view of how either could be characterized as statutes of general application or how the resulting assessment of an ERISA-covered MEWA could be viewed as consistent with ERISA's exclusive benefit rule. Moreover, none of the cases cited by the circuit court actually support such a theory. Instead, the current matter is distinguishable from nearly all of the ERISA preemption cases cited by the circuit court in that each of the assessments in those cases were made for purposes of the state's general welfare and evaluated by the courts under the "relates to" test. *See supra* note 14. Assessments under SDCL Ch. 58-29C are different in their very nature because these such assessments are made for purposes of funding a very specific insurance safety net for which the Trust's own participants are, by statute, denied protection. *See* SDCL § 58-29C-46.B(2)(d)(i). Indeed, none of the ERISA cases relied upon by the circuit court answer or even examine the pivotal question of whether *direct assessment* against an ERISA plan — a single ERISA plan at that — for the specific and direct benefit of individuals *other than* participants in that plan, may co-exist with ERISA's exclusive benefit rule. *See supra* note 14. The answer is that it may not. To accept the Association's argument and the circuit court's conclusion that ERISA does not protect ERISA plan assets from assessment under SDCL Ch. 58-29C would confer upon the Trust the status of a public piggybank, a result clearly inconsistent with ERISA.[15]

[15] In pointing out that the Trust has no inherent right to exist and do business in the state of South Dakota, the Association characterizes assessment under SDCL Ch. 58-29C as simply a "cost of doing business." SR 397. While the Association is correct

ERISA's exclusive benefit rule requires that plan assets "be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). Given the totality of the former SDCL § 58-18-88(6) and SDCL Ch. 58-29C as applicable to the Trust, the Association's assessment against the Trust constitutes neither a benefit to plan participants nor a reasonable expense of administering the plan. As a result, the Association's assessment against the Trust must be found to be preempted as inconsistent with ERISA's exclusive benefit rule pursuant to 29 U.S.C. § 1144(b)(6)(A)(ii).

III. THE CIRCUIT COURT ERRED WHEN IT ORDERED THE TRUST TO PAY PREJUDGMENT INTEREST.

The circuit court erred when ordering the Trust to pay prejudgment interest of ten percent to the Association after it reversed the OHE order that required the Association to return the assessment amounts to the Trust.

> Prejudgment interest seeks to compensate an injured party for [the] *wrongful detention* of money owed. The true principle, which is based on the sense of justice in the business community and our statute, is that he who retains money which he ought to pay another should be charged interest upon it.

S.D. Subsequent Injury Fund v. Homestake Mining Co., 1999 S.D. 159, ¶ 9, 603 N.W.2d 527, 529 (internal quotations omitted) (emphasis added).

In this case, the Trust initially paid the Association for both the 2021 and the 2022 assessments, albeit under protest. The Association possessed that assessment money until the OHE ordered that the Association it pay back to the Trust. Until the circuit court reversed the OHE's order, the OHE decision was the law of the land, and the Trust

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that the state's legislature is empowered with establishing the conditions upon which MEWAs such as the Trust may operate, it is incredulous to argue that such conditions may go so far as to offend ERISA.

rightfully possessed their own money back from the Association. *See Hartman v. Home Owners' Loan Corp*,7 N.W.2d 720, 722 (S.D. 1943) ("The trial court erred in giving effect to the 1941 Law, but the court had jurisdiction to determine the validity of the act, and having such jurisdiction, its determination is binding upon these parties until reversed upon appeal."); *see also Campbell v. Case*, 46 N.W. 504 (Dakota Territory 1872) ("[a party] is bound by order of the Court therein, until reversed on appeal.").

Had the Trust refused to pay the Association for the assessments in the first place and had the decision-makers ultimately found that the Association was properly owed that money, then prejudgment interest would be appropriate, as such would be considered a "wrongful detention" of the money. *See Homestake Mining Co.*, 1999 S.D. 159, ¶ 9, 603 N.W.2d at 529. However, the Trust was in possession of the assessment money from 2020 and 2021 because the Association paid that money to the Trust, pursuant to the order of the OHE. The Trust, in accepting that money the Association was ordered to pay it, was not "wrongfully detaining" its own money; it was simply receiving its own money, per the OHE decision. Therefore, the circuit court erred when it awarded prejudgment interest to the Association, because the Trust was not wrongfully detaining the money which the OHE had ordered the Association pay it.

CONCLUSION

Neither SDCL Ch. 58-29C nor the Association's Plan of Operation permitted the Association to assess the Trust in 2020 and 2021. The Trust did not become liable for all future Penn Treaty assessments in 2017. The Trust, as with other Association members, became liable for assessments when the assessments were authorized and called. The Trust ceased to be a member of the Association on July 1, 2019. The 2020 and 2021

assessments were authorized and called after July 1, 2019. The Plan of Operation version applicable to the Trust permitted the Association to assess former members for impairments, but not for insolvencies. It is inapposite that Penn Treaty was impaired before it was insolvent because the very order liquidating Penn Treaty vacated any prior directives in place when Penn Treaty was an impaired insurer and replaced such directives with orders pertaining to Penn Treaty's insolvency. Therefore, neither SDCL Ch. 58-29C nor the Association's Plan of Operation creates an on-going obligation for the Trust to continue paying assessments related to the Penn Treaty liquidation after the July 1, 2019, which is date on which the Trust ceased to be an Association member.

In addition, where application of state law to an ERISA-covered entity such as the Trust is concerned, due consideration must be given to ERISA preemption. The Association's assessment of the Trust, for the sole purpose of funding coverage for beneficiaries of insolvent insurance arrangements *other than* the Trust, is, on its face inconsistent with ERISA's exclusive benefit rule. An assessment of this nature does nothing to advance the state's legitimate interest in regulating or monitoring the Trust and may not be viewed as an assessment of general application. More importantly, such an assessment directly abridges the rights of the Trust's participants pursuant to ERISA's exclusive benefit rule. The Association offers no persuasive arguments or justifications to the contrary. The 2020 and 2021 Assessments were improperly made against the Trust in violation of ERISA's exclusive benefit rule and, therefore, must be found preempted.

Finally, it was an error on the circuit court's part to require that the Trust pay the Association prejudgment interest, because the only reason the Trust had the money for the assessments in its possession was because the OHE had ordered that the Association

reimburse the Trust for the assessment amounts. Prejudgment interest is therefore inappropriate.

The Supreme Court should reverse the circuit court's decision and affirm the OHE's decision that the Trust is not liable to pay any assessment from the Association which was authorized and called after the Trust ceased to be a member on July 1, 2019. This would include both the 2020 and 2021 Class B Assessments, as well as future assessments.

Dated this 21 day of March, 2022.

MAY, ADAM, GERDES & THOMPSON, LLP

BY: _____

TERRA M. LARSON
Attorneys for Appellant
503 South Pierre Street; P.O. Box 160
Pierre, SD 57501
(605) 224-8803
terra@mayadam.net

CERTIFICATE OF SERVICE

Terra M. Larson of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 21 day of March, 2022, she served an electronic copy of the foregoing Appellant's Brief in the above-captioned action to the appellee's counsel, to-wit:

Charles D. Gullickson
Mitchell A. Peterson
Michael A. Snyder
Davenport, Evans, Hurwitz
& Smith, LLP
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101
Attorneys for Appellee

BY: _____
Terra M. Larson

CERTIFICATE OF COMPLIANCE

Terra M. Larson, counsel for Appellant, hereby certifies that the foregoing Brief of Appellant complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 8,575 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, Certificate of Service, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Times New Roman, and left justified.

Dated this 21 day of March, 2022.

MAY, ADAM, GERDES & THOMPSON, LLP

BY: _____

TERRA M. LARSON
Attorneys for Appellant
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
(605) 224-8803
terra@mayadam.net

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL 15-26C-3 she served an electronic copy in Word format, and the original and two (2) hard-copies of the above and foregoing Appellant's Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

Clerk of the Supreme Court
State Capital Building
500 E. Capitol Avenue
Pierre, SD 57501
scclerkbriefs@ujs.state.sd.us

Dated this 21 day of March, 2022.

MAY, ADAM, GERDES & THOMPSON, LLP

BY: _____
TERRA M. LARSON
Attorneys for Appellant
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
(605) 224-8803
terra@mayadam.net

Appellant's Appendix Table of Contents

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY COURTHOUSE
P.O. BOX 1238
PIERRE, SOUTH DAKOTA 57501-1238

M. BRIDGET MAYER
CIRCUIT COURT JUDGE
Phone: (605) 773-3970
Fax: (605) 773-6492
Bridget.Mayer@ujs.state.sd.us

MONA WEIGER
COURT REPORTER
Phone: (605) 773-3971
Mona.Weiger@ujs.state.sd.us

December 12, 2021

Michael F. Shaw
Terra M. Larson
May Adam Gerdes & Thompson
PO Box 160; 503 S Pierre St
Pierre SD 57501
mfs@mayadam.net
terra@mayladam.net

Charles D. Gullickson
Mitchell Peterson
Michael L. Snyder
206 West 14th St.
Sioux Falls, SD 57101
msnyder@dehs.com
mpeterson@dehs.com
cgullickson@dehs.com

MEMORANDUM OPINION

RE: South Dakota Life & Health Insurance Guaranty Association v. South Dakota Bankers Benefit Plan Trust, 32CIV21-65

SUMMARY

The court is finding the OHE impermissibly gave Senate Bill 37 retroactive effect and therefore its decision must be reversed. The Association had the authority to issue assessments to the Trust, which assessments were related to liquidation of an insolvent insurer. In addition, the court is also reversing the OHE determination that ERISA precluded the Trust from paying

the assessments issued to Trust. The two assessments paid under protest must remain paid, and interest thereon is further ordered.

FACTUAL BACKGROUND

The South Dakota Life & Health Insurance Guaranty Association (the "Association") was created and is governed by the South Dakota Life & Health Insurance Guaranty Association Act, SDCL chapter 58-29C (the "Act"). The Act was passed by the South Dakota Legislature to protect certain insured persons from failures in contract performance obligations by impaired or insolvent member insurers of the Association.

The Association pays benefits and continues coverages of insolvent insurers to their insured, as permitted by the Act. The Association is comprised of member insurers and funds its obligations and activities through assessments levied to these member insurers.

The South Dakota Bankers Benefit Plan Trust (the "Trust") is a Multiple Employer Welfare Arrangement ("MEWA") pursuant to Section 3(40) of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Trust is also a self-funded Multiple Employer Trust ("MET") pursuant to SDCL 58-18-88. The Trust maintains an employee welfare benefit plan for eligible employees of employers that are active members of the South Dakota Bankers Association ("SDBA"). From 2014 to 2019, the Trust was statutorily required to be a member and participate in the Association. In 2019, the South Dakota Legislature passed Senate Bill 37, eliminating the Trust's mandatory participation in the Association.

On or about March 1, 2017, Penn Treaty Network American Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC," and collectively with PTNA, "Penn Treaty"), were declared insolvent pursuant to an Order of Liquidation entered by the Commonwealth Court of Pennsylvania. Penn Treaty wrote almost exclusively long-term care insurance, a type of insurance which cannot be canceled by the insurer except for non-payment of premiums. Penn Treaty policyholders may continue their insurance coverage for the rest of their lives as long as they continue to pay their premiums, and thus the Association on March 1, 2017, became statutorily obligated to pay policyholder benefits for decades into the future.

The Association could have assessed and collected from its members, including the Trust, the entire cost of reinsuring the Penn Treaty obligations in 2017. However, instead of fully funding its guaranty obligations with an immediate lump-sum assessment levied against its members, the Association chose to reinsure its obligations and spread the assessments out over a period of five years. To do so, on March 1, 2017, the Association issued Reserve Funding PGA Promissory Notes (the "Notes") in connection with the liquidation of Penn Treaty (collectively, the "Penn Treaty Liquidation"). The Notes evidence future amounts due to protected cells of LTC Reinsurance PCC ("LTC Re"), pursuant to Reinsurance and Administrative Services Agreements (the "Reinsurance Agreements") dated as of March 1, 2017, between the Association and LTC Re whereby LTC Re agreed to reinsure the obligations incurred by the Association to affected policyholders as a result of the Penn Treaty Liquidation.

The Association issued Class B health assessments in connection with the Penn Treaty Liquidation against the Trust in 2017, 2018, and 2019 to fund payments due from the Association to LTC Re under the Notes. The Trust paid all assessments issued by the Association in connection with the Penn Treaty Liquidation for 2017, 2018, and 2019.

The Association also made an assessment (the "2020 Assessment") against its member companies to fund that year's installments due to LTC Re under the Notes. The 2020 Assessment was authorized by the Association's Board of Directors on December 20, 2019. On January 28, 2020, the Trust protested the 2020 Assessment. The Association responded to the Trust's January 28, 2020, letter by correspondence dated February 7, 2020. The Trust responded to the Association's February 7, 2020, letter by correspondence dated February 21, 2020, and paid the 2020 Assessment under protest. On April 9, 2020, the Association denied the Trust's protest. Also, on April 9, 2020, the Association advised the Director of the denial of the Trust's protest. The Trust appealed the denial to the Division by letter dated June 2, 2020. The Division issued a Notice of Hearing dated June 26, 2020, scheduling an appeal before the OHE. The Division also issued an Order Making Proposed Decision of Examiner Final Agency Action on June 26, 2020.

While the matter of the 2020 Assessment was pending before the OHE, the Association issued a Class B health assessment arising from the Penn Treaty Liquidation on January 11, 2021, to the Trust in the amount of $77,943.55 (the "2021 Assessment") (together with the 2020 Assessment, the

"Assessments"). The 2021 Assessment was authorized on January 5, 2021. On January 25, 2021, the Trust paid the 2021 Assessment under protest and, on February 8, 2021, the Association denied the Trust's protest for the same grounds as the Board considered in denying the Trust's protest of the 2020 Assessment. On February 15, 2021, the Trust appealed the denial of the protest by letter to the Director. On February 17, 2021, and pursuant to the agreement of the parties, the Division issued its Request for Consolidation of Assessment Cases to consolidate the Trust's 2020 and 2021 appeals to be heard before the OHE. The Division also issued an Order Making Proposed Decision of Hearing Examiner Final Agency Decision on February 17, 2021, with Notice of Entry given on the same day. On February 17, 2021, the OHE entered its Order Consolidating Cases, which consolidated the Trust's appeals into one proceeding.

Finally, on March 13, 2021, the OHE issued its Final Decision, Findings of Fact, Conclusions of Law, and its Final Order. According to the OHE, the Association had no authority to issue assessments to the Trust related to insolvencies that occurred prior to the Trust's withdrawal as a member of the Association. The OHE also concluded ERISA prohibited the Trust from paying the assessments. Thus, the OHE upheld the Trust's protests. The Association timely filed its Notice of Appeal on April 16, 2021. Briefs were submitted to the circuit court and oral argument was waived.

QUESTION PRESENTED

1. Whether the Association had the authority to issue statutorily required assessments to the Trust, in 2020 and 2021, related to insurer liquidations which occurred while the Trust was a member of the Association?

   The OHE held the Association did not have such authority.

2. Whether the Employee Retirement Income Security Act of 1974 (ERISA) precluded the Trust from paying the assessments issued to the Trust by the Association in 2020 and 2021?

   The OHE held ERISA precluded the Trust from making such payments.

LEGAL STANDARD

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36.

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or

> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

SDCL 1-26-36. *Brown v. Douglas School Dist.*, 2002 S.D. 92, ¶ 9, 650 N.W.2d 264, 267. The Department's factual determinations based on documentary evidence are reviewed de novo. *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (further citations omitted). Questions of law are reviewed de novo, as are mixed questions of law and fact. *Brown*, 2002 S.D. 92, ¶ 9, 650 N.W.2d at 267 (further citations omitted).

However, since the parties **stipulated** to the **facts** before the South Dakota Department of Labor, Division of Insurance (the "Division"), OHE, the issues presented to this circuit court are solely legal issues to be reviewed de novo. *Sisseton Educ. Assoc. v. Sisseton Sch. Dist.*, 516 N.W.2d 301 (S.D.1994); *Oberle v. City of Aberdeen*, 470 N.W.2d 238 (S.D.1991).

ANALYSIS

I. THE OHE ERRED WHEN IT GAVE RETROACTIVE APPLICATION TO SENATE BILL 37 & ERRONEOUSLY CONCLUDED THERE WAS NO AUTHORITY TO MAKE THE 2020 and 2021 ASSESSMENTS TO THE TRUST.

The effect of the OHE ruling results in Senate Bill 37 terminating the Trust's liability to pay any future assessments related to insolvencies that occurred prior to the Trust's withdrawal as a member of the Association. While the OHE's decision is also contrary to SDCL 58-29C-53.B and the Association's Plan of Operation, its ultimate decision amounts to an unlawful, retroactive application of Senate Bill 37.

Prior to the effective date of Senate Bill 37, the Trust was obligated to be a member of the Association, and it was, as a matter of law, a "member

insurer." *See* SDCL 58-18-88 (amended July 1, 2019). The Court agrees with the Association's assertion that the passage of Senate Bill 37 simply removed the legal mandate that METs like the Trust be members of the Association. Nothing in Senate Bill 37 exempts an MET like the Trust from the requirements of the Act relating to periods when the MET was a member. Indeed, the definition of "member insurer" contained in SDCL 58-29C-48, which was unchanged by Senate Bill 37, does not differentiate between present and former members of the Association. *See also* SDCL 58-29C-49.A. ("All member insurers shall be and remain members of the association as a condition of their authority to transact insurance in this state"). The Trust's act of withdrawing from the Association did not change its legal status under the Act and the Association's Plan of Operation, *i.e.*, it did not affect the existence of the Trust's ongoing liability for insolvencies that occurred while it was a member. Indeed, for Senate Bill 37 to do what the OHE's decision purports–to nullify the Trust's ongoing liability for insolvencies that occurred while the Trust was a member–amounts to an unlawful retroactive application of Senate Bill 37.

South Dakota law provides that,

> The repeal of any statute by the Legislature shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

SDCL 2-14-18 (emphasis added); *see also* SDCL 2-14-21 (providing statutes shall not be construed as retroactive "unless such intention plainly appears"). While Senate Bill 37 repealed the requirement that a MET be a member of the

Association going forward, nowhere in Senate Bill 37 does it plainly or expressly provide, or even suggest, that it should be given retroactive effect, or that it extinguishes the liability a MET incurred prior to the effective date of Senate Bill 37.

In the absence of such an express declaration, Senate Bill 37 can only be applied retroactively if it amounts to a mere "procedural," as opposed to a "substantive," change in the law. *West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990). So-called "substantive" legislative changes are those that "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994). So-called "procedural" legislative changes are those affecting remedies or procedure, such as "ones that describe methods for enforcing, processing, administering, or determining rights, liabilities or status." *Tischler v. United Parcel Serv.*, 1996 S.D. 98, ¶ 72, 552 N.W.2d 597, 608.

Here, each Association member became obligated to the Association following the insolvency of a member insurer so that the Association can discharge its statutory obligations in accordance with each member's pro rata share of premiums received during the three years prior to the year when the insolvency occurred. SDCL 58-29C-45; SDCL 58-29C-52.C. (4). As the Association's obligations became fixed and unavoidable as of March 1, 2017, when PTNA and ANIC were placed into liquidation, so, too, did the Trust's liability as of that date for all future assessments made related to those

liquidations. In connection with the Association's assessment needs for the Penn Treaty Liquidation, all assessments are allocated based on the premiums each member received in 2014 – 2016, years in which the Trust was undeniably a member of the Association.

However, the OHE concluded "the statute [SDCL 58-18-88] was changed before the Association authorized and called [the assessments], thereby precluding liability to the Trust." The OHE's conclusion was is incorrect. The Trust was *already liable* (and, according to the Plan of Operation, it "remained liable") for assessments related to the Penn Treaty Liquidation prior the passage of Senate Bill 37, and so Senate Bill 37 could not retroactively terminate that pre-existing (and "remaining") liability.

The OHE's decision also served to retroactively nullified the Trust's liability for assessments made related to the Penn Treaty Liquidation. At the same time, the OHE effectively and retroactively shifted the Trust's share of the financial burden that arose while it was undeniably a member of the Association onto all of the Association's other members. The OHE's application of Senate Bill 37 in this fashion would alter the pre-enactment legal status and obligations of the Association and all of its members, not just those of the Trust. Such a change would clearly be substantive, rather than merely procedural. *Sopko v. C & R Transfer Co., Inc.*, 2003 S.D. 69, ¶ 15, 665 N.W.2d 94, 98-99 (concluding pre-enactment liabilities cannot be altered by subsequent changes in the law because doing so "would constitute a clear violation of the prohibition against giving statutes which control substantive

rights retroactive effect"); *see also* 82 C.J.S. Statutes § 574 ("Thus, a retrospective statute is one which gives to preenactment conduct a different legal effect from what it would have had without the passage of the statute"). Thus, Senate Bill 37 did not, and could not, extinguish the Trust's liability to the Association for assessments related to the Penn Treaty Liquidation, and the OHE erred when it concluded otherwise.

OTHER ARGUMENTS

The court also finds that other erroneous legal conclusions were reached, or other arguments were not fully addressed by the OHE, which ultimately makes a difference in the final outcome of this case. The court certainly agrees the issues raised in this case are complex. Both the Association and the Trust are presenting excellent points to the courts to assist it to make the proper legal determination, all in a backdrop of slim caselaw on the issues. However, this court is adopting the overall analysis that the Association has made on the other issues as well. These include but are not limited to the following areas below.

The Trust argues that the Association's plan of operation is not controlling. Trust also claims that "impairments" are distinguishable from "insolvencies". Penn Treaty was impaired before they went insolvent, so this latter point is a distinction without a difference.

As to the claim that the Association's lacked authority to assess, the court disagrees. Article VI, Section B of the 2007 iteration of the Association's Plan of Operation provided as follows:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the Act. However, such insurer shall remain liable for any assessments based on impairments occurring prior to the termination of its license. Such insurer shall also be entitled to a refund of all or part of any assessments which were made prior to the termination of its license which later proves to be excessive. (emphasis added).

This provision obligates the Trust to pay its share of all assessments the Association may require in funding its statutory responsibilities arising from the Penn Treaty Liquidation, which occurred while the Trust was a member of the Association. *See* SDCL 58-29C-53.B (providing members of the Association "shall comply with the plan of operation.").

According to the Trust, this quoted language from the Plan of Operation is inapplicable because it "must involve an insurer that is not insolvent, but rather placed under an order of rehabilitation or conservation. Yet, as of March 1, 2017, PTNA and ANIC were 'insolvent' (not impaired) insurers under SDCL § 5[8]-29C-48(11)[.]" True, an "impaired insurer" is one "placed under an order of rehabilitation or conservation by a court of competent jurisdiction." SDCL 58-29C-48(10). However, both PTNA and ANIC were under orders of rehabilitation, and the companies were liquidated at the termination of those proceedings. ("The rehabilitation of PTNA [and ANIC] is hereby TERMINATED, and all orders entered during the rehabilitation, to the extent inconsistent with this Liquidation Order, are VACATED"). The captions of these two Pennsylvania actions also clearly denote each entity as "in Rehabilitation" since 2009.

The court agrees with the Associations position that the impairments of PTNA and ANIC were precursors to their insolvencies, which would not be uncommon as an insolvent insurer is often an impaired insurer that could not be rehabilitated. *See* 1 Couch on Ins. § 5:30 ("Rehabilitation proceedings may terminate in either the restoration of the company to the original management, or the liquidation of the company"). Additionally, in practice, the Association does not levy assessments unless an impaired insurer becomes an insolvent insurer, because the latter is what triggers the Associations mandatory obligations to provide benefits to the affected South Dakota policy holders. SDCL 58-29C-51.B.

Nonetheless, there is no dispute the Trust was a member of the Association while the companies were impaired and under orders of rehabilitation, just as there is no dispute the Trust was, and remained, a member for two years after those rehabilitation proceedings ultimately resulted in PTNA and ANIC being liquidated. Therefore, the Trust remains "liable for any assessments based on impairments occurring" while it was a member of the Association, notwithstanding the fact those impairments ripened into insolvencies. The Trust is, and remains, liable for any assessments the Association may require in funding its statutory responsibilities arising from the Penn Treaty Liquidation.

This outcome is warranted whether the Court views only the 2007 version of the Association's Plan of Operation, or also the 2020 version. As the Association noted, the operative language of Article VI, Section B is

substantively identical. While the Association made changes and clarifications to its Plan of Operation to alleviate further confusion and for other reasons, the effect is immaterial. Lastly, it is undisputed that the Director approved both the 2007 and 2020 versions of the Association's Plan of Operation. Apparently, Director saw no issue with the Association including language in its Plan of Operation that obligated withdrawing members to remain liable for assessments related to insolvencies that occurred while the member belonged to the Association, as the Director approved the same twice. Thus, the Association's Plan of Operation is proper and, as a matter of law, the Trust remains liable for future assessments made based on the Penn Treaty Liquidation.

The limited caselaw pertaining to the issues raised herein are supportive of this court's decision to reverse the OHE decision. *See Liberty Mut. Ins. Co. v. Superintendent of Ins.*, 689 A.2d 600, 602-603 (Me. 1997) (explaining based on a similarly worded plan of operation that a member's act of withdrawing from Maine's guaranty association "did not affect the *existence* of its ongoing liability to [the Maine guaranty association] for insolvencies that occurred while it remained a member insurer"); *Miss. Mfrs. Ass'n Workers' Comp. Grp. v. Miss. Workers' Comp. Grp. Self-Insurer Guar. Ass'n*, 281 So.3d 108, 115 (Miss. Ct. App. 2019) (rejecting argument similar to the Trust's and explaining "[i]f every solvent group self-insurer could withdraw from the [Mississippi guaranty association] and immediately avoid any further assessment, the [Mississippi guaranty association's] ability to guarantee claims and benefits on behalf of

insolvent groups would be compromised"). The Trust, although trying to distinguish both cases, has not cited any legal authority to the contrary. See also *Citizens Mut. Fire & Lightning Ins. Soc. v. Schoen*, 105 S.W.2d 43 (Mo. Ct. App. 1937); *See* 1 Couch on Ins. § 70:27.

As noted, the Trust attempts to distinguish the first two cases above. The Trust contends the distinction between insolvent insurers and impaired insurers is material, which as discussed earlier by the court; it is not. The Trust alleges it was not an "insurer," and so it could not be a member of the Association. However, the pre-2019 version of SDCL 58-18-88 expressly required METs like the Trust to "participate[] in the [Association] pursuant to chapter 58-29C *and is a member pursuant to subdivision 58-29C-48(12)*." As such, it was a member insurer as a matter of law, and so it was also bound by the Association's Plan of Operation. SDCL 58-29C-53.B (providing members of the Association "shall comply with the plan of operation."). See also *Citizens, supra* herein.

Next, the Trust attempts to distinguish *Mississippi Manufacturing*, by pointing out the case involved a statutory scheme applicable to a guaranty association for workers' compensation benefits, as opposed to health and life insurance. Nonetheless, courts have held guaranty association members cannot evade their obligations to continue paying assessments by simply withdrawing, when a guaranty association's plan of operation–like the Association's–contains language expressly stating the opposite.

Next, the Trust and the OHE claims there is a meaningful distinction between an "authorized assessment" verses a "called assessment". The Trust cites to SDCL 58-29C-48(3) and (5), defining the same and in support of its argument. However, under these definitions an assessment may be authorized prior to the date it is called, and the latter of which provides the timeframe within which an assessment must be paid before it will accrue interest. All of the assessments related to the Penn Treaty Liquidation were authorized as early as April 5, 2017, and the assessments were individually called ahead of each year's March 1 installment due date.

The Trust argues that under SDCL 58-29C-52.C(5), assessments "may not be authorized or called until necessary to implement the purposes of this chapter." This statute means the Association could not levy a Class B assessment unless, for example, an insolvency had occurred which triggered the Association's guaranty obligations under SDCL 58-29C-51. The Penn Treaty Liquidation occurred, so this statute does not support the Trust's attempt to avoid its liability for assessments related to that liquidation.

Trust also alleges that "only the Association became liable for the Penn Treaty Liquidation in 2017." The court disagrees. The Association was statutorily obligated following the Penn Treaty Liquidation to assess its members (including the Trust) for the funds needed to fulfill its statutory obligations based on each member's pro rata share of premiums received in South Dakota in the applicable line of business during the three (3) prior years. SDCL 58-29C-52.A. and C(4). The Association's Plan of Operation confirms the

Trust "shall *remain liable*" for assessments related to the Penn Treaty Liquidation.

Lastly, it is clear that the Association could have fully funded its guaranty obligations for the Penn Treaty Liquidation with an immediate lump-sum assessment levied against its members. See SDCL 58-29C-51.O; SDCL 58-29C-52.A. This one-time payment would have totaled $40,429,000.00, from which the Trust's pro rata share would be mathematically determinable. However, out of convenience to its members, the Association chose to reinsure its obligations and spread the assessments out over a period of five years. Doing so, however, did not–as confirmed by the Plan of Operation–limit the Trust's liability for its share of those guaranty obligations only to the period of time while it remained a member of the Association. Rather, the opposite is true. The court must give due regard to the Legislature's directive that the Act be construed to effectuate its purpose, SDCL 58-29C-47, and therefore the Trust's liability for assessments related to the Penn Treaty Liquidation became fixed and unavoidable as of March 1, 2017. The OHE erred when it concluded otherwise.

II. THE OHE ERRED WHEN IT HELD THAT ERISA PRECLUDED THE TRUST FROM PAYING THE ASSESSMENTS.

According to the OHE, the Association assessments to the Trust would violate ERISA'S "exclusive benefits" provision. Thus, the OHE ruled this pre-empts the Act's assessment to the Trust. The OHE did not reach the correct conclusion under ERISA's concerns.

Pursuant to 29 U.S.C. 1104(a)(1)(A), Congress wanted to "Safeguard employees from such abuses as self-dealing, imprudent investing and misappropriation of plan funds". *Fort Halifax Packing Co. v Coyne*, 482U.S. 1, 15 (1987). They were not necessarily concerned whether persons not covered by ERISA plan were somehow benefitted by the operation of the plans. *Boyle v. Anderson*, 68 F.3d 1093, 1102 (8th Cir. 1995).

With respect to pre-emption, the United States Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead ha[s] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). ERISA pre-empts state laws insofar as they "relate to any employee benefit plan." 29 U.S.C.A. § 1144. However, the Supreme Court has cautioned against an uncritical literalism of the phrase "relate to" because if it "were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Travelers Ins. Co.*, 514 U.S. at 655 (citation omitted). "But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Id.*

ERISA's "exclusive purpose" provision says nothing whatsoever about a state's authority to regulate MEWAs (or any entities) like the Trust operating within its borders, and ERISA does not pre-empt a state's authority to impose

insurance-related administrative or regulatory expenses under statutes of general applicability, like the assessments provided for in SDCL Ch. 58-29C. Indeed, ERISA confirms states may regulate MEWAs "to the extent not inconsistent with the preceding sections of this subchapter." *See* 29 USC 1144(b)(6)(A)(ii). And according to the U.S. Department of Labor,

> [G]iven the clear intent of Congress to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs, as evidenced by the enactment of the MEWA provisions, it is the view of the Department that it would be contrary to Congressional intent to conclude that states, while having the authority to apply insurance laws to such plans, do not have the authority to require and enforce registration, licensing, reporting and similar requirements necessary to establish and monitor compliance with those laws.

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ERISA also expressly confirms plan funds may be used to defray such expenses. 29 U.S.C 1104(a)(1)(A)(ii) (providing plan fiduciary shall discharge its duties "for the exclusive purpose of . . . defraying reasonable expenses of administering the plan"). As the Second Circuit Court of Appeals recognized in a case involving a MEWA in Connecticut, "Plaintiffs also contend that Connecticut imposes certain fees on insurance companies that are inconsistent with ERISA's requirement that funds be held in trust for the participants and be used only to provide benefits and to defray administrative costs. *In our view, regulatory fees can be a legitimate administrative expense." Atl. Healthcare*

[1] *Available at* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1990-18a.pdf (last accessed, 5/21/2021).

Benefits Tr. v. Googins, 2 F.3d 1, 6 (2d Cir. 1993) (emphasis added). The same is true here with respect to the assessments authorized by SDCL Ch. 58-29C.

In an analogous context, the Eighth Circuit held ERISA did not preempt a Minnesota law that allowed medical providers to pass the costs of a 2% tax on their gross revenues to health care plans, including plans covered by ERISA. *Boyle*, 68 F.3d at 1112. Proceeds from the tax were used to reduce healthcare costs and make healthcare coverage more available for Minnesotans in general. *Id.* at 1097. A number of trustees who administered ERISA plans argued the law violated the "exclusive purpose" provision because the tax would result in an increase in plan expenditures for non-plan purposes and because the tax revenue would be used to fund state programs that provided benefits to persons who are not beneficiaries of the ERISA plans. *Id.* at 1102. The Eighth Circuit rejected the argument and agreed instead that ERISA's preemptive effect should not be used to "frustrate efforts of a state, under its police power, to regulate health care costs." *Id.* at 1102-03 (citation omitted). Indeed, "such a view would mean that every state law that led to increases in plan costs—such as sales tax, minimum wage or environmental regulation statutes—would be preempted." *Id.* at 1103.

Other courts, including the United States Supreme Court, have more generally held that ERISA does not preempt state regulations that impose a mere economic impact on plans governed by ERISA. *Travelers Ins. Co.*, 514 U.S. at 659 ("An indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an

ERISA plan itself"); *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647, 653 (7th Cir. 1995) ("Because the HIRSP assessments imposed by Wisconsin on health insurance carriers do not interfere with the provisions or administration of ERISA plans, the assessments do not 'relate to' such plans in a manner significant enough to implicate the preemption clause of the statute"); *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F.2d 1179, 1194 (3d Cir. 1993) (rejecting "exclusive benefit" preemption challenge to New Jersey's medical services rate setting system and agreeing "if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress"); *Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) (rejecting contention that regulation which increased a plan's cost of doing business was preempted, because "That argument does not withstand scrutiny. So too, for example, do state laws and municipal ordinances regulating zoning, health, and safety increase the operational costs of ERISA trusts, but no one would seriously argue that they are preempted").

Again, the same result should be reached here. The point of these cases–which the OHE never addressed–is that the assessment mechanism in SDCL 58-29C functions as *a cost of doing business* in the State, which ERISA plainly permits. METs/MEWAs like the Trust have no inherent right to exist and do business in South Dakota; that privilege is granted by the Legislature. The Legislature permitted entities like the Trust to do business in the state if,

among other things, they agreed to "participate [] in the [Association] pursuant to chapter 58-29C and is a member pursuant to subdivision 58-29C-48(12)." The Trust would have had no authority to exist and operate in South Dakota in the first place unless it agreed to assume the same rights and obligations as other members of the Association, which, under the Plan of Operation, includes the continuing obligation of paying assessments for insurer insolvencies that occurred while the Trust was a member of the Association. Thus, the Trust was only able to exist and provide benefits to its members by virtue of this arrangement, and clearly–though an ancillary point–the Trust's members also "benefitted" from that arrangement. To conclude otherwise would mean the Trust must also be exempt from paying any form of operational expenses, overhead expenses, taxes, rent, etc., –a truly anomalous result Congress neither articulated nor intended.

Therefore, the assessment mechanisms of SDCL Ch. 58-29C do not violate ERISA's "exclusive purpose" provision merely because some the Trust's funds must be put toward satisfying its obligations for insolvencies that occurred while it was a member of the Association. The OHE's opposing conclusion both dramatically expands ERISA's preemptive reach and significantly impairs a state's ability to exercise its police power to enact regulations for the health and welfare of the general public. *Travelers Ins. Co.*, 14 U.S. at 661 ("Indeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out

of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that '[p]re-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability'") (citation omitted). Thus, ERISA does not preempt application of SDCL Ch. 58-29C to the Trust, and the OHE erred when it concluded otherwise.[2]

CONCLUSION

The OHE erred when it held the Association had no authority to issue the assessments to the Trust. The OHE erred when it held ERISA precluded the Trust from paying the assessments. This court concludes that the Trust was and is liable for any assessments related to insurer insolvencies that occurred while the Trust was a member of the Association. Thus, the OHE decision is reversed for the reasons stated herein. The Trust is further ordered to pay the Assessments, plus prejudgment interest. Association will prepare any necessary finding of facts, conclusion or law and Order consistent with this opinion. Additional Finding and Conclusions may be added to clarify the court's ruling herein, as this court is primarily adopting the arguments and analysis of the Appellants. This memorandum opinion should be incorporated therein reference.

[2] It is also significant that the Trust paid the Association's Penn Treaty assessments for 2017, 2018, and 2019 without ever alleging that ERISA preempted the applicable statutes of SDCL Ch. 58-29C that authorized those assessments.

Dated December 12, 2021

BY THE COURT

M. Bridget Mayer
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

SOUTH DAKOTA LIFE & HEALTH GUARANTY ASSOCIATION, Appellant, vs. SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST Appellee.	32CIV21-65 **ORDER AND FINAL JUDGMENT**

WHEREAS, the Court having considered the matter on the submissions of the parties, including the briefs and the parties' stipulated facts and exhibits, and the Court having entered its Memorandum Opinion on December 12, 2021, and having expressly incorporated the same herein, it shall be and hereby is

ORDERED, ADJUDGED, and DECREED:

The OHE's conclusion that Appellant lacked authority to issue assessments to Appellee in 2020 and 2021 is REVERSED.

The Court concludes Appellant's Plan of Operation obligates Appellee to pay its share of assessments Appellant may require in funding its statutory responsibilities arising from the Penn Treaty Liquidation, which occurred while Appellee was a member of the South Dakota Life & Health Guaranty Association.

The Court concludes Appellee's liability for future assessments made by Appellant related to the Penn Treaty Liquidation became fixed and unavoidable as of March 1, 2017, when PTNA and ANIC were placed into liquidation.

The Court concludes the passage of Senate Bill 37, effective July 1, 2019, did not retroactively terminate Appellee's pre-existing liability for future assessments made by Appellant related to the Penn Treaty Liquidation.

The OHE's conclusion that the Employee Retirement Income Security Act of 1974 (ERISA) precluded Appellee from paying assessments to Appellant in 2020 and 2021 is REVERSED.

The Court concludes ERISA's "exclusive purpose" provision does not preempt Appellant's assessment mechanisms under SDCL Ch. 58-29C.

Appellee is ordered to pay the 2020 and 2021 assessments to Appellant, plus pre-judgment interest at the rate of 10% per annum per SDCL 21-1-13.1 and SDCL 54-3-16, with said interest beginning to accrue as of April 7, 2021.

Pursuant to SDCL 1-26-32.1 and SDCL 15-6-52(a), the Court's Memorandum Opinion shall act as the Court's finding of fact and conclusions of law as permitted by SDCL 1-26-36.

12/30/2021 4:54:13 PM

BY THE COURT

Hon. M. Bridget Mayer
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
OFFICE OF HEARING EXAMINERS
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST, Appellant, vs. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION, Appellee.	INS. 20-12 **DECISION**

This is an appeal of the South Dakota Bankers Benefit Plant Trust ("Trust") to the assessment made by the South Dakota Life and Health Guaranty Association ("Association"). The Trust is represented by its attorneys of record, Michael Shaw and Terra Fisher from May, Adam, Gerdes & Thompson, LLP. The Association is represented by their attorneys of record, Mitchell Peterson and Charles Gullickson of Davenport Law Firm. This matter was stipulated by the parties to be heard upon briefs and the Stipulated Facts and Record. This matter is a contested hearing and is heard by the Office of Hearing Examiners under jurisdiction of SDCL §1-26D-4. This Decision is a Final Decision without further agency action pursuant to an Order signed by the Director of the Division pursuant to SDCL §1-26D-7.

Stipulated Findings of Fact

1. The Association exists and is governed by the South Dakota Life & Health Insurance Guaranty Association Act, SDCL §58-29C-44 et seq.

2. The Association exists to pay benefits and continue coverages of insolvent insurers, subject to certain limits and exclusions, pursuant to SDCL Ch. §58-29C through assessments levied by the Association to its member insurers.

3. The Trust is a Multiple Employer Welfare Arrangement ("MEWA") pursuant to Section 3(40) of the Employee Retirement Income Security Act of 1974 ("ERISA") and a self-funded Multiple Employer Trust ("MET") pursuant to SDCL §58-18-88.

4. The Trust maintains an employee welfare benefit plan for eligible employees of employers

who are active members of the South Dakota Bankers Association ("SDBA").

5. Prior to July 1, 2019, the Trust was required to participate in and be a member of the Association pursuant to SDCL §58-18-88(6).

6. On July 1, 2019, South Dakota Senate Bill 37 (Record A) became effective and amended SDCL §58-18-88, eliminating the Trust's mandatory participation in the Association.

7. On March 1, 2017, Penn Treaty Network American Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC" and collectively with PTNA, "Penn Treaty") were declared insolvent pursuant to an Order of Liquidation entered by the Commonwealth Court of Pennsylvania. Copies of the Orders of Liquidation (Record B).

8. On March 1, 2017, the Association issued Reserve Funding PGA Promissory Notes in connection with the liquidation of PTNA and ANIC (collectively, the "Penn Treaty Liquidation"). The Promissory Notes (Record C) evidence future amounts due from the Association to protected cells of LTC Reinsurance PCC ("LTC Re") pursuant to Reinsurance and Administrative Services Agreements dated as of March 1, 2017, between the Association and LTC Re whereby LTC Re agreed to reinsure the obligations to policyholders incurred by the Association as a result the liquidation of PTNA and ANIC.

9. The Association authorized Class B health assessments in connection with the Penn Treaty Liquidation against the Trust in 2017, 2018 and 2019. (Record D, E and F are redacted minutes of the Association meetings dated April 5, 2017, January 9, 2018, and December 17, 2018.)

10. The Trust paid all assessments issued by the Association in connection with the Penn Treaty Liquidation for 2017, 2018 and 2019.

11. On January 22, 2020, the Association issued a Class B health assessment arising from the Penn Treaty Liquidation to the Trust. (Record G.)

12. The 2020 assessment was authorized by the Association's Board of Directors on December 20, 2019. Minutes of the December 20, 2019 meeting, (Record H) and e-mail exchange between Charles Gullickson and Randie Thompson dated April 9 and 10, 2020 (Record I) are evidence of this.

13. On January 28, 2020, the Trust protested the assessment by letter to Charles Gullickson from Michael Feimer and David King. (Record J)

14. Gullickson responded to the Trust's January 28, 2020, by letter dated February 7, 2020. (Record K)

15. The Trust responded to Gullickson's February 7, 2020, letter by correspondence dated February 21, 2020, and paid the assessment under protest. (Record L).

16. On April 9, 2020, the Association denied the Trust's protest by way of letter from Gullickson. (Record M).

17. On April 9, 2020, Gullickson advised the South Dakota Division of Insurance Director Larry Deiter of the denial of the Trust's protest. (Record N).

18. The Trust appealed the denial to the South Dakota Division of Insurance by letter dated June 2, 2020. (Record O).

19. The Division of Insurance issued a Notice of Hearing dated June 26, 2020, scheduling the appeal before the Office of Hearing Examiners. (Record P).

20. The Division of Insurance also issued an Order Making Proposed Decision of Hearing Examiner Final Agency Action on June 26, 2020. (Record Q).

21. On July 7, 2020, the Association filed the Affidavit of Charles Gullickson Concerning Plan of Operation of the Association with the Office of Hearing Examiners (Record R).

22. On August 13, 2020, the Association requested that the Q&A Concerning April 2017 Class B Assessment (Record S) be included in the record. The Trust has no objection but states they have no record of receiving this document prior to August 13, 2020.

Findings of Fact – Not stipulated

23. On January 25, 2021, the Trust paid the Class B 2021 Health Assessment to Association under protest. On February 8, 2021, the Association denied the Trust's protest.

24. See Exhibit T for the February 15, 2021 letter from Trust to the Division requesting consolidation of the requested hearings for the 2020 and the 2021 protests.

25. Any additional findings included in the Reasoning section of this decision are incorporated herein by this reference.

26. To the extent any of the foregoing are improperly designated and are instead conclusions of law, they are hereby redesignated and incorporated herein as conclusions of law.

DECISION

The Penn Treaty Liquidation in March 2017 triggered Association to make plans to assess its

"member insurers in the health line of business pursuant to SDCL §58-29C-52" a certain amount for the next five years to fund Promissory Notes by Association. The Trust, although in the health line of business and belonging to the Association, but not a "member insurer"[1], paid three of the five assessments to the Association, as they were required by law to belong to the Association. Then in 2019, the law regarding Association qualifications changed and Trust no longer belonged to Association. SDCL §58-18-88(6). Prior to 2017 and currently, Trust is not a "member insurer" under SDCL §58-29C-48(12), as they operated on an assessment basis.[2] Trust is the only group within the Association that did not meet the definition of a "member insurer".

Association's Board used data from 2013, 2014, and 2015 to determine the Penn Treaty Liquidation assessment for 2017. For years beyond 2017, they used data from 2014, 2015, and 2016 with an expected "true-up" for future years. On December 19, 2019, the Association Board met to "authorize" the assessment to Trust for 2020. The Association assessment to Trust in 2020, and now again in 2021, were paid by Trust under protest.

SDCL §58-29C-48 defines both an Authorized Assessment and a Called Assessment:

> (3) "Authorized assessment" or the term "authorized" when used in the context of assessments, means a resolution by the board of directors has been passed whereby an assessment will be called immediately or in the future from member insurers for a specified amount. An assessment is authorized when the resolution is passed;
>
> (5) "Called assessment" or the term "called" when used in the context of assessments, means that a notice has been issued by the association to member insurers requiring that an authorized assessment be paid within the time frame set forth within the notice. An authorized assessment becomes a called assessment when notice is mailed by the association to member insurers;

SDCL §58-29C-48 (3) and (5).

At the time the assessment was authorized in 2019 and 2020, Trust was a MEWA regulated by ERISA and could not be a member of Association pursuant to state law. In addition, SDCL §58-29C-46.B(2)(d)(i) states that "[t]his chapter may not provide coverage for a portion of a policy or contract issued to a plan or program of an employer, association, or other person to provide life, health, or

[1] SDCL §58-29C-48(12) "Member insurer," an insurer licensed or that holds a certificate of authority to transact in this state any kind of insurance for which coverage is provided under §58-29C-46, and includes an insurer whose license or certificate of authority in this state may have been suspended, revoked, not renewed, or voluntarily withdrawn, but does not include:

(e) A mutual assessment company or other person that operates on an assessment basis;

[2] Trust is a MEWA or multiple employer welfare arrangement regulated under ERISA, the employee Requirement Income Security Act of 1974, as amended. Trust is also a MET, a self-funded multiple employer trust as defined by SDCL §58-18-88. All employers within a MET enter into a Participation and Adoption Agreement whereby each employer agrees to be held jointly and severally liable for any deficiencies of the Trust.

annuity benefits to its employees, members, or others, to the extent that the plan or program is self-funded or uninsured, including benefits payable by an employer, association, or other person under a multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1002(40))."

Association accrued the liability in 2017 when they accepted the Penn Treaty Liquidation. Association argues that Trust was made liable for the five years of Penn Equity assessments in 2017. Trust argues that Trust was not liable for the assessment until the Association Board authorized and called the assessment each year. Association formulated the Penn Treaty assessment to Trust and other members each year. Trust argues that members only accrue liability after the assessment is authorized each year by Association.

SDCL §58-29C-53 regulates the Association's Plan of Operation. The Plan of Operation, which the Division of Insurance had approved, provided under the Membership Article VI:

Section A:

> Any insurer which transacts in this state any kind of insurance for which coverage is provided under the Act and which is included in the definition of "member insurer" in SDCL §58-29C-48(12) shall be a member of the Association.

Section B:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the Act. However, such insurer shall remain liable for any assessments based on impairments occurring prior to the termination of its license. Such insurer shall also be entitled to a refund of all or part of any assessments which were made prior to the termination of its license which later proves to be excessive.

See Record R (2007 Plan of Operation, p. 8).

There are a couple of similar situations in caselaw that are cited by Association in their brief. Had Trust been a "member insurer" as defined by SDCL §58-29C-48(12), then the Maine case of *Liberty Mut Ins Co. v. Superintendent of Ins.*, 689 A.2d 600 (Me. 1997) would be applicable. In *Liberty Mut.*, a member insurer of a guaranty association stopped providing workers compensation insurance. The insurer voluntarily withdrew their insurance license . However, the insurer had made an agreement to the association's plan of operation and were found by the Maine Supreme Court to be liable for the assessments. Similarly, the cited case of *Miss. Mfrs. Ass'n Worker's Comp. Grp v. Miss Workers' Comp. Grp. Self-Insurer Guar. Ass'n*, 281, So.3d 108 (Miss. Ct. App. 2019). Again, an insurer voluntarily withdrew from an association. The insurer was assessed after their withdrawal from the association. In both cases cited by Association, the insurers were actually "member insurers" under their state definitions and the joining of the association and subsequent withdrawal from association was voluntary and not a legal requirement. Both of these insurers, in Maine and Missouri, were protected by belonging to their respective associations. The cases set out above are rightly distinguished by Trust.

The 2019 amendments to SDCL §58-18-88 make the Trust's withdrawal from Association mandatory, and not voluntary.

"It is general basic law that the effect of the repeal of a statute, where neither a saving clause within the repealing statute itself nor a general saving statute exists to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act *in futuro* and to divest the right to proceed under the statute which, except as to proceedings passed and closed, is considered as if it had never existed." *Matter of Tinklenberg*, 2006 S.D. 52, 716 N.W.2d 798 (quoting *State Highway Commission v. Wieczorek*, 248 N.W.2d 369, 372, (S.D. 1976)). The 2019 Senate Bill 37 changing SDCL §58-18-88 did not have a specific savings clause that was enacted at the same time. However, there is a general savings clause within South Dakota Code that saves any enforcements of penalties, forfeitures, or liabilities from extinction due to the repeal of a statute. SDCL §2-14-18[3]. This statute only applies if, in fact, a liability had accrued under the statute. *Schultz v. Jibben*, 94 SDO 251, 513 N.W.2d 923 (S.D. 1994). In this case, the statute was changed before Association authorized and called the assessment, thereby precluding liability to Trust.

> Fn 2. The specific purpose of saving clauses is to preserve preexisting rights, and on repeal of a statute a saving clause or general saving statute preserves rights and liabilities which have accrued under the act repealed.
> ... .
> A saving clause whereby the right of some person or of the state is reserved must be strictly construed and will not be held to embrace anything not fairly within its terms. 82 CJS § 440 (emphasis added).

Schultz v. Jibben, 94 SDO 251 fn2, 513 N.W.2d 923 (S.D. 1994).

The statute regulating an assessment from Association to members is SDCL §58-29C-52. This assessment at issue is a Class B assessment, as defined by statute.

> A. For the purpose of providing the funds necessary to carry out the powers and duties of the association, the board of directors shall assess the member insurers, separately for each account, at the time and for the amounts as the board finds necessary. Assessments are due not less than thirty days after prior written notice to the member insurers and accrue interest at ten percent per annum on and after the due date.
>
> B. There are two classes of assessments, as follows: ...
>
> (2) Class B assessments are authorized and called to the extent necessary to carry out the powers and duties of the association under §58-29C-51 with regard to an impaired or an insolvent insurer.
>
> C. (2) The amount of a Class B assessment, except for assessments related to long-term care insurance shall be allocated for assessment purposes between the accounts and among the subaccounts of the life insurance and annuity account,

[3] SDCL §2-14-18. The repeal of any statute by the Legislature shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

> pursuant to an allocation formula which may be based on the premiums or reserves of the impaired or insolvent insurer or any other standard the board in its sole discretion determines is fair and reasonable under the circumstances.
>
> ...
>
> (4) Class B assessments against member insurers for each account and subaccount shall be in the proportion that the premiums received on business in this state by each assessed member insurer on policies or contracts covered by each account for the three most recent calendar years for which information is available preceding the year in which the member insurer became insolvent (or, in the case of an assessment with respect to an impaired insurer, the three most recent calendar years for which information is available preceding the year in which the member insurer became impaired) bears to premiums received on business in this state for those calendar years by all assessed member insurers.
>
> (5) Assessments for funds to meet the requirements of the association with respect to an impaired or insolvent insurer may not be authorized or called until necessary to implement the purposes of this chapter. Classification of assessments under subpart B and computation of assessments under this subpart shall be made with a reasonable degree of accuracy, recognizing that exact determinations may not always be possible. The association shall notify each member insurer of the member insurer's anticipated pro rata share of an authorized assessment not yet called within one hundred eighty days after the assessment is authorized.

SDCL §58-29C-52 (in pertinent part). Therefore, under (A) and (C)(5) the assessment from Association to Trust is only authorized after the Board determines the amount and notices the Trust. The evidence from the parties indicate that the final amounts were authorized by the Association Board each year before they were called by Association.

Trust is a non-profit employee benefit plan regulated by ERISA. As such, although required by (now-repealed) law to belong to Association, they would never have received any benefit or protection from Association due to ERISA regulations.

Title I of ERISA provides for the "exclusive benefit" rule. This rule mandates that "a fiduciary shall discharge his duties ... solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1). Further, this rule requires that plan assets "be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries, and defraying reasonable expenses of administering the plan." 29 U.S.C. §1103(c)(1). This exclusive benefit rule must be read in conjunction with the S.D. law regarding assessments of participants in associations. SDCL §58-29C-46B(2)(d)(i).

SDCL §58-29C-45, entitled: Purpose of Chapter – Creation of Association, gives the reasons for an association being formed. The purpose of an association "A. ...is to protect ... the person specified in subpart A of §58-29C-46 against failure in the performance of contractual obligations ... because of the impairment or insolvency of the member insurer that issued the policies, plans, or contracts." "B. To provide this protection ... members of the association are subject to assessment."

However, in SDCL §58-29C-46, policies and portions specifically "not covered" by the chapter of law under §58-29C-46B(2)(d)(i) are "[a] multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1002(40))." Therefore, any assessment of Trust under the chapter would not benefit members of Trust and therefore be at odds with the ERISA rules. As pointed out by Trust in their brief, this is one of the reasons for the 2019 amendment of SDCL 58-18-88(6).

The "exclusive benefit" rule in ERISA does not allow assessment by Association to Trust or for Trust to pay any assessment by Association that is not for a purpose outlined in 29 U.S.C. 1104(a)(1). ERISA also preempts any state statute that provides otherwise. 29 U.S.C. §1144(b)(6)(A)(ii).

Conclusions of Law

1. The Office of Hearing Examiners has authority over this matter pursuant to SDCL §1-26D-4.
2. The Division of Insurance has given authority to issue a Final Determination to the Office of Hearing Examiners pursuant to SDCL §1-26D-11.
3. Under SDCL Ch. 58-29C, as of July 1, 2019, Trust is no longer a member of Association and is exempted from participation in or coverage under the Association.
4. Trust was not a member insurer of Association when assessments were authorized and called by Association for payment in 2019 and 2020.
5. There was no statutory authority for Association to authorize an assessment to Trust in 2019 and 2020. The purpose of the assessment by Association was not for any reason provided for at 29 U.S.C. §1103(c)(1).
6. Trust was statutorily prohibited from making the assessment payment as the assessment was not for a reason under 29 U.S.C. §1103(c)(1). Trust was not statutorily authorized to make these assessment payments to Association in 2020 and 2021.
7. Trust is a Multiple Employer Welfare Arrangement (MEWA) regulated by ERISA, the Employee Retirement Income Security Act of 1974.
8. ERISA preempts state law regarding MEWAs that are "inconsistent with" ERISA laws regarding MEWAs. 29 U.S.C. §1144(b)(6)(A)(ii).
9. The Association assessed Trust pursuant to SDCL §58-29C-52 for payments to be made in 2020 and 2021.
10. Trust protested the payments made to Association in 2020 and 2021 pursuant to SDCL §58-29C-52(I).

11. SDCL §58-29C-52(I)(5) "If the protest or appeal on the assessment is upheld, the amount paid in error or excess shall be returned to the member insurer. Interest on a refund due a protesting member insurer shall be paid at the rate actually earned by the association."

12. Any additional conclusions of law included in the Reasoning section of this proposed decision are incorporated by reference.

13. To the extent any of the foregoing are improperly designated and are, instead, findings of fact, they are hereby redesignated and incorporated herein as findings of fact.

Final Order

It is Ordered that Trust was under no obligation to pay the assessments to Association in 2020 and 2021 as the assessments were made after Trust no longer belonged to Association. Trust had no outstanding obligation to pay Association's liabilities, pursuant to State and Federal Law. Federal law prohibits Trust from making payments to Association as the assessment from Association is not for the exclusive benefit or in the interest of the participants and beneficiaries of Trust or for any other purpose outlined under Federal law. Any South Dakota law which may hold otherwise regarding Trust, as a MEWA, is preempted by ERISA. Trust paid the assessments to Association under protest, and the protests are deemed upheld.

Furthermore, it is Ordered that the Association assessments be refunded to Trust with prejudgment interest.

This is ORDERED this 23rd day of March, 2021

Catherine Williamson
Chief Hearing Examiner

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served by mail and e-mail upon the following on March 23, 2021

Catherine Williamson
Catherine.Williamson@state.sd.us

Mr. Michael F. Shaw
Ms. Terra M. Fisher
MAY, ADAMS, GERDES & THOMPSON
P. O. Box 160
503 S. Pierre Street
Pierre, SD 57501
mfs@mayadam.net
tmf@mayadam.net

Ms. Randie Thompson
ERISA Law Practice LLC
4817 East 18th Avenue
Denver CO 80220
randie@erisalawpractice.com

Mr. Mitchell A. Peterson
Mr. Charles Gullickson
Davenport Law Firm
206 West 14th Street
Sioux Falls, SD 57101-1030
MPeterson@dehs.com
CGullickson@dehs.com

Mr. Larry Dieter, Director
Mr. Frank Marnell, Chief Legal Counsel
Division of Insurance
South Dakota Department of Labor & Regulation
124 South Euclid Avenue, 2nd Floor
Pierre, SD 57501
Larry.Dieter@state.sd.us
Frank.Marnell@state.sd.us

SD Bankers Benefit Plan Trust v SD Life and Health Insurance Guaranty Association Stipulation as to Facts And Record A-S

Rec'd on

9-24-2020

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR & REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION	INS. 20-12 **STIPULATION AS TO** **FACTS AND RECORD**

COMES NOW the undersigned counsel of record for South Dakota Bankers Benefit Plan Trust ("the Trust") and the South Dakota Life & Health Insurance Guaranty Association ("the Association") and hereby stipulate that the following shall constitute the facts and the record in this case.

1. The Association exists and is governed by the South Dakota Life & Health Insurance Guaranty Association Act, SDCL 58-29C-44 et seq.

2. The Association exists to pay benefits and continue coverages of insolvent insurers, subject to certain limits and exclusions, pursuant to SDCL Ch. 58-29C through assessments levied by the Association to its member insurers.

3. The Trust is a Multiple Employer Welfare Arrangement ("MEWA") pursuant to Section 3(40) of the Employee Retirement Income Security Act of 1974 ("ERISA") and a self-funded Multiple Employer Trust ("MET") pursuant to SDCL 58-18-88.

4. The Trust maintains an employee welfare benefit plan for eligible employees of employers who are active members of the South Dakota Bankers Association ("SDBA").

5. Prior to July 1, 2019, the Trust was required to participate in and be a member of the Association pursuant to SDCL 58-18-88(6).

6. On July 1, 2019, South Dakota Senate Bill 37, attached hereto as Record A, became effective and amended SDCL 58-18-88, eliminating the Trust's mandatory participation in the Association.

7. On March 1, 2017, Penn Treaty Network American Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC" and collectively with PTNA, "Penn Treaty") were declared insolvent pursuant to an Order of Liquidation entered by the Commonwealth Court of Pennsylvania. Copies of the Orders of Liquidation are attached hereto as Record B.

8. On March 1, 2017, the Association issued Reserve Funding PGA Promissory Notes in connection with the liquidation of PTNA and ANIC (collectively, the "Penn Treaty Liquidation"). The Promissory Notes are attached as Record C. The Promissory Notes evidence future amounts due

from the Association to protected cells of LTC Reinsurance PCC ("LTC Re") pursuant to Reinsurance and Administrative Services Agreements dated as of March 1, 2017, between the Association and LTC Re whereby LTC Re agreed to reinsure the obligations to policyholders incurred by the Association as a result the liquidation of PTNA and ANIC.

9. The Association authorized Class B health assessments in connection with the Penn Treaty Liquidation against the Trust in 2017, 2018 and 2019. Attached hereto as Record D, E and F are redacted minutes of the Association meetings dated April 5, 2017, January 9, 2018, and December 17, 2018.

10. The Trust paid all assessments issued by the Association in connection with the Penn Treaty Liquidation for 2017, 2018 and 2019.

11. On January 22, 2020, the Association issued a Class B health assessment arising from the Penn Treaty Liquidation to the Trust. A copy of the January 22, 2020, health assessment is attached hereto as Record G.

12. The 2020 assessment was authorized by the Association's Board of Directors on December 20, 2019. Attached are minutes of the December 20, 2019 meeting, Record H, and e-mail exchange between Charles Gullickson and Randie Thompson dated April 9 and 10, 2020, Record I.

13. On January 28, 2020, the Trust protested the assessment by letter to Charles Gullickson from Michael Feimer and David King. A copy of the January 28, 2020, letter is attached hereto as Record J.

14. Gullickson responded to the Trust's January 28, 2020, by letter dated February 7, 2020. A copy of the February 7, 2020, Gullickson letter is attached hereby as Record K.

15. The Trust responded to Gullickson's February 7, 2020, letter by correspondence dated February 21, 2020, and paid the assessment under protest. A copy of the Trust letter dated February 21, 2020, is attached hereto as Record L.

16. On April 9, 2020, the Association denied the Trust's protest by way of letter from Gullickson. A copy of the April 9, 2020, Gullickson letter is attached hereto as Record M.

17. On April 9, 2020, Gullickson advised the South Dakota Division of Insurance Director Larry Deiter of the denial of the Trust's protest. A copy of Gullickson's letter to Director Deiter is attached hereto as Record N.

18. The Trust appealed the denial to the South Dakota Division of Insurance by letter dated June 2, 2020. A copy of the Trust's letter of June 2, 2020, is attached hereto as Record O.

19. The Division of Insurance issued a Notice of Hearing dated June 26, 2020, scheduling the appeal before the Office of Hearing Examiners. This Notice of Hearing is attached hereto as Record P.

20. The Division of Insurance also issued an Order Making Proposed Decision of Hearing Examiner Final Agency Action on June 26, 2020. Such Order with Notice of Entry is attached hereto as Record Q.

21. On July 7, 2020, the Association filed the Affidavit of Charles Gullickson Concerning Plan of Operation of the Association with the Office of Hearing Examiners, which is attached hereto as Record R.

22. On August 13, 2020, the Association requested that the Q&A Concerning April 2017 Class B Assessment, attached hereto as Record S, be included in the record. The Trust has no objection but states they have no record of receiving this document prior to August 13, 2020.

The parties furthermore stipulate and agree that the following records shall be deemed the record of appeal in this matter.

- Record A: South Dakota Senate Commerce and Energy Engrossed Bill 37, effective July 1, 2019.
- Record B: Orders of Liquidation entered by the Commonwealth Court of Pennsylvania regarding PTNA and ANIC, each dated March 1, 2017.
- Record C: the Association's Reserve Funding PGA Promissory Notes each dated March 1, 2017
- Record D: the Association's April 5, 2017, meeting minutes.
- Record E: the Association's January 9, 2018, meeting minutes.
- Record F: the Association's December 17, 2018, meeting minutes.
- Record G: January 22, 2020, health assessment issued by the Association.
- Record H: the Association's December 20, 2019, meeting minutes.
- Record I: April 9 and 10, 2020, e-mail exchange between Gullickson and Thompson.
- Record J: January 28, 2020, letter from Michael Feimer and David King to Gullickson.
- Record K: February 7, 2020, Gullickson's responsive letter to the Trust.
- Record L: February 21, 2020, the Trust's responsive letter to Gullickson with payment under protest.
- Record M: April 9, 2020, letter from the Association denying the Trust's protest.
- Record N: April 9, 2020, Gullickson's letter advising South Dakota Division of Insurance Director Larry Deiter of the denial of the Trust's protest.
- Record O: June 2, 2020, the Trust's letter appealing the denial to the South Dakota Division of Insurance.

- Record P: June 26, 2020, Notice of Hearing issued by the Division of Insurance scheduling an appeal before the Office of Hearing Examiners.
- Record Q: June 26, 2020, Order Making Proposed Decision of Hearing Examiner Final Agency Action issued by the Division of Insurance, with Notice of Entry.
- Record R: July 7, 2020, Affidavit of Charles Gullickson Concerning Plan of Operation of the Association filed with the Office of Hearing Examiners.
- Record S: the Association's Q&A Concerning April 2017 Class B Health Assessment.

Dated this 15th day of September, 2020.

MAY, ADAM, GERDES & THOMPSON

BY: _____
MICHAEL F. SHAW
TERRA M. FISHER
Attorneys for South Dakota Bankers Benefit Plan Trust
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605)224-8803
Telefax: (605)224-6289
E-mail: mfs@mayadam.net and tmf@mayadam.net

Dated this 11th day of September, 2020.

DAVENPORT, EVANS, HURWITZ & SMITH

BY: _____
CHARLES D. GULLICKSON
MITCHELL A. PETERSON
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57104-1030
Telephone: (605)336-2880
Telefax: (605)335-3639
E-mail: cgullickson@dehs.com and mpeterson@dehs.com

Record A

State of South Dakota

NINETY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2019

400B0304

SENATE COMMERCE AND ENERGY
ENGROSSED NO. SB 37 - 1/17/2019

Introduced by: The Committee on Commerce and Energy at the request of the Department of Labor and Regulation

FOR AN ACT ENTITLED, An Act to revise certain provisions regarding association health plans.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 58-18-3 be amended to read:

58-18-3. Group health insurance may be under a policy issued to ~~an~~ a bona fide association of employers, including a labor union, ~~which shall have~~ that has a constitution and bylaws and ~~which~~ that has been organized and is maintained in good faith ~~for purposes other than that of~~ with at least one substantial business purpose unrelated to obtaining insurance, insuring members, employees, or employees of members of the association for the benefit of persons other than the association or its officers or trustees. ~~The term "employees" as used herein~~ For the purposes of this section, the term, employees, may include retired employees, and the term, employers, includes working owners without employees who qualify as both an employer and employee.

Section 2. That chapter 58-18 be amended by adding a NEW SECTION to read:

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Insertions into existing statutes are indicated by underscores. Deletions from existing statutes are indicated by ~~overstrikes~~.

A group health insurance policy may not be issued to an association under §§ 58-18-3 and 58-18-4 that is formed, owned, or controlled by any of the following, other than to the extent the entities participate in the group or association in their capacity as employer members of the group or association:

(1) A health insurance issuer;

(2) A subsidiary or affiliate of a health insurance issuer;

(3) A health care organization or network provider that is part of the health care delivery system; or

(4) An insurance producer, broker, or consultant.

Section 3. That chapter 58-18 be amended by adding a NEW SECTION to read:

An employer member that participates in an association under §§ 58-18-3 and 58-18-4 shall participate in the association plan for a period of not less than three consecutive calendar years. Any contract issued to an association shall contain reasonable enforcement provisions including reasonable fees or assessments for early departure or for enrollment in another multiple employer plan during the early departure date.

Section 4. That chapter 58-18 be amended by adding a NEW SECTION to read:

An association plan based in this state or any other state shall follow all applicable South Dakota laws and administrative rules if the association plan covers South Dakota residents.

Section 5. That chapter 58-18 be amended by adding a NEW SECTION to read:

A health insurer offering a fully insured health benefit plan through an association shall:

(1) Guarantee acceptance of all eligible individuals under the employer members' association or fully insured multiple employer arrangement and, if coverage is offered to spouses and dependents, to all of the spouses and dependents;

(2) Provide a bronze health plan that has an actuarial value of sixty percent;

(3) Comply with all applicable state mandates; and

(4) Have premium rates that meet a minimum loss ratio of eighty-five percent.

Section 6. That § 58-18-88 be amended to read:

58-18-88. A self-funded multiple employer trust, as defined in section 3 of the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002, paragraph 40, that is sponsored by an association, may be authorized by the director if the multiple employer trust meets all of the following conditions:

(1) The multiple employer trust is administered by an authorized insurer or a licensed or registered third-party administrator;

(2) The multiple employer trust ~~meets all of the requirements of § 58-18B-59~~ is sponsored and maintained by a bona fide association of employers eligible to procure coverage under §§ 58-18-3 and 58-18-4;

(3) The association sponsoring the multiple employer trust is established by employers in a homogenous trade, industry, line of business, or ~~professional association of employers that~~ profession with commonality of interest. The association has a constitution or bylaws, and is organized under the laws of South Dakota ~~and has been maintained in good faith for purposes other than providing insurance for at least ten continuous years~~;

(4) The association sponsoring the multiple employer trust ~~is engaged in~~ has a substantial ~~activity for its members~~ business purpose other than sponsorship of an employer welfare benefit plan;

(5) The association sponsoring the multiple employer trust is a nonprofit entity organized under applicable South Dakota law;

(6) The multiple employer ~~trust, upon authorization by the director, participates in the~~

~~South Dakota Life and Health Insurance Guaranty Association pursuant to chapter 58-29C and is a member pursuant to subdivision 58-29C-48(12)~~ trust's board of trustees shall assess participating employers in an amount necessary to remedy deficiencies at any time the assets and stop loss insurance policies of the multiple employer trust are insufficient to:

(a) Pay claims made against the multiple employer trust;

(b) Discharge liabilities and obligations relating to health benefit plan claims; or

(c) Maintain adequate reserves and surpluses;

(7) The multiple employer trust:

(a) Meets the capital and surplus requirements of § 58-6-23;

(b) Meets the risk based capital requirements of § 58-4-48;

(c) Is subject to the hazardous financial condition requirements of §§ 58-4-39 to 58-4-42, inclusive;

(d) Invests its assets pursuant to the requirements of chapters 58-26 and 58-27;

(e) Is subject to chapter 58-3 on the same basis as insurers;

(f) Is subject to the insurers supervision, rehabilitation, and liquidation provisions of chapter 58-29B;

(g) Maintains a minimum loss ratio of eighty-five percent or be community rated; and

(h) Complies with all coverage mandates that are applicable to group health insurance under this title;

(8) Each sponsoring association is comprised of and controlled by employer members, consists of five hundred or more covered employees, and has been in existence for a period of three continuous years;

(9) Any solicitation or sales materials to prospective members discloses the provisions regarding fees and assessments for participation in the multiple employer trust; and

(10) The director, after consideration of the impact on the insurance-buying public, determines that the arrangement is in the best interests of the public.

~~The director may authorize a multiple employer trust that is not an association meeting the requirements of subdivisions (2) to (5), inclusive, of this section, if the multiple employer trust is comprised exclusively of employers engaged in a common industry for which there is some degree of common ownership, the ownership of two or more participating employers has existed since July 1, 2007, the employers forming the trust were previously providing health benefits collectively to their employees in this state, and the director finds that authorizing the multiple employer trust pursuant to this section is in the public interest.~~

Section 7. That chapter 58-18 be amended by adding a NEW SECTION to read:

An association not formed in this state may request a waiver of subdivisions 58-18-88(3) and (5) regarding organization in South Dakota to sponsor a multiple employer trust in this state if the association provides sufficient evidence a waiver is in the best interests of the insurance-buying public. An association not formed in this state shall be in full compliance with the laws of all states where the association does business.

Section 8. That § 58-18-90 be amended to read:

58-18-90. Except as otherwise provided in ~~§§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59, a~~ this chapter, an authorized multiple employer trust ~~organized pursuant to §§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59~~ may not be ~~deemed~~ determined to be or considered to be an insurance company or association of any kind or character under ~~Title 58~~ this title, or subject to the provisions of §§ 58-8-6 to 58-8-19, inclusive.

Section 9. That § 58-18-91 be amended to read:

58-18-91. A multiple employer trust authorized ~~by §§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59~~ under this chapter may have its authorization suspended or revoked by the director for violating any applicable provision of ~~§§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59 or because its capital is impaired, and in either instance the~~ this title. The director may take action in lieu of suspension or revocation as though the trust were an insurer as provided by § 58-4-28.1.

Section 10. That § 58-18-93 be amended to read:

58-18-93. No agent may sell, solicit, or negotiate a self-funded multiple employer trust authorized ~~by §§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59~~ under this chapter unless the agent is licensed to sell life and health insurance pursuant to chapter 58-30.

Section 11. That § 58-18-94 be amended to read:

58-18-94. The provisions of ~~§§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59~~ this chapter regarding multiple employer trusts do not apply to any single employer self-funded plan as preempted by Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 or any arrangement exempted pursuant to § 1-24-17. ~~A~~ An authorized self-funded multiple employer trust ~~authorized by §§ 58-18-88 to 58-18-94, inclusive, and § 58-18B-59~~ may include as participating employers both small employers and large employers.

Section 12. That § 58-18B-59 be repealed.

~~58-18B-59. The rating requirements of this chapter do not apply to an association if all of the following criteria are met:~~

~~(1) The trade, industry, or professional association is comprised in part of homogenous small employers, meets the requirements for the issuance of group health insurance pursuant to § 58-18-3 and if applicable, § 58-18-4, has a constitution or bylaws, has been organized under the laws of South Dakota and maintained in good faith for~~

~~purposes other than providing insurance for at least ten continuous years, and will provide coverage to not fewer than five hundred employees by January 1, 2007;~~

~~(2) The group health plan provides coverage to association members' employees and dependents on a community rated basis;~~

~~(3) The director, after consideration of the impact on the insurance-buying public, has determined that the arrangement is in the best interest of the public.~~

Record B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America :
Insurance Company in Rehabilitation : No. 1 PEN 2009

ORDER OF LIQUIDATION

AND NOW, this 1st day of March, 2017, upon consideration of the Verified Petition of Teresa D. Miller, Insurance Commissioner of the Commonwealth of Pennsylvania, to Convert Rehabilitation to Liquidation (Liquidation Petition), filed on July 27, 2016, the hearing thereon and the certificate executed by the Board of Directors of Penn Treaty Network America Insurance Company ("PTNA") unanimously consenting to the liquidation of PTNA, it is hereby **ORDERED** that:

1. PTNA is hereby declared insolvent and ordered to be **LIQUIDATED** pursuant to Article V of The Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, added by the Act of December 14, 1977, P.L. 280, *as amended*, 40 P.S. §§ 221.1 – 221.63 ("Article V").

2. The rehabilitation of PTNA is hereby **TERMINATED**, and all orders entered during the rehabilitation, to the extent inconsistent with this Liquidation Order, are **VACATED**.

3. The Insurance Commissioner, Teresa D. Miller, and her successor in office, is hereby, **APPOINTED** Statutory Liquidator of PTNA ("the Liquidator") and directed to take possession of PTNA's property, business, and affairs and to administer them in accordance with Article V and the orders of this Court.

4. The Liquidator is hereby **VESTED** with all the powers, rights, and duties authorized under Article V and other applicable statutes and regulations.

ASSETS OF THE ESTATE

5. The Liquidator is vested with title to all property, assets, contracts, and rights of action ("assets") of PTNA of whatever nature and wherever located, as of the date of filing of the Liquidation Petition. All assets of PTNA are hereby found to be *in custodia legis* of this Court and this Court asserts jurisdiction as follows: (a) *in rem* jurisdiction over all assets of PTNA wherever they may be located and regardless of whether they are held in the name of PTNA or in any other name; (b) exclusive jurisdiction over all determinations as to whether assets belong to PTNA or to another party; (c) exclusive jurisdiction over all determinations of the validity and amounts of claims against PTNA; and (d) exclusive jurisdiction over the determination of the priority of all claims against PTNA.

6. The filing or recording of this Liquidation Order with the Clerk of the Commonwealth Court or with the Recorder of Deeds of Lehigh County, in which PTNA's principal office or place of business is located, shall impart the same notice as is imparted by any deed, bill of sale, or other evidence of title duly filed or recorded with that Recorder of Deeds.

7. To protect the assets of the PTNA Estate and facilitate the liquidation, the Liquidator is directed to:

(a) Instruct all banks, investment bankers, companies, other entities or other persons having in their possession assets which are the property of PTNA, unless otherwise instructed by the Liquidator, to deliver these assets to the Liquidator, and not disburse, convey, transfer, pledge, assign, hypothecate, encumber or in any manner

dispose of the same without the prior written consent of the Liquidator.

(b) Instruct all producers and other persons having sold policies of insurance issued by PTNA to account for and pay all earned commissions and premiums, collected or uncollected, for the benefit of PTNA to the Liquidator within 30 days of notice of this Liquidation Order.

(c) Instruct all producers, reinsurance intermediaries and other persons doing business with PTNA not to disburse any monies that come into their possession and are owed to, or claimed by, PTNA for any purpose other than to make payment to the Liquidator.

(d) Instruct any premium finance company that has entered into a contract to finance a policy (if any) that has been issued by PTNA to pay any and all premium owed to PTNA to the Liquidator.

(e) Instruct all attorneys, who are employed by PTNA or performing legal services for PTNA as of the date of this Liquidation Order, that within 30 days they must report to the Liquidator, to the extent not previously reported to the Rehabilitator, the name, claim number (if applicable) and status of each matter they are handling on behalf of PTNA; the full caption and docket number of each case as well as the name and address of opposing counsel; an accounting of any funds received from or on behalf of PTNA for any purpose; and, further, that the Liquidator will not make payment for any unsolicited report.

(f) Inform any entity that has custody or control of any data processing information and records, including electronically stored information and records belonging to PTNA, to transfer custody and control of such documents to the Liquidator upon her request.

(g) Instruct any entity furnishing claims processing or data processing services to PTNA to maintain such services and transfer any such accounts to the Liquidator as of the date of this Liquidation Order, upon her request.

(h) Continue such services as the Liquidator deems reasonably necessary for the conduct of the liquidation.

8. PTNA's directors, officers, and employees, to the extent that the following obligations have not been satisfied in the course of PTNA's rehabilitation, shall: (a) surrender peaceably to the Liquidator the premises where PTNA conducts its business; (b) deliver all keys or access codes thereto and to any safe deposit boxes; (c) advise the Liquidator of the combinations and access codes of any safe or safekeeping devices of PTNA or any password or authorization code or access code required for access to data processing equipment; and (d) deliver and surrender peaceably to the Liquidator all the assets, books, records, files, credit cards, and other property of PTNA in their possession or control, wherever located, and otherwise advise and cooperate with the Liquidator in identifying and locating any of the foregoing.

9. The amount recoverable by the Liquidator from any reinsurer shall not be reduced as a result of this Liquidation Order, regardless of any provision in a reinsurance contract or other agreement. Payment made directly by the reinsurer to

an insured or other creditor of PTNA shall not diminish the reinsurer's obligation to PTNA, except to the extent provided by law.

TRANSFER OF POLICY OBLIGATIONS TO GUARANTY ASSOCIATIONS

10. Not later than thirty (30) days from the effective date of this Liquidation Order, the Liquidator will transfer policy obligations, including the continued payment of claims and continued coverage arising under PTNA's policies, to state guaranty funds. The Liquidator will make PTNA's facilities, computer systems, books, records, and third-party administrators (to the extent possible) available to any guaranty association (and to states and state officials holding statutory deposits for the benefit of such claimants).

11. In accordance with Section 536(a) of Article V, 40 P.S. §221.36(a), the Liquidator may advance funds from the estate of PTNA for the payment of claims by state guaranty funds with the approval of the Court.

NOTICE OF LIQUIDATION

12. In addition to the notice requirements of Section 524 of Article V, 40 P.S. §221.24, the Liquidator shall publish notice in newspapers of general circulation where PTNA has its principal places of business, and in the national edition of the *Wall Street Journal*, that: (a) specifies the deadlines for the filing of claims; (b) explains the procedure by which claims may be submitted to the Liquidator; (c) provides the address of the Liquidator's office for the submission of claims; and (d) notifies the public of the right to present a claim, or claims, to the Liquidator.

13. Within thirty (30) days of giving notice of the order of liquidation and of the procedures for filing claims against the estate of PTNA, as set forth above,

the Liquidator shall file a compliance report with the Court noting, in reasonable detail, the date that and manner by which these notices were given.

ADMINISTRATIVE EXPENSES

14. The Liquidator shall pay as costs and expenses of administration, pursuant to Section 544(a) of Article V, 40 P.S. §221.44(a), the actual, reasonable, and necessary costs of preserving or recovering the assets of PTNA, and the costs of goods or services provided to and approved by the Rehabilitator or by this Court during the period of PTNA's rehabilitation that are unpaid as of the date of this Liquidation Order.

15. Distribution of the assets of PTNA in payment of the costs and expenses of estate administration within the meaning of Section 544(a) of Article V, 40 P.S. §221.44(a), and not otherwise covered by Sections 523 and 545(b) of Article V, 40 P.S. §§221.23 and 221.45(b), shall be made under the direction and approval of the Court.

16. The Liquidator may request from the Court such other Orders as may be deemed necessary and proper for the conduct of the liquidation of PTNA in accordance with Article V and this Liquidation Order.

17. The Court's prior orders shall remain in full force and effect to the extent they are not inconsistent with this Liquidation Order.

MARY HANNAH LEAVITT, President Judge

Certified from the Record
MAR 01 2017
And Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: American Network Insurance Company in Rehabilitation	: No. 1 ANI 2009

ORDER OF LIQUIDATION

AND NOW, this 1st day of March, 2017, upon consideration of the Verified Petition of Teresa D. Miller, Insurance Commissioner of the Commonwealth of Pennsylvania, to Convert Rehabilitation to Liquidation (Liquidation Petition), filed on July 27, 2016, the hearing thereon and the certificate executed by the Board of Directors of American Network Insurance Company ("ANIC") unanimously consenting to the liquidation of ANIC, it is hereby **ORDERED** that:

1. ANIC is hereby declared insolvent and ordered to be **LIQUIDATED** pursuant to Article V of The Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, added by the Act of December 14, 1977, P.L. 280, *as amended*, 40 P.S. §§ 221.1 – 221.63 ("Article V").

2. The rehabilitation of ANIC is hereby **TERMINATED**, and all orders entered during the rehabilitation, to the extent inconsistent with this Liquidation Order, are **VACATED**.

3. The Insurance Commissioner, Teresa D. Miller, and her successor in office, is hereby **APPOINTED** Statutory Liquidator of ANIC ("the Liquidator") and directed to take possession of ANIC's property, business, and affairs and to administer them in accordance with Article V and the orders of this Court.

4. The Liquidator is hereby **VESTED** with all the powers, rights, and duties authorized under Article V and other applicable statutes and regulations.

ASSETS OF THE ESTATE

5. The Liquidator is vested with title to all property, assets, contracts, and rights of action ("assets") of ANIC of whatever nature and wherever located, as of the date of filing of the Liquidation Petition. All assets of ANIC are hereby found to be *in custodia legis* of this Court and this Court asserts jurisdiction as follows: (a) *in rem* jurisdiction over all assets of ANIC wherever they may be located and regardless of whether they are held in the name of ANIC or in any other name; (b) exclusive jurisdiction over all determinations as to whether assets belong to ANIC or to another party; (c) exclusive jurisdiction over all determinations of the validity and amounts of claims against ANIC; and (d) exclusive jurisdiction over the determination of the priority of all claims against ANIC.

6. The filing or recording of this Liquidation Order with the Clerk of the Commonwealth Court or with the Recorder of Deeds of Lehigh County, in which ANIC's principal office or place of business is located, shall impart the same notice as is imparted by any deed, bill of sale, or other evidence of title duly filed or recorded with that Recorder of Deeds.

7. To protect the assets of the ANIC Estate and facilitate the liquidation, the Liquidator is directed to:

(a) Instruct all banks, investment bankers, companies, other entities or other persons having in their possession assets which are the property of ANIC, unless otherwise instructed by the Liquidator, to deliver these assets to the Liquidator, and not disburse, convey, transfer, pledge, assign, hypothecate, encumber or in any manner

dispose of the same without the prior written consent of the Liquidator.

(b) Instruct all producers and other persons having sold policies of insurance issued by ANIC to account for and pay all earned commissions and premiums, collected or uncollected, for the benefit of ANIC to the Liquidator within 30 days of notice of this Liquidation Order.

(c) Instruct all producers, reinsurance intermediaries and other persons doing business with ANIC not to disburse any monies that come into their possession and are owed to, or claimed by, ANIC for any purpose other than payment to the Liquidator.

(d) Instruct any premium finance company that has entered into a contract to finance a policy (if any) that has been issued by ANIC to pay any and all premium owed to ANIC to the Liquidator.

(e) Instruct all attorneys,. who are employed by ANIC or performing legal services for ANIC as of the date of this Liquidation Order, that within 30 days they must report to the Liquidator, to the extent not previously reported to the Rehabilitator, the name, claim number (if applicable) and status of each matter they are handling on behalf of ANIC; the full caption and docket number of each case as well as the name and address of opposing counsel; an accounting of any funds received from or on behalf of ANIC for any purpose; and, further, that the Liquidator will not make payment for any unsolicited report.

(f) Inform any entity that has custody or control of any data processing information and records, including electronically stored information and records belonging to ANIC, to transfer custody and control of such documents to the Liquidator, upon her request.

(g) Instruct any entity furnishing claims processing or data processing services to ANIC to maintain such services and transfer any such accounts to the Liquidator as of the date of this Liquidation Order, upon her request.

(h) Continue such services as the Liquidator deems reasonably necessary for the conduct of the liquidation.

8. ANIC's directors, officers, and employees, to the extent that the following obligations have not been satisfied in the course of ANIC's rehabilitation, shall: (a) surrender peaceably to the Liquidator the premises where ANIC conducts its business; (b) deliver all keys or access codes thereto and to any safe deposit boxes; (c) advise the Liquidator of the combinations and access codes of any safe or safekeeping devices of ANIC or any password or authorization code or access code required for access to data processing equipment; and (d) deliver and surrender peaceably to the Liquidator all the assets, books, records, files, credit cards, and other property of ANIC in their possession or control, wherever located, and otherwise advise and cooperate with the Liquidator in identifying and locating any of the foregoing.

9. The amount recoverable by the Liquidator from any reinsurer shall not be reduced as a result of this Liquidation Order, regardless of any provision in a reinsurance contract or other agreement. Payment made directly by the reinsurer to

an insured or other creditor of ANIC shall not diminish the reinsurer's obligation to ANIC, except to the extent provided by law.

TRANSFER OF POLICY OBLIGATIONS
TO GUARANTY ASSOCIATIONS

10. Not later than thirty (30) days from the effective date of this Liquidation Order, the Liquidator will transfer policy obligations, including the continued payment of claims and continued coverage arising under ANIC's policies, to state guaranty funds. The Liquidator will make ANIC's facilities, computer systems, books, records, and third-party administrators (to the extent possible) available to any guaranty association (and to states and state officials holding statutory deposits for the benefit of such claimants).

11. In accordance with Section 536(a) of Article V, 40 P.S. §221.36(a), the Liquidator may advance funds from the estate of ANIC for the payment of claims by state guaranty funds, with the approval of the Court.

NOTICE OF LIQUIDATION

12. In addition to the notice requirements of Section 524 of Article V, 40 P.S. § 221.24, the Liquidator shall publish notice in newspapers of general circulation where ANIC has its principal places of business, and in the national edition of the *Wall Street Journal*, that: (a) specifies the deadlines for the filing of claims; (b) explains the procedure by which claims may be submitted to the Liquidator; (c) provides the address of the Liquidator's office for the submission of claims; and (d) notifies the public of the right to present a claim, or claims, to the Liquidator.

13. Within thirty (30) days of giving notice of the order of liquidation and of the procedures for filing claims against the estate of ANIC, as set forth above,

the Liquidator shall file a compliance report with the Court noting, in reasonable detail, the date that and manner by which these notices were given.

ADMINISTRATIVE EXPENSES

14. The Liquidator shall pay as costs and expenses of administration, pursuant to Section 544(a) of Article V, 40 P.S. §221.44(a), the actual, reasonable, and necessary costs of preserving or recovering the assets of ANIC, and the costs of goods or services provided to and approved by the Rehabilitator or by this Court during the period of ANIC's rehabilitation that are unpaid as of the date of this Liquidation Order.

15. Distribution of the assets of ANIC in payment of the costs and expenses of estate administration within the meaning of Section 544(a) of Article V, 40 P.S. §221.44(a), and not otherwise covered by Sections 523 and 545(b) of Article V, 40 P.S. §§ 221.23 and 221.45(b), shall be made under the direction and approval of the Court.

16. The Liquidator may request from the Court such further Orders as may be deemed necessary and proper for the conduct of the liquidation of ANIC in accordance with Article V and this Liquidation Order.

17. The Court's prior orders shall remain in full force and effect to the extent they are not inconsistent with this Liquidation Order.

MARY HANNAH LEAVITT, President Judge

Certified from the Record
MAR 01 2017
And Order Exit

Record C

March 1, 2017

RESERVE FUNDING PGA PROMISSORY NOTE

$30,476,158

THIS PROMISSORY NOTE ARISES OUT OF THAT CERTAIN REINSURANCE AND ADMINISTRATIVE SERVICES AGREEMENT (THE "AGREEMENT") IN CONNECTION WITH THE LIQUIDATION OF PENN TREATY NETWORK AMERICA ("PENN TREATY") INSURANCE COMPANY DATED AS OF MARCH 1, 2017 BY AND AMONG THE UNDERSIGNED PARTICIPATING GUARANTY ASSOCIATION ("MAKER"), THE OTHER PARTICIPATING GUARANTY ASSOCIATIONS, PENN TREATY PROTECTED CELL OF LTC RE ("PAYEE") AND THE NATIONAL ORGANIZATION OF LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATIONS. ALL CAPITALIZED TERMS USED IN THIS PROMISSORY NOTE AND NOT OTHERWISE DEFINED SHALL HAVE THE MEANING ASCRIBED TO THEM IN THE AGREEMENT.

For value received, Maker promises to pay to the order of Payee, the principal sum of $30,476,158 with interest on the balance of the principal remaining unpaid from time to time at the per annum rate of 4.25 % per annum compounded annually on the outstanding balance.

The principal of this Promissory Note and all interest accruing thereon, shall be due and payable in the installments set forth in the following table:

Installment Payment Due Date	Principal Amount Due	Interest Payment Due	Total Installment Payment Amount
March 1, 2018	$5,598,685	$1,295,237	$6,893,921
March 1, 2019	$5,836,629	$1,057,293	$6,893,921
March 1, 2020	$6,084,685	$809,236	$6,893,921
March 1, 2021	$6,343,285	$550,637	$6,893,921
March 1, 2022	$6,612,874	$281,047	$6,893,921

If any Installment Payment Due Date falls on a legal holiday, Saturday or Sunday, Maker will pay interest on the first Business Day thereafter. (A "Business Day" shall be any day other than a Saturday, Sunday or any other day on which banking institutions are authorized or required by law or executive order to close in New York, New York.) Interest on this Promissory Note will accrue on the principal amount outstanding under this Promissory Note from the date of the most recent payment of interest, or, if no interest has been paid, from the date of issuance. Interest will also accrue on any payment of interest that is not punctually paid as required by this paragraph from the date payment was due until the actual date of payment. Interest will be computed on the basis of a 360 day year of twelve 30 day months.

CONFIDENTIAL

All payments should be made to Payee by wire transfer in immediately available funds to the bank and account number designated by Payee in writing.

Maker waives presentment for payment, protest and demand, notice of protest, demand and notice of dishonor and nonpayment of this Promissory Note, and consents that Payee may extend the time of payment or otherwise modify the terms of payment of any part of the whole of the debt evidenced by this Promissory Note, at the request of any person liable hereon, and such consent shall not alter nor diminish the liability of Maker hereon.

Failure to pay or perform any of the obligations of Maker under this Promissory Note shall be a default hereunder, and under the Agreement. Failure to pay or perform any of the material obligations of Maker under the Agreement shall be a default hereunder and under the Agreement. Except as set forth in the Agreement, no notice of default or right to cure any default shall be afforded to Maker.

Notwithstanding any other provisions of this Promissory Note, if Maker fails to make a payment of principal or interest (the "Default Amount") when due, then the remaining Covered Obligations (as that term is defined in the Agreement) reinsured by Payee to which this Promissory Note was made shall, pursuant to the terms of the Agreement, be transferred, revert back and be a direct liability of Maker to the holder of all of Maker's Covered LTC Policies, and this Promissory Note shall be deemed reduced, without further action on the part of Maker or Payee by the Default Amount and with (a) appropriate revisions and adjustments made in accordance with the Agreement, and (b) appropriate notification by the Payee to each holder of a Covered LTC Policy.

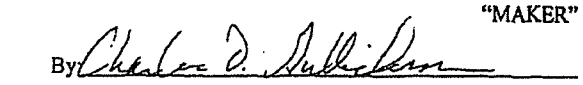
Maker agrees to pay all costs of collection, including reasonable attorneys' fees and expenses, and court costs, in case of a default hereunder or under the Agreement.

This Promissory Note may be prepaid without penalty or charge. This Promissory Note shall be construed in accordance with the laws of the State of South Dakota.

The covenants of Maker contained in this Promissory Note shall be binding upon and inure to the benefit of Maker's and Payee's respective successors and assigns.

If any provisions of this Promissory Note shall be determined to be invalid or unenforceable under law, such determination shall not affect the validity or enforcement of the remaining provisions of this Promissory Note.

South Dakota Life & Health Insurance Guaranty Association,
"MAKER"

By 

Charles D. Gullickson, Esq.
Executive Director & General Counsel

CONFIDENTIAL

March 1, 2017

Exhibit 1.28

RESERVE FUNDING PGA PROMISSORY NOTE

$47,581

THIS PROMISSORY NOTE ARISES OUT OF THAT CERTAIN REINSURANCE AND ADMINISTRATIVE SERVICES AGREEMENT (THE "AGREEMENT") IN CONNECTION WITH THE LIQUIDATION OF AMERICAN NETWORK INSURANCE COMPANY (ANIC) DATED AS OF MARCH 1, 2017 BY AND AMONG THE UNDERSIGNED PARTICIPATING GUARANTY ASSOCIATION ("MAKER"), THE OTHER PARTICIPATING GUARANTY ASSOCIATIONS, ANIC PROTECTED CELL OF LTC RE ("PAYEE") AND THE NATIONAL ORGANIZATION OF LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATIONS. ALL CAPITALIZED TERMS USED IN THIS PROMISSORY NOTE AND NOT OTHERWISE DEFINED SHALL HAVE THE MEANING ASCRIBED TO THEM IN THE AGREEMENT.

For value received, Maker promises to pay to the order of Payee, the principal sum of $47,581 with interest on the balance of the principal remaining unpaid from time to time at the per annum rate of 4.25 % per annum compounded annually on the outstanding balance.

The principal of this Promissory Note and all interest accruing thereon, shall be due and payable in the installments set forth in the following table:

Installment Payment Due Date	Principal Amount Due	Interest Payment Due	Total Installment Payment Amount
March 1, 2018	$8,741	$2,022	$10,763
March 1, 2019	$9,112	$1,651	$10,763
March 1, 2020	$9,500	$1,263	$10,763
March 1, 2021	$9,903	$860	$10,763
March 1, 2022	$10,324	$439	$10,763

If any Installment Payment Due Date falls on a legal holiday, Saturday or Sunday, Maker will pay interest on the first Business Day thereafter. (A "Business Day" shall be any day other than a Saturday, Sunday or any other day on which banking institutions are authorized or required by law or executive order to close in New York, New York.) Interest on this Promissory Note will accrue on the principal amount outstanding under this Promissory Note from the date of the most recent payment of interest, or, if no interest has been paid, from the date of issuance. Interest will also accrue on any payment of interest that is not punctually paid as required by this paragraph from the date payment was due until the actual date of payment. Interest will be computed on the basis of a 360 day year of twelve 30 day months.

All payments should be made to Payee by wire transfer in immediately available funds to the bank and account number designated by Payee in writing.

Maker waives presentment for payment, protest and demand, notice of protest, demand and notice of dishonor and nonpayment of this Promissory Note, and consents that Payee may extend the time of payment or otherwise modify the terms of payment of any part of the whole of the debt evidenced by this Promissory Note, at the request of any person liable hereon, and such consent shall not alter nor diminish the liability of Maker hereon.

Failure to pay or perform any of the obligations of Maker under this Promissory Note shall be a default hereunder, and under the Agreement. Failure to pay or perform any of the material obligations of Maker under the Agreement shall be a default hereunder and under the Agreement. Except as set forth in the Agreement, no notice of default or right to cure any default shall be afforded to Maker.

Notwithstanding any other provisions of this Promissory Note, if Maker fails to make a payment of principal or interest (the "Default Amount") when due, then the remaining Covered Obligations (as that term is defined in the Agreement) reinsured by Payee to which this Promissory Note was made shall be transferred, revert back and be a direct liability of Maker to the holder of all of Maker's Covered LTC Policies, and this Promissory Note shall be deemed reduced, without further action on the part of Maker or Payee by the Default Amount and with (a) appropriate revisions and adjustments made in accordance with the Agreement, and (b) appropriate notification by the Payee to each holder of a Covered LTC Policy.

Maker agrees to pay all costs of collection, including reasonable attorneys' fees and expenses, and court costs, in case of a default hereunder or under the Agreement.

This Promissory Note may be prepaid without penalty or charge. This Promissory Note shall be construed in accordance with the laws of the State of South Dakota.

The covenants of Maker contained in this Promissory Note shall be binding upon and inure to the benefit of Maker's and Payee's respective successors and assigns.

If any provisions of this Promissory Note shall be determined to be invalid or unenforceable under law, such determination shall not affect the validity or enforcement of the remaining provisions of this Promissory Note.

South Dakota Life & Health Insurance Guaranty Association,
"MAKER"

By: _____

Charles D. Gullickson, Esq.
Executive Director & General Counsel

CONFIDENTIAL

Record D

MINUTES

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

April 5, 2017

SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of the South Dakota Life and Health Insurance Guaranty Association was held by conference call on April 5, 2017, and the meeting was called to order by Chairperson Bob Corn at 10:30 a.m. Present at the meeting were board members Ed Donahue, representing American Family Life Assurance Company; Greg Hollibaugh, representing American Memorial Life Insurance Company; Bob Corn, representing Mutual of Omaha Insurance Company; Christa Kuennen, representing Wellmark of South Dakota, Inc.; James Harrison, representing Principal Life Insurance Company; Mark Bianchi, representing RiverSource Life Insurance Company, and Catherine Bresler, representing Trustmark Insurance Company. Executive Director Charles D. Gullickson was also present.

Chairperson Bob Corn indicated that the primary purpose of the Board's meeting is to consider making assessments by the Association against its member companies both for administrative expenses, as a Class A assessment, and to fund the Association's Penn Treaty-related payment obligations due by May 30, 2017, under the Association's Reinsurance Agreement with LTC Reinsurance PCC, in the form of a Class B assessment. [redacted]

Corn then asked Executive Director Charles D. Gullickson to provide the Board with background information and referred to a draft resolution for consideration by the Board that Gullickson distributed to the Board in advance of the meeting.

Gullickson began with a summary of the overall liquidation plan developed by the guaranty associations' Penn Treaty Task Force for affected GAs and referred to the Board's earlier decision to opt into all elements of the plan, including the LTC Re Reinsurance Agreement. Gullickson also noted that when the Association decided to participate in the LTC Re Reinsurance Agreement it elected to participate on a Reserve Funding basis. Gullickson then reviewed the funding requirements that apply to a Reserve Funding member of LTC Re.

Gullickson next summarized projections prepared by The Long Term Care Group, consulting actuaries to the Penn Treaty Task Force, of the estimated net liability of the Association, and Gullickson referred to liability funding estimates and a funding schedule prepared by LTCG which Gullickson distributed to the Board prior to the meeting.

Board members discussed the Association's estimated Penn Treaty liabilities, and Gullickson noted that LTCG has estimated that the present value of the Association's Penn Treaty obligations before accounting for any available estate assets was approximately $43,605,000 as of March 1, 2017, using a 4.25% discount rate. Gullickson also noted that from Penn Treaty's remaining assets the amount allocable to the Association as of March 1, 2017, was projected to be approximately $3,176,000.

[redacted]

[redacted] It was noted that it will likely take more than 20 years for the industry to fully use up all premium tax offsets that might otherwise be available for assessments the Association will be making at least through March 2022 to fund Penn Treaty obligations due to the cap in SDCL 58-29C-56.

Members of the Board generally discussed the draft resolution which was distributed by Gullickson to the Board. After discussion Christa Kuennen moved to approve the resolution attached as Exhibit A to these minutes. Greg Hollibaugh seconded the motion. After discussion the motion passed unanimously.

Board members discussed the timing of sending assessment notices out to member companies. It was also suggested that Gullickson include background information concerning the rationale and purpose for the assessments and provide an explanation as to how the industry will be able to use premium tax offsets in South Dakota going forward.

[redacted]

There being no further business to come before the meeting, it was moved and seconded to adjourn the meeting, and the motion passed unanimously. The meeting was adjourned at approximately 11:52 a.m. Central Time.

Christa Kuennen, Secretary/Treasurer

EXHIBIT A

RESOLUTION
OF
BOARD OF DIRECTORS
OF
SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION

WHEREAS, the Commonwealth Court of Pennsylvania (the "Court") on March 1, 2017, entered Orders of Liquidation against Penn Treaty Network America Insurance Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC," and collectively with PTNA, "Penn Treaty"), with a finding of insolvency for each of PTNA and ANIC; and

WHEREAS, each of PTNA and ANIC are member companies of the South Dakota Life and Health Insurance Guaranty Association (the "Association") and thus as a result of the entry of Orders of Liquidation against PTNA and ANIC the Association has become obligated to provide benefits to eligible South Dakota residents who are policyholders of PTNA or ANIC pursuant to SDCL 58-29C-51.B.; and

WHEREAS, the Association has entered into Reinsurance and Administrative Services Agreements dated as of _____, 201__ (the "Reinsurance Agreements"), among the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA") and the PTNA and ANIC Protected Cells of LTC Reinsurance PCC ("LTC Re"). Pursuant to the Reinsurance Agreements the Association has selected Reserve Funding, as such term is defined in the Reinsurance Agreements, as the basis for determining its payment obligations to LTC Re; and

WHEREAS, the Board of Directors of the Association has been informed that the initial Funding Date for payment of the Association's obligations to LTC Re under the Reinsurance Agreements will be no later than May 30, 2017, and the Board desires to make a Class B assessment against its member insurers in the health line of business pursuant to SDCL 58-29C-52 to provide funds, when combined with other funding sources identified herein, sufficient to satisfy the Association's initial obligations under the Reinsurance Agreements; and

WHEREAS, the Association maintains a significant negative balance in its "Fund Equity – Admin" account on its Balance Sheet, due to the fact that the Association has not made a Class A assessment for administrative expenses for a number of years, and the Board desires to make a Class A administrative expense assessment to substantially eliminate the negative balance in its "Fund Equity – Admin" account and to raise funds for ongoing administrative expenses; and

WHEREAS, the Association has accumulated a significant positive balance in its "Fund Equity – A/H" account over the years which, coupled with positive balances which the Association has accumulated in its "Fund Equity – Life" and "Fund Equity – Annuity" accounts, having indirectly provided a source of funding for the Association's administrative expenses; and

WHEREAS, the Board believes that it would be appropriate and fair to use from the proceeds of a Class A administrative expense assessment an amount equal to the positive balance in its "Fund Equity – A/H" account to fund a portion of the initial payments due from the Association under the Reinsurance Agreements; and

WHEREAS, the Board has for a number of years determined that the Assessment Data Survey conducted annually by NOLHGA in conjunction with the National Association of Insurance Commissioners is a reasonable basis for determining member companies' assessable premiums, and the Board again determines that such Assessment Data Surveys for the assessment years described herein constitute a fair and reasonable basis for determining each member insurer's liability for the assessments authorized herein.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The Board hereby ratifies its participation in the Penn Treaty Reinsurance Agreements on a Reserve Funding basis, confirms that the Closing Date thereunder shall be as of March 1, 2017, and directs its Executive Director to make a payment on behalf of the Association to LTC Re for the initial payments due from the Association as reasonably determined by LTC Re.

2. The Board hereby authorizes and approves a Class B assessment of its member insurers having health premiums in South Dakota for the time periods specified herein in the amount of $8,800,000 less the amount of PTNA and ANIC assets allocable to the Association as reasonably determined by the guaranty associations' Penn Treaty Task Force, its consulting actuaries, LTC Re, and the Executive Director of the Association. The Board notes that the current estimated amount of estate assets allocable to the Association is $3,176,000 and may be subject to change.

3. The Board determines that the appropriate calendar years for determining member insurers' pro rata share of health premiums in South Dakota are 2014, 2015, and 2016. The Board acknowledges, however, that 2016 is not currently available, and the Executive Director of the Association is directed to use data available for the years 2013, 2014, and 2015, with the expectation that future Penn Treaty assessment for the Association will be based upon the years 2014, 2015, and 2016, and it is the expectation of the Board that in a subsequent Penn Treaty assessment the Executive Director will conduct a true-up among the Association and its member insurers to align the member insurers' payment amounts for the Penn Treaty assessment authorized herein with assessment data available for 2014, 2015, and 2016.

4. The Board hereby authorizes and approves a Class A assessment of its member insurers having assessable premium in South Dakota in 2015 for the annuity, life, and health lines of business in the amount of $2,800,000. The assessment shall be calculated on a pro rata basis based on each member insurer's 2015 assessable premiums in South Dakota. The Board authorizes the use of $1,900,000 from the proceeds of such assessment to fund that amount of the Association's initial funding obligations under the Association's Reinsurance Agreements with LTC Re.

5. The Executive Director is authorized to take such steps as may be necessary or appropriate in his reasonable discretion to implement the actions authorized herein by this Board and compute the assessments authorized in these resolutions with a reasonable degree of accuracy, recognizing that exact determinations may not always be possible, in accordance with SDCL 58-29C-52.C.(3).

Record E

MINUTES

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

January 9, 2018

SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of the South Dakota Life and Health Insurance Guaranty Association was held by conference call on January 9, 2018, and the meeting was called to order by Chairperson Bob Corn at 3:30 p.m. Present at the meeting were board members Ed Donahue, representing American Family Life Assurance Company; Jessica Dewald-Sever, representing American Memorial Life Insurance Company; Bob Corn, representing Mutual of Omaha Insurance Company; Christa Kuennen, representing Wellmark of South Dakota, Inc.; James Harrison, representing Principal Life Insurance Company; Mark Bianchi, representing RiverSource Life Insurance Company, and Eric DuPont, representing The Guardian Life Insurance Company of America. Executive Director Charles D. Gullickson was also present.

Chairperson Bob Corn began the meeting by noting that a quorum was present. Corn then explained that the purpose of the meeting is to consider making a Class B assessment in the health line for purposes of funding the Association's obligations with respect to the insolvencies of Penn Treaty Network America Insurance Company and American Network Insurance Company. Corn then asked Executive Director Charles D. Gullickson to provide background information to the Board concerning the purpose of the meeting.

Gullickson referred back to the Board's decision in April 2017 to authorize the Association to participate as a member of LTC Reinsurance PCC, a DC-domiciled captive insurer organized by the Guaranty Associations for purposes of running off their Penn Treaty and ANIC obligations. Gullickson also referred to the Reinsurance Agreements entered into by the Association with LTC Re for these insolvencies and referred to the funding schedule the Board selected for its payment obligations to LTC Re. Gullickson also referred to promissory notes delivered by the Association to LTC Re for its obligations and the installments due under those notes on March 1, 2018.

Gullickson noted that the amounts due under its promissory notes payable to LTC Re as of March 1, 2018, are approximately $6,905,000. Board members discussed the Association's participation in LTC Re and the funding schedule for the Association's obligations through March 1, 2022. After discussion Ed Donahue moved to authorize the Association to make a Class B assessment in the amount of $7,000,000 to fund the Association's March 1, 2018, obligations due to LTC Re plus Penn Treaty-related expenses. James Harrison seconded the motion, and after discussion the motion passed unanimously.

[redacted]

CONFIDENTIAL

[redacted]

There being no further business to come before the Board Chairman Corn adjourned the meeting at 4:00 p.m. Central Time.

Christa Kuennen, Secretary/Treasurer

CONFIDENTIAL

Record F

MINUTES

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

December 17, 2018

SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of the South Dakota Life and Health Insurance Guaranty Association was held by conference call on December 17, 2018, and the meeting was called to order by Chairperson Bob Corn at 10:00 a.m. Present at the meeting were board members Ed Donahue, representing American Family Life Assurance Company; Jessica Dewald-Sever, representing American Memorial Life Insurance Company; Bob Corn, representing Mutual of Omaha Insurance Company; Christa Kuennen, representing Wellmark of South Dakota, Inc.; James Harrison, representing Principal Life Insurance Company; Mark Bianchi, representing RiverSource Life Insurance Company, Eric DuPont, representing The Guardian Life Insurance Company of America, and Catherine Bresler, representing Trustmark Insurance Company. Executive Director Charles D. Gullickson was also present. Chairperson Corn noted that all members of the Association's Board of Directors were represented at the meeting and that a quorum was present as required by Article II.D. of the Association's Amended and Restated Plan of Operation.

Chairman Corn then referred to an agenda for the meeting distributed in advance by Charles Gullickson and referred to item 2 on the agenda concerning Class B assessments by the Association in the health line. Gullickson referred to Promissory Notes payable by the Association to LTC Reinsurance PCC, the captive organized by member guaranty associations to re-insure their Penn Treaty and ANIC obligations. Gullickson noted that the Association has payments due March 1, 2019, in the amount of approximately $6,905,000 under those Promissory Notes, and Gullickson also noted that the Association has incurred other Penn Treaty-related expenses. Gullickson recommended to the Board that the Association make an assessment in the health line for Penn Treaty and ANIC obligations and expenses in the amount of $7,135,000. James Harrison moved to authorize an assessment for Penn Treaty and ANIC in the amount of $7,135,000 in health line, Catherine Bresler seconded the motion, and the motion passed unanimously.

[redacted]

There being no further business to come before the meeting, Chairman Corn asked for a motion to adjourn. It was moved and seconded that the meeting be adjourned, and the motion passed unanimously. The meeting was adjourned at approximately 10:10 a.m. Central Time.

Christa Kuennen, Secretary/Treasurer

Record 6

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
Telephone: (605) 336-0177
Facsimile: (605) 335-3639

January 22, 2020

STATEMENT - Class B Health Assessment for 2020

Penn Treaty Network American Insurance Company and American Network Insurance Company

PAYMENT DUE BY FEBRUARY 21, 2020

NAIC NO. 15453	Class B – Health (Penn Treaty)	$77,943.55
SOUTH DAKOTA BANKERS INSURANCE & SERVICES INC.	Class B – Health (LHICA)	
109 WEST MISSOURI AVE	Less Credit from Prior Refund(s)	
PO BOX 1081	NET AMOUNT DUE (or CREDIT BALANCE)	$77,943.55
PIERRE SD 57501		

WHEN PAID, THIS STATEMENT SERVES AS YOUR CERTIFICATE OF CONTRIBUTION

This statement contains information concerning a Class B health account assessment made by the South Dakota Life and Health Insurance Guaranty Association for the insolvencies of Penn Treaty Network American Insurance Company and American Network Insurance Company (collectively "Penn Treaty"). This assessment is made by the Association to fund its obligations under the Penn Treaty Network American Insurance Company and American Network Insurance Company Reinsurance Agreements. The computations for these assessments are based on the NOLHGA Assessment Data Survey for the years 2014, 2015, and 2016.

The total health assessment authorized by the Board of Directors in 2020 for Penn Treaty Network American Insurance Company and American Network Insurance Company is $7,250,000.00.

You may determine your pro-rata share of the above assessment by dividing your total assessable premiums for the years 2014, 2015, and 2016 by the state-wide three year total as follows:

HEALTH (state-wide premiums) $2,990,114,324

Please make your check payable to SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, and mail it, along with a copy of this statement, to the address shown above. Wire transfer/ACH payments are also accepted and payment information will be provided upon request. Payment is due within 30 days of the date of this notice. If not received within 30 days, interest at the rate of 10% per annum will be charged and we will be required to report a failure to pay to the Director of the South Dakota Division of Insurance who may impose penalties.

Please return a copy of this letter/invoice with your check.

Exhibit B

Record #

MINUTES

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

December 20, 2019

SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of the South Dakota Life and Health Insurance Guaranty Association was held by conference call on December 20, 2019, and the meeting was called to order by Chairperson Bob Corn at 9:30 a.m. Present at the meeting were board members Ed Donahue, representing American Family Life Assurance Company; Jessica Dewald-Sever, representing American Memorial Life Insurance Company; Bob Corn, representing Mutual of Omaha Insurance Company; Alex D'Agostino, representing New York Life Insurance Company; James Harrison, representing Principal Life Insurance Company; Eric DuPont, representing The Guardian Life Insurance Company of America, and Christa Kuennen, representing Wellmark of South Dakota, Inc. Executive Director Charles D. Gullickson was also present. Chairperson Corn noted that a quorum was present as required by Article II.D. of the Association's Amended and Restated Plan of Operation.

Chairman Corn then asked Executive Director Gullickson to address the first item on the agenda for the meeting concerning Class B assessments by the Association in the health line. Gullickson referred to Promissory Notes payable by the Association to LTC Reinsurance PCC, the captive organized by member guaranty associations to re-insure their Penn Treaty and ANIC obligations. Gullickson noted that the Association has payments due March 1, 2020, in the amount of approximately $6,905,000 under those Promissory Notes, and Gullickson also noted that the Association has incurred other Penn Treaty-related expenses. Gullickson recommended to the Board that the Association make an assessment in the health line for Penn Treaty and ANIC obligations and expenses in the amount of $7,250,000.00. It was moved and seconded to authorize an assessment for Penn Treaty and ANIC in the amount of $7,250,000.00 in the health line, and the motion passed unanimously.

[redacted]

CONFIDENTIAL

[redacted]

There being no further business to come before the meeting, Chairman Corn asked for a motion to adjourn. It was moved and seconded that the meeting be adjourned, and the motion passed unanimously. The meeting was adjourned at approximately 10:40 a.m. Central Time.

Christa Kuennen, Secretary/Treasurer

Michael Shaw

From:	Randie Thompson <randie@erisalawpractice.com>
Sent:	Thursday, July 23, 2020 11:31 AM
To:	Michael Shaw; Terra Fisher
Subject:	FW: Protest of January 22, 2020 Assessment from South Dakota Life and Health Insurance Guiaranty Association
Attachments:	image001.jpg; image002.png

Hi Mike and Terra. It was nice speaking with you this morning. Below is the email I received from Mr. Gullickson regarding the 2020 assessment. Thank you, Randie

Randie Thompson, J.D., LL.M.
303.808.4041

Randie Thompson
ERISA Law Practice, LLC

Record I

From: "Charles D. Gullickson" <CGullickson@dehs.com>
Date: Friday, April 10, 2020 at 10:18 AM
To: Randie Thompson <randie@erisalawpractice.com>
Subject: RE: Protest of January 22, 2020 Assessment from South Dakota Life and Health Insurance Guiaranty Association

Thank you for your email, Randie. In response to your request, the Association's 2020 assessment for the Penn Treaty and ANIC cases was authorized at a meeting of the Association's Board of Directors held by conference call on December 20, 2019. No formal or written resolution concerning the assessment was distributed in writing ahead of time, and the matter was handled orally at the December 20 meeting. The Minutes of that meeting include the following:

> It was moved and seconded to authorize an assessment for Penn Treaty and ANIC in the amount of $7,250,000.00 in the health line, and the motion passed unanimously.

This response is provided without any intent to waive the confidentiality provisions concerning the records of the Association that are set forth in SDCL 58-29C-57.8.

Yes, I am staying healthy and safe, and I hope the same goes for you and that you enjoy the weekend ahead, too.

Thanks.

Charles D. Gullickson
Executive Director and General Counsel

South Dakota Life and Health Insurance Guaranty Association
Davenport, Evans, Hurwitz & Smith, L.L.P.
605.357.1270

DAVENPORT EVANS
LAWYERS

From: Randie Thompson [mailto:randie@erisalawpractice.com]
Sent: Friday, April 10, 2020 9:08 AM
To: Charles D. Gullickson
Subject: Re: Protest of January 22, 2020 Assessment from South Dakota Life and Health Insurance Guiaranty Association

Good morning, Mr. Gullickson. Thank you for your correspondence regarding the SDBBPT's protest. We appreciate the additional information. Can you please provide me with a copy of the Guaranty Association's board resolution authorizing the 2020 assessment?

Thank you again for your assistance. I hope that you are staying healthy and safe — enjoy the weekend ahead. Best Regards, Randie

Randie Thompson, J.D., LL.M.
303.808.4041

Randie Thompson
ERISA Law Practice, LLC

From: "Charles D. Gullickson" <CGullickson@dehs.com>
Date: Thursday, April 9, 2020 at 12:27 PM
To: Randie Thompson <randie@erisalawpractice.com>
Subject: Protest of January 22, 2020 Assessment from South Dakota Life and Health Insurance Guiaranty Association
Resent-From: Proofpoint Essentials <do-not-reply@proofpointessentials.com>
Resent-To: Randie Thompson <randie@erisalawpractice.com>
Resent-Date: Thursday, April 9, 2020 at 12:27 PM

Hello Ms. Thompson.

Please note the attached correspondence concerning the protest filed by South Dakota Bankers Benefits Plan Trust to an assessment made in January of this year by the South Dakota Life and Health Insurance Guaranty Association to fund its

continuing Penn Treaty obligations. In addition to sending the attached to you electronically, I am forwarding the original of the attached to you by UPS for delivery tomorrow. Please let me know if you believe this is not adequate notice from the Association to the Trust as required by SDCL 58-29C-52.I.(iii).

Like you, I look forward to an efficient resolution of this matter.

Charles D. Gullickson
Executive Director and General Counsel
South Dakota Life and Health Insurance Guaranty Association
Davenport, Evans, Hurwitz & Smith, L.L.P.
605.357.1270

RECORD J

SDBANKERS
INSURANCE & SERVICES

Educate. Advocate. Grow.

January 28, 2020

Mr. Charles D. Gullickson, Executive Director
South Dakota Life and Health Insurance Guarantee Association
206 W. 14th Street
Sioux Falls, SD 57104

Dear Mr. Gullickson,

South Dakota Bankers Insurance & Services, Inc. recently received the enclosed Class B Health Assessment Statement for 2020. Upon South Dakota legislature's enactment of SB37 during the 2019 session, self-funded multiple employer health insurance trusts are not required to maintain membership in the SD Life and Health Guarantee Association. The operative change in SDCL 58-18-88(6) can be found in Section 6 of SB37. Correspondingly, neither SDBIS nor SD Bankers Benefit Trust are subject to the proposed Class B Assessment for 2020.

Please feel free to contact either Mike Feimer or myself if you have any questions.

Sincerely,

Michael P. Feimer

Michael P. Feimer, Plan Administrator
South Dakota Bankers Benefit Trust Board of Trustees

David W. King

David W. King, Chairman
South Dakota Bankers Benefit Trust Board of Trustees

enclosure

www.sdba.com
PO Box 7086 | Yankton, SD 57078
Phone: 800.221.7551 | Email: mfeimer@sdba.com

RECEIVED
JAN 31 2020

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
Telephone: (605) 336-0177
Facsimile: (605) 335-3639

January 22, 2020

STATEMENT - Class B Health Assessment for 2020

Penn Treaty Network American Insurance Company and American Network Insurance Company

PAYMENT DUE BY FEBRUARY 21, 2020

NAIC NO. 15453	Class B – Health (Penn Treaty)	$77,943.55
SOUTH DAKOTA BANKERS INSURANCE & SERVICES INC.	Class B – Health (LHICA)	
109 WEST MISSOURI AVE	Less Credit from Prior Refund(s)	
PO BOX 1081	NET AMOUNT DUE (or CREDIT BALANCE)	$77,943.55
PIERRE SD 57501		

WHEN PAID, THIS STATEMENT SERVES AS YOUR CERTIFICATE OF CONTRIBUTION

This statement contains information concerning a Class B health account assessment made by the South Dakota Life and Health Insurance Guaranty Association for the insolvencies of Penn Treaty Network American Insurance Company and American Network Insurance Company (collectively "Penn Treaty"). This assessment is made by the Association to fund its obligations under the Penn Treaty Network American Insurance Company and American Network Insurance Company Reinsurance Agreements. The computations for these assessments are based on the NOLHGA Assessment Data Survey for the years 2014, 2015, and 2016.

The total health assessment authorized by the Board of Directors in 2020 for Penn Treaty Network American Insurance Company and American Network Insurance Company is $7,250,000.00.

You may determine your pro-rata share of the above assessment by dividing your total assessable premiums for the years 2014, 2015, and 2016 by the state-wide three year total as follows:

HEALTH (state-wide premiums) $2,990,114,324

Please make your check payable to SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, and mail it, along with a copy of this statement, to the address shown above. Wire transfer/ACH payments are also accepted and payment information will be provided upon request. Payment is due within 30 days of the date of this notice. If not received within 30 days, interest at the rate of 10% per annum will be charged and we will be required to report a failure to pay to the Director of the South Dakota Division of Insurance who may impose penalties.

<u>Please return a copy of this letter/invoice with your check.</u>

Record K

SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone (605) 336-0177
Telecopier (605) 335-3639

February 7, 2020

VIA EMAIL TRANSMISSION AND U.S. FIRST CLASS MAIL

Michael P. Feimer, Plan Administrator
South Dakota Bankers Benefit Trust Board of Trustees
South Dakota Bankers Insurance & Services, Inc.
PO Box 7086
Yankton, SD 57078

Re: January 22, 2020, Assessment for Penn Treaty Network America Insurance Company and American Network Insurance Company

Dear Mr. Feimer:

I have received your letter of January 28, 2020, concerning the assessment sent by the South Dakota Life and Health Insurance Guaranty Association to South Dakota Bankers Insurance & Services, Inc. for funds required by the Association to fulfill its statutory obligations for the insolvencies of Penn Treaty Network America Insurance Company and American Network Insurance Company.

Penn Treaty Network America Insurance Company and American Network Insurance Company were placed in liquidation by Order of the Commonwealth Court of Pennsylvania on March 1, 2017. As a result each of those companies became an "insolvent insurer" as that term is defined in SDCL 58-29C-48(11), and thus as of that date and pursuant to SDCL 58-29C-51.B. the Association became statutorily obligated to provide benefits (subject to statutory limits) to fulfill the contractual obligations of Penn Treaty and ANIC. South Dakota Bankers Insurance & Services, Inc. was a member of the Association on March 1, 2017, when the Association became fully obligated to provide those benefits.

The Association is aware of Senate Bill 37 enacted by the South Dakota Legislature in 2019. Although Senate Bill 37 terminated the requirement that self-funded multiple employer health insurance trusts maintain membership in the South Dakota Life and Health Insurance Guaranty Association, the Association does not believe that Senate Bill 37 terminates your organization's liability for assessments made by the Association to fund its obligations for insolvencies occurring while the organization was a member of the Association.

The Association is required to assess its member insurers for the funds needed to fulfill its statutory obligations based on the member insurers' pro rata share of premiums received in South Dakota during the three (3) calendar years prior to the year in which the Association becomes statutorily obligated to provide benefits (*see* SDCL 58-29C-52.C.(2)). For these purposes the

term "member insurer" is defined in SDCL 58-29C-48(12), and it is noteworthy that the definition includes prior members of the Association. Senate Bill 37 enacted by the legislature in 2019 did not amend that definition of "member insurer."

A fundamental principle concerning the retroactive application of legislation has been codified by the South Dakota Legislature in SDCL 2-14-18 which provides as follows:

> The repeal of any statute by the Legislature shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Senate Bill 37 does not provide that its effect shall be retroactive. Therefore, pursuant to the plain terms of SDCL 2-14-18 the South Dakota Bankers Insurance & Services, Inc. remains obligated for the liability it incurred as a member of the South Dakota Life and Health Insurance Guaranty Association to fund the amounts needed by the Association to fulfill its statutory obligations while South Dakota Bankers Insurance & Services, Inc. was a member of the Association.

If South Dakota Bankers Insurance & Services, Inc. desires to protest the Association's recent assessment for Penn Treaty and ANIC it is required to follow the procedures set forth in SDCL 58-29C-52.I. Specifically, to protest an assessment the member insurer is required to pay the assessment in full by the time it is due, and payment must be accompanied by a statement in writing that the payment is made under protest and with a brief statement of the grounds for the protest.[1] A failure by South Dakota Bankers Insurance & Services, Inc. to follow the procedures set forth in SDCL 58-29C-52.I., including a failure to pay the subject assessment when due, will be deemed by the Association as a waiver of the organization's right to appeal the subject assessment.

Please do not hesitate to contact me if you need any additional information concerning this matter.

Sincerely,

Charles D. Gullickson

CHARLES D. GULLICKSON
Executive Director

CDG/kd

cc *(via e-mail)*: David W. King, Chairman, South Dakota Bankers Benefit Trust Board of Trustees
Board of Directors, South Dakota Life & Health Insurance Guaranty Association

[1] Payment for the Association's assessments is due within thirty (30) days after notice of the assessment in the member insurer. *See* SDCL 58-29C-52.A.

February 21, 2020

Record L

VIA EMAIL & CERTIFIED MAIL

Mr. Charles D. Gullickson
Executive Director
South Dakota Life and Health Insurance Guaranty Association
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030

Dear Mr. Gullickson,

I represent the South Dakota Bankers Benefits Plan Trust ("Trust") and its plan administrator, South Dakota Bankers Insurance & Services, Inc. ("SDBIS"). We are in receipt of the Class B Assessment authorized in 2020 and dated January 22, 2020 ("Assessment") from the South Dakota Life and Health Guaranty Association ("Association" or "Guaranty Fund"). We are also in receipt of the Association's corresponding letter dated February 7, 2020, setting forth the Association's position and the procedure for protesting the Assessment pursuant to SDCL 58-29C-52.1.

Please accept this letter in protest of the Assessment for the reasons set forth herein. Payment under protest in the amount of $77,943.55 is enclosed.

Background. The Trust maintains an employee welfare benefit plan available to the eligible employees of participating employers. Only banking employers who are active members in good standing with the South Dakota Bankers Association ("SDBA") may participate in the Trust. As such, the Trust constitutes a "multiple employer welfare arrangement" ("MEWA") within the meaning of Section 3(40) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and a self-funded "multiple employer trust" ("MET") within the meaning of SDCL 58-18-88. The Trust operates on an assessment basis – that is, participating employers are contractually liable for any and all deficiencies of the Trust in fulfilling the Trust's obligations.[1]

Enactment of Senate Bill 37 Repealed Application of the Guaranty Fund to METs. Senate Bill 37 was enacted in February 2019 for the purpose of revising certain laws pertaining to association health plans, including the Trust. Prior to enactment of Senate Bill 37, SDCL 58-18-88 ("Authorization of self-funded multiple employer trust sponsored by association—Conditions") required that the Trust "participate in the South Dakota Life and Health Insurance Guaranty Association pursuant to chapter 58-29C and [be] a member pursuant to subdivision 58-29C-48(12)." SDCL 58-18-88(6). As referenced in the Association's February 7, 2020 letter, Senate Bill 37 repealed the above requirement from SDCL 58-18-88(6) and replaced it with the requirement that the Trust's board of trustees "assess participating employers in an amount necessary to

[1] As a condition of entry to the plan, participating employers are required to enter into a "Participation & Adoption Agreement" whereby each employer agrees to be held jointly and severally liable for any deficiencies of the Trust.

remedy deficiencies at any time the assets and stop-loss insurance policies of the multiple employer insurance trust are insufficient to: (a) pay claims made against the multiple employer trust; (b) discharge liabilities and obligations relating to health benefit plan claims; or (c) maintain adequate reserves and surpluses[.]"

Following the enactment of Senate Bill 37, we are not aware of any remaining provision in South Dakota law that makes the Trust subject to assessment under SDCL 58-29C. Instead, we assert that Senate Bill 37 effectively terminated the Association's ability to assess the Trust, particularly with respect to assessments authorized after the Trust ceased to be a member of the Association.

"Member Insurers" Assessable by the Guaranty Fund. The Association's February 7, 2020 letter asserts that the Trust is or was an "insurer" for purpose of SDCL 58-29C. In this regard, the letter states: "Senate Bill 37 enacted by the legislature in 2019 did not amend [the] definition of 'member insurer'." While we agree that Senate Bill 37 did not amend SDCL 58-29C's definition of "member insurer," we disagree with the Association's application of SDCL 58-29C to the Trust following enactment of Senate Bill 37.

Senate Bill 37 specifically repealed the provisions previously contained in SDCL 58-18-88(6) that made the Trust subject to Guaranty Fund participation. Following this repeal, assessments by the Guaranty Fund are governed exclusively by SDCL 58-29C. A plain reading of SDCL 58-29C in no way suggests that the Trust is currently assessable by the Association. In fact, it leads one to the opposite conclusion.

The definition of "member insurer" set forth in SDCL 58-29C provides, in relevant part:

> Member insurer means *an insurer* licensed or that holds a certificate of authority to transact in this state any kind of insurance *for which coverage is provided under § 58-29C-46*, and includes an insurer whose license or certificate of authority in this state may have been suspended, revoked, not renewed, or voluntarily withdrawn, but does not include ... (e) a mutual assessment company *or other person that operates on an assessment basis*[.]" SDCL 58-29C-48(12) (Emphasis added.)

Because the Trust does not meet the definition of "member insurer," it is not now subject to Association assessment. First, the Trust is not, and has never been, an "insurer."[2] Second, following enactment of Senate Bill 37, the Trust is no longer covered by SDCL 58-29C-46; instead, it is expressly excluded from coverage. *See* SDCL 58-29C-46.B(2)(d)(i), excluding coverage for MEWAs.[3] Finally, the definition of "member insurer" itself expressly excludes an entity that "operates on an assessment basis," which includes the Trust. As the Trust is expressly excluded from the definition of "member insurer" for purposes of assessment pursuant to SDCL 58-29C, the current Assessment cannot be valid.[4]

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[2] *See* SDCL 58-18-90: "Except as otherwise provided in this chapter, an authorized multiple employer trust may not be determined to be or considered to be an insurance company or association of any kind or character under this title."

[3] SDCL 58-29C-46.B(2)(d)(i) expressly states that "[t]his chapter may not provide coverage for "a portion of a policy or contract issued to a plan or program of an employer, association, or other person to provide life, health, or annuity benefits to its employees, members, or others, to the extent that the plan or program is self-funded or uninsured, including benefits payable by an employer, association, *or other person under a multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1002(40))*." (Emphasis added.)

[4] Because the Trust does not meet the definition of "member insurer" for purposes of SDCL 58-29C, we believe it is unnecessary to analyze comments made in the February 7, 2020 letter regarding "prior

Penalties and Liabilities Surviving Repeal of Act. The Association's February 7, 2020 letter also cites to SDCL 2-14-18 in support of the current Assessment: "The repeal of any statute by the Legislature shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

We are not aware of any law that causes a "liability" within the meaning of SDCL 2-14-18 to "incur" to a member of the Association pursuant to SDCL 58-29C until such time as the Association makes an assessment. "Assessments for funds to meet the requirements of the association with respect to an impaired or insolvent insurer may not be authorized or called until necessary to implement the purposes of this chapter." SDCL 58-29C-52.C(3). According to the Assessment statement, the Assessment was "authorized by the Board of Directors in 2020," after enactment of Senate Bill 37 and after the date on which the Trust ceased to be a member of the Association. Accordingly, we do not believe that SDCL 20-14-18 applies to the facts of the current Assessment.

ERISA Preemption. As previously referenced, the Trust is governed by ERISA. In the context of a self-insured MEWA such as the Trust, a state insurance law may apply only to the extent it is "not inconsistent" with ERISA. See 514(b)(6)(A)(ii). Under ERISA, a plan must operate pursuant to its governing documents. *See* ERISA Section 404(a). As the plan's governing documents require that the Trust operate on an assessment basis, coverage under SCGL 58-29C offers no benefit to the Trust or its participants. In this context, we believe that a requirement for the Trust to participate in (and be subject to assessment by) the Association runs afoul of ERISA's exclusive benefit rule.[5] Accordingly, we also object to application of SDCL 58-29C to the Trust on the basis of ERISA preemption.

Conclusion. To summarize, we protest the Assessment on the basis that the provisions of SDCL 58-29C no longer apply to the Trust with respect to assessments made following the enactment of Senate Bill 37. A plain reading of SDCL 58-29C, including its express exemption of "assessment" organizations from participation in the Association as well as the express exclusion of MEWAs from Association coverage, fully supports this conclusion. We also object to the current assessment on the basis of ERISA preemption.

---

members" of the Association. "Prior member" is not a term utilized in SDCL 58-29C. Nonetheless, we highlight the fact that the Trust is neither an "insurer," nor an insurer whose license has been "suspended, revoked, non-renewed or voluntarily withdrawn." Instead, the Trust is a MET which is no longer subject to SDCL 58-29C.

[5] *See* ERISA Section 404(a)(1)(A), requiring that an ERISA plan be administered and maintained "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan."

We appreciate the Association's time and consideration of this matter, and look forward to an efficient resolution. Please do not hesitate to contact me regarding next steps or if you require any additional information in evaluating this matter.

Very truly yours,

Randie Thompson

Randie Thompson
ERISA Law Practice, LLC

cc *(via email only)*: David King, Chairman
South Dakota Bankers Benefit Plan Trust

Mike Feimer, President
South Dakota Bankers Insurance & Services, Inc.

SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone (605) 336-0177
Telecopier (605) 335-3639
E-Mail: cgullickson@dehs.com

Record M

April 9, 2020

VIA EMAIL TRANSMISSION AND
UPS OVERNIGHT DELIVERY

Randie Thompson
ERISA Law Practice, LLC
4817 E. 18th Ave
Denver, CO 80220
randie@erisalawpractice.com

Re: Protest of January 22, 2020 Assessment from South Dakota Life and Health Insurance Guaranty Association

Dear Ms. Thompson:

The South Dakota Life and Health Insurance Guaranty Association ("Association") is writing in response to your February 21, 2020 letter on behalf of the South Dakota Bankers Benefits Plan Trust ("Trust") protesting the assessment issued by the Association to the Trust on January 22, 2020. The Association has considered the Trust's arguments contained in your letter and denies the protest on the grounds described below.

Background

The Association exists and is governed by the South Dakota Life and Health Insurance Guaranty Association Act (the "SDLHIGA Act"). SDCL 58-29C-44 *et seq.* It is by statute an unincorporated association of members who "are subject to assessment to provide funds to carry out the purpose of [the Association]." SDCL 58-29C-45B. The Association's statutory purpose is to protect South Dakota residents who hold insurance policies issued by various types of insurers doing business in South Dakota when those insurers becomes insolvent. SDCL 58-29C-45A. The Association's obligations are mandatory and arise at the time one of its members becomes an "insolvent insurer." SDCL 58-29C-51B. A member insurer becomes an "insolvent insurer" when it is "placed under an order of liquidation by a court of competent jurisdiction with a finding of insolvency." SDCL 58-29C-48(11). Once the Association's obligations arise, it must assess all of its member insurers proportionately based on "the proportion that the premiums received on business in this state by each assessed member insurer on policies or contracts covered by each account for the three most recent calendar years for which information is available **preceding the year in which the insurer became insolvent** . . . bears to premiums received on business in this state for those calendar years by all assessed member insurers." SDCL 58-29C-52C(2).

The Association's assessments being protested in your letter relate to the Association's obligations to South Dakota residents who were policyholders of Penn Treaty Network America Insurance Company ("Penn Treaty") or its subsidiary American Network Insurance Company ("ANIC"). Penn Treaty and ANIC were Pennsylvania-domiciled insurers who were placed under orders of liquidation with findings of insolvency by the Pennsylvania Commonwealth Court on March 1, 2017, fixing on that date the Association's statutory obligations to South Dakota resident policyholders of those companies and the proportionate assessment burden of each of the Association's members for the funds the Association needed to meet those obligations. Each company's proportionate share of the Association's assessment needs is based entirely on the premium volume in South Dakota for the three (3) years prior 2017. SDCL 58-29C-52C(2).

The Association board is granted by statute "discretion and may exercise reasonable business judgment to determine the means by which the association is to provide the benefits of this chapter in an economical and efficient manner." SDCL 58-29C-51O. The Association's board exercised that discretion by becoming a party to two Reinsurance and Administrative Services Agreements dated March 1, 2017, to discharge its obligations to South Dakota residents. One Reinsurance and Administrative Services Agreement was with the Penn Treaty Protected Cell of LTC Re and the second was with the ANIC Protected Cell of LTC Re. Instead of funding all of its financial obligations under the Reinsurance and Administrative Services Agreements upfront in cash, which the Association could have done by assessing members the full amount at that time, the Association elected to issue promissory notes to each of the LTC Re Protected Cells that provide for five annual installment payments from the Association due each March 1 through 2022 (the "Promissory Notes").

At the time Penn Treaty and ANIC were placed under the orders of liquidation and the Association became a party to the Reinsurance and Administrative Services Agreements and issued its Promissory Notes, any self-funded multiple employer trust ("MET") in South Dakota was obligated to be member of the Association. SDCL 58-18-88(6) (amended July 1, 2019). Senate Bill 37 amended the statute governing METs effective as of July 1, 2019, to remove the requirement that METs be a member of the Association.

The South Dakota Bankers Association created the Trust, which is a "multiple employer welfare arrangement" ("MEWA") pursuant to Section 3(40) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and a MET pursuant to SDCL 58-18-88. The Trust was a member of the Association as of March 1, 2017 and has paid its allocable share of prior Association assessments related to Penn Treaty and ANIC.

Grounds for Denial of Protest

1. **The Trust remains liable for the Penn Treaty and ANIC assessments after the enactment of Senate Bill 37.**

There have been no amendments to the SDLHIGA Act relevant to the status or obligations of any member of the Association. Instead, the 2014 enactment of SDCL 58-18-88 authorized the establishment of METs subject to a number of requirements, including originally that a MET participate in and be a member of the Association "upon authorization of the director [of the South Dakota Division of Insurance]." The requirement that a MET be an Association member was

removed by Senate Bill 37 effective July 1, 2019, after the Association incurred statutory obligations related to Penn Treaty and ANIC and had entered into contractual relationships to discharge those obligations.

a. The repeal of the requirement that the MET be a member of the Association does not extinguish the Trust's liability for any obligation that arose while the MET was a member of the Association.

Nothing in Senate Bill 37 exempts a MET from the requirements under the SDLHIGA Act relating to periods when the MET was a member. Senate Bill 37 only removed the affirmative requirement that a MET be a member of the Association effective as of July 1, 2019. The situation created by the 2019 enactment of Senate Bill 37 is governed by SDCL 2-14-18, which states:

> The repeal of any statute by the Legislature **shall not** have the effect to release or extinguish any penalty, forfeiture, or **liability incurred** under such statute **unless the repealing act shall so expressly provide**, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

(emphasis added); *see also* SDCL 2-41-21 (statutes "shall not be construed as retroactive unless such intention plainly appears").

In this case, Senate Bill 37 repealed the requirement that a MET be a member of the Association, but it does not extinguish any liability incurred prior to the effective date of Senate Bill 37. As noted earlier, under the SDLHIGA Act each Association member becomes obligated to the Association so that the Association can discharge its statutory obligations based on the entity's defined proportional share of premiums during the three years prior to the year when the Association's obligations arose. SDCL 58-29C-45 and 58-29C-52C(2). This statutory pass-through to the Association's members is one of the two primary sources of the Association's funding.[1] In connection with the Association's assessment needs for Penn Treaty and ANIC, that means all assessments are allocated based on premiums in 2014-16, years in which the MET was an Association member. The Trust's protest would render this statutory construct meaningless and improperly shift the Trust's share of the financial burden that arose while it was undeniably a member of the Association to all of the Association's other members.

b. Member obligations related to Penn Treaty and ANIC arose at the time the court issued orders of liquidation, each with a finding of insolvency, on March 1, 2017, and when the Trust was a member of the Association.

The Association incurred statutory obligations as of March 1, 2017, and entered into contractual arrangements as of that date to discharge those obligations. The Association could have assessed the full amount needed to meet its obligations in 2017. If it had done so, any MET would have been obligated to pay its share of the total assessment at that time. The fact that the Association

[1] The other primary source of the Association's funding comes from its statutory rights and claims to the remaining assets of the insolvent insurer. SDCL 58-29C-51(K) (assignment from and subrogation to policyholder claims against insolvent insurer) and SDCL 58-29C-57(C) & (D) (statutory rights to assets from insolvent insurer).

elected to issue Promissory Notes that allowed it to spread out the assessment burden over five years and avoid imposing the entire financial burden all at once does not change the fact that the Association's members incurred an assessment liability to the Association in 2017 for the amounts the Association needed to meet its Penn Treaty and ANIC obligations. Nothing in Senate Bill 37 expressly or even impliedly provides that a MET which was an Association member in 2017 was relieved of future payment obligations for liabilities that were incurred in 2017.

Cases reaching similar results in other contexts are instructive. For example, in Dahl v. Sittner, 474 N.W.2d 897 (1991), the South Dakota Supreme Court held that newly enacted substantive statutes will not be given a retroactive effect unless such an intention is plainly expressed by the legislature. On the other hand, amendments that affect only procedural matters, as opposed to substantive rights can be given retroactive effect. Here, the obligations of any Association member (including a MET) under the SDLHIGA Act are substantive and not merely procedural. *See also* Territory of Alaska v. American Can Company, 358 U.S. 224 (1959) (Alaska could collect taxes accrued prior to, but not payable until after, the tax statute imposing the taxes had been repealed); State of Vermont Department of Taxes v. Zinn, 552 A.2d 413 (1988) (sellers of a parcel of land were still liable for gains tax even though an amended statute imposed the tax on the purchaser because the sellers' liability accrued on the date of sale which occurred before amendment).

c. *The treatment of liability for the Penn Treaty and ANIC assessments by other Association members, as well as insurers in other jurisdictions, reflects the widespread acceptance that the liability for Association obligations arose in 2017 when the court issued orders of liquidation with findings of insolvency.*

How the other Association members have recognized their liability for the assessments for the Association's 2017 promissory notes lends further support that the liability arose on March 1, 2017, when the Association was triggered and entered into contractual arrangements to discharge its obligations. A review of filed financial statements (statutory financial statements prepared in accordance with statutory accounting principles and GAAP financial statements filed by member insurers that are part of public companies) show that members acknowledged their liability related to Penn Treaty and ANIC as of 2017 regardless of when the liability matures for payment. The Trust's protest improperly attempts to defer a liability until it becomes payable and use a prospective change in the law to escape that existing liability.

2. **The assessment is not preempted by ERISA because ERISA recognizes that state laws that regulate insurance may apply to MEWAs such as the Trust.**

Your letter argues that ERISA preempts the application of SDCL 58-29C to the Trust. As your letter acknowledges, in addition to ERISA's general preemption provisions, ERISA contains specific rules applicable in the context of a state's regulation of MEWAs. Specifically, for MEWAs such as the Trust, ERISA Section 514(b)(6)(ii) provides that "any law of any state which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title." The South Dakota statutes at issue, the SDLHIGA Act, are not "inconsistent with" the sections of ERISA applicable to the Trust. First, while your letter cites to ERISA's exclusive purpose requirement in ERISA Section 404(a)(1)(A), that rule functions as a standard regulating a plan fiduciary's exercise of its ERISA-mandated duties and responsibilities, and not as a restriction on a state's authority to

regulate MEWAs operating within its borders. Further, the fact that the assessment does not provide a direct benefit to the Trust's participants does not provide a rationale for the application of ERISA preemption. South Dakota retains the right to regulate insurance and MEWAs that operate within the state, and ERISA recognizes that right. For example, the U.S. Department of Labor's Employee Benefits Security Administration has previously opined that state premium tax and high-risk pool assessments do not violate ERISA's exclusive purpose requirements and are not preempted with respect to self-funded MEWAs. *See*, e.g., DOL Advisory Opinion 2005-18A and authorities cited therein.

Conclusion

In summary, the protest is denied on the grounds stated above. The Trust incurred a liability to the Association while it was a member and it remains liable because Senate Bill 37 only removed the affirmative requirement that a MET be a member of the Association, and in no way exempts a MET from the requirements under the SDLHIGA Act relating to periods when the MET was a member. This conclusion is not altered by ERISA because the assessment is not preempted by ERISA, which recognizes that state laws that regulate insurance may apply to MEWAs such as the Trust.

Sincerely,

Charles D. Gullickson

CHARLES D. GULLICKSON
Executive Director and General Counsel

CDG/kd

cc *(via email)*: Board of Directors, South Dakota Life and Health Insurance Guaranty Association

SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone (605) 336-0177
Telecopier (605) 335-3639
E-Mail: cgullickson@dehs.com

Record IV

April 9, 2020

VIA EMAIL TRANSMISSION

Larry Deiter, Director
South Dakota Division of Insurance
South Dakota Department of Labor and Regulation
124 South Euclid Ave, 2nd Floor
Pierre, SD 57501-3185

Re: Denial of Penn Treaty Assessment Protest Received from Member Company

Dear Director Deiter:

I write to let you know that the Board of Directors of the South Dakota Life and Health Insurance Guaranty Association (the "Association") has denied a protest the Board has received from a former member concerning an assessment made by the Association earlier this year to fund its obligations arising from the insolvencies of Penn Treaty Network America Insurance Company and American Network Insurance Company (the "Companies"). The protest was received from the South Dakota Bankers Benefits Plan Trust (the "Trust"). No action is required from the Division on this matter at this time.

The Companies were placed in liquidation in their domiciliary state on March 1, 2017. Therefore, at that point in time the Association became obligated to fund all future benefits that might be due under the Companies' policies, subject to limitations and exceptions to the Association's coverage obligations as set forth in the Association's governing statutes found at SDCL Ch. 58-29C. Also at that point in time, i.e., March 1, 2017, all companies then members of the Association became obligated to provide funding for such future benefits based on their pro rata share of premiums received in South Dakota for the three calendar years prior to the date of liquidation in the applicable line of business. To fund its obligations for the liquidation of the Companies, the Association by statute is required to assess those companies who were members of the Association on March 1, 2017, based on their premiums received in the prior three-year period.

The Trust has protested the assessment in question, which the Association made against its relevant members in January of this year, based on an amendment to its governing statutes (*see* SDCL 58-18-88) that was enacted in the South Dakota Legislature in 2019. The Board of Directors of the Association, however, strongly believes that the 2019 legislation does not relieve the Trust of its liability, which was fixed as of March 1, 2017, to pay assessments that the Association needs to fund its statutory obligations that became effective on March 1, 2017. It is a core tenet of the national life and health insurance guaranty association system that members of a guaranty association cannot

use future changes in the member's legal status or future changes in the law to avoid or shed their obligation to fund obligations of the guaranty association that become fixed as of the date a member company becomes insolvent. For this reason the Board has denied the assessment protest received from the Trust.

Today we are providing the Trust with a written denial of the Trust's protest pursuant to the requirements of SDCL 58-29C-52(I)(2), and the Board has requested that I provide you with this update. Enclosed for your information is a copy of the Board's denial of the Trust's protest and the initial protest dated as of February 21, 2020, received from the Trust. Also, as additional background, I am providing to you a copy of correspondence sent by the Association to the Trust on February 7, 2020, concerning this year's Penn Treaty assessment.

I note that the Trust has the ability to protest this denial to you pursuant to SDCL 58-29C-52(I)(3), and I provide these materials to you simply for your information.

If you have any questions concerning this matter please do not hesitate to contact me.

Sincerely,

Charles D. Gullickson

CHARLES D. GULLICKSON
Executive Director and General Counsel

CDG/kd
Enclosures

cc *(via email)*: Board of Directors, South Dakota Life and Health Insurance Guaranty Association

Record O

SDBANKERS
INSURANCE & SERVICES
Educate. Advocate. Grow.

June 2, 2020

Mr. Larry Deiter, Director
Division of Insurance
South Dakota Department of Labor and Regulation
124 South Euclid Avenue, 2nd Floor
Pierre, SD 57501

Dear Mr. Deiter,

We serve as fiduciaries to the South Dakota Bankers Benefit Plan Trust ("Trust"). We are writing in regard to the Class B 2020 Health Assessment made by the South Dakota Life and Health Insurance Guaranty Association ("Association") against the Trust.

On February 21, 2020, the Trust paid a $77,943.55 assessment under protest. By letter dated April 9, 2020, the Association denied the Trust's protest. Pursuant to SDCL 58-29C.I(3), this letter is to appeal the Association's denial. A copy of the Association's denial is attached for your reference.

Please accept this letter in appeal of the Association's April 9, 2020 denial of the Trust's February 21, 2020 protest of the Class B 2020 Health Assessment.

1. **The Trust.** The Trust maintains an employee welfare benefit plan available to the eligible employees of participating employers. Only banking employers who are active members in good standing with the South Dakota Bankers Association ("SDBA") may participate in the Trust. As such, the Trust constitutes a "multiple employer welfare arrangement" ("MEWA") within the meaning of Section 3(40) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and a self-funded "multiple employer trust" ("MET") within the meaning of SDCL 58-18-88. The Trust operates on an assessment basis – that is, participating employers are contractually liable for any and all deficiencies of the Trust in fulfilling the Trust's obligations.

2. **The Association.** As outlined in the Association's denial, the Association exists and is governed by the South Dakota Life and Health Insurance Guaranty Association Act (the "SDLHIGA Act"). SDCL 58-29C-44 *et seq.* It is by statute an unincorporated association of members who "are subject to assessment to provide funds to carry out the

www.sdba.com
PO Box 7086 | Yankton, SD 57078
Phone: 800.221.7551 | Email: mfelmer@sdba.com

purpose of [the Association]." SDCL 58-29C-45B. The Association's obligations are statutory and arise at the time one of its members becomes an "insolvent insurer." SDCL 58-29C-51B. The powers and duties of the Association are distinct from those of its member insurers. For the purpose of providing the funds necessary to carry out the powers and duties of the Association, the Association's board of directors "shall assess the member insurers, separately for each account, at such time and for such amounts as the board finds necessary." SDCL 58-29C-52A.

3. **The Trust Ceased to be a Member Insurer of the Association Effective July 1, 2019.** Senate Bill 37 became effective July 1, 2019 and was enacted for the purpose of revising certain laws pertaining to association health plans, including the Trust. Prior to enactment of Senate Bill 37, SDCL 58-18-88 ("Authorization of self-funded multiple employer trust sponsored by association—Conditions") required that the Trust "participate in the South Dakota Life and Health Insurance Guaranty Association pursuant to chapter 58-29C and [be] a member pursuant to subdivision 58-29C-48(12)." SDCL 58-18-88(6).

Senate Bill 37 repealed the above requirement from SDCL 58-18-88(6) and replaced it with the requirement that the Trust's board of trustees "assess participating employers in an amount necessary to remedy deficiencies at any time the assets and stop-loss insurance policies of the multiple employer insurance trust are insufficient to: (a) pay claims made against the multiple employer trust; (b) discharge liabilities and obligations relating to health benefit plan claims; or (c) maintain adequate reserves and surpluses[.]" Thus, the law is clear that the Trust ceased to be a member insurer of the Association effective July 1, 2019.

4. **The Association Authorized the Class B 2020 Health Assessment on December 20, 2019.** Under the SDLHIGA Act, "Class B assessments shall be authorized and called to the extent necessary to carry out the powers and duties of the association with regard to an impaired or an insolvent insurer." SDCL 58-29C-52B(2). By email dated April 10, 2020, Mr. Charles Gullickson, Executive Director and General Counsel of the Association, represents that the Association's 2020 assessment was authorized at a meeting of the Association's board of directors on December 20, 2019. According to Mr. Gullickson's email, the Minutes of that meeting include: "It was moved and seconded to authorize an assessment for Penn Treaty and ANIC in the amount of $7,250,000.00 in the health line, and the motion passed unanimously." Thus, the Class B 2020 Health Assessment was authorized after the date on which the Trust was made exempt from participation as a member insurer of the Association.

5. **The Association Has Failed to Establish A Legal Basis for Assessing the Trust Following Senate Bill 37.** The Trust protested the Class B 2020 Health Assessment based on the fact that it was no longer a "member insurer" of the Association subject to assessment on the date the Class B 2020 Health Assessment was authorized.

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The Association's April 9, 2020 denial of the Trust's protest fails to establish any cognizable legal basis for an argument to the contrary.

The following addresses each of the Association's rationales for making the Class B 2020 Health Assessment against the Trust, as set forth in the Association's April 9, 2020 denial. Italicized paragraph headings in quotes (*(a), (b), (c) and (d)*) restate headings used in the Association's April 9, 2020 denial and are representative of the primary bases for the Association's denial.

"a. The repeal of the requirement that the MET be a member of the Association does not extinguish the Trust's liability for any obligation that arose while the MET was a member of the Association."

The Association identifies March 1, 2017 as the date the Association became statutorily liable in relation to the Penn Treaty and ANIC insolvencies. However, the Association fails to point to anything in the SDLHIGA Act that equates a liability of the Association with a liability of the Trust.

The primary obligation of a member insurer under the SDLHIGA Act is the timely payment of assessments "authorized and called to the extent necessary to carry out the powers and duties of the association under Section 58-29C-51 with regard to an impaired insurer." SDCL 58-29C-52B(2). Under the SDLHIGA Act, the term "authorized" when used in the context of assessments means "a resolution by the board of directors has been passed whereby an assessment will be called immediately or in the future from member insurers for a specified amount. An assessment is authorized when the resolution is passed." SDCL 58-29C-48(3). Importantly, "assessments for funds to meet the requirements of the association with respect to an impaired or insolvent insurer may not be authorized or called until necessary to implement the purposes of this chapter." SDCL 58-29C-52C(3).

The Association's 2017 election to issue promissory notes providing for five annual promissory installment payments from the Association rather than funding all of its financial obligations up front through the assessment of Association member insurers at that time, while relevant to the Association's own liabilities under the SDLHIGA Act, does not establish an assessment liability for the Trust pursuant to SDCL 58-29C-52B.

"b. Member obligations related to Penn Treaty and ANIC arose at the time the court issued orders of liquidation, each with a finding of insolvency, on March 1, 2017, and when the Trust was a member of the Association."

Again, the Association attempts to somehow transform the Association's own liability into that of the Trust's. The Association fails to point to anything in the SDLHIGA Act that equates a liability of the Association with a liability of the Trust. Instead, the Association's member insurers are subject to assessment for the funds necessary to carry

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Phone: 800.221.7551 | Email: mfelmer@sdba.com

out the Association's purpose. Nothing in the SDLHIGA Act causes a member insurer to incur any liability with respect to the Association's obligations until such time as the Association authorizes and calls an assessment.

In this regard, we also do not find the case law referenced in the Association's April 9, 2020 denial persuasive of the Association's position or even relevant to this matter. For example, the Association cites to Dahl v. Sittner, 474 N.W.2d 897 (1991), in which the South Dakota Supreme Court held that newly enacted substantive statutes will not be given a retroactive effect unless such an intention is plainly expressed by the legislature. However, the issue before the *Dahl* court is not dispositive to the matter at hand. The Trust does not seek retroactive application of Senate Bill 37. Instead, the Trust contends that liability of a member insurer under the SDLHIGA Act is fixed on the date an assessment is authorized pursuant to SDCL 58-29C-52B, not on the date another member insurer becomes insolvent. Because the Trust was no longer a member insurer of the Association on the date the Class B 2020 Health Assessment was authorized, that assessment was improperly made against the Trust.

We also dispute the applicability of other case law cited to by the Association in its denial. The core of the Trust's protest hinges on identifying the legal date on which a specific liability attaches to a member insurer pursuant the SDLHIGA Act. Territory of Alaska v. American Can Company, 358 U.S. 224 (1959) and State of Vermont Department of Taxes v. Zinn, 552 A.2d 413 (1988), cited to by the Association in its denial, do not involve questions of when a liability accrues, but instead address matters of payment obligations and collection rights once a liability is fixed. These cases are not relevant to our protest and this appeal.

Tax assessment precedent more analogous to the matter at hand may be found by reference to South Dakota tax law. For example, *ad valorem* taxes may be assessed by a governmental entity in a manner similar to the Association's assessment of its member insurers. The purpose of *ad valorem* tax assessments are also similar to that of the Association's in that they enable an assessing entity to collect amounts necessary to operate, such as the provision of certain welfare and security benefits to residents. As with the SDLHIGA Act, certain entities are or may become exempt from *ad valorem* tax assessment. In looking to South Dakota's tax laws for instruction, SDCL 10-4-19.1 is particularly relevant:

> **Time of determination of exempt status--Apportionment when property transferred to exempt entity.** Any exemption from ad valorem taxation in this state as provided by this chapter on account of the use or ownership of real property on the part of any governmental or private entity shall be determined with respect to the ownership and use of such property *on the legal assessment day* regardless of after acquired or disposed of property, except as provided in § 10-4-19.2. However, any person, firm, or corporation, owning or controlling any property transferred to any entity

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> exempt from taxation as provided in this chapter shall be liable for the payment of all taxes based on an assessment during the year of transfer, proportionate to the length of time such nonexempt person, firm, or corporation owned such property, and until the date on which such tax-exempt entity is legally entitled to and has acquired actual possession of such property and is making use of the same for the purposes of the tax-exempt entity. Such transferred property may not be taxed for any month in the taxable year in which such property is in the legal possession of any such tax-exempt entity for more than sixteen days. (Emphasis added.)

Thus, the dispositive factor in the *ad valorem* tax context is the entity's exempt or non-exempt status on the "legal assessment day." By analogy and according to information received from the Association itself, the legal assessment date of the Class B 2020 Health Assessment is December 20, 2019. At this date, the Trust was statutorily exempted from participation in the Association. Accordingly, the Association's Class B 2020 Health Assessment was improperly made against the Trust.

"c. The treatment of liability for the Penn Treaty and ANIC assessments by other Association members, as well as insurers in other jurisdictions, reflects the widespread acceptance that the liability for Association obligations arose in 2017 when the court issued orders of liquidation with findings of insolvency."

It is unclear how this undocumented assertion might lend any support to the Association's position that the Class B 2020 Health Assessment was properly made against the Trust. The manner in which certain members of guaranty funds (particularly those in other jurisdictions) acknowledge their Penn Treaty and ANIC "liabilities" for purposes of financial reporting is not legal precedent and should have no bearing on the Director's resolution of this matter.

In addition, the Association's characterization of the Trust's protest as an attempt to "improperly shift the Trust's share of the financial burden that arose while it was undeniably a member of the Association to all of the Association's other members" is incredulous. The Trust's Class B 2020 Health Assessment in the amount of $77,943.55 constitutes 1% of the Association's overall 2020 assessment of $7,250,000.00. To suggest that foregoing this amount or allocating this amount amongst the actual member insurers would create a financial burden is not rational, particularly considering that the assessment represents only an estimate of necessary expenses.

Moreover, where matters of equity are concerned, we call your attention to the fact that MEWAs such as the Trust are statutorily exempt from guaranty fund participation in the vast majority of jurisdictions. This is true in large part due to the assessable nature of MEWAs, rendering their solvency concerns distinct from those of traditional insurers. The South Dakota legislature agreed with this distinction, evidenced by its passage of Senate Bill 37, exempting MEWAs from the SDLHIGA Act effective July 1, 2019.

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"d. The assessment is not preempted by ERISA because ERISA recognizes that state laws that regulate insurance may apply to MEWAs such as the Trust."

As fiduciaries to an ERISA-covered MEWA, we are well aware of a state's ability to impose extensive regulation of MEWAs such as the Trust. That fact is not in dispute, and we respect the state's regulatory authority. However, as explained in the US Department of Labor's ("DOL") Advisory Opinion cited to by the Association in its denial, a state's ability to regulate a MEWA is not without limit:

> "For example, a state insurance law which would adversely affect a participant's or beneficiary's right to request or receive plan documents to which they have a right under Title I of ERISA, or to pursue claims procedures in accordance with section 503 of ERISA, or to obtain and maintain continuation health coverage in accordance with Part 6 of ERISA, or that would require an ERISA-covered plan to make imprudent investments would be deemed to be "inconsistent" with the provisions of Title I of ERISA." DOL Advisory Opinion 2005-18A.

Contrary to the Association's position, we believe the fact that the assessment does not provide a direct (or even indirect) benefit to the Trust's participants does provide a rationale for the application of ERISA preemption. The opinion rendered by the DOL in Advisory Opinion 2005-18A regarding state premium taxes and high-risk pool assessments not being pre-empted by ERISA is inapposite of the current scenario. In that opinion, the State of Washington was able to establish certain benefits to plan participants in relation to the assessments at issue. In the context of the Trust's participation in the Association, the Association itself has conceded to the fact that the Association's assessment does not provide a benefit to the Trust's participants. Accordingly, we believe that the absence of any benefit to plan participants makes the Association's assessment against the Trust inconsistent with the provisions of ERISA requiring that plan assets be used for the exclusive benefit of plan participants, thus triggering ERISA preemption.

In addition to a plain reading of ERISA's preemption laws, it is also instructive to note that we are not aware of any other self-funded MEWA subject to a state guaranty fund assessment. In fact, in looking to the National Association of Insurance Commissioner's Life and Health Insurance Guaranty Association Model Act ("NAIC Model Act"), MEWAs are expressly excluded from participation. As the Proceedings of the NAIC explain: "It was suggested that the exception be expanded to clarify that certain types of contractual relationships are not covered by the Act. *Clearly excluded would be* self-funded and uninsured plans, *multiple employer welfare arrangements*, stop-loss plans, and administrative services only contracts. 1984 Proc. II 462." (Emphasis added.) The fact that this suggestion was adopted in the NAIC Model Act strongly supports the notion that ERISA preemption applies in this context.

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PO Box 7086 | Yankton, SD 57078
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6. **SDLHIGA Act Provisions Regarding MEWAs Prohibit the Association from Treating the Trust as a Member Insurer After July 1, 2019.** We also call your attention to the fact that, at the time the Class B 2020 Health Assessment was made (and currently), the SDLHIGA Act includes unequivocal provisions regarding MEWAs. These provisions are consistent with those included in the NAIC's Life and Health Insurance Guaranty Association Model Act, as referenced above. We believe that these provisions must be taken into account as part of the Director's current evaluation of the Trust's protest.

First, the definition of "member insurer" set forth in SDCL 58-29C provides, in relevant part: member insurer means *an insurer* licensed or that holds a certificate of authority to transact in this state any kind of insurance *for which coverage is provided under § 58-29C-46*, and includes an insurer whose license or certificate of authority in this state may have been suspended, revoked, not renewed, or voluntarily withdrawn, but does not include ... (e) a mutual assessment company *or other person that operates on an assessment basis*[.]" SDCL 58-29C-48(12) (Emphasis added.) As you are aware, South Dakota law requires that the Trust operate on an assessment basis.

In addition to the above, SDCL 58-29C-46.B(2)(d)(i) expressly states that "[t]his chapter may not provide coverage for "a portion of a policy or contract issued to a plan or program of an employer, association, or other person to provide life, health, or annuity benefits to its employees, members, or others, to the extent that the plan or program is self-funded or uninsured, including benefits payable by an employer, association, *or other person under a multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1002(40))*." (Emphasis added.) As the Trust clearly constitutes a MEWA, we find it illogical to accept assessment liability based on a statute that expressly exempts MEWAs as of the assessment date in question.

7. **Conclusion.** The Trust has paid in full all assessments properly made upon it while an Association member insurer, and the Association has failed to provide any cognizable legal basis for the Class B 2020 Health Assessment now made against the Trust.

Effective July 1, 2019, Senate Bill 37 repealed the requirement that the Trust participate in the Association, making it exempt from the SDLHIGA Act. The Class B 2020 Health Assessment was authorized by the Association's Board on December 20, 2019. At that date, the Trust was no longer a "member insurer" under the SDLHIGA Act and statutorily exempted from assessment. As we are not aware of any remaining provision in South Dakota law that makes the Trust subject to assessment under SDCL 58-29C, we assert that the Class B Health Assessment for 2020 was improperly made against the Trust. Accordingly, we appeal the Association's April 9, 2020 denial of the Trust's February 21, 2020 protest.

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PO Box 7086 | Yankton, SD 57078
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We respectfully request that this Director uphold this appeal and require that the Association return the full amount paid by the Trust under protest, with interest, within thirty (30) days of the Director's decision. The Trust requires finality and certainty in establishing its premiums and meeting its financial obligations.

We appreciate the Director's time and consideration in this matter, and look forward to an efficient resolution. Please do not hesitate to contact our legal representative for this matter, Ms. Randie Thompson, regarding next steps or if you require any additional information in evaluating this matter. Ms. Thompson may be reached at via telephone at 303.808.4041 or via email at randie@erisalawpractice.com.

Very truly yours,

David W. King

David King, Chairman
South Dakota Bankers Benefit Plan Trust

Joseph Anglin, Trustee
South Dakota Bankers Benefit Plan Trust

George Kenny, Trustee
South Dakota Bankers Benefit Plan Trust

Mark Law, Trustee
South Dakota Bankers Benefit Plan Trust

Dean Dreesen, Trustee
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Michael D Feimer

Mike Feimer, President
South Dakota Bankers Insurance & Services, Inc.

www.sdba.com
PO Box 7086 | Yankton, SD 57078
Phone: 800.221.7551 | Email: mfeimer@sdba.com

Record P

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)))	INS. 20-12 NOTICE OF HEARING

YOU ARE EXPRESSLY NOTIFIED that a telephonic administrative hearing will be held on the above-entitled matter on August 28, 2020, beginning at 9:00 A.M. CST at the Office of Hearing Examiners in Pierre, South Dakota, covering the issues set forth below. There will be a prehearing conference with the Office of Hearing Examiners on July 28, 2020. At the scheduled time of the prehearing conference, you must call the Office of Hearing Examiners at 1-800-254-1665 or 605-224-1125. When prompted, please enter the access code 0020920. If you have any difficulties calling in and using the automated system, please call the Office of Hearing Examiners at 605-773-6811. The Office of Hearing Examiners may be contacted by phone at 605-773-6811 or by e-mail at SDOHE@state.sd.us.

The purpose of the hearing is to provide a venue for appeal of the decision by the South Dakota Life and Health Guaranty Association ("Guaranty Association") denying the South Dakota Bankers Benefit Plan Trust's ("Bankers MET") protest of an assessment relating to expenses attributable to an insurance company insolvency.

The contested case hearing is to be held pursuant to the jurisdiction of the Director of the Division of Insurance ("Division") under the legal authority conferred by SDCL 1-26-1(2), 58-4-9, and 58-29C-52I. The Office of Hearing Examiners will preside over this matter pursuant to SDCL 1-26D-4 and issue a Proposed Decision pursuant to SDCL Chapter 1-26D. Pursuant to Order attached as Exhibit A and SDCL 1-26D-7, the Proposed Decision of the Hearing Examiner will be the Final Decision in this matter.

The Bankers MET is an Authorized self-funded multiple employer trust pursuant to SDCL 58-18-88 et. seq. with an address of PO Box 7086, Yankton, SD 57078. The Guaranty Association consists of member insurers organized to pay benefits and continue coverages of certain liquidated insurers pursuant to SDCL Ch. 58-29C through assessments of its members with an address of 206 West 14th Street, Sioux Falls, SD 57101-1030. The entire record as provided to the Division to date is attached as Exhibit B to this Notice of Hearing. The specific issues raised by the parties are contained in these exhibits.

This is an adversary proceeding, and any interested party has a right to be present at the hearing and to be represented by an attorney. If not exercised at the hearing, these and other due process rights will be forfeited. A default order may be issued against any party not appearing at the hearing.

If the amount in controversy exceeds $2,500 or if a property right may be terminated, any party to a contested case may request the use of the Office of Hearing Examiners by giving notice.

Any action taken at the hearing may be appealed to Circuit Court and the South Dakota Supreme Court, pursuant to SDCL Chapter 1-26.

Pursuant to the Americans with Disabilities Act, this hearing is being held in a physically accessible location. Please contact the Office of Hearing Examiners 48 hours before the hearing if you have special needs, so arrangements can be made to accommodate you.

A person who is not an original party to this contested case and whose pecuniary interests would be directly affected by the Division's Order made upon the hearing may become a party to the hearing by intervention if timely application therefore is made to the Division, pursuant to SDCL § 1-26-17.1.

Dated at Pierre, South Dakota this 26th day of June, 2020.

Larry Deiter, Director
South Dakota Division of Insurance

Record Q

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)	INS. 20-12
	)	ORDER MAKING PROPOSED DECISION OF HEARING EXAMINER FINAL AGENCY DECISION

WHEREAS the South Dakota Life and Health Guaranty Association ("Guaranty Association") issued an assessment to the South Dakota Bankers Benefit Plan Trust, an Authorized Multiple Employer Trust ("Bankers MET") on January 22, 2020;

WHEREAS the Bankers MET submitted the assessment funds under protest on February 21, 2020 pursuant to SDCL 58-29C-52I;

WHEREAS the Guaranty Association denied the Bankers MET protest on April 9, 2020;

WHEREAS the Bankers MET may appeal the Guaranty Association's final action to the South Dakota Division of Insurance, part of the Department of Labor and Regulation ("Division");

WHEREAS, the Division received an appeal request from the Bankers MET regarding the final decision of the Guaranty Association on June 4, 2020; and

WHEREAS, pursuant to SDCL 1-26-1(2) and 1-26D-4, this matter is a contested case hearing which must be heard at the Office of Hearing Examiners;

NOW THEREFORE, IT IS HEREBY ORDERED pursuant to SDCL 1-26D-7, that the Proposed Decision of the Hearing Examiner assigned to this matter by the Office of Hearing Examiners shall become final without further agency action.

Dated at Pierre, South Dakota this 26th day of June, 2020.

Larry Deiter, Director
South Dakota Division of Insurance

Exhibit A to NOH

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)))	INS. 20-12 NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that attached hereto is a true and correct copy of the "Order Making Proposed Decision of Hearing Examiner Final Agency Decision" entered by the Larry Deiter, Director of Insurance, on June 26, 2020.

Dated this 26th day of June, 2020 in Pierre, South Dakota.

Frank A. Marnell, Senior Legal Counsel
South Dakota Division of Insurance
Department of Labor and Regulation
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501
Phone (605) 773-3563

Record R

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	INS. 20-12 AFFIDAVIT OF CHARLES D. GULLICKSON CONCERNING PLAN OF OPERATION OF SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Charles D. Gullickson, after being first duly sworn upon his oath, deposes and states as follows:

1. I am attorney licensed to practice law in South Dakota since September 1980 and have been an attorney with the Sioux Falls-based law firm of Davenport, Evans, Hurwitz & Smith, L.L.P. also since 1980. I have firsthand knowledge of all of the facts set forth in this Affidavit.

2. I have served as the Executive Director and General Counsel ("Executive Director") for the South Dakota Life and Health Insurance Guaranty Association (the "Association") since 1993 and currently serve in that position.

3. The Association is a non-profit legal entity created by South Dakota law (*see* SDCL 58-29C-45). At all times while I have served as the Executive Director, under South Dakota law (currently codified at SDCL 58-29C-53) the Association has been required to maintain a Plan of Operation which is subject to the review and approval of the Director of the South Dakota Division of Insurance (the "Director"). Any amendments to the Association's Plan of Operation are also subject to the review and approval of the Director and are deemed approved by the Director if not disapproved within thirty days after their submission to the Director (SDCL 58-29C-53.A.(1)).

4. In 2007 the Association decided to update its Plan of Operation and submitted an Amended and Restated Plan of Operation to the Director for his consideration on June 14, 2007 (the "2007 Plan of Operation"). The 2007 Plan of Operation was approved by the Director on June 21, 2007. A copy of the 2007 Plan of Operation is attached as Exhibit A to this Affidavit and is incorporated herein by this reference. The 2007 Plan of Operation remained in effect at all times relevant to the appeal which is the subject of this proceeding.

5. For reasons unrelated to this proceeding and the matters at issue herein, on May 21, 2020 the Association submitted an updated Amended and Restated Plan of Operation to the Director for his consideration (the "2020 Plan of Operation"). The 2020 Plan of Operation was approved by the Director on July 1, 2020. A copy of the 2020 Plan of Operation is attached as Exhibit B to this Affidavit and is incorporated herein by this reference.

6. The following language appears in Article 6., Section B. of the 2007 Plan of Operation:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the Act. However, such insurer shall remain liable for any assessments based on impairments occurring prior to the termination of its license. Such insurer shall also be entitled to a refund of all or part of any assessments which were made prior to termination of its license which later proves to be excessive.

7. The following language appears in Article 6., Section B. of the 2020 Plan of Operation:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the South Dakota Life and Health Insurance Guaranty Association Act. However, such insurer shall remain liable for any assessments based on impairments or insolvencies occurring prior to the termination of its license. Such insurer shall also be entitled to a refund of all or part of any assessments which were made prior to termination of its license which later proves to be excessive.

Further Affiant sayeth not.

Dated this 7th day of July, 2020.

Charles D. Gullickson

Subscribed and sworn to before me this 7th day of July, 2020.

KRIS M. DUMDEI
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

Notary Public, South Dakota
My Commission expires: 9/25/2020

EXHIBIT A

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

AMENDED AND RESTATED PLAN OF OPERATION

Table of Contents

Approved by Board of Directors June 7, 2007
Approved by Director of South Dakota Division of Insurance June 21, 2007

Article I. Plan of Operation

A. This Amended and Restated Plan of Operation (the "Plan of Operation") of the South Dakota Life & Health Insurance Guaranty Association (the "Association") shall become effective upon written approval of the Director of the South Dakota Division of Insurance as provided in SDCL 58-29C-53A(1) or upon thirty (30) days following submission of this Plan of Operation to the Director if it has not been disapproved by the Director.

B. Amendments to this Plan of Operation, as necessary or suitable to assure the fair, reasonable and equitable administration of the Association, may be adopted by the Board of Directors for approval. Any such amendments so submitted shall be effective upon written approval of the Director or 30 days after submission if the Director has not disapproved them.

C. A copy of this Plan of Operation shall be available for inspection by any member insurer at the office of the Association during normal business hours, and a copy shall be provided to any member insurer upon request.

Article II. Annual Meetings of the Member Insurers

A. An annual meeting of the member insurers of the Association shall be held for the election of directors at the office of the Association immediately preceding the annual meeting of the Board of Directors, unless the Chairman of the Board of Directors, upon proper notice, shall designate some other time, day or place.

B. Member insurers shall be notified of the time, day and place of the annual meeting of the member insurers at least ninety (90) days prior to such annual meeting.

C. At annual meetings of the member insurers, if there are more nominees than vacancies, Directors shall be elected by member insurers by votes cast. Each member insurer shall have one vote in person or by proxy for each member of the Board of Directors to be elected.

D. At all subsequent annual meetings of the member insurers:

1. Proxy voting shall be permitted, except that the presence of not fewer than five (5) member insurers shall be required to constitute a quorum.

2. The member insurers receiving the greatest number of votes shall be elected.

3. In the event that there is not more than one nominee for each position to be filled, the Secretary shall cast one vote for each such nominee.

Article III. Board of Directors

A. There shall be a Board of Directors in accordance with the provisions of SDCL 58-29C-50.

1. The Board of Directors shall consist of not less than five (5) nor more than nine (9) member insurers. The Board shall devise a system of staggered terms, so that all Director terms do not expire simultaneously. The standard term for a directorship shall be three (3) years, recognizing that terms shorter than this will be necessary for some Directors in order to achieve the staggering of terms.

   a) The Board of Directors shall be elected by the member insurers as provided in Article 2 hereof, and as required in the South Dakota Life & Health Insurance Guaranty Association Act set forth in SDCL Ch. 58-29C (the "Act"). No two members of the Board shall be from the same affiliated insurers and members of the Board shall fairly represent the members of the Association.

   b) Each elected member of the Board shall designate its representative and any alternate.

   c) The previously elected Board members shall serve until their successors have been duly elected and qualified to serve.

2. Upon the election of members of the Board of Directors, the Association shall notify the Director and request written approval of the members of the Board as elected.

3. The Board of Directors shall:

   a) Elect a Chairman, Vice Chairman, Secretary and Treasurer from among its members, and such other officers as it deems necessary. The posts of Secretary and Treasurer may be held by the same member. Each officer shall serve a term of one year or until a successor is elected.

   b) Have its Chairman, with the advice and consent of the Board, appoint from among its members, a nominating committee. Such committee shall select a nominee to succeed each Board member whose term expires at the annual meeting of the member insurers. Such nominees shall be made known to the member insurers at least ninety (90) days prior to such annual meeting. Other nominees may be submitted to the Board, but not less than sixty (60) days prior to such annual meeting, upon the petition of ten member insurers.

c) In the event there is more than one nominee for each position to be filled, the Board shall make the names of said nominees known to member insurers at least thirty (30) days prior to the annual meeting of the member insurers.

4. The Chairman of the Board of Directors may, with the advice and consent of the Board:

a) Appoint an Executive Committee from its members. Such Committee shall have as its members the Chairman, Secretary and Treasurer, and such other directors, if any, as appointed by the Chairman. The Executive Committee shall have such powers as may be delegated by the Board, provided it shall not have the authority to act on any matters requiring a majority vote of the full Board as provided B.3. below.

b) Appoint an Audit Committee consisting of three (3) members. At least one member serving on the Audit Committee, which preferably shall be the chairman of the committee, shall have an accounting or financial background. If an Audit Committee is appointed, the Audit Committee shall recommend selection of the independent outside auditor and facilitate the annual audit of the Association by an independent outside auditor; it shall also review and provide recommendations regarding any financial or operational review of the Association by independent outside auditors or the South Dakota Division of Insurance.

5. Vacancies occurring on the Board of Directors between annual meetings of the member insurers shall be filled by a majority vote of the remaining members of the Board with the approval of the Director. Vacancies occurring in elective offices between the annual meetings shall be filled by majority vote of the Board. Such interim directors and officers shall serve for the unexpired terms.

B.

1. At any meeting of the Board of Directors, each member of the Board shall have one vote.

2. A majority of the Board shall constitute a quorum for the transaction of business and the acts of the majority of the Board members present at a meeting at which a quorum is present shall be the acts of the Board, except as provided in paragraph 3 below.

3. An affirmative vote of a majority of the full Board is required to:

a) Approve a contract with a servicing facility for overall administration of the Association;

b) Levy an assessment or provide for a refund;

c) Borrow money or establish or change a line of credit;

d) Approve reinsurance contracts, assumption agreements or guarantee plans; or

e) Adopt amendments to the Plan of Operation.

C. The annual meeting of the Board shall be held immediately following the annual meeting of the member insurers, unless the Chairman of the Board, upon proper notice, shall designate some other time, day or place. Unless otherwise determined by the Board, the Chairman of the Board may designate the date, time, and place for the Association's annual meeting. At each annual meeting the Board shall:

1. Review operating expenses and outstanding contractual obligations and determine whether an assessment, or a refund of a prior assessment, is necessary for the proper administration of the Association and if so, the amount of either.

2. Elect the officers of the Association pursuant to Paragraph 3 of Article III.A. of this Plan of Operation.

3. Review, consider and act on any other matters deemed by it to be necessary and proper for the administration of the Association.

D. The Board may hold other regular or special meetings at such times and with such frequency as it deems appropriate to conduct the business of the Association. Such meetings may be held telephonically. Any Board member not present may consent in writing to any specific action taken by the Board, but this shall not permit Board members to act through other Board members by proxy. Any action approved by the required number of Board members at such meeting, including those consenting in writing, shall be as valid a Board action as though authorized at an annual or regular meeting of the Board or at the meeting held in person. In addition, any action which may be taken at a meeting of the Board may be taken without a meeting if a writing setting forth and approving the action taken shall be signed by all of the Board members entitled to vote on such action. In such cases, such consent shall have the same force and effect as if a meeting had been held.

E. Special meetings of the Board of Directors may be called by the chairman and shall be called upon the request of any two Board members. At such special meeting the Board may consider and decide any matter deemed necessary for the proper administration of the Association. Not less than five days notice shall be given to each Board member of the time, place and purpose of any such special meeting.

F. At meetings at which the impairment or insolvency of a member insurer is considered, the Board shall:

1. Consider and determine the legal obligations of the Association with regard to any reported impairment or insolvency.

2. Consider and decide what methods or facilities, as permitted under SDCL 58-29C-51, shall be adopted or utilized to assure fulfillment of the covered obligations of the impaired or insolvent member insurer for each of the categories of covered policies.

3. Assure that timely action is taken to gain access to and effect proper retention of records of the impaired or insolvent member insurer which are deemed necessary to the prompt and economical handling of its legally imposed duties.

4. Consider and decide to what extent and in what manner the Board shall exercise the powers authorized by SDCL 58-29C-51 to bring legal actions or provide for the defense thereof in order to avoid payment of improper claims.

5. Consider and decide or defer the decision as to what assessment, if any, should be levied, and consider and decide whether any assessment shall be deferred or abated. If such assessment, deferral, or abatement shall be determined to be appropriate, such action or actions shall be in accordance with the requirements specified in SDCL Ch. 58-29C. Notices of assessments to member insurers shall be in sufficient detail as to form a basis for the payment of such assessment by the member insurer. The Board shall promptly inform the Director of the failure of any member to pay an assessment made pursuant to this paragraph when due.

6. Take all steps permitted by law, and deemed necessary, to protect the Association's rights as pertaining to the impaired or insolvent member insurer and its policyholders. In addition to the foregoing powers, the Board shall have and exercise such other powers as may be reasonably necessary to implement its powers and responsibilities under the Act.

7. Issue to each member insurer a certificate of contribution for each Class of assessment paid for which certificates are to be provided under SDCL 58-29C-52. The certificate shall show the amount paid by each such insurer, the date of the assessment, name of the particular insolvent or impaired insurer for which the assessment was made, the value, if any, of such certificate as determined by the Director, and such other information as the Board shall find relevant.

8. In addition to the foregoing powers, the Board shall have and exercise such other powers as may be reasonably necessary to implement the provisions of the Act.

G. Members of the Board may be reimbursed from the assets of the Association for reasonable expenses incurred by them as members of the Board of Directors upon approval of such expenses by the Board, but members of the Board shall not be compensated by the Association for their services as members of the Board of Directors.

Article IV. Operations

A. The official address of the Association unless otherwise determined by the Board shall be 206 West 14th Street, Sioux Falls, South Dakota 57104.

B. The Board of Directors may employ or retain such persons, firms or corporations to perform such administrative functions as are necessary for the Board's performance of the duties imposed upon the Association. The Board may use the mailing address of such person, firm or corporation as the official address of the Association. Such persons may include an executive director with such authority as may be delegated by the Board to implement and carry out broad directives of the Board made pursuant to its statutory authority and duties. Such persons shall be knowledgeable about insurance matters, conversant with the law as it relates to covered policies of insurance and administratively capable of implementing the Board's directives. Such persons may also include attorneys at law, actuaries, accountants, claims personnel and such other specialists or persons whose advice or assistance is deemed by the Board to be necessary to the discharge of its duties imposed by law. The Board may agree to compensate such persons so as best to serve the interests of the Association and the public. Such persons, firms or corporations shall keep and maintain such records of their activities as may be required by the Board and the Act.

C. The Board may open such bank accounts as it deems necessary for the proper administration of Association business. Reasonable delegation and withdrawal authority to such accounts for Association business will be made consistent with prudent fiscal policy. Check signature limits and wire authority limits and procedures shall be determined by the Treasurer and approved by the Board. Investment policy shall be recommended by the Treasurer and approved by the Board, and shall be reviewed at the annual meeting of the Board of Directors.

D. If in the event in the judgment of the Board of Directors the maximum assessment under SDCL 58-29C-52, in combination with the Association's borrowing authority, will be insufficient over any given year to cover the outstanding and anticipated covered claims against the Association relating to one or more impaired or insolvent member insurers under any account or accounts, the Board of Directors may provide that the Association shall make partial and periodic payments on such claims in accordance with a schedule to be adopted by the Board of Directors. Such schedule may give preference to health claims, periodic annuity benefit payments, death benefits, supplemental benefits and cash withdrawals under emergency or hardship standards proposed by the Board of Directors and approved by the Director under SDCL 58-29C-52. Such schedule may be adjusted from time to time as changes in the volume

and type of such covered claims may warrant, and may be structured so as not to give preference to claims in the order in which they were incurred or made or in the order of which member insurers first became impaired or insolvent, or to require retroactive adjustments.

E. The Board of Directors shall determine at least annually if an excess of funds in any account exists such that the funds are not reasonably needed to fund future obligations of current or future insolvencies for the payment of the obligations of the Association. The Board's review for this purpose shall include, but not be limited to, a review of assets accruing from assignment, subrogation, net realized gains on distributions and income from investments. If the Board determines an excess exists, it may in its sole discretion, and in proportion to the contribution of each insurer to that account:

(1) refund in cash; or,

(2) refund in the form of a credit against any future assessments with respect to that account; to the extent a credit is granted to an insurer, it shall be reflected in the next subsequent assessment of the insurer for that account; or,

(3) reallocate excess funds to any other impairment or insolvency within the same account, or place the excess funds in a composite account to be held for this purpose.

In order to avoid disproportionate clerical expense, the Board may establish an amount below which refunds shall not be made.

Article V. Records and Reports

A. Minutes of the proceedings of each Board Meeting, annual meeting of the members and committee meetings shall be written. The original of these minutes shall be retained by the Secretary of the Board of Directors or by such other person as the Board may designate. Records of negotiations or meetings concerning an actual or potential impaired or insolvent insurer shall be made public only upon the termination of a liquidation, rehabilitation or conservation proceeding involving the impaired or insolvent insurer, upon the termination of the impairment or insolvency of the insurer, or upon the order of a court of competent jurisdiction. Nothing in the subsection shall limit the duty of the Association to render a report of its activities under Section C. The Board of Directors may upon majority vote make reports and recommendations to the Director upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

B. Copies of minutes, reports, recommendations, records and documents shall be furnished to each Board member, to the Director and to any member insurer upon request; provided, however, that such minutes, reports, recommendations or other records and documents relating to the portions of such proceeding which were closed, because of confidential nature of the matters addressed, shall also be confidential, and distribution of such minutes, reports, recommendations, records and documents shall be limited to the members of the Board of Directors and the Association's attorneys, employees or agents, considered by the Board of

Directors to be necessary or pertinent to the discussion of the matter addressed or performance of the actions taken during such confidential proceedings.

C. The Board of Directors shall make an annual report as required by SDCL 58-29C-59 not later than 120 days after the Association's fiscal year to the Director. Such report shall include a financial report for the preceding year in a form approved by the Director and a review of the activities of the Association during the preceding calendar year.

D. The Board shall, once each calendar year, engage an independent certified public accountant to review or audit the financial affairs of the Association.

Article VI. Membership

A. Any insurer which transacts in this state any kind of insurance for which coverage is provided under the Act and which is included in the definition of "member insurer" in SDCL 58-29C-48(12) shall be a member of the Association.

B. An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the Act. However, such insurer shall remain liable for any assessments based on impairments occurring prior to the termination of its license. Such insurer shall also be entitled to a refund of all or part of any assessments which were made prior to termination of its license which later proves to be excessive.

C. A member insurer which becomes an impaired or insolvent insurer after its license or certificate of authority in this state may have been suspended, revoked, not renewed, or voluntarily withdrawn shall remain a member insurer for purposes of the liability of the Association with respect to the covered policies or contracts of such member insurer.

Article VII. Appeals

A. Any member insurer aggrieved by an act of the Board of Directors or Association shall appeal to the Board of Directors before appealing to the Director. Such appeal shall be taken with in 60 days of the date on which such member insurer knew or should have known of such act. If such member insurer is aggrieved by the final action or decision of the Board on the appeal, or if the Board declines or fails to act on such appeal within 60 days, the member insurer may appeal to the Director within 60 days after the action or decision of the Board or the expiration of the 60-day period within which the Board failed to act on such appeal. Any member insurer which makes an appeal to the Director pursuant to this Article must provide the Association with notice of the appeal by mailing a copy of the appeal to the Association by certified mail on the same day on which the appeal is submitted to the Director. Failure to take an appeal within the time and in the manner set forth in this plan shall bar any claim that a member might otherwise have with respect to any act taken by the Association or its Board. If the appeal pertains to a protest of all or part of an assessment, the member shall pay when due the full amount of the assessment as set forth in the notice provided by the Association. The payment shall be available to meet Association obligations during the pendency of the protest or

any subsequent appeal. Payment shall be accompanied by a statement in writing that the payment is made under protest and setting forth a brief statement of the grounds for the protest.

Article VIII. Indemnification

A. All persons, except the Director and his representatives, described in SDCL 58-29C-50, including but not limited to the individual representatives of the member insurers serving on the Board of Directors, shall be indemnified by the Association for all reasonable expenses incurred on account of any action taken or not taken by them in the performance of their powers and duties under the Act, unless such persons shall be finally adjudged to have committed a breach of duty involving gross negligence, bad faith, dishonesty, willful misfeasance or reckless disregard of the responsibilities of their office or position. Such expenses shall include, but not be limited to, attorneys' fees, judgments, decrees, fines, penalties and amounts paid in settlement actually and necessarily incurred in the defense of any action, suit or proceeding, whether civil, criminal, administrative or investigative, including all appeals, brought against such persons, their testators or intestates. In the event of settlement before final adjudication, with or without court approval, such indemnity shall be provided only if the Association is advised by independent legal counsel that such persons did not, in counsel's opinion, commit such a breach of duty.

B. This Article is intended to operate as a supplement and additional safeguard to, and not in place of, the immunity granted by SDCL 58-29C-60.

Article IX. Conformity to Statute

A. SDCL Ch. 58-29C as written, and as may be hereafter amended, is incorporated as a part of this Plan and as such is attached hereto.

EXHIBIT B

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION

AMENDED AND RESTATED PLAN OF OPERATION

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Please Note the Following:

- All references herein to "the Act" refer to South Dakota's statutes found at SDCL Ch. 58-29C.
- The term "Director" herein refers to the Director of the South Dakota Division of Insurance.

Approved by Board of Directors May 21, 2020
Approved by Director of South Dakota Division of Insurance July 1, 2020

Article 1. Plan of Operation

A. This Amended and Restated Plan of Operation (the "Plan") shall become effective upon written approval of the Director) as provided in SDCL 58-29C-53. Unless otherwise defined herein, terms used in this Plan shall have the same meaning as those defined in the Act. In the event of any conflict between this Plan and South Dakota law, South Dakota law will prevail.

B. Amendments to this Plan as necessary or suitable to assure the fair, reasonable and equitable administration of the Association shall be adopted by the Board of Directors ("the Board"). Any such amendments so submitted shall be effective upon written approval of the Director, or thirty (30) days after submission if the Director has not disapproved them.

C. A copy of this Plan shall be provided to any member insurer upon request.

D. Unless otherwise specified in this Plan, actions and communications including notices, approvals, consents and signatures will be deemed to be written and acceptable if they are written and provided by United States Postal Service mail, courier service, or by e-mail, facsimile, or other electronic means. Contemporaneous documentation of such actions and communication should be maintained in the Association's records in a hard copy or an electronic file for future reference.

Article 2. Annual Meetings of the Member Insurers

A. An annual meeting of the member insurers of the Association shall be held for the election of directors at the office of the Association immediately preceding the annual meeting of the Board, unless the Chair of the Board ("the Chair"), upon proper notice, shall designate some other time, day or place.

B. Member insurers and the Director shall be notified of the time, day and place of the annual meeting of the member insurers, and the nominees to succeed each director whose term expires or otherwise terminates at the annual meeting of the Association, at least ninety (90) days prior to such annual meeting.

C. At annual meetings of the member insurers, if there are more nominees than vacancies, Directors shall be elected by member insurers by votes cast. Each member insurer shall have one vote in person or by proxy for each member of the Board to be elected.

D. At all annual meetings of the member insurers:

1. Proxy voting shall be permitted, except that the presence of not fewer than five (5) member insurers shall be required to constitute a quorum.

2. The member insurers receiving the greatest number of votes shall be elected.

3. In the event there is not more than one nominee for each position to be filled, the Secretary shall cast one vote for each such nominee, and declare each such nominee elected to the Director position, subject to approval of the Director.

Article 3. **Board of Directors**

A. There shall be a Board of Directors in accordance with the provisions of SDCL 58-29C-50.

1. The Board shall devise a system of staggered terms, so that all Director terms do not expire simultaneously. The standard term for a directorship shall be three (3) years, recognizing that terms shorter than this may be necessary for some Directors in order to achieve the staggering of terms. The Board shall consist of not less than seven nor more than eleven member insurers.

a. The Board shall be elected by the member insurers as provided in Article 2 hereof, and as required in the Act. No two members of the Board shall be from the same or affiliated insurers.

b. Each elected member of the Board shall designate its representative and may designate an alternate.

c. Subject to paragraph (d) below, the previously elected Board members shall serve until their successors have been duly elected and qualified to serve.

d. In the event of a change in a Board members' corporate or licensing status, the Executive Committee if there is such a Committee, or the Board, will review whether such change is consistent with the conditions and requirements for Board membership. Based on its review, the Executive Committee, if there is one, will recommend action to the full Board, or the Board may take action. Such action may include requesting the company to resign from the Board if it is determined that the company's new status is no longer consistent with the basis for inviting it to be a nominee or to fill a vacancy. The Board member shall be replaced in accordance with the provisions of paragraph (a).

2. Upon the election of members of the Board, the Association shall notify the Director and request written approval of the members of the Board as elected. In the event the Director shall disapprove the election of any

Director elected at an annual meeting, the existing Board of Directors shall call another election. The Board of Directors shall have the option of seeking approval of the nominees by the Director in writing prior to holding the election or annual meeting.

3. The Board shall:

   a. Elect a Chair, Vice Chair, Secretary and Treasurer from among its members, and such other officers as it deems necessary. The posts of Secretary and Treasurer may be held by the same member. Each officer shall be elected to serve a term of one year.

   b. Appoint an Executive Committee from among its members. Such Committee shall have as its members the Chair, the Vice Chair, Secretary and Treasurer, and such other Directors, if any, as appointed by the Board. The Executive Committee shall have such powers as may be delegated by the Board, provided it shall not have the authority to act on matters requiring a majority vote of the full Board as provided in paragraph B.(3) of this Article 3 below.

   c. Appoint from among its members, a nominating committee. Such committee shall select a nominee to succeed each Board member whose term expires at the annual meeting of the member insurers. Such nominees shall be made known to the member insurers at least ninety (90) days prior to such annual meeting. Other nominees may be submitted to the Board, but not less than sixty (60) days prior to such annual meeting, upon the petition of ten member insurers.

   d. In the event there is more than one nominee for each position to be filled, the Board shall make the names of said nominees known to member insurers at least sixty (60) days prior to the annual meeting of the member insurers.

   e. Appoint from among its members, an audit committee. The audit committee shall recommend selection of the independent outside auditor and facilitate the annual audit of the Association by an independent outside auditor; it shall also review and provide recommendations regarding any financial or operational review of the Association by independent outside auditors or the South Dakota Division of Insurance.

4. Vacancies occurring on the Board between annual meetings of the member insurers shall be filled by a majority vote of the remaining members of the Board with the approval of the Director. Vacancies occurring in elective offices between the annual meetings shall be filled by

majority vote of the Board. Such interim directors and officers shall serve for the unexpired terms.

B. All Directors shall receive notice of all meetings of the Board and committees appointed by the Board, and be afforded the opportunity to participate. Meetings of the Board and committees appointed by the Board may be held in person, by telephone, or by other electronic means.

1. At any meeting of the Board, each member of the Board shall have one vote.

2. A majority of the Board shall constitute a quorum for the transaction of business and the acts of the majority of the Board members present at a meeting at which a quorum is present shall be the acts of the Board, except as provided in paragraph 3 below.

3. An affirmative vote of a majority of the full Board is required to:

a. Approve a contract with a servicing facility for overall administration of the Association;

b. Authorize and call an assessment or provide for a refund;

c. Borrow money or establish or change a line of credit;

d. Approve reinsurance contracts, assumption agreements or guarantee plans; or

e. Adopt amendments to this Plan.

B. The annual meeting of the Board shall be held immediately following the annual meeting of the member insurers, unless the Chair, upon reasonable notice, shall designate some other time, day or place. At each annual meeting the Board shall:

1. Review the Plan and submit proposed amendments, if any, to the Director for approval.

2. Review each outstanding contract or agreement, if any, and make necessary or desirable corrections, improvements or additions.

3. Review operating expenses and outstanding contractual obligations and determine whether an assessment, or a refund of a prior assessment, is necessary for the proper administration of the Association and if so, the amount of either.

4. Review, consider and act on any other matters deemed by it to be necessary and proper for the administration of the Association.

C. The Board may hold other regular or special meetings at such times, in such manner, and with such frequency as it deems appropriate to conduct the business of the Association. Any Board member not present may consent in writing to any specific action taken by the Board, but this shall not permit Board members to act through other Board members by proxy. Any action approved by the required number of Board members at such meeting, including those consenting in writing, shall be as valid a Board action as though authorized at an annual or regular meeting of the Board or at a meeting held in person.

D. In lieu of holding a Board meeting, the Board may take any action which is in accordance with this Plan by acting by written consent, and written consent may be made by electronic communication. Such actions by written consent require the approval of all member Directors.

E. Special meetings of the Board may be called by the Chair and shall be called upon the request of any two Board members. At such special meeting the Board may consider and decide any matter deemed necessary for the proper administration of the Association. Reasonable notice under the circumstances shall be given to each Board member of the time, place and purpose of any such special meeting. The Association may provide that a member insurer's attendance or participation at any meeting shall constitute a waiver of the notification requirement.

F. At meetings at which the impairment or insolvency of a member insurer is considered, the Board shall:

1. Consider and determine the legal obligations of the Association with regard to any reported impairment or insolvency.

2. Consider and decide what methods or facilities, as permitted under SDCL 58-29C-51, shall be adopted or utilized to assure fulfillment of the covered obligations of the impaired or insolvent member insurer for each of the categories of covered policies.

3. Assure that timely action is taken to gain access to and effect proper retention of records of the impaired or insolvent member insurer which are deemed necessary to the prompt and economical handling of its legally imposed duties.

4. Consider and decide to what extent and in what manner the Board shall exercise the powers authorized by the Act to bring legal actions or provide for the defense thereof in order to avoid payment of improper claims.

5. Consider and decide or defer the decision as to what assessment, if any, should be levied, and consider and decide whether any assessment shall be deferred or abated. If such assessment, deferral, or abatement shall be determined to be appropriate, such action or actions shall be in accordance with the requirements specified in the appropriate item or items of SDCL 58-29C-52. Notices of assessments to member insurers shall be in sufficient detail as to form a basis for the payment of such assessment by the member insurer. The Board shall promptly inform the Director of the failure of any member to pay an assessment made pursuant to this paragraph when due.

6. Take all steps permitted by law, and deemed necessary, to protect the Association's rights as pertaining to the impaired or insolvent member insurer and its policyholders. In addition to the foregoing powers, the Board shall have and exercise such other powers as may be reasonably necessary to implement its powers and responsibilities under the Act.

7. Issue to each member insurer a certificate of contribution for each Class of assessment paid for which certificates are to be provided under SDCL 58-29C-52. The certificate shall show the amount paid by each such insurer, the date of the assessment, name of the particular insolvent or impaired insurer for which the assessment was made, the value, if any, of such certificate as determined by the Director, and such other information as the Board shall find relevant.

8. In addition to the foregoing powers, the Board shall have and exercise such other powers as may be reasonably necessary to implement the provisions of the Act.

G. Members of the Board may be reimbursed from the assets of the Association for reasonable expenses incurred by them as members of the Board upon approval of such expenses by the Board, but members of the Board shall not be compensated by the Association for their services as members of the Board.

H. The Board shall establish procedures whereby a Board Member may be removed for cause, including in the case where a Board Member becomes an impaired or insolvent insurer.

I. The Board shall establish and maintain a policy and procedure for addressing conflicts of interest.

Article 4. <u>Operations</u>

A. The official address of the Association shall be 206 West 14th Street, Sioux Falls, South Dakota 57104.

B. The Board may employ or retain such persons, firms or corporations to perform such administrative functions as are necessary for the Board's performance of the duties imposed upon the Association. The Board may use the mailing address of such person, firm or corporation as the official address of the Association. Such persons may include an executive director with such authority as may be delegated by the Board to implement and carry out broad directives of the Board made pursuant to its statutory authority and duties. Such persons shall be knowledgeable about insurance matters, conversant with the law as it relates to covered policies of insurance and administratively capable of implementing the Board's directives. Such persons may also include attorneys at law, actuaries, accountants, claims personnel and such other specialists or persons whose advice or assistance is deemed by the Board to be necessary to the discharge of its duties imposed by law. The Board may agree to compensate such persons so as best to serve the interests of the Association and the public. Such persons, firms or corporations shall keep and maintain such records of their activities as may be required by the Board and the Act.

C. The Board may open such bank accounts as it deems necessary for the proper administration of Association business. Reasonable delegation and withdrawal authority to such accounts for Association business will be made consistent with prudent fiscal policy. Check signature limits and wire authority limits and procedures shall be determined by the Treasurer and approved by the Board. Investment policy shall be recommended by the Treasurer or other board-appointed committee, and approved by the Board, and shall be reviewed at the annual meeting of the Board, and may be amended by the Board from time to time as financial and other conditions warrant.

D. In the event in the judgment of the Board the maximum assessment under SDCL 58-29C-52, in combination with the Association's borrowing authority, will be insufficient over any given year to cover the outstanding and anticipated covered claims against the Association relating to one or more impaired or insolvent member insurers under any account or accounts, the Board may provide that the Association shall make partial and periodic payments on such claims in accordance with a schedule to be adopted by the Board. Such schedule may give preference to health claims, periodic annuity benefit payments, death benefits, supplemental benefits and cash withdrawals under emergency or hardship standards proposed by the Board and approved by the Director under the Act. Such schedule may be adjusted from time to time as changes in the volume and type of such covered claims may warrant, and may be structured so as not to give preference to claims in the order in which they were incurred or made or in the order of which member insurers first became impaired or insolvent, or to require retroactive adjustments.

E. The purpose of this paragraph is to provide the framework for allocating Class B assessments attributable to the Association's obligations for any covered long-term care policies between the "Health Account" and the "Life and Annuity

Account" defined below. The allocation method outlined below is intended to implement the requirements of SDCL 58-29C-52. The instructions are intended to result in a net allocation of any Class B assessments for the Association's long-term care policy obligations in equal 50% shares to "Accident and Health Member Insurers" and "Life and Annuity Member Insurers" as those two categories of member insurers are defined below.

In accordance with SDCL 58-29C-52, if a Class B assessment is authorized due to covered long-term care policies, a portion of the Association's Class B assessment authorized to meet its obligations for the covered long-term care policies (the "LTC Assessment") shall be allocated to the Life and Annuity Account, without dividing it between the subaccounts thereof, with the remaining portion of the LTC Assessment allocated to the Health Account.

The following definitions shall apply only for the purposes of allocating any such Class B assessment for covered long-term care policies to the Life and Annuity Account and the Health Account in accordance with the below formula:

"Accident and Health Member Insurer" means any member insurer that does not qualify as a Life and Annuity Member Insurer.

"Health Account" shall mean the health insurance account established under SDCL 58-29C-49A.(2).

"LAMIHA" shall mean the quotient of (a) the Life and Annuity Member Insurers' aggregate assessable premium in the Health Account divided by (b) the total assessable premium in the Health Account.

"LAMILAA" shall mean the quotient of (a) the Life and Annuity Member Insurers' aggregate assessable premium in the Life and Annuity Account divided by (b) the total assessable premium in the Life and Annuity Account.

"Life and Annuity Account" shall mean the aggregate life insurance and annuity account established under SDCL 58-29C-49A.(1), without dividing such account into subaccounts.

"Life and Annuity Member Insurers" shall mean each and every member insurer having (i) total assessable premium in the Life and Annuity Account greater than or equal to (ii) its total assessable premium in the Health Account, where assessable premium in the Health Account includes, but is not limited to, the member insurer's assessable health maintenance organization premiums but shall exclude the member insurer's assessable premiums for disability income and long-term care insurance. Note: The exclusion of a member insurer's assessable premiums for disability income and long-term care insurance shall be applied only for the purpose of the definition of "Life and Annuity Member Insurers," and such exclusion shall not apply for any other purposes.

The amount of the LTC Assessment allocated to the Life and Annuity Account shall be determined in accordance with the following formula:

$$\text{Life and Annuity Account LTC Assessment Share} = \text{LTC Assessment} * \frac{(.50 - \text{LAMIHA})}{(\text{LAMILAA} - \text{LAMIHA})}$$

The amount of the LTC Assessment not allocated to the Life and Annuity Account as provided above shall be allocated to the Health Account.

The amount of any LTC Assessment allocated to the Life and Annuity Account or to the Health Account shall be allocated among member insurers in accordance with SDCL 58-29C-52.C.(4), except that the total assessable premium in the entire Life and Annuity Account shall be used in the aggregate without dividing it between the subaccounts.

F. The Board shall determine at least annually if an excess of funds in any account exists such that the funds are not reasonably needed to fund future obligations of current or future insolvencies for the payment of the obligations of the Association. The Board's review for this purpose shall include, but not be limited to, a review of assets accruing from assignment, subrogation, net realized gains on distributions and income from investments. If the Board determines an excess exists, it can in its sole discretion, and in proportion to the contribution of each insurer to that account:

(1) refund in cash; or,

(2) refund in the form of a credit against any future assessments with respect to that account; to the extent a credit is granted to an insurer, it shall be reflected in the next subsequent assessment of the insurer for that account; or,

(3) reallocate excess funds to any other impairment or insolvency within the same account, or place the excess funds in a composite account to be held for this purpose.

In order to avoid disproportionate clerical expense, the Board may establish an amount below which refunds shall not be made.

G. The Board may establish a general policy whereby the Board or the Board's designee may accept amended assessable premium reports filed with the NAIC which correct reports filed for prior years which contain inadvertent errors made by a member insurer. Under such a policy, correction of the error would be

prospective only. The corrected assessable premium would be used for future assessments, but could not be used to re-calculate prior assessments.

Article 5. **Records and Reports**

A. Minutes of the proceedings of each Board Meeting, annual meeting of the members and committee meetings shall be written. The original of these minutes shall be retained by the Secretary of the Board or by such other person as the Board may designate. Records of such negotiations or meetings shall be made public only upon the termination of a liquidation, rehabilitation or conservation proceeding involving the impaired or insolvent insurer, upon the termination of the impairment or insolvency of the insurer, or upon the order of a court of competent jurisdiction. Nothing in this paragraph shall limit the duty of the Association to render a report of its activities under paragraph C. The Board may upon majority vote, make reports and recommendations to the Director upon any matter germane to the solvency, liquidation, rehabilitation or conservation of any member insurer. Such reports and recommendations shall not be considered public documents.

B. Copies of minutes, reports, recommendations, records and documents shall be furnished to each Board member, to the Director and to any member insurer upon request; provided, however, that such minutes, reports, recommendations or other records and documents relating to the portions of such proceeding which were closed, because of confidential nature of the matters addressed, shall also be confidential, and distribution of such minutes, reports, recommendations, records and documents shall be limited to the members of the Board and the Association's attorneys, employees or agents, considered by the Board to be necessary or pertinent to the discussion of the matter addressed or performance of the actions taken during such confidential proceedings.

C. The Board shall make an annual report as required by SDCL 58-29C-58 not later than 120 days after the end of each year to the Director. Such report shall include a financial report for the preceding year in a form approved by the Director and a review of the activities of the Association during the preceding fiscal or calendar year.

D. The Board shall, once each calendar or fiscal year, engage an independent certified public accountant to review or audit the financial affairs of the Association.

Article 6. **Membership**

A. Any insurer which transacts in this state any kind of insurance for which coverage is provided under the Act and which is included in the definition of "member insurer" in SDCL 58-29C-48(12) shall be a member of the Association.

B. An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the South Dakota Life and Health Insurance Guaranty Association Act. However, such insurer shall remain liable for any assessments based on impairments or insolvencies occurring prior to the termination of its license. Such insurer shall also be entitled to a refund of all or part of any assessments which were made prior to termination of its license which later proves to be excessive.

C. A member insurer which becomes an impaired or insolvent insurer after its license or certificate of authority in this state may have been suspended, revoked, not renewed, or voluntarily withdrawn shall remain a member insurer for purposes of the liability of the Association with respect to the covered policies or contracts of such member insurer.

Article 7. Appeals

Unless otherwise provided by statute, any member insurer aggrieved by an act of the Board or Association shall appeal to the Board before appealing to the Director. Such appeal shall be taken within sixty (60) days of the date on which such member insurer knew or should have known of such act. If such member insurer is aggrieved by the final action or decision of the Board on the appeal, or if the Board declines or fails to act on such appeal within 60 days, the member insurer may appeal to the Director within 60 days after the action or decision of the Board or the expiration of the 60-day period within which the Board failed to act on such appeal. Any member insurer which makes an appeal to the Director pursuant to this Article must provide the Association with notice of the appeal by providing a copy of the appeal to the Association on the same day on which the appeal is submitted to the Director. Failure to take an appeal within the time and in the manner set forth in this Plan shall bar any claim that a member might otherwise have with respect to any action taken by the Association or its Board. If the appeal pertains to a protest of all or part of an assessment, the member shall pay when due the full amount of the assessment as set forth in the notice provided by the Association. The payment shall be available to meet Association obligations during the pendency of the protest or any subsequent appeal. Payment shall be accompanied by a statement in writing that the payment is made under protest and setting forth a brief statement of the grounds for the protest.

Article 8. Indemnification

A. All persons, except the Director and his representatives, described in SDCL 58-29C-60, including but not limited to the individual representatives of the member insurers serving on the Board, shall be indemnified by the Association for all reasonable expenses incurred on account of any action taken or not taken by them in the performance of their powers and duties under the South Dakota Life and Health Insurance Guaranty Association Act, unless such persons shall be finally adjudged to have committed a breach of duty involving gross negligence, bad

faith, dishonesty, willful misfeasance or reckless disregard of the responsibilities of their office or position. Such expenses shall include, but not be limited to, attorneys' fees, judgments, decrees, fines, penalties and amounts paid in settlement actually and necessarily incurred in the defense of any action, suit or proceeding, whether civil, criminal, administrative or investigative, including all appeals, brought against such persons, their testators or intestates. In the event of settlement before final adjudication, with or without court approval, such indemnity shall be provided only if the Association is advised by independent legal counsel that such persons did not, in counsel's opinion, commit such a breach of duty.

B. This Article is intended to operate as a supplement and additional safeguard to, and not in place of, the immunity granted by SDCL 58-29C-60.

Article 9. Conformity to Statute

SDCL Ch. 58-29C as written, and as may be hereafter amended, is incorporated as a part of this Plan and as such is attached hereto.

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
Telephone: (605) 336-0177
Facsimile: (605) 335-3639

Records

QUESTIONS AND ANSWERS CONCERNING
SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION
APRIL 2017 CLASS B HEALTH ASSESSMENT

The South Dakota Life & Health Insurance Guaranty Association (the "Association") is providing these questions and answers to members of the Association who are receiving an assessment notice for a Penn Treaty Class B health assessment.

How much is the assessment? What is this assessment for?

The amount of this Class B assessment for the health line is $3,900,000 (after allowing for credits which the association is carrying for certain member companies) The assessment is intended to fund a portion of the liabilities created for the Association as a result of the insolvencies of Penn Treaty Network America Insurance Company and American Network Insurance Company (collectively "Penn Treaty"), which were placed in liquidation on March 1, 2107.

Did the Association elect to participate in the life and health insurance guaranty associations' captive insurer, LTC Reinsurance PCC ("LTC Re")? If so, what funding election did the Association make for its participation in LTC Re?

The various state life and health insurance guaranty associations, acting collectively through the National Organization of Life and Health Insurance Guaranty Associations Penn Treaty Task Force, created LTC Re, a captive insurer organized under the laws of the District of Columbia, as a mechanism for assisting the guaranty associations in managing the runoff of their Penn Treaty obligations. The Association elected to become a member of LTC Re.

Guaranty associations participating in LTC Re did so by entering into a Reinsurance and Administrative Services Agreement (the "Reinsurance Agreement") with LTC Re. The Reinsurance Agreement provides participating guaranty associations ("PGAs") with choices on how they fund their obligations to LTC Re. The Association elected to become a member of LTC Re and chose what is called Reserve Funding under the Reinsurance Agreement; the Reserve Funding option requires the Association to fund 90% of its estimated liabilities to LTC Re within five (5) years.

The Reinsurance Agreement requires guaranty associations who have elected the Reserve Funding option to make an initial payment to LTC Re of not less than 20% of their estimated liabilities and further requires the association to deliver with its initial payment a Promissory Note payable over five (5) years for that portion of 90% of its estimated liabilities not immediately funded in cash (if a guaranty association's ultimate liabilities exceed 90% of its current estimated liability the association is also required to pay that amount – referred to in the Reinsurance Agreement as a PGA Payable – as and when due).

The Association has determined to make only the initial 20% payment this year which is due under the Reinsurance Agreement and will deliver to LTC Re a Promissory Note payable over five (5) years per the terms of the Reinsurance Agreement for the remaining 90% of its estimated liabilities.

What is the estimated amount of the Association's total liabilities for Penn Treaty?

Consulting actuaries at The Long Term Care Group ("LTCG") who have been retained by the guaranty associations' Penn Treaty Task Force have done extensive work to analyze each association's estimated liabilities for Penn Treaty. LTCG estimates that the total present value of the Association's gross liabilities for Penn Treaty is approximately $43,600,000. LTCG further estimates that the Association should be entitled to the use of approximately $3,200,000 in estate assets on hand at Penn Treaty on March 1, 2017, when the companies were placed in liquidation, for a net present value liability estimate of approximately $40,400,000. It is important to note that these estimates are calculated on a fully discounted, present value basis; because the Association will pay 90% of its liabilities over a period of five years (and may well also make future payments for its PGA Payable) the actual amount of cash payments to be made by the Association to LTC Re over the years will significantly exceed the present value estimates noted above.

Does the Association contemplate future assessments for Penn Treaty?

Yes. As noted above, the Association intends to pay 90% of its Penn Treaty liabilities over five years. This assessment, together with other funds that are available to the Association, will only fund the Association's minimum initial payment due to LTC Re by May 30, 2017. The Association contemplates significant additional Class B assessments in the health line for each of the years 2018-2022 to make annual installment payments due under the Promissory Note described above.

How was this assessment calculated?

This assessment was calculated based upon member insurers' pro rata share of assessable health premiums in South Dakota. Pursuant to SDCL 58-29C-52.C.(2) when calculating a Class B assessment the Association is required to calculate a member company's assessment based on its pro rata share of assessable premiums in the applicable line of business (in this case, health insurance) "for the three most recent calendar years for which information is available preceding the year in which the insured became insolvent."

The Association uses the results of the NOLHGA/NAIC Assessment Data Survey to calculate member companies' assessments in South Dakota. As of this time the three most recent calendar years for which ADS results are available to the Association are 2013, 2014, and 2015.

As noted above, the Association contemplates future Penn Treaty assessments in 2018-2022 (and perhaps beyond), and for all future assessments the three relevant calendar years for determining a member company's assessments will be 2014, 2015, and 2016. It is contemplated that when the Association does a Penn Treaty assessment in 2018, it will also do a true-up of this assessment to recalculate what member companies should owe for this assessment based on 2014, 2015, and 2016 data.

Is this assessment eligible for a premium tax offset?

South Dakota law generally allows member companies to use Class B assessments against their premium tax liability in South Dakota, spread out over a period of five years beginning in the year after which the assessment is paid. However, South Dakota law has a somewhat unique provision concerning PTOs in its governing statutes. Specifically, SDCL 58-29C-56.A. provides that the "total assessments against premium taxes may not exceed two million dollars in any year" for the entire industry, and for all PTOs that might otherwise be available for any then pending or recent insolvencies. To the extent that the member companies are unable to use PTOs in any one calendar year due to the $2 million cap they are permitted to carry forward unused PTOs until a subsequent year in which the cap will not be exceeded.

The South Dakota Association expects that the net present value of the liabilities it must fund for Penn Treaty will exceed $40 million. The Association's current and expected future Penn Treaty assessments will create a pool of PTOs well in excess of the $2 million cap imposed by SDCL 58-29C-56 and expects that the pool of PTOs that might otherwise be claimed by the industry will not fall below $2 million for more than two decades (assuming no other insolvencies that create Class B assessments for the Association occur in the meantime). Note also that a portion of the $2 million cap in PTOs that the industry can use in South Dakota is already being used for recent assessments made by the Association for Executive Life Insurance Company, Executive Life Insurance Company of New York, and Life and Health Insurance Company of America.

In summary, the value of PTOs going forward for Class B assessments will be significantly reduced for several years given the annual $2 million cap on the use of PTOs in South Dakota.

How can I obtain additional information about this assessment?

Information concerning the calculation of the Association's Penn Treaty liabilities on both a discounted and undiscounted basis, together with projections of the Association's funding plans for Penn Treaty, is available on the website of the National Organization of Life and Health Insurance Guaranty Associations on its website, NOLHGA.com. You may go to the home page of NOLHGA.com, click on "Facts & Figures" at the top of the homepage, and then click on "Insolvency Cost Files" in a dropdown bar that appears with that tab, where additional links are available concerning the guaranty associations' estimated Penn Treaty liabilities and cash flow projections.

Member companies with questions about this assessment may also contact the Association by contacting its Executive Director:

Charles D. Gullickson
South Dakota Life and Health Insurance Guaranty Association
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
Telephone: (605) 336-0177
Facsimile: (605) 335-3639
Direct Dial: (605) 357-1270
Email Address: cgullickson@dehs.com

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR & REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION	)	INS. 20-12 **AMENDED STIPULATION AS TO FACTS AND RECORD**

COMES NOW the undersigned counsel of record for South Dakota Bankers Benefit Plan Trust ("the Trust") and the South Dakota Life & Health Insurance Guaranty Association ("the Association") and hereby stipulate that the following shall constitute the facts and the record in this case.

1. The Association exists and is governed by the South Dakota Life & Health Insurance Guaranty Association Act, SDCL 58-29C-44 et seq.

2. The Association exists to pay benefits and continue coverages of insolvent insurers, subject to certain limits and exclusions, pursuant to SDCL Ch. 58-29C through assessments levied by the Association to its member insurers.

3. The Trust is a Multiple Employer Welfare Arrangement ("MEWA") pursuant to Section 3(40) of the Employee Retirement Income Security Act of 1974 ("ERISA") and a self-funded Multiple Employer Trust ("MET") pursuant to SDCL 58-18-88.

4. The Trust maintains an employee welfare benefit plan for eligible employees of employers who are active members of the South Dakota Bankers Association ("SDBA").

5. Prior to July 1, 2019, the Trust was required to participate in and be a member of the Association pursuant to SDCL 58-18-88(6).

6. On July 1, 2019, South Dakota Senate Bill 37, attached hereto as Record A, became effective and amended SDCL 58-18-88, eliminating the Trust's mandatory participation in the Association.

7. On March 1, 2017, Penn Treaty Network American Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC" and collectively with PTNA, "Penn Treaty") were declared insolvent pursuant to an Order of Liquidation entered by the Commonwealth Court of Pennsylvania. Copies of the Orders of Liquidation are attached hereto as Record B.

8. On March 1, 2017, the Association issued Reserve Funding PGA Promissory Notes in connection with the liquidation of PTNA and ANIC (collectively, the "Penn Treaty Liquidation"). The Promissory Notes are attached as Record C. The Promissory Notes evidence future amounts due

from the Association to protected cells of LTC Reinsurance PCC ("LTC Re") pursuant to Reinsurance and Administrative Services Agreements dated as of March 1, 2017, between the Association and LTC Re whereby LTC Re agreed to reinsure the obligations to policyholders incurred by the Association as a result the liquidation of PTNA and ANIC.

9. The Association authorized Class B health assessments in connection with the Penn Treaty Liquidation against the Trust in 2017, 2018 and 2019. Attached hereto as Record D, E and F are redacted minutes of the Association meetings dated April 5, 2017, January 9, 2018, and December 17, 2018.

10. The Trust paid all assessments issued by the Association in connection with the Penn Treaty Liquidation for 2017, 2018 and 2019.

11. On January 22, 2020, the Association issued a Class B health assessment arising from the Penn Treaty Liquidation to the Trust. A copy of the January 22, 2020, health assessment is attached hereto as Record G.

12. The 2020 assessment was authorized by the Association's Board of Directors on December 20, 2019. Attached are minutes of the December 20, 2019 meeting, Record H, and e-mail exchange between Charles Gullickson and Randie Thompson dated April 9 and 10, 2020, Record I.

13. On January 28, 2020, the Trust protested the assessment by letter to Charles Gullickson from Michael Feimer and David King. A copy of the January 28, 2020, letter is attached hereto as Record J.

14. Gullickson responded to the Trust's January 28, 2020, by letter dated February 7, 2020. A copy of the February 7, 2020, Gullickson letter is attached hereby as Record K.

15. The Trust responded to Gullickson's February 7, 2020, letter by correspondence dated February 21, 2020, and paid the assessment under protest. A copy of the Trust letter dated February 21, 2020, is attached hereto as Record L.

16. On April 9, 2020, the Association denied the Trust's protest by way of letter from Gullickson. A copy of the April 9, 2020, Gullickson letter is attached hereto as Record M.

17. On April 9, 2020, Gullickson advised the South Dakota Division of Insurance Director Larry Deiter of the denial of the Trust's protest. A copy of Gullickson's letter to Director Deiter is attached hereto as Record N.

18. The Trust appealed the denial to the South Dakota Division of Insurance by letter dated June 2, 2020. A copy of the Trust's letter of June 2, 2020, is attached hereto as Record O.

19. The Division of Insurance issued a Notice of Hearing dated June 26, 2020, scheduling the appeal before the Office of Hearing Examiners. This Notice of Hearing is attached hereto as Record P.

20. The Division of Insurance also issued an Order Making Proposed Decision of Hearing Examiner Final Agency Action on June 26, 2020. Such Order with Notice of Entry is attached hereto as Record Q.

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21. On July 7, 2020, the Association filed the Affidavit of Charles Gullickson Concerning Plan of Operation of the Association with the Office of Hearing Examiners, which is attached hereto as Record R.

22. On August 13, 2020, the Association requested that the Q&A Concerning April 2017 Class B Assessment, attached hereto as Record S, be included in the record. The Trust has no objection but states they have no record of receiving this document prior to August 13, 2020.

23. On January 11, 2021, the Association issued a Class B health assessment arising from the Penn Treaty liquidation to the Trust in the amount of $77,943.55. A copy of the January 11, 2021, assessment is attached hereto as Record T.

24. The 2021 assessment was authorized by the Association's Board of Directors on January 5, 2021.

25. On January 25, 2021, the Trust paid the assessment and protested the assessment by letter to Charles Gullickson from Randie Thompson. A copy of the January 25, 2021, letter is attached hereto as Record U.

26. Gullickson responded to the Trust's January 25, 2021, letter by correspondence dated February 8, 2021, by communicating the Association's denial of the protest. A copy of the February 8, 2021, Gullickson letter is attached hereby as Record V.

27. On February 15, 2021, the Trust appealed the denial of the protest by letter to South Dakota Division of Insurance Director Larry Deiter. A copy of the February 15, 2021, letter appealing the denial of the protest is attached hereto as Record W.

28. On February 17, 2021, and pursuant to the agreement of the parties, the Division of Insurance issued its Request for Consolidation of Assessment Cases to consolidate the Trust's 2020 and 2021 appeals to be heard together before the Office of Hearing Examiners. This Request for Consolidation of Assessment Cases is attached hereto as Record X.

29. The Division of Insurance also issued and Order Making Proposed Decision of Hearing Examiner Final Agency Decision on February 17, 2021. Such Order with Notice of Entry is attached hereto as Record Y.

The parties furthermore stipulate and agree that the following records shall be deemed the record of appeal in this matter.

- Record A: South Dakota Senate Commerce and Energy Engrossed Bill 37, effective July 1, 2019.
- Record B: Orders of Liquidation entered by the Commonwealth Court of Pennsylvania regarding PTNA and ANIC, each dated March 1, 2017.
- Record C: the Association's Reserve Funding PGA Promissory Notes each dated March 1, 2017

- Record D: the Association's April 5, 2017, meeting minutes.
- Record E: the Association's January 9, 2018, meeting minutes.
- Record F: the Association's December 17, 2018, meeting minutes.
- Record G: January 22, 2020, health assessment issued by the Association.
- Record H: the Association's December 20, 2019, meeting minutes.
- Record I: April 9 and 10, 2020, e-mail exchange between Gullickson and Thompson.
- Record J: January 28, 2020, letter from Michael Feimer and David King to Gullickson.
- Record K: February 7, 2020, Gullickson's responsive letter to the Trust.
- Record L: February 21, 2020, the Trust's responsive letter to Gullickson with payment under protest.
- Record M: April 9, 2020, letter from the Association denying the Trust's protest.
- Record N: April 9, 2020, Gullickson's letter advising South Dakota Division of Insurance Director Larry Deiter of the denial of the Trust's protest.
- Record O: June 2, 2020, the Trust's letter appealing the denial to the South Dakota Division of Insurance.
- Record P: June 26, 2020, Notice of Hearing issued by the Division of Insurance scheduling an appeal before the Office of Hearing Examiners.
- Record Q: June 26, 2020, Order Making Proposed Decision of Hearing Examiner Final Agency Action issued by the Division of Insurance, with Notice of Entry.
- Record R: July 7, 2020, Affidavit of Charles Gullickson Concerning Plan of Operation of the Association filed with the Office of Hearing Examiners.
- Record S: the Association's Q&A Concerning April 2017 Class B Health Assessment.
- Record T: 2021 Class B Heath Assessment.
- Record U: January 25, 2021, Trust letter to Gullickson with payment under protest.

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- Record V: February 8, 2021, letter from Association denying the Trust's protest.
- Record W: February 15, 2021, Trust letter to Division of Insurance Director Larry Deiter notifying of Trust's appeal of denial of protest.
- Record X: February 17, 2021, Request for Consolidation of Assessment Cases issued by the Division of Insurance.
- Record Y: February 17, 2021, Order Making Proposed Decision of Hearing Examiner Final Agency Action issued by the Division of Insurance, with Notice of Entry.

Dated this 17th day of February, 2021.

MAY, ADAM, GERDES & THOMPSON

BY: _____

MICHAEL F. SHAW
TERRA M. FISHER
Attorneys for South Dakota Bankers Benefit Plan Trust
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605)224-8803
Telefax: (605)224-6289
E-mail: mfs@mayadam.net and tmf@mayadam.net

Dated this 17th day of February, 2021.

DAVENPORT, EVANS, HURWITZ & SMITH

BY: _____

CHARLES D. GULLICKSON
MITCHELL A. PETERSON
MICHAEL L. SNYDER
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57104-1030
Telephone: (605)336-2880
Telefax: (605)335-3639
E-mail: cgullickson@dehs.com , mpeterson@dehs.com, msnyder@dehs.com

Record T

SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
Telephone: (605) 336-0177
Facsimile: (605) 335-3639

January 11, 2021

STATEMENT - Class B Health Assessment for 2021

Penn Treaty Network American Insurance Company and American Network Insurance Company

PAYMENT DUE BY FEBRUARY 10, 2021

NAIC NO. 15453

SOUTH DAKOTA BANKERS INSURANCE & SERVICES INC.
ATTN: ACCOUNTING/TAX COMPLIANCE DEPT
109 WEST MISSOURI AVE
PO BOX 1081
PIERRE SD 57501

2021 Class B – Health	$77,943.55
Less Credit from Prior Refund(s)	
NET AMOUNT DUE (or CREDIT BALANCE)	$77,943.55

WHEN PAID, THIS STATEMENT SERVES AS YOUR CERTIFICATE OF CONTRIBUTION

This statement contains information concerning a Class B health account assessment made by the South Dakota Life and Health Insurance Guaranty Association for the insolvencies of Penn Treaty Network American Insurance Company and American Network Insurance Company (collectively "Penn Treaty"). This assessment is made by the Association to fund its obligations under the Penn Treaty Network American Insurance Company and American Network Insurance Company Reinsurance Agreements. The computations for these assessments are based on the NOLHGA Assessment Data Survey for the years 2014, 2015, and 2016.

The total health assessment authorized by the Board of Directors in 2021 for Penn Treaty Network American Insurance Company and American Network Insurance Company is $7,250,000.00.

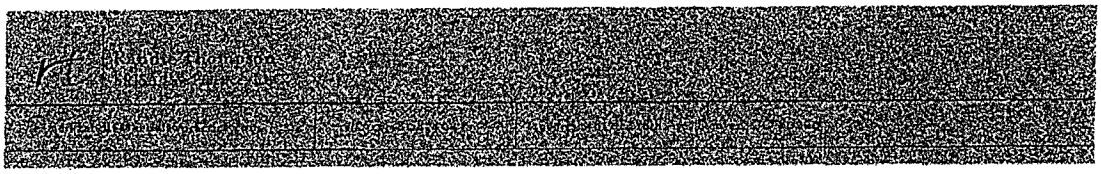
You may determine your pro-rata share of the above assessment by dividing your total assessable premiums for the years 2014, 2015, and 2016 by the state-wide three year total as follows:

HEALTH (state-wide premiums) $2,990,114,324

Please make your check payable to SOUTH DAKOTA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, and mail it, along with a copy of this statement, to the address shown above. Wire transfer/ACH payments are also accepted and payment information will be provided upon request. Payment is due within 30 days of the date of this notice. If not received within 30 days, interest at the rate of 10% per annum will be charged and we will be required to report a failure to pay to the Director of the South Dakota Division of Insurance who may impose penalties.

<u>Please return a copy of this letter/invoice with your check.</u>

Record 1



January 25, 2021

VIA EMAIL & CERTIFIED MAIL

Mr. Charles D. Gullickson
Executive Director
South Dakota Life and Health Insurance Guaranty Association
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030

Dear Mr. Gullickson,

I represent the South Dakota Bankers Benefits Plan Trust ("Trust") and its plan administrator, South Dakota Bankers Insurance & Services, Inc. ("SDBIS"). We are in receipt of the Class B Assessment authorized in 2021 and dated January 11, 2021 ("Assessment") from the South Dakota Life and Health Guaranty Association ("Association" or "Guaranty Fund").

Please accept this notification of the Trust's protest of the 2021 Assessment on the same grounds as the Trust's protest of the 2020 Assessment, currently before the Office of Hearing Examiners for the State of South Dakota's Division of Insurance. Payment under protest in the amount of $77,943.55 is enclosed.

To ensure the most efficient resolution of this matter, please contact Mr. Mike Shaw, litigation counsel for the Trust, at your earliest convenience to discuss potential consolidation of the 2020 and 2021 Assessment protests. Please let me know if you require further information.

Very truly yours,

Randie Thompson

Randie Thompson
ERISA Law Practice, LLC

cc *(via email only)*: David King *(dking@oneamericanbank.com)*
South Dakota Bankers Benefit Plan Trust

Mike Feimer *(mfeimer@sdba.com)*
South Dakota Bankers Insurance & Services, Inc.

Mike Shaw *(mfs@mayadam.net)*
Terra Fisher-Larson *(terra@mayadam.net)*
May, Adams, Gerdes & Thompson LLP

Mitch Peterson *(mpeterson@dehs.com)*
Davenport Evans

Record V

SOUTH DAKOTA LIFE & HEALTH INSURANCE GUARANTY ASSOCIATION
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030
Telephone (605) 336-0177
Telecopier (605) 335-3639
E-Mail: cgullickson@dehs.com

February 8, 2021

VIA EMAIL TRANSMISSION TO: randie@erisalawpractice.com
AND UPS OVERNIGHT DELIVERY

Randie Thompson
ERISA Law Practice, LLC
4817 E. 18th Ave
Denver, CO 80220

Re: Protest of January 11, 2021 Assessment from South Dakota Life and Health Insurance Guaranty Association

Dear Ms. Thompson:

The South Dakota Life and Health Insurance Guaranty Association ("Association") is writing in response to your January 25, 2021, letter on behalf of the South Dakota Bankers Benefits Plan Trust ("Trust") protesting the assessment issued by the Association to the Trust on January 11, 2021. The Board of Directors of the Association has considered the protest pursuant to and as required by SDCL 58-29C-52.I., and the Board denies the protest.

The Board's determination was made on the same grounds that the Board considered in denying the Trust's protest of the Association's 2020 assessment for the Penn Treaty case as set forth in my letter to you of April 9, 2020, a copy of which is enclosed. In denying the 2021 protest the Board has also considered and is relying upon (i) the arguments advanced by the Association in its briefs filed in the Trust's appeal of the Board's 2020 determination to deny the Trust's protest of the 2020 Penn Treaty assessment which briefs have been filed in the matter currently pending before the South Dakota Division of Insurance (INS. 20-12) and (ii) Article 6, Section B. of the Association's Amended and Restated Plan of Operation approved by the Director of the South Dakota Division of Insurance on July 1, 2020.

Sincerely,

Charles D. Gullickson

CHARLES D. GULLICKSON
Executive Director and General Counsel

CDG/kd

cc *(via email)*: Board of Directors, South Dakota Life and Health Insurance Guaranty Association
Terra Fisher-Larson, Esq.
Michael Shaw, Esq.

Record (W)

MAY ADAM
Since 1881

ROBERT B. ANDERSON
TIMOTHY M. ENGEL
MICHAEL F. SHAW
BRETT KOENECKE
JUSTIN L. BELL
DOUGLAS A. ABRAHAM
TERRA M. LARSON
CODY L. HONEYWELL

WWW.MAYADAM.NET

WARREN W. MAY 1920-2018
THOMAS C. ADAM 1935-2019
BRENT A. WILBUR 1949-2006

TELEPHONE
605 224-8803
FAX
605 224-6289
E-MAIL
mfg@mayadam.net

February 15, 2021

Mr. Larry Deiter, Director
Division of Insurance
South Dakota Department of Labor and Regulation
124 South Euclid Avenue, 2nd Floor
Pierre, SD 57501

RE: SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST VS. SOUTH DAKOTA LIFE & HEALTH GUARANTY ASSOCIATION
Our file: 7735
Case No: INS. 20-12

Dear Mr. Deiter,

We serve as attorneys to the South Dakota Bankers Benefit Plan Trust ("Trust"). We are writing in regard to the Class B 2021 Health Assessment made by the South Dakota Life and Health Insurance Guaranty Association ("Association") against the Trust.

On January 25, 2021, the Trust paid a $77,943.55 assessment under protest. By letter dated February 8, 2021, the Association denied the Trust's protest. Pursuant to SDCL 58-29C.I(3), this letter is to appeal the Association's denial. A copy of the Association's denial is attached for your reference.

Please accept this letter in appeal of the Association's February 8, 2021 denial of the Trust's January 25, 2021 protest of the Class B 2021 Health Assessment.

It should be noted that the Class B 2020 Health Assessment upon the Trust is currently under appeal with the Department. As grounds for this appeal, the Trust incorporates all language from its June 2, 2020 appeal letter, which is attached hereto. Because the appeal of the Class B 2020 Assessment is still pending, we request that the two appeals be consolidated. Neither the Trust's nor the Association's arguments differ between the Class B 2020 Assessment and the Class B 2021 Assessment.

We appreciate the Director's time and consideration in this matter and look forward to an efficient resolution.

MAY, ADAM, GERDES & THOMPSON LLP
503 SOUTH PIERRE STREET • P.O. BOX 160
PIERRE, SOUTH DAKOTA 57501-0160

Very truly yours,

MAY, ADAM, GERDES & THOMPSON LLP

MICHAEL F. SHAW
TERRA M. LARSON

Enclosures

cc: Charles D. Gullickson
Mitchell A. Peterson

Record X

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)	INS. 20-12
	)	REQUEST FOR CONSOLIDATION OF ASSESSMENT CASES AND ORDER

COMES NOW Larry Deiter, in his capacity as Director of Insurance for the State of South Dakota, with this Request for Consolidation of Assessment Cases and Order ("Request and Order"). The Office of Hearing Examiners in Pierre, South Dakota is conducting proceedings under a Notice of Hearing and Order issued by the South Dakota Division of Insurance ("Division") on June 26, 2020. The contested case is being held pursuant to the jurisdiction of the Director of the Division under the legal authority conferred by SDCL 1-26-1(2), 58-4-9, and 58-29C-52I. The Office of Hearing Examiners presides over this matter pursuant to SDCL 1-26D-4 and will issue a Proposed Decision pursuant to SDCL Chapter 1-26D. That decision will be the final agency decision pursuant to SDCL 1-26D-7 and the Director's Order on June 26, 2020.

The purpose of the proceedings is to provide a venue for appeal of the decision by the South Dakota Life and Health Guaranty Association ("Guaranty Association") denying the South Dakota Bankers Benefit Plan Trust's ("Bankers MET") protest of an assessment relating to expenses attributable to an insurance company insolvency. The hearing currently concerns the Guaranty Association's 2020 assessment. On February 15, 2021, the Division received an assessment appeal from the Bankers MET via e-mail involving the Guaranty Association's 2021 assessment on substantially the same grounds as the 2020 assessment. The e-mail and documents as provided by the Bankers MET are attached as Exhibit A to this Request and Order.

It is the Division's understanding that the 2020 and 2021 assessments involve the same questions of fact and law as the current proceeding and so the 2021 assessment can properly be decided in the ongoing proceeding where arguments have already been offered. To that end, the Division is also offering a proposed Order Consolidating Cases as attached. An Order is issued below pursuant to SDCL 1-26D-7 to make the Proposed Decision of the Hearing Examiner the Final Decision in this matter as regards both the 2020 and 2021 assessments.

This is an adversary proceeding, and any interested party has a right to be present and to be represented by an attorney. If not exercised during the proceedings, these and other due process rights will be forfeited. A default order may be issued against any party not appearing. If the amount in controversy exceeds $2,500 or if a property right may be terminated, any party to a contested case may request the use of the Office of Hearing Examiners by giving notice. Any action taken may be appealed to Circuit Court and the South Dakota Supreme Court, pursuant to SDCL Chapter 1-26.

Pursuant to the Americans with Disabilities Act, hearings are held in a physically accessible location. Please contact the Office of Hearing Examiners 48 hours before a hearing if you have special needs, so arrangements can be made to accommodate you.

A person who is not an original party to this contested case and whose pecuniary interests would be directly affected by the proceedings may become a party by intervention if timely application therefore is made to the Division, pursuant to SDCL § 1-26-17.1.

ORDER MAKING PROPOSED DECISION OF HEARING EXAMINER FINAL AGENCY DECISION

WHEREAS the Guaranty Association issued an assessment to the Bankers MET in 2020 and the Bankers MET submitted the assessment funds under protest in 2020 pursuant to SDCL 58-29C-52I;

WHEREAS the Guaranty Association denied the Bankers MET 2020 protest on April 9, 2020 which was appealed to the Division;

WHEREAS, pursuant to SDCL 1-26-1(2) and 1-26D-4, the matter is a contested case hearing being heard at the Office of Hearing Examiners pursuant to the Notice of Hearing and Order issued on June 26, 2020 and the matter has been submitted to the Hearing Examiner for a decision;

WHEREAS the Guaranty Association issued an assessment in 2021 which was submitted under protest by the Bankers MET and that protest denied by the Guaranty Association;

WHEREAS the Bankers MET appealed the Guaranty Association's decision regarding the 2021 assessment to the Division on February 15, 2021 under similar facts and circumstances as the 2020 Guaranty Association assessment;

NOW THEREFORE, IT IS HEREBY ORDERED pursuant to SDCL 1-26D-7, that the Proposed Decision of the Hearing Examiner assigned to this matter by the Office of Hearing Examiners shall become final without further agency action regarding both the 2020 and 2021 Guaranty Association assessments as regards the Bankers MET.

Dated at Pierre, South Dakota this 17th day of February, 2021.

Larry Deiter, Director
South Dakota Division of Insurance

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)	INS. 20-12 ORDER CONSOLIDATING CASES

This matter came before the Office of Hearing Examiners pursuant to a Notice of Hearing and Order issued by the South Dakota Division of Insurance ("Division") on June 26, 2020 regarding a decision by the South Dakota Life and Health Guaranty Association ("Guaranty Association") to deny the South Dakota Bankers Benefit Plan Trust's ("Bankers MET") protest of a 2020 assessment relating to expenses attributable to an insurance company insolvency. The matter has been fully argued and a decision from the Hearing Examiner is forthcoming.

The Division submitted a Request for Consolidation of Assessment Cases and Order ("Request and Order") on February 17, 2021 attaching an appeal request from the Bankers MET regarding the Guaranty Association's 2021 assessment. These matters are nearly identical in facts and law to the current proceeding and so the current proceedings and those appealed in 2021 should be decided together. The Division has further ordered that the Hearing Examiner's decision regarding the 2021 assessment protest appeal be final.

NOW THEREFORE, IT IS HEREBY ORDERED these matters shall be consolidated into one proceeding to conclude the appeals by the Bankers MET of the 2020 and 2021 Guaranty Association assessments, namely the current proceedings before the Hearing Examiner; and it is further

ORDERED that the 2021 appeal documents as attached to the Division's Request and Order are hereby made part of the administrative record in this case; and it is further

ORDERED, acknowledging the arguments, filings, and record to date, that the 2020 and 2021 assessment disputes are ripe for decision under the current proceeding; and it is further

ORDERED, pursuant to the Division's Order and SDCL 1-26D-7, that the decision by the Hearing Examiner shall be the final administrative decision for both the 2020 and 2021 assessment disputes.

Dated at Pierre, South Dakota this ____ day of February, 2021.

Catherine Williamson, Hearing Examiner

Record 4

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)))	INS. 20-12 NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that attached hereto is a true and correct copy of the "Order Making Proposed Decision of Hearing Examiner Final Agency Decision" entered by the Larry Deiter, Director of Insurance, on February 17, 2021.

Dated this 17th day of February, 2021 in Pierre, South Dakota.

Frank A. Marnell, Senior Legal Counsel
South Dakota Division of Insurance
Department of Labor and Regulation
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501
Phone (605) 773-3563

BEFORE THE DIVISION OF INSURANCE
DEPARTMENT OF LABOR AND REGULATION
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST V. SOUTH DAKOTA LIFE AND HEALTH GUARANTY ASSOCIATION	)))	INS. 20-12 CERTIFICATE OF SERVICE

I, Frank Marnell, the undersigned, do hereby certify that on the date shown below, a true and correct copy of the Request for Consolidation of Assessment Cases and Order and its exhibits, including the Order Making Proposed Decision of Hearing Examiner Final Agency Decision, with respect to the above-entitled action was sent U.S. First Class Mail and e-mail thereon, to the following:

South Dakota Life & Health Guar. Ass'n
206 West 14th Street
Sioux Falls, SD 57101-1030

Chuck Gullickson
Davenport Evans, Hurwitz & Smith, LLP
206 West 14th Street
Sioux Falls, SD 57101-1030
cgullickson@dehs.com
Counsel for Guaranty Association

South Dakota Bankers Benefit Plan Trust
PO Box 7086
Yankton, SD 57078

Randie Thompson
4817 E. 18th Ave.
Denver, CO 80220
randie@erisalawpractice.com
Counsel for Bankers MET

Catherine Williamson, Chief Hearing Examiner
South Dakota Office of Hearing Examiners
Foss Building
523 E. Capitol Avenue
Pierre, SD 57501
Catherine.Williamson@state.sd.us

Mike Shaw
May, Adam, Gerdes & Thompson LLP
PO Box 160
Pierre, SD 57501
mfs@mayadam.net
Counsel for Bankers MET

Terra Fisher-Larson
May, Adam, Gerdes & Thompson LLP
PO Box 160
Pierre, SD 57501
terra@mayadam.net
Counsel for Bankers MET

Dated this 17th day of February, 2021 in Pierre, South Dakota.

Frank A. Marnell, Senior Legal Counsel
South Dakota Division of Insurance
124 S. Euclid Ave., 2nd Floor
Pierre, SD 57501

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29895

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST

Appellant,

vs.

SOUTH DAKOTA LIFE & HEALTH GUARANTY ASSOCIATION,

Appellee.

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable M. Bridget Mayer, Presiding Judge

BRIEF OF APPELLEE SOUTH DAKOTA LIFE & HEALTH GUARANTY ASSOCIATION

Notice of Appeal Filed February 2, 2022

Charles D. Gullickson
Mitchell A. Peterson
Michael L. Snyder
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880

Attorneys for Appellee

Michael F. Shaw
Terra M. Larson
May, Adam, Gerdes, & Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501
Telephone: (605) 224-8803

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

PRELIMINARY STATEMENT

Appellee, South Dakota Life & Health Guaranty Association, will be referred to as "the Association" in this Brief, while Appellant, South Dakota Bankers Benefit Plan Trust, will be referred to as "the Trust." The Association will reference documents in the Trust's Appendix using the same "AP" citation used by the Trust. Documents in the Appendix of this Brief will be cited as "Appellee Appx.," followed by the corresponding page number.

The parties submitted this matter on a stipulated statement of facts and records, which appear in the Trust's Appendix. Note that an Amended Stipulation as to Facts and Record is located at AP 139–143. Citations to the parties' factual stipulations will be referred to as "Stipulation," followed by the corresponding paragraph number(s), and the record stipulations will be referred to as "Record" followed by the corresponding record/exhibit letter(s).

JURISDICTIONAL STATEMENT

The Trust appealed from the Order and Final Judgment dated December 30, 2021, in matter number 32CIV21-65, in the Sixth Judicial Circuit Court of South Dakota, the Honorable M. Bridget Mayer, Circuit Court Judge, presiding, which reversed the Final Order dated March 23,

2021, in the matter number INS. 20-12, before the Office of Hearing Examiners, (the "OHE"), the Honorable Catherine Williamson presiding. AP. 25-26. Notice of Entry of the Circuit Court's Order and Final Judgment was given on January 5, 2022, and the Trust's Notice of Appeal was filed on February 2, 2022.

STATEMENT OF THE ISSUES

1) Whether the Association had the authority to issue Class B assessments to the Trust in 2020 and 2021 related to insurer liquidations that occurred while the Trust was a member of the Association?

   The Circuit Court held in the affirmative.

   - *In re Dorsey & Witnet Tr. Co. LLC*, 2001 S.D. 35, 623 N.W.2d 468
   - *West v. John Morrell & Co.*, 460 N.W.2d 745 (S.D 1990)
   - *Liberty Mut. Ins. Co. v. Superintendent of Ins.*, 689 A.2d 600 (Me. 1997)
   - *Miss. Mfrs. Ass'n Workers' Comp. Grp. v. Miss. Workers' Comp. Grp. Self-Insurer Guar. Ass'n*, 281 So.3d 108 (Miss. Ct. App. 2019)

   - SDCL Ch. 58-29C
   - SDCL 58-18-88 (pre-2019)
   - SDCL 2-14-18
   - SDCL 2-14-21

2) Whether the Employee Retirement Income Security Act of 1974 (ERISA) precluded the Trust from paying assessments issued by the Association in 2020 and 2021?

   The Circuit Court held in the negative.

   - *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)

- *De Buono v. NYSA-ILA Med & Clinical Servs. Fund*, 520 U.S. 806 (1997)
- *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995)
- *Atl. Healthcare Benefits Tr. v. Googins*, 2 F.3d 1 (2d Cir. 1993)

- 29 U.S.C. 1104
- 29 U.S.C. 1144

3) Whether the Trust was required to pay prejudgment interest as of April 7, 2021?

The Circuit Court held in the affirmative.

- *St. John v. Peterson*, 2013 S.D. 67, 837 N.W.2d 394
- *Casper Lodging, LLC v. Akers*, 2015 S.D. 80, 871 N.W.2d 477

- SDCL 58-29C-52.A
- SDCL 21-1-13.1
- SDCL 54-3-16

STATEMENT OF THE CASE

Beginning in 2017, the Association issued a series of statutory, yearly assessments to its members following certain insurer liquidations that occurred while the Trust was a member of the Association. Stipulation ¶ 9; *see also* Records D, E, and F (collectively the redacted meeting minutes of the Association dated April 5, 2017, January 9, 2018, and December 17, 2018). The Trust paid the assessments for 2017, 2018, and 2019 without protest. Stipulation ¶ 10. The Trust, however, paid under protest the assessments issued in 2020 (the "2020 Assessment") and in 2021 (the "2021

Assessment") (together "the Assessments"). Stipulation ¶¶ 13, 25, Records J, U.

The Association denied the Trust's protests and the Trust appealed those denials to OHE which, after consolidation, issued its Decision and Final Order on March 23, 2021. AP. 27-35. The OHE concluded the Association lacked the authority to issue the Assessments and also that ERISA prohibited the Trust from paying them. *See id.* The Association timely appealed to the Circuit Court on April 16, 2021.

On December 12, 2021, the Circuit Court issued its Memorandum Opinion, wherein it reversed the OHE's Decision in its entirety and concluded the Association properly issued the Assessments to the Trust and also that ERISA did not prohibit the Trust from paying them. *See* AP 1-24. An Order and Final Judgment to this effect was entered on December 30, 2021. AP. 25-26. Notice of Entry of the Circuit Court's Order and Final Judgment was given on January 5, 2022, and the Trust's Notice of Appeal was filed on February 2, 2022.

STATEMENT OF FACTS

The Association is created under and governed by the South Dakota Life & Health Insurance Guaranty Association Act (the "Act"), SDCL 58-29C-44 *et seq.* Stipulation ¶ 1. The Association exists to pay benefits and continue coverages of insolvent insurers, subject to certain limits and exclusions, pursuant to SDCL Ch. 58-

29C, and the Association funds its statutory obligations through assessments levied by the Association to its members. *Id.* at ¶ 2. The Trust is a Multiple Employer Welfare Arrangement ("MEWA") pursuant to Section 3(4) of ERISA, and is a self-funded Multiple Employer Trust ("MET") pursuant to SDCL 58-18-88. *Id.* at ¶ 3. The Trust maintains an employee welfare benefit plan for eligible employees of employers who are active members of the South Dakota Bankers Association. *Id.* at ¶ 4.

Prior to July 1, 2019, the Trust was required to participate in and be a member of the Association pursuant to SDCL 58-18-88(6). *Id.* at ¶ 5. On July 1, 2019, South Dakota Senate Bill 37 became effective and amended SDCL 58-18-88, eliminating the Trust's mandatory participation in the Association. *Id.*; *see also* Record A.

On or about March 1, 2017, Penn Treaty Network American Company ("PTNA") and its subsidiary, American Network Insurance Company ("ANIC," and collectively with PTNA, "Penn Treaty"), were declared insolvent pursuant to an Order of Liquidation entered by the Commonwealth Court of Pennsylvania. Stipulation ¶ 7; Record B. Penn Treaty wrote almost exclusively long-term care insurance**,** a type of insurance which cannot be canceled by the insurer except for non-payment of premiums. Penn Treaty policyholders may continue their insurance coverage for the rest of their lives as long as they continue to pay their premiums, and thus the Association on March 1, 2017, became statutorily obligated to pay policyholder benefits for decades into the future. *See* SDCL 58-29C-45.

The Association could have assessed and collected from its members, including the Trust, the entire cost of reinsuring the Penn Treaty obligations in 2017. SDCL 58-29C-51.O; SDCL 58-29C-52.A. Instead, however, the Association chose to spread the

assessments out over a period of five years. To do so, on March 1, 2017, the Association issued Reserve Funding PGA Promissory Notes (the "Notes") in connection with the liquidation of Penn Treaty (the "Penn Treaty Liquidation"). Stipulation ¶ 8; Record C. The Notes evidence future amounts due to protected cells of LTC Reinsurance PCC ("LTC Re"), pursuant to Reinsurance and Administrative Services Agreements (the "Agreements") dated March 1, 2017, between the Association and LTC Re whereby LTC Re agreed to reinsure the obligations incurred by the Association to affected policyholders as a result of the Penn Treaty Liquidation. Stipulation ¶ 8.

The Association issued Class B health assessments in connection with the Penn Treaty Liquidation against the Trust in 2017, 2018, and 2019 to fund payments due under the Notes. Stipulation ¶ 9; *see also* Record D, E, and F. The Trust paid all assessments issued by the Association in connection with the Penn Treaty Liquidation for 2017, 2018, and 2019 without protest. Stipulation ¶ 10.

The 2020 Assessment was authorized on December 20, 2019. *Id.* at ¶ 12; *see also* Record H; Record I. On January 28, 2020, the Trust protested the 2020 Assessment via letter. Stipulation ¶ 13; Record J. The Association responded to the Trust's January 28, 2020, letter by correspondence dated February 7, 2020. Stipulation ¶ 14; Record K. The Trust responded by correspondence dated February 21, 2020, and paid the 2020 Assessment under protest. Stipulation ¶ 15; Record L.

On April 9, 2020, the Association denied the Trust's protest. Stipulation ¶ 16; Record M. Also on April 9, 2020, the Association advised the Director of the South Dakota Division of Insurance (the "Director") of the denial of the Trust's protest. Stipulation ¶ 17; Record N. The Trust appealed the denial to the Division of Insurance by

letter dated June 2, 2020. Stipulation ¶ 18; Record O. The Division issued a Notice of Hearing dated June 26, 2020, scheduling an appeal before the OHE. Stipulation ¶ 19; Record P. The Division also issued an Order Making Proposed Decision of Examiner Final Agency Action on June 26, 2020. Stipulation ¶ 20; Record Q.

On July 7, 2020, the Association filed the Affidavit of Charles Gullickson Concerning Plan of Operation of the Association with the OHE. Stipulation ¶ 21; Record R. Then, on August 13, 2020, the Association requested that the Q&A Concerning April 2017 Class B Assessment be included in the record. Stipulation ¶ 22; Record R. The Trust did not object, but stated it has no record of receiving the document prior to August 13, 2020. Stipulation ¶ 22.

While the matter of the 2020 Assessment was pending before the OHE, the Association issued the 2021 Assessment to the Trust on January 11, 2021. Stipulation ¶ 23; Record T. The 2021 Assessment was authorized on January 5, 2021. Stipulation ¶ 24. On January 25, 2021, the Trust paid the 2021 Assessment under protest and, on February 8, 2021, the Association denied the Trust's protest for the same grounds as the Board considered in denying the Trust's protest of the 2020 Assessment. Stipulation ¶¶ 25-26; Records U, V. On February 15, 2021, the Trust appealed the denial of the protest by letter to the Director. Stipulation ¶ 27; Record W. On February 17, 2021, and pursuant to the agreement of the parties, the Division issued its Request for Consolidation of Assessment Cases to consolidate the Trust's 2020 and 2021 appeals to be heard before the OHE. Stipulation ¶ 28; Record X. The Division also issued an Order Making Proposed Decision of Hearing Examiner Final Agency Decision on February 17, 2021, with Notice of Entry given on the same day. Stipulation ¶ 29; Record Y. Also on February 17, 2021,

the OHE entered its Order Consolidating Cases, which consolidated the Trust's appeals of the Assessments into one proceeding. *Id.*

On March 13, 2021, the OHE issued its Decision, which included its Findings of Fact, Conclusions of Law, and its Final Order. AP 27-36. The OHE held the Association had no authority to issue the Assessments and also that ERISA prohibited the Trust from paying the Assessments. AP. 34. Thus, the OHE upheld the Trust's protests. AP 34-35. The Association timely filed its Notice of Appeal on April 16, 2021.

On December 12, 2012, the Circuit Court issued its Memorandum Opinion, which reversed the OHE's Decision in its entirety. AP 1-26. Among other things, the Circuit Court concluded the OHE erred by giving Senate Bill 37 retroactive effect and that the OHE erroneously concluded the Association had no authority to issue the Assessments. AP. 7-17. The Circuit Court also concluded that the OHE erred when it held ERISA precluded the Trust from paying the Assessments. AP 17-24. An Order and Final Judgment to this effect was entered on December 30, 2021. AP. 25-26. Notice of Entry of the Circuit Court's Order and Final Judgment was given on January 5, 2022, and the Trust's Notice of Appeal was filed on February 2, 2022.

ARGUMENT

The Court should conclude the Trust is and remains liable for assessments related to the Penn Treaty Liquidation, and that Senate Bill 37 cannot extinguish that liability by being given retroactive effect. The Court should also conclude ERISA does not prevent the Trust from paying the Assessments. Thus, the Circuit Court should be affirmed.

The parties submitted this case upon stipulations, and so the Court's review of the matter is *de novo*. *Wendell v. S. Dakota Dep't of Transp.*, 1998 S.D. 130, ¶ 5, 587 N.W.2d 595, 597. The Court should be aware the Circuit Court found the arguments and authorities advanced by the Association to be persuasive, and it appears the Circuit Court largely adopted them. *See* Memorandum Opinion, 11. Accordingly, several of the arguments below may appear similar in form and content.

I. The Circuit Court Correctly Concluded the Association Had the Authority to Issue the Assessments

A. The Circuit Court correctly construed the Act to effectuate its purpose

The Association is a non-profit legal entity established by the Act to protect South Dakota insureds from most health and life insurer insolvencies. SDCL 58-29C-45; SDCL 58-29C-46; SDCL 58-29C-59. To do so, the Act requires most insurers to be and remain members of the Association as a condition of their authority to do business in the State. SDCL 58-29C-49.A. If a member insurer becomes insolvent and ordered to be liquidated, the Association is required by law to provide benefits, subject to statutory limitations, to

South Dakota residents who hold health and life insurance policies and individual annuities with the insolvent insurer(s). SDCL 58-29C-51. The Association is also required to assess its members for the funds needed to fulfill these statutory obligations based on each member's pro rata share of premiums received in South Dakota in the applicable line of business during the three (3) calendar years prior to the year in which the Association becomes statutorily obligated to provide benefits. SDCL 58-29C-52.A and C.

The Act specifies its purpose is to provide the protections identified above through the assessments issued to members of the Association. SDCL 58-29C-45. The Legislature also declared the Act must be construed to effectuate this purpose. SDCL 58-29C-47; *In re Dorsey & Whitney Tr. Co. LLC*, 2001 S.D. 35, ¶ 14, 623 N.W.2d 468, 473 (providing the Court adheres to Legislative mandates on the construction of statutes). The Circuit Court correctly observed and followed this Legislative directive. AP. 17.

B. The Circuit Court correctly held the Trust was a "member insurer" of the Association at the time of the Penn Treaty Liquidation

Following the Penn Treaty Liquidation, the Association became obligated by law to provide benefits, subject to statutory limits, to fulfill the contractual obligations of PTNA and ANIC in South Dakota. SDCL 58-29C-51.B. The Association was also required to assess its members for the funds necessary to do so. SDCL 58-29C-51.A. There is no dispute that at the

time of the Penn Treaty Liquidation, the Trust was–as a matter of law–a "member insurer" of the Association under SDCL 58-29C-48(12). The pre-July 1, 2019, version of SDCL 58-18-88(6) explicitly required METs like the Trust to "participate[] in the [Association] pursuant to chapter 58-29C *and is a member pursuant to subdivision 58-29C-48(12)*." SDCL 58-18-88(6) (pre-July 1, 2019) (emphasis added). Thus, the Circuit Court correctly concluded the Trust was a "member insurer" at the time of the Penn Treaty Liquidation. AP. 7-8.

Further, there is no dispute the Association could have fully funded its guaranty obligations with an immediate lump-sum assessment levied against its members. SDCL 58-29C-51.O (providing the Association's board the "discretion and may exercise reasonable business judgment to determine the means by which the association is to provide the benefits of this chapter in an economical and efficient manner"); SDCL 58-29C-52.A (providing the Association authority to issue assessments "at the time and for the amounts as the board finds necessary."). The record reflects this one-time payment would have totaled $40,429,000.00, from which the Trust's pro rata share would be mathematically determinable. Record D; SDCL 58-29C-52.A and C. However, out of convenience to its members, the Association chose to reinsure its obligations and spread the assessments out over a period of five

years. There is no dispute assessments were issued against the Trust in 2017, 2018, and 2019, which the Trust paid without protest. Stipulation ¶ 10. Finally, there is no dispute the Trust remained a member until at least July 1, 2019, the effective date of Senate Bill 37, which in turn removed the requirement for METs like the Trust be members of the Association.

C. The Circuit Court correctly held the Association's Plan of Operation obligates the Trust to pay the Assessments

1. The plain language of both the Act and of the Association's Plan of Operation controls

The Act requires the Association to submit a "plan of operation" to the Director, which becomes effective upon the Director's approval. SDCL 58-29C-53.A(1). Any amendments to a plan of operation also must be submitted to the Director for review and approval. *Id.* Once approved, a plan of operation is essentially the Association's bylaws, *i.e.*, it sets forth the Association's administrative rules and operative requirements. SDCL 58-29C-53.C.

The 2007 iteration of the Association's Plan of Operation remained in effect at all times relevant to the appeal of the 2020 Assessment. Record R (Affidavit of Charles Gullickson, ¶ 4). Article VI, Section B of the Plan provided in part:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination or expiration of its license to transact the kinds of insurance covered by the Act. *However, such insurer shall remain liable for any assessments based on impairments occurring prior to the termination of its license*.

See Record R (2007 Plan of Operation, p. 8) (emphasis added). For reasons unrelated to these proceedings, the Association submitted an Amended and Restated Plan of Operation to the Director on May 21, 2020, which was approved on July 1, 2020, and thus remained in effect at all times relevant to the appeal of the 2021 Assessment. Record R (Affidavit of Charles Gullickson, ¶ 5). Aside from minor changes, the operative language of Article VI, Section B cited, *supra*, is materially identical to the Amended and Restated Plan of Operation approved by the Director on July 1, 2020. *See* Record R (2020 Plan of Action, p. 12).

There is no dispute the Penn Treaty Liquidation occurred prior to the Trust's withdrawal from the Association. The Trust–legally, a "member insurer"–was also required to comply with the Association's Plan of Operation. SDCL 58-29C-53.B ("All member insurers shall comply with the plan of operation"). Accordingly, the Trust's obligation to "remain liable for any assessments based on impairments occurring" while it was a member of the Association conclusively establishes Trust's obligation to pay its share of all assessments the Association may require to fund its statutory responsibilities arising from the Penn Treaty Liquidation. That the Association exercised its business judgment to reduce the immediate burden

on its members by spreading the payments over a period of five years does not change this fact.

The Trust contends the language quoted from the Association's Plan of Operation, *supra*, is inapplicable for two reasons. *See* Appellant's Brief at 12-16. First, according to the Trust, it was never a member of the Association and so it could not be bound by the Association's Plan of Operation. Yet, again, the Trust was–as a matter of law–a "member insurer" of the Association when the Penn Treaty Liquidation occurred.

The Trust's citation to SDCL 58-18-90 as contrary authority is misplaced. For one, the Trust cites a portion of the statute as it existed in 2019 and following its amendment that year, which was also when the Legislature removed the Trust's mandatory participation in the Association via Senate Bill 37. *See* S.D. Sess. Laws 2019, Ch. 212, § 8. The pre-amendment version of SDCL 58-18-90 plainly required the Trust to be a member of the Association pursuant to SDCL 58-18-88(6). *See id.* Thus, SDCL 58-18-90 is irrelevant.

Second, with respect to 2020 Assessment, the Trust contends the 2007 iteration of the Plan of Operation's "remain liable" language applied only to insurer "impairments," and not insurer impairments that proceeded into "insolvencies." True, an "impaired insurer" is one "placed under an order of rehabilitation or conservation by a court of competent jurisdiction." SDCL 58-29C-48(10). However, and as the Circuit Court correctly observed, both PTNA and ANIC were under orders of rehabilitation, and the companies were ultimately liquidated at the termination of those proceedings. *See* Record B, pp. 1, 7 ("The rehabilitation of PTNA [and ANIC] is hereby TERMINATED, and all orders entered during the rehabilitation, to the extent inconsistent with this Liquidation

Order, are VACATED"). The captions of these two Pennsylvania actions also clearly denote each entity as "in Rehabilitation" (*i.e.*, impaired) since 2009 which, again, is when the Trust undeniably was a member of the Association. *Id.*

Further, as the Circuit Court correctly noted, the impairments of PTNA and ANIC were precursors to their insolvencies, which is not uncommon as an insolvent insurer is often an impaired insurer that could not be rehabilitated. *See* 1 Couch on Ins. § 5:30 ("Rehabilitation proceedings may terminate in either the restoration of the company to the original management, or the liquidation of the company"). That is simply what occurred with PTNA and ANIC. And, pursuant to the Pennsylvania court's Orders, the South Dakota obligations of PTNA and ANIC were at that time transferred to the Association. *See* Record B, pp. 5, 11 (directing liquidator to "transfer policy obligations, including continued payment of claims and continued coverage arising under PTNA's [and ANIC's] policies, to state guaranty funds"). Additionally, in practice, the Association does not levy assessments unless an impaired insurer becomes an insolvent insurer, because the latter is what triggers the Association's mandatory obligations to provide benefits to affected South Dakota policy holders. SDCL 58-29C-51.B. Thus, the distinction between impairments and insolvencies drawn by the Trust is immaterial.

Finally, the Trust, for the first time, assigns to the Association an improper motive when it amended its Plan of Operation in 2020. While those amendments added four pages of revisions to the Association's Plan of Operation, *compare* AP. 113 *with* AP. 123, the Trust claims the Association clarified and updated the "remains liable" language for nefarious reasons or for gamesmanship in this litigation. To the contrary, the Association submitted an Amended and Restated Plan of Operation to the Director for

reasons entirely unrelated to this lawsuit. Record R (Affidavit of Charles Gullickson, ¶ 5). It is undisputed the Director approved both the 2007 and 2020 versions of the Association's Plan of Operation, and the Director apparently saw no issue with the language that required withdrawing members to remain liable for assessments related to insolvencies that occurred while the member belonged to the Association. All of the aforementioned was brought to the Circuit Court's attention following arguments raised by the Trust on appeal concerning insurer impairments and insolvencies. Thus, the Trust cannot be heard to complain that the Association merely responded to its contentions in the Association's Reply Brief.

There is no dispute the Trust was a member of the Association while PTNA and ANIC were impaired and under orders of rehabilitation, just as there is no dispute the Trust was, and remained, a member for two years after those rehabilitation proceedings ultimately resulted in PTNA and ANIC being liquidated. Therefore, the Trust "remain[s] liable for any assessments based on impairments occurring" while it was a member of the Association, notwithstanding the fact those impairments ripened into insolvencies. Thus, the Circuit Court correctly held the Trust is, and remains, liable for any assessments arising from the Penn Treaty Liquidation.

2. The Circuit Court's ruling is consistent with case law

This outcome is consistent with cases in other jurisdictions considering similar issues. For example, in *Liberty Mut. Ins. Co. v. Superintendent of Ins.*, 689 A.2d 600, 601 (Me. 1997), Liberty Mutual was a member of Maine's Insurance Guaranty Association Act (the "MIGAA"). In 1987, Liberty Mutual terminated its license to provide workers' compensation insurance in Maine, and thus it withdrew as a member of MIGAA. *Id.* In

1989, the MIGAA was revised to specify the extent to which a former member remained a "member insurer" and to modify the method used in making assessments against each member. *Id.* From 1989 through 1993, the Maine Insurance Guaranty Association ("MIGA") continued to make assessments against Liberty Mutual for claims related to insurers that had become insolvent prior to Liberty's withdrawal. *Id.* Then in 1994, MIGA issued an additional assessment for 1991 after it learned two Liberty Mutual companies had previously not been assessed that year, which Liberty Mutual refused to pay. *Id.* at 601-02.

The Supreme Judicial Court of Maine held Liberty Mutual was liable for the assessments. The Court observed "MIGA's plan of operation provided that a withdrawn insurance carrier would remain liable for any assessments based on insolvencies that occurred prior to the termination of its license." *Id.* at 602. All members of MIGA were also required to comply with its plan of operation. *Id.* Consequently, "[p]ursuant to that plan, even after Liberty Mutual ceased to be a 'member insurer,' it remained liable for insolvencies that occurred prior to its withdrawal." *Id.* at 603. Thus,

> Liberty Mutual's 1987 act of withdrawing from the Maine workers' compensation market did not change its legal status under the Act, *i.e.*, it did not affect the *existence* of its ongoing liability to MIGA for insolvencies that occurred while it remained a member insurer.

Id. (emphasis in original). Likewise, the subsequent amendments had no effect on Liberty Mutual's liability. *Id.*

A similar result was reached in *Miss. Mfrs. Ass'n Workers' Comp. Grp. v. Miss. Workers' Comp. Grp. Self-Insurer Guar. Ass'n*, 281 So.3d 108 (Miss. Ct. App. 2019). Like in *Liberty Mutual*, this case involved assessments made against a former member of a Mississippi insurance guaranty association (the "GGA"). The former member (the

Mississippi Manufacturers Association Workers' Compensation Group, or "MMAWCG") claimed "the GGA lacked authority to assess the MMAWCG because it had withdrawn from the GGA" before the assessments had been authorized. *Id.* at 110.

The Mississippi Court of Appeals disagreed. As in *Liberty Mutual*, the GGA was statutorily obligated to maintain a plan of operation that was binding on all of its members, and that plan of operation specifically stated that a withdrawing member would remain liable for future assessments. *Id.* at 115 (noting the plan "specifically provides that a withdrawing member 'will continue to be liable for assessment for a period of three (3) years or until there are no liabilities outstanding under its previous self-insured pooling status, which[ever] is greater.'"). There was no dispute the assessment made against the MMAWCG was made within the parameters set by the plan of operation. *Id.* The Court also cogently observed the purpose of the GGA would be compromised if members could avoid future assessments by simply withdrawing from the GGA:

> If every solvent group self-insurer could withdraw from the GGA and immediately avoid any further assessment, the GGA's ability to guarantee claims and benefits on behalf of insolvent groups would be compromised.

Id. at 115. Consequently, the Mississippi Court of Appeals concluded the MMAWCG was bound by the terms of the plan of operation and, thus, the assessment was valid.

The same analysis holds here. Like in *Liberty Mutual* and *Mississippi Manufacturer's*, the Association has a plan of operation that has been approved by the Director and, thus, it is valid and binding on all members. As in those cases, the Association's plan of operation requires withdrawing members to remain liable for future assessments made based on insolvencies that occurred prior to the member's withdrawal. As observed by the *Liberty Mutual* court, the Trust's act of withdrawing from the

Association did not change its legal status under the Act, *i.e.*, it did not affect the *existence* of the Trust's ongoing liability for insolvencies that occurred while it was a member. As the *Mississippi Manufacturer's* court noted, if a member insurer like the Trust could withdraw from the Association and immediately avoid any further assessments, then the Association's ability to guaranty claims and benefits on behalf of insolvent insurers would be compromised.

The Circuit Court correctly analogized the present case to *Liberty Mutual* and *Mississippi Manufacturer's*. AP 14-15. Notably, even the OHE agreed these cases were analytically similar, though it erred when it attempted to distinguish them, as the Circuit Court observed. *See* AP. 31. To date, the Trust has never cited any authority to the contrary. Rather, and for the first time on appeal, the Trust appended in a footnote statutes from other states that, at least according to the Trust, exempt entities like the Trust from participation in the relevant state's guaranty association. *See* Trust's Brief, at 17, n.8. Regardless, these other statutory schemes are irrelevant because, *under South Dakota law*, the Trust was required to be a member of the Association and follow its Plan of Operation.

The Trust then attempts to distinguish *Liberty Mutual* and *Mississippi Manufacturer's* based on immaterial matters. First, the Trust again contends the distinction between insolvent insurers and impaired insurers is material, which as noted *supra*, it is not. Second, the Trust contends the court in *Mississippi Manufacturer's* "did not even address the general and relatively-uniform health and life insurance guaranty association statutes." Trust's Brief at 19. It is unclear what the Trust means by this, as the case is cited as analogous authority and the fact remains that the Trust was statutorily

obligated to be a member of the Association under South Dakota law. The Trust next attempts to distinguish these cases, particularly *Mississippi Manufacturer's*, by pointing out the case involved a statutory scheme applicable to a guaranty association for workers' compensation benefits, as opposed to health and life insurance. Simply stated, the Trust misses the point of these cases, which is that courts have held guaranty association members cannot evade their obligations to continue paying assessments for preexisting obligations by withdrawing, when a guaranty association's plan of operation–like the Association's–contains language expressly stating the opposite.

On this latter issue, the Trust claims "SDCL Ch. 58-29C is silent as to whether the Association may obligate former members for assessments authorized and called after the member ceases membership." Trust's Brief at 20. To the contrary, the Act gives the Association the authority to draft its Plan of Operation as "necessary or suitable to assure the fair, reasonable, and equitable administration of the association." SDCL 58-29C-53.A(1). The Act also broadly empowers the Association to adopt in its plan of operation any "additional provisions necessary or proper for the execution of the powers and duties of the association." SDCL 58-29C-53.C(7). The "remains liable" language is necessary and suitable because the Association is required to assess its members for the funds needed to fulfill its statutory obligations based on each member insurer's pro rata share of premiums during the three (3) calendar years prior to the year in which the Association becomes statutorily obligated to provide benefits. SDCL 58-29C-52.A and C. The language is also fair, reasonable, and equitable, because withdrawing members could otherwise impair the Association's ability to guarantee claims and benefits on behalf of insolvent insurers, while also shifting the withdrawing member's share of the financial

burden that arose while it was a member of the Association onto the Association's remaining members. Accordingly, the "remains liable" language is proper. Thus, the Circuit Court did not err when it concluded the Trust was bound by the Association's Plan of Operation and, as such, it "remains liable" for assessments based on the Penn Treaty Liquidation.

D. The Circuit Court correctly concluded the Trust's liability was fixed and unavoidable as of March 1, 2017

The Association's statutory obligations with respect to the Penn Treaty Liquidation became fixed as of March 1, 2017, and the Association was also statutorily obligated to assess its members (including the Trust) for the funds needed to fulfill those obligations. SDCL 58-29C-52.A (providing the Association "shall assess the member insurers" to carry out these obligations). In addition, again, the Association's Plan of Operation confirms withdrawing members "shall *remain liable*" for future assessments. Thus, the Circuit Court correctly held the Trust's liability for those assessments was also fixed and unavoidable as of March 1, 2017. AP. 9-10.

The Plan of Operation aside, the Trust focuses on a handful of statutes that define when an assessment is "authorized" and/or "called." Trust's Brief at 4, 10-11. According to the Trust, "SDCL Ch. 58-29C <u>*expressly*</u> limits the funding obligations of a 'member insurer' to assessments 'authorized and called.'" *Id.*, at 10 (emphasis added). Notably absent is any statutory citation "expressly" (let alone implicitly) providing this limitation. This omission is

all the more glaring in the face of the Legislature's clear directive that the Act be construed to effectuate its purpose. SDCL 58-29C-47.

Nonetheless, the Trust claims SDCL 58-29C-52.B(2) "sets forth the primary obligation of a member insurer" which, according to the Trust, is the timely payment of assessments. Trust's Brief at 10. However, the statute cited by the Trust says no such thing. Rather, SDCL 58-29C-52.B merely defines the two classes of assessments the Association may issue to fund its activities: Class A and Class B. In particular, SDCL 58-29C-52.B(2) defines a Class B assessment as the type "authorized and called to the extent necessary to carry out the powers and duties of the association under § 58-29C-51 with regard to an impaired or an insolvent insurer." This latter statute sets out the Association's obligations to provide benefits to South Dakota residents who are holders of the health and life insurance policies and individual annuities with the insolvent insurer(s). SDCL 58-29C-51. Thus, SDCL 58-29C-52.B(2) defines a Class B assessment as one issued to fulfill that purpose.

Next, the Trust relies on SDCL 58-29C-48(3) and (5), which define an "authorized assessment" and a "called assessment." An assessment is "authorized" when "a resolution by the board of directors has been passed whereby an assessment will be called immediately or in the future from

member insurers for a specified amount. An assessment is authorized when the resolution is passed." SDCL 58-29C-48(3) (emphasis added). An assessment is "called" when "a notice has been issued by the association to member insurers requiring that an authorized assessment be paid within the time frame set forth within the notice." SDCL 58-29C-48(5). Thus, an assessment may be authorized prior to the date it is "called," the latter of which provides the timeframe within which an assessment must be paid before it will accrue interest. *See* SDCL 58-29C-52.A.

On March 1, 2017, the Association entered into the Notes in connection with the Penn Treaty Liquidation which evidence future amounts due to LTC Re, pursuant to the reinsurance Agreements between the Association and LTC Re. Stipulation ¶ 8; Record C. The Notes set forth the installment amounts due from the Association from March 1, 2018 – 2022. On April 5, 2017, the Association's board passed a resolution specifically restating its obligations under the Notes and the Agreements, and acknowledged that future assessments will be required to satisfy those obligations. *See* Record D, pp. 3-4 (noting that "The Board hereby ratifies its participation in the [Agreements] on a Reserve Funding basis" and that "future Penn Treaty assessment[s] for the Association will be based upon the years 2014, 2015, and 2016"). While the board essentially re-authorized each assessment on an annual basis going forward, by April 5, 2017, the board had passed a resolution "whereby an assessment *will be called . . . in the future* from member insurers for a specified amount." SDCL 58-29C-48(3) (emphasis added). The assessments were then "called" ahead of each year's March 1 installment payment due

date. *See* Record G (2020 Assessment notice of January 22, 2020); Record T (2021 Assessment notice of January 11, 2021).

Thus, these statutes say nothing about absolving the Trust's continued liability for assessments made based on the Penn Treaty Liquidation, which occurred while the Trust was a member of the Association. Rather, and with due regard to the Legislature's directive that the Act be construed to effectuate its purpose, SDCL 58-29C-47, the Trust's liability for assessments related to the Penn Treaty Liquidation became fixed and unavoidable as of March 1, 2017, as the Circuit Court correctly observed. *See* SDCL 58-29C-52.A.

Again, the Association could have fully funded its guaranty obligations with an immediate lump-sum assessment levied against its members at this time. SDCL 58-29C-51.O; SDCL 58-29C-52.A. However, out of convenience to its members, the Association chose to reinsure its obligations and spread the assessments out over a period of five years. That the Association chose to do so in no way lessened the inevitability that the Trust would be required to fund its share of those obligations. The Trust does not dispute any of the foregoing, but simply concludes based on nothing more than these definitional statutes that its act of withdrawing from the Association cut off its liability for assessments related to the Penn Treaty

Liquidation. While the Trust proclaims broadly that any other outcome "contravenes a plain reading of SDCL Ch. 58-29C," Trust's Brief at 11, none of the statutes cited by the Trust support its conclusion.

E. The Circuit Court correctly held Senate Bill 37 did not abrogate the Trust's ongoing liability

Again, there is no dispute that prior to the effective date of Senate Bill 37, the Trust was obligated to be a member of the Association, and it was, as a matter of law, a "member insurer." The passage of Senate Bill 37 simply removed the legal mandate that METs like the Trust be members of the Association. However, as detailed more fully *supra*, the Trust's act of withdrawing from the Association did not change its legal status under the Act and the Association's Plan of Operation, *i.e.*, it did not affect the existence of the Trust's ongoing liability for insolvencies that occurred while it was a member.

The Trust paid assessments based on the Penn Treaty Liquidation in 2017, 2018, and 2019 without protest. Stipulation, ¶ 10. The Trust then argued Senate Bill 37 relieved it of its obligation to pay future assessments related to the Penn Treaty Liquidation. *See* Record L, p. 2 (February 21, 2020, protest letter, stating "we assert that Senate Bill 37 effectively terminated the Association's ability to assess the Trust . . ."). However, as the Circuit Court correctly observed, for Senate Bill 37 to effectuate such a

change would amount to an unlawful, retroactive application of the law. AP. 7-11. This is so because the Legislature has prohibited giving laws that release or extinguish liabilities retroactive effect unless the law expressly so provides, which Senate Bill 37 does not. SDCL 2-14-18; 2-14-21. Accordingly, Senate Bill 37 could only be applied retroactively if it amounted to a mere "procedural" change, as opposed to a "substantive" one. *West v. John Morrell & Co.*, 460 N.W.2d 745, 747 (S.D. 1990); *see also Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994) (defining "substantive" changes as those that "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"); *Tischler v. United Parcel Serv.*, 1996 S.D. 98, ¶ 72, 552 N.W.2d 597, 608 (defining "procedural" changes as affecting remedies or procedure, such as "ones that describe methods for enforcing, processing, administering, or determining rights, liabilities or status").

Prior to the passage of Senate Bill 37, the Trust was (and "remains") liable for assessments related to the Penn Treaty Liquidation. As the Circuit Court observed, to accept the Trust's argument would have retroactively nullified the Trust's liability for future assessments, while also shifting the Trust's share of the financial burden onto the Association's other members.

AP. 9-10. Therefore, it would amount to a substantive change in the law. *See Sopko v. C & R Transfer Co., Inc.*, 2003 S.D. 69, ¶ 15, 665 N.W.2d 94, 98-99 (concluding pre-enactment liabilities cannot be altered by subsequent changes in the law because doing so "would constitute a clear violation of the prohibition against giving statutes which control substantive rights retroactive effect"); *see also* 82 C.J.S. Statutes § 574 ("Thus, a retrospective statute is one which gives to preenactment conduct a different legal effect from what it would have had without the passage of the statute"). Thus, the Circuit Court rightly held Senate Bill 37 could not be applied retroactively.

Now, however, and despite paying each assessment related to the Penn Treaty Liquidation until Senate Bill 37 became effective, the Trust claims Senate Bill 37 is simply immaterial. Trust's Brief at 16. While this concession cannot be squared with the Trust's position following the enactment of Senate Bill 37, the Court should conclude, as the Circuit Court did, that Senate Bill 37 cannot be given retroactive effect.

In sum, the Circuit Court did not err when it held the Association had the authority to issue the Assessments. Thus, the Circuit Court should be affirmed.

II. The Circuit Court Correctly Held ERISA Does Not Preclude the Trust from Paying the Assessments

A. The pre-amendment version of SDCL 58-18-88(6) is irrelevant

The Court should be aware the Trust has incorrectly framed the ERISA question. First, according to the Trust, the now-repealed version of SDCL 58-18-88(6) that obligated METs like the Trust to be members of the Association improperly "related to" an ERISA plan. Trust's Brief at 21. While the Trust is plainly wrong that its members received no correlating benefit from membership with the Association, *see infra*, the Trust's assertion is irrelevant, as the law was repealed in 2019, and so it has no legal effect. Thus, the question of whether the pre-amendment version of SDCL 58-18-88(6) improperly "related to" an ERISA plan is moot.

Second, there is simply no law "applicable to a single ERISA plan which authorizes a direct assessment against that plan[.]" *Contra* Trust's Brief at 21. Even the pre-amendment version of SDCL 58-18-88(6) applied to <u>*any*</u> MET, not just the Trust. Regardless, and as set forth in more detail, *infra*, SDCL 58-29C-52–the statute that commands the Association to assess its members to fulfill its funding obligations–is a statute of general applicability. Accordingly, the question for the Court is whether this statute of general applicability is pre-empted by ERISA. The Circuit Court correctly held it is not.

B. ERISA does not pre-empt South Dakota law

The United States Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead ha[s] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). In general, ERISA pre-empts state laws that "relate to any employee benefit plan." 29 U.S.C. 1144 (a). However, the Supreme Court has cautioned against an uncritical literalism of the phrase "relate to" because if it "were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Travelers Ins. Co.*, 514 U.S. at 655 (citation omitted). "But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Id.*

1. The "exclusive purpose" provision

The Trust's appeal primarily concerns ERISA's so-called "exclusive purpose" (or "exclusive benefit") provision. The "exclusive purpose" clause obligates ERISA plan fiduciaries to carry out their duties for the exclusive purpose of providing benefits to plan participants and their beneficiaries, and for defraying administrative expenses. 29 U.S.C. 1104(a)(1)(A). This is the familiar fiduciary duty of loyalty borrowed from the law of trusts, which Congress included to "safeguard employees from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds." *Fort*

Halifax Packing Co. v. Coyne, 482 U.S. 1, 15 (1987). Congress, however, "was not concerned with whether persons not covered by ERISA plans were somehow benefitted by the operation of the plans." *Boyle v. Anderson*, 68 F.3d 1093, 1102 (8th Cir. 1995).

By way of example, courts have found violations of the "exclusive purpose" provision when plan fiduciaries "deceiv[ed] a plan's beneficiaries in order to save the employer money at the beneficiaries' expense," *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), or by arbitrarily agreeing on an inflated purchase price for plan assets, *Chao v. Hall Holding Co.*, 285 F.3d 415, 434 (6th Cir. 2002), or by amending a severance plan in order to make an otherwise eligible employee ineligible to receive plan benefits. *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 361 (E.D. Mo. 1979). Clearly, the plan fiduciaries in these situations were not discharging their duties solely in the interests of the plan beneficiaries. As detailed, *infra*, however, state laws of general applicability which merely impose an economic impact on ERISA plans are neither pre-empted nor in conflict with ERISA.

For instance, ERISA's "exclusive purpose" provision says nothing whatsoever about a state's authority to regulate MEWAs (or any entities) like the Trust, and ERISA does not pre-empt a state's authority to impose insurance-related administrative or regulatory expenses under statutes of general applicability, like the assessments provided for in SDCL Ch. 58-29C. Indeed, ERISA confirms states may regulate MEWAs "to the extent not inconsistent with the preceding sections of this subchapter." *See* 29 U.S.C. 1144(b)(6)(A)(ii). According to the U.S. Department of Labor,

> [G]iven the clear intent of Congress to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs, as evidenced by the enactment of the MEWA provisions, it is the view of the Department that it would be contrary to Congressional intent to conclude that states, while having the authority to apply insurance laws to such plans, do not have the authority to require and enforce registration, licensing, reporting and similar requirements necessary to establish and monitor compliance with those laws.

Advisory Opinion 90-18A (*see* https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1990-18a.pdf (last accessed, 4/21/2022)).

ERISA also expressly confirms plan funds may be used to defray such expenses. 29 U.S.C. 1104(a)(1)(A)(ii) (providing plan fiduciary shall discharge its duties "for the exclusive purpose of . . . defraying reasonable expenses of administering the plan"). As the Second Circuit Court of Appeals recognized in a case involving a MEWA in Connecticut, "Plaintiffs also contend that Connecticut imposes certain fees on insurance companies that are inconsistent with ERISA's requirement that funds be held in trust for the participants and be used only to provide benefits and to defray administrative costs. *In our view, regulatory fees can be a legitimate administrative expense*." *Atl. Healthcare Benefits Tr. v. Googins*, 2 F.3d 1, 6 (2d Cir. 1993) (emphasis added). The same is true here with respect to the assessments authorized by SDCL Ch. 58-29C.

In an analogous context, the Eighth Circuit held ERISA did not preempt a Minnesota law that allowed medical providers to pass the costs of a 2% tax on their gross revenues to health care plans, including plans covered by ERISA. *Boyle*, 68 F.3d at 1112. Proceeds from the tax were used to reduce healthcare costs and make healthcare coverage more available for Minnesotans in general. *Id.* at 1097. A number of trustees who administered ERISA plans argued the law violated the "exclusive purpose" provision

because the tax would result in an increase in plan expenditures for non-plan purposes and because the tax revenue would be used to fund state programs that provided benefits to persons who are not beneficiaries of the ERISA plans. *Id.* at 1102. The Eighth Circuit rejected the argument and agreed instead that ERISA's preemptive effect should not be used to "frustrate efforts of a state, under its police power, to regulate health care costs." *Id.* at 1102-03 (citation omitted). Indeed, "such a view would mean that every state law that led to increases in plan costs—such as sales tax, minimum wage or environmental regulation statutes—would be preempted." *Id.* at 1103.

Other courts, including the United States Supreme Court, have more generally held that ERISA does not preempt state regulations that impose a mere economic impact on plans governed by ERISA. *Travelers Ins. Co.*, 514 U.S. at 659 ("An indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself"); *Safeco Life Ins. Co. v. Musser*, 65 F.3d 647, 653 (7th Cir. 1995) ("Because the HIRSP assessments imposed by Wisconsin on health insurance carriers do not interfere with the provisions or administration of ERISA plans, the assessments do not 'relate to' such plans in a manner significant enough to implicate the preemption clause of the statute"); *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Mem'l Hosp.*, 995 F.2d 1179, 1194 (3d Cir. 1993) (rejecting "exclusive benefit" challenge to New Jersey's medical services rate setting system and agreeing "if ERISA is held to invalidate every State action that may increase the cost of operating employee benefit plans, those plans will be permitted a charmed existence that never was contemplated by Congress"); *Lane v. Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) (rejecting contention that regulation which increased a plan's cost of doing

business was preempted, because "That argument does not withstand scrutiny. So too, for example, do state laws and municipal ordinances regulating zoning, health, and safety increase the operational costs of ERISA trusts, but no one could seriously argue that they are preempted").

The point of these cases, as the Circuit Court recognized, is that the assessment mechanism in SDCL 58-29C functions as *a cost of doing business* in the State, which ERISA plainly permits. METs/MEWAs like the Trust have no inherent right to exist and do business in South Dakota; that privilege is granted by the Legislature. Prior to Senate Bill 37, the Legislature only permitted entities like the Trust to do business in the state if, among other things, they agreed to be members of the Association. The Trust would have had no authority to exist and operate in South Dakota in the first place unless it agreed to assume the same rights and obligations as other members of the Association which, under the Plan of Operation, includes the continuing obligation of paying assessments for insurer insolvencies that occurred while the Trust was a member of the Association.

The Trust was only able to exist and provide benefits to its members by virtue of this arrangement, and clearly–though an ancillary point–the Trust's members "benefitted" from the compromise. While the Trust claims it was denied the protection of the Association, the Association has never taken the position that it would not provide coverage for plan participants of a MEWA/MET that was a member of the Association under the pre-amendment version of SDCL 58-18-88(6). In fact, the Association argued exactly the opposite, *see* Appellee Appx. 1-4, which the Trust never disputed.

In sum, courts have consistently rejected absolutist and literalist arguments like those advanced by the Trust, which suggest that every dollar expended by an ERISA plan

must be used directly to benefit of plan beneficiaries. To conclude otherwise would mean the Trust must also be exempt from paying any form of operational expenses, overhead expenses, taxes, rent, etc.,–a truly anomalous result Congress neither articulated nor intended. Thus, the Circuit Court did not err when it held the assessment mechanisms of SDCL Ch. 58-29C do not violate ERISA's "exclusive purpose" provision merely because some the Trust's funds must be put toward satisfying its obligations for insolvencies that occurred while it was a member of the Association.

2. The "inconsistent with" provision

ERISA confirms states may regulate MEWAs "to the extent not inconsistent with the preceding sections of this subchapter." *See* 29 U.S.C. 1144(b)(6)(A)(ii). As the Trust observes, the U.S. Department of Labor has equated this clause with regulatory measures which "mak[e] compliance with ERISA impossible." Trust's Brief at 23 (citing U.S. Dep't of Labor, *MEWAs: A Guide to State and Federal Regulation*). The Trust then claims, without any supporting authority, that the assessment mechanism of SDCL Ch. 58-29C is "inconsistent with" ERISA. Trust's Brief at 23. The Circuit Court correctly rejected this argument.

As detailed, *supra*, numerous courts have held state laws that require an ERISA plan to expend some of its funds to defray administrative, regulatory, and similar costs do not violate ERISA. Consequently, if those requirements are not prohibited by ERISA, then the same requirements

could not be "inconsistent with" ERISA, or otherwise "mak[e] compliance with ERISA impossible." *Cf. Atl. Healthcare Benefits Tr.*, 2 F.3d at 6 ("Atlantic asserts that such requirements are inconsistent with ERISA because imposing such reserves would eliminate one of the economic advantages of the MEWA structure and would create additional tax liability. This argument is frivolous. All state regulation entails marginal costs; since ERISA allows state regulation, the associated costs cannot be deemed inconsistent with ERISA's regulatory scheme."); *Atl. Health Care Benefits Tr. v. Foster*, 809 F. Supp. 365, 374 (M.D. Pa. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993) (observing "requiring a plan to obtain a state license has been held not to be inconsistent with the provisions of ERISA") (citing authorities). Again, the Trust cites no contrary authority. Thus, the Circuit Court did not err when it held the assessment mechanisms of SDCL Ch. 58-29C do not violate ERISA's "inconsistent with" provision.

3. The "relates to" provision

Finally, the only other avenue of finding pre-emption is under ERISA's more general "relates to" clause, 29 U.S.C. 1144 (a). While the Trust disavows this clause, *see* Trust's Brief at 21-22, the Trust contends the assessment mechanism in SDCL Ch. 58-29C is not a law of general application. *See* Trust's Brief at 26-27 (also referring to repealed version of

SDCL 58-18-88(6)). Rather, according to the Trust, it applies discreetly and specially in some undefined way with respect to the Trust. *Id.* at 26.

The Trust's contention requires discussion of ERISA's "relates to" clause because it conflates the Association's actual argument. For context, courts analyzing pre-emption claims under ERISA's "relate to" clause have drawn distinctions between laws of general applicability and laws "which single[] out ERISA employee welfare benefit plans for different treatment[.]" *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 830 (1988). Thus, in *Mackey*, the Supreme Court held a Georgia garnishment statute that "expressly refers to—indeed, solely applies to—ERISA employee benefit plans" was pre-empted. *Id.* Likewise, a Washington statute that bound "ERISA plan administrators to a particular choice of rules for determining beneficiary status" based on "state law, rather than to those identified in the plan document," impermissibly "conflict[ed] with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents," and was thus pre-empted. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147-150 (2001).

In contrast, "[a] law of general applicability is one that does not treat ERISA plans differently from non-ERISA plans." *Boyle*, 68 F.3d at 1101. Such laws may "impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." *De Buono v. NYSA-ILA*

Med. & Clinical Servs. Fund, 520 U.S. 806, 815 (1997). In *De Buono*, a New York law that imposed certain taxes on hospitals generally, but which also had the effect of increasing costs of providing ERISA plan benefits to New York beneficiaries, was not pre-empted by ERISA. *Id.* at 816. As the Supreme Court explained, "Any state tax, or other law, that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute." *Id.*; *see also Travelers Ins. Co.*, 514 U.S. at 659 ("Indeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that '[p]re-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability'") (citation omitted).

This distinction is why the Association also argued the assessment mechanism in SDCL Ch. 58-29C is a law of general applicability. Indeed, the cases cited by the Association in Section II.B.1, *supra*, all concluded ERISA does not pre-empt a state's authority to impose insurance-related administrative or regulatory expenses under statutes of general applicability. *See, e.g.*, *Travelers Ins. Co.*, 514 U.S. at 661; *Boyle*, 68 F.3d at 1101; *Musser*, 65 F.3d at 653; *United Wire*, 995 F.2d at 1192; *Lane*, 743 F.2d at 1340. While the Trust tries to distinguish these cases, the Trust fails to dispute the basic premise for which they stand: ERISA does not pre-empt generally applicable state regulations that

impose a mere economic impact on plans governed by ERISA. Again, the Trust also cites no contrary authority.

As for the assessment mechanism itself, the Association is required to assess its members for the funds needed to fulfill its statutory obligations based on each member's pro rata share of premiums received in South Dakota during the three (3) calendar years prior to the year in which the Association becomes obligated to provide benefits. SDCL 58-29C-52.C(2). The statute neither singles out ERISA plans for different treatment, nor does it refer to ERISA plans in any way. *Mackey*, 486 U.S. at 830. Likewise, the statute in no way conflicts with an express requirement for how ERISA plans must be administered. *Egelhoff*, 532 U.S. 141 at 150. Thus, it is a law of general applicability, which is applied to all Association members regardless of whether the member is an ERISA plan or not. *See De Buono*, 520 U.S. at 816; *Boyle*, 68 F.3d at 1101 ("The provider tax does not apply to ERISA plans differently than non-ERISA plans, and it is a statute of general application"). Again, the Trust cites no contrary authority or authority in support of the positions it is asking the Court to accept.

Therefore, the assessment mechanism of SDCL Ch. 58-29C does not violate ERISA merely because some of the Trust's funds must be put toward satisfying its obligations for insolvencies that occurred while it was a member of the Association. Thus, the Circuit Court correctly held ERISA does not pre-empt application of SDCL Ch. 58-29C to the Trust.

III. The Circuit Court Did Not Err When it Ordered the Trust to Pay Interest

Assessments accrue interest at the rate of ten percent per annum. SDCL 58-29C-52.A; *see also* SDCL 21-1-13.1; SDCL 54-3-16. The Trust

paid the 2020 Assessment under protest via letter dated February 21, 2020. Stipulation, ¶ 15; Record L. The Trust then paid the 2021 Assessment under protest via letter dated January 25, 2021. Stipulation, ¶ 24; Record U. The Assessments were each in the amount of $77,943.55. Record L; Record U.

The OHE ordered the Association to refund the Assessments on March 23, 2021, along with prejudgment interest. AP. 35. Pursuant to SDCL 58-29C-52.I(5), "[i]nterest on a refund due a protesting member insurer shall be paid at the rate actually earned by the [A]ssocation." Thus, on April 7, 2021, the Association returned to the Trust a total payment in the amount of $155,898.50, which included the interest earned by the Association while the Assessment funds were in its possession. *See* Appellee Appx. 5-8 (correspondence on the Association's repayment following the OHE's Decision, along with interest). However, on December 30, 2021, the Circuit Court entered its Order and Final Judgment, which reversed the OHE and ordered the Trust to pay the Assessments along with prejudgment interest at the rate of 10% per annum, with interest beginning on April 7, 2021.

The Circuit Court's award of interest is correct. By reversing the OHE, the OHE's Decision "is without any validity, force or effect, and ought never to have existed." *St. John v. Peterson*, 2013 S.D. 67, ¶ 22, 837 N.W.2d 394, 400. The purpose of prejudgment interest is to reimburse a

party for the period of time it was deprived the use of money. *Casper Lodging, LLC v. Akers*, 2015 S.D. 80, ¶ 76, 871 N.W.2d 477, 500, *abrogated on other grounds by Magner v. Brinkman*, 2016 S.D. 50, ¶ 76, 883 N.W.2d 74. Further, an award of prejudgment interest is mandatory. *Id.*, ¶ 74. Here, the Association lost the use of the Assessment funds on April 7, 2021, when it was erroneously ordered to return them to the Trust. Therefore, the Circuit Court did not err when it used that date as the date prejudgment interest began to accrue, and the Circuit Court correctly required the Trust to pay interest at the rate of 10% per annum going forward. Thus, the Circuit Court's award of interest should be affirmed.

CONCLUSION

The Court should conclude the Circuit Court did not err when it held the Association had the authority to issue the Assessments. Further, the Court should conclude the Circuit Court did not err when it held ERISA did not preclude the Trust from paying the Assessments. Finally, the Circuit Court's award of interest was correct. Thus, the Circuit Court should be affirmed.

Dated at Sioux Falls, South Dakota, this 5th day of May, 2022.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ Michael L. Snyder

Charles D. Gullickson
Mitchell A. Peterson
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 9,834 words and 52,053 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 points) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 5th day of May, 2022.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ Michael L. Snyder

Charles D. Gullickson
Mitchell A. Peterson
Michael L. Snyder

206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellee" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on the 5th day of May, 2022.

The undersigned further certifies that an electronic copy of "Brief of Appellee" was served electronically to the attorneys set forth below, on the 5th day of May, 2022.

Michael F. Shaw
Terra M. Larson
May, Adam, Gerdes, & Thompson
503 South Pierre Street
PO Box 160
Pierre, SD 57501
Attorneys for Appellant

Dated at Sioux Falls, South Dakota, this 5th day of May, 2022.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

/s/ Michael L. Snyder

_____

Charles D. Gullickson
Mitchell A. Peterson
Michael L. Snyder
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880

Facsimile: (605) 335-3639
Attorneys for Appellee

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SOUTH DAKOTA BANKERS BENEFIT PLAN TRUST, Appellant, vs. SOUTH DAKOTA LIFE & HEALTH GUARANTEE ASSOCIATION Appellee	)	Appeal No. # 29895

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLANT

Michael F. Shaw
Terra M. Larson
May, Adam, Gerdes
& Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501
Attorneys for the Appellant

Charles D. Gullickson
Mitchell A. Peterson
Michael A. Snyder
Davenport, Evans, Hurwitz
& Smith, LLP
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101
Attorneys for Appellee

NOTICE OF APPEAL FILED FEBRUARY 2, 2022

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REPLY ARGUMENT

I. THE TRUST DID NOT BECOME LIABLE FOR ALL FUTURE ASSESSMENTS IN 2017.

The Association argues that because the Association's Board passed a resolution on April 5, 2017 making reference to future assessments, the 2017 resolution triggered all future liabilities to the Trust because the Trust was on notice that an assessment "will be called . . . in the future." Appellee's Brief, p. 21. The Association categorizes all subsequent resolutions authorizing assessments as being "essentially re-authorized . . . ." *Id.* It then states that "the assessments were then 'called' ahead of each year's March 1 installment payment due date." *Id.* The Association's characterization, however, is not actually reflected in the language of that resolution. AP 067-68.

The 2017 resolution, in applicable part, actually states the following:

> The Board hereby ratifies its participation in the Penn Treaty Reinsurance Agreements on a Reserve Funding basis . . . and directs the Executive Director to make a payment on behalf of the Association to the LTC Re for the *initial payments* due from the Association as reasonably determined by the LTC Re.

SR 068, ¶ 1 (emphasis added).

> The Board hereby authorizes and approves a Class B assessment of its member insurers having health premiums in South Dakota *for the time periods specified herein in the amount of $8,800,000* [amounting to the 2017 assessment] . . . . The Board notes that the current estimated amount of estate assets allocable to the Association is $3,176,000 and may be subject to change.

Id. ¶ 2 (emphasis added).

> The Board determines that the appropriate calendar years for determining member insurers' pro rata share of health premiums in South Dakota are 2014, 2015, and 2016. The Board acknowledges, however, that 2016 is not currently available, and the Executive Director of the Association is directed to use data available for the years 2013, 2014, and 2015, with the *expectation* that the *future* Penn Treaty assessment for the Association will be based on

> the years 2014, 2015, and 2016, and it is the *expectation* of the Board that in *a subsequent Penn Treaty assessment* the Executive Director will conduct a true-up amount the Association and its members to align the member insurers' payment amounts . . . .

Id. ¶ 3 (emphasis added).

As a refresher, SDCL § 58-29C-52.B(2) sets forth the obligations of a member insurer, which are to timely pay assessments that are "*authorized and called* to the extent necessary to carry out the powers and duties of the association under Section 58-29C-51 with regard to an impaired or insolvent insurer." SDCL § 58-29C-52.B(2) (emphasis added). The term "authorized assessment" is defined as "a *resolution* by the board of directors *has been passed whereby an assessment will be called* immediately or in the future from member insurers for a *specified amount*. An assessment is authorized when the resolution is passed." SDCL § 58-29C-48(3) (emphasis added). The term "called assessment" "means that a *notice has been issued* by the association *to member insurers requiring that an authorized assessment be paid* within the time frame set forth within the notice. An authorized assessment becomes a called assessment when notice is mailed by the association to member insurers." *Id.* at (5) (emphasis added).

Pursuant to SDCL § 58-29C-25.B, "Class B assessments are *authorized and called* to the extent necessary to carry out the powers and duties of the association under § 58-29C-51 with regard to an impaired or an insolvent insurer." (emphasis added). "[A]ssessments for funds to meet the requirements of the Association with respect to an impaired or insolvent insurer may not be authorized or called until *necessary* to implement the purposes of this chapter." SDCL § 58-29C-52C(3) (emphasis added). The statutory language plainly requires an assessment to be both authorized and called before a member is obligated to pay.

In this case, the 2017 Resolution authorized the payment of the 2017 Assessment only. AP 068, ¶ 2. The Resolution's brief reference to future assessments when determining the premium years, coupled with its explicit statement that "the current estimated amount of estate assets allocatable to the Association . . . may be subject to change" does not constitute an "authorized assessment" under the definition, but even if it did, it by no means "called" the future assessments. *Compare* AP 068, ¶ 2 *with* SDCL §§ 58-29C-48(3) & (5). The Association admitted as much when it stated: "The assessments were then "called" ahead of each year's March 1 installment payment due date." Appellee's Brief, p. 21. Thus, even if the 2017 Resolution had authorized the assessment for 2020 and subsequent years, which it did not, the 2020 Assessment was not called until January 22, 2020, more than six months after the Trust ceased to be a member. The same is true for the 2021 assessment and all future assessments thereafter.

By the Association's own admission, the Trust did not incur liability for all future assessments in 2017. *See* Appellee's Brief, p. 21. The Trust incurred liability for the 2017 Assessment in 2017, which it paid without protest. AP 039, ¶ 10. Thereafter, the Trust paid without protest all subsequent assessments which were authorized and called during the times it was a member of the Association. AP 039, ¶ 10 (2017, 2018, and 2019 assessments). However, once the Trust ceased to be a member on or about July 1, 2019, no liability incurred upon the Trust to pay for the assessments authorized and called after that date. This Court must, therefore, reverse the circuit court's decision that improperly held the Trust liable for assessments that were authorized and called after it ceased to be a member on or about July 1, 2019.

II. THE ASSOCIATION'S PLAN OF OPERATION DOES NOT ALLOW THE ASSOCIATION TO ASSESS THE TRUST.

The Association bends over backwards in its brief in attempting to somehow equate the Penn Treaty Liquidation (an obvious insolvency) to an impairment. However, the 2007 Plan of Operation — which is the version of the Association's Plan applicable to the Trust — did not allow the Association to assess the Trust for an insolvency, like the Penn Treaty liquidation. The 2007 Plan of Operation states:

> An insurer which ceases to be admitted shall automatically cease to be a member effective on the day following the termination of its license to transact the kinds of insurance covered by the Act. However, such insurer shall remain liable for any assessments based on *impairments* occurring prior to the termination of its license.

AP 121, Record R, Exhibit A (emphasis added).

The Association attempts to characterize that language as applicable to the Penn Treaty Liquidation because at one point in time, PTNA and ANIC were once impaired and impairments are "precursors to insolvencies." *See* Appellee's Brief, p. 12. However, while the Association may be correct that an impairment is a potential "precursor" to an insolvency, that doesn't give the Association the power to hold the Trust liable for an *assessment based on an insolvency*; which is what the Penn Treaty Liquidation assessments are. This is especially true when the statutory definitions of impairments and insolvencies specifically state one is not the other.

Pursuant to SDCL Ch. 58-29C, "impairments" are not "insolvencies," and these terms are not interchangeable. The relevant statutory definitions specifically state that an impairment is not an insolvency. *See* SDCL § 58-29C-48. "Impaired insurer" is defined as "a member insurer which, after July 1, 2003, *is not an insolvent insurer,* and is placed under an order of rehabilitation or conservation by a court of competent jurisdiction."

SDCL § 58-29C-48(10) (emphasis added). "Insolvent insurer" is defined as "a member insurer which after July 1, 2003, is placed under an *order of liquidation* by a court of competent jurisdiction with a finding of insolvency." *Id.*(11) (emphasis added).

Furthermore, even if this Court were to find that the separately-defined impaired insurer and insolvent insurer definition in the code, which specifically state that one is not the other and vice versa (*see* SDCL § 58-29C-48(10)&(11)) did not matter and the Association could make assessments based on insolvencies versus impairments using its 2007 Plan of Operation language, the Association still could not assess the Trust.

Again, the 2007 Plan of Operation language states:

> An *insurer* which ceases to be admitted shall automatically cease to be a member effective on the day following the termination of its license to transact the kinds of insurance covered by the Act. However, such *insurer* shall remain liable for any assessments based on impairments occurring prior to the termination of its license.

AP 121, Record R, Exhibit A (emphasis added). The Trust was never an "insurer" under SDCL Ch 58-29C's definition and it never possessed a license to transact insurance. It was only required to be a member through a separate statute.[1] The language stating "such insurer shall remain liable for any assessments" references the prior sentence and an insurer whose license was terminated. AP Record R, Exhibit A. Had the Plan of

[1] The Association attempts to categorize the Trust's pre-2019 obligation of membership as making it a *de jure* "member insurer." However, that categorization, too, is unsupported by the statutory language. "Member insurer" is defined as "an insurer licensed or that holds a certificate of authority to transact in this state any kind of insurance for which coverage is provided under § 58-29C-46, and includes an insurer whose license or certificate of authority in this state may have been suspended, revoked, not renewed, or voluntarily withdrawn . . . ." SDCL § 58-29C-48(12). The Trust, is not nor has it ever been licensed to transact insurance. As such, while it was required to be a "member" of the Association, the Trust was by no means a "member insurer."

Operation stated something along the lines of "[h]owever, *a former member* shall remain liable for any assessments based on impairments occurring prior to the termination of its *membership*," then such provision could be applicable. However, again, that's not what the applicable Plan of Operation language states.

Neither the statutory language of SDCL Ch. 58-29C nor the Association's 2007 Plan of Operation obligates the Trust to continue to pay assessments which are authorized and called after it ceased to me a member in 2019. Furthermore, neither the Association's arguments regarding retroactivity of Senate Bill 37[2] nor their arguments about impairments being "precursors" to insolvencies allow for the language of SDCL Ch. 58-29C or the Association's 2007 Plan of Operation to be interpreted so as to obligate the Trust to continue paying assessments that were authorized and called after July 1, 2019. The circuit court incorrectly ruled in favor of the Association, and this Court should reverse the circuit court's decision in this case.

III. ERISA PREEMPTS THE ASSOCIATION'S ASSESSMENT OF THE TRUST.

In arguing that ERISA preemption does not preclude the Association's assessment of the Trust, the Association relies upon two primary legal conclusions: (1) because SDCL § 58-18-88(6) has now been repealed, the question of whether the pre-amendment version improperly "related to" an ERISA plan is moot; and (2) that both the pre-

[2] Pursuant to the Trust's Appellant's brief, whether Senate Bill 37 is to be applied retroactively doesn't make any difference. All Senate Bill 37 did was relieve the Trust from its membership obligation with the Association. It is the Association's own statutes and Plan of Operation that relieve the Trust from assessments that were not authorized and called until after the Trust was no longer a member.

amendment version of SDCL § 58-18-88(6) and the current SDCL § 58-29C-52 amount to a permissible "cost of doing business" for the Trust.

a. The Trust's "relates to" argument is not moot.

The Association concludes that because SDCL § 58-18-88(6) was repealed in 2019, "the question of whether SDCL 58-18-88(6) improperly 'related to' an ERISA plan is moot." *See* Appellee's Brief at pg. 24.[3] The Association offers no legal or other rationale for reaching this conclusion. *Id.* In reality, however, absent the pre-amendment version of SDCL § 58-18-88(6), SDCL § 58-29C-52 provides no basis whatsoever for the Association's assessment against the Trust. Since that assessment is the sole matter before this Court, the pre-amendment version of SDCL § 58-18-88(6) cannot be so conveniently disregarded.

The pre-amendment version of SDCL § 58-18-88(6) provided as follows:

> A self-funded multiple employer trust, *as defined in section 3 of the federal Employee Retirement Income Security Act of 1974*, 29 U.S.C. §1002, paragraph 40, that is sponsored by an association, may be authorized by the director if the multiple employer trust meets all of the following conditions … (6) participate in the South Dakota Life and Health Insurance Guaranty Association pursuant to chapter 58-29C and [be] a member pursuant to subdivision 58-29C-48(12).

(Emphasis added.)

With enumerated exceptions, ERISA voids all state laws to the extent that they "relate to" an ERISA plan: "the provisions of [ERISA] shall supersede any and all State

[3] It should also be observed that the Association expends a significant amount of its briefing explaining how Senate Bill 37 was substantive versus procedural and therefore requires this Court to find that the Association can continue to assess the Trust. *See* Appellant's Brief, pp. 22-24. Now the Association is arguing that the very language it previously claimed cannot be ignored must be considered moot for the purpose of ERISA preemption.

laws insofar as they may now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144(a). Multiple U.S. Supreme Court rulings confirm the obvious: a statute such as the pre-amendment version of SDCL § 58-18-88(6) that by its very terms applies specifically and only to an ERISA plan sufficiently "relates to" ERISA for purpose of ERISA preemption. "A state law relates to an ERISA plan if it has a connection with or reference to such a plan." *See Egelhoff v. Egelhoff,* 532 U.S. 141, 147 (2001) (internal quotations omitted); *see also Shaw v. Delta Airlines,* 436 U.S. 85, 97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."); *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 830 (1988) ("The state statute's express reference to ERISA plans brings it within the [ERISA's] preemptive reach."). As previously explained, because the pre-amendment version of SDCL § 58-88-18(6) so explicitly "relates to" an ERISA plan, the Association's heavy reliance upon case law analyzing the underlying "relates to" test is simply not applicable to the facts of this case. *See* Appellant's Brief, pp. 21-22.

The question of whether the pre-amendment version of SDCL § 58-18-88(6) "relates to" an ERISA plan is not moot. Without a doubt and pursuant to firmly established U.S. Supreme Court case law, the pre-amendment version of SDCL § 58-18-88(6) "related to" an ERISA plan for purposes of 29 U.S.C. § 1144(a). As a result, unless an exception applies, the Association's assessments against the Trust are preempted by ERISA.

b. The Association's "cost of doing business" argument causes SDCL Ch. 58-29C and § 58-18-88(6) to fall outside of any exception to ERISA preemption.

The Association has offered multiple theories for why the assessments against the Trust can co-exist with ERISA's exclusive benefit rule. First, the Association argues the assessments are simply a "cost of doing business." Second, it argues the assessments somehow represent insurance-related administrative or regulatory expenses. Third, it argues the assessments are made pursuant to statutes of general applicability. Finally, the Association now seems to suggest that a state can regulate a MEWA such as the Trust in any manner it wishes: "[t]he assessment mechanism of SDCL 58-29C functions as a cost of doing business, which ERISA plainly permits. METs/MEWAs like the Trust have no inherent right to exist and do business in South Dakota; that privilege is granted by the Legislature." Appellee's Brief, p. 29.

The Association's expansion of its "cost of doing business" justification for the assessment shines a light on its rather puzzling view that the South Dakota Legislature is empowered to subject ERISA-covered MEWAs to any conditions it sees fit in exchange for the "right to exist and do business in South Dakota." Appellee's Brief, p. 29. Not only is this expanded viewpoint inconsistent with the statutory limitation set forth in 29 U.S.C. § 1144(b)(6)(A)(ii), discussed *supra*, it also begs the question of whether the Association's assessments of the Trust pursuant to SDCL Ch. 58-29C by virtue of the pre-amendment version of SDCL § 58-18-88(6) are even made pursuant to laws *regulating insurance* in the first place.

As previously discussed, certain exceptions to ERISA preemption apply even when a state statute is found to "relate to" an ERISA plan. *See* 29 U.S.C. § 1144. Relevant to this matter is the exception to ERISA preemption that applies in the case of self-funded MEWAs such as the Trust: "state laws *regulating insurance* are not

preempted to the extent not inconsistent with ERISA." 29 U.S.C. § 1144(b)(6)(A)(ii) (emphasis added).[4] Importantly, however, unless SDCL Ch. 58-29C and the pre-amendment version of SDCL § 58-18-88(6) can be properly characterized as laws *regulating insurance* when applied to the Trust, the special exception to ERISA preemption set forth in 29 U.S.C § 1144(b)(6)(A)(ii) does not apply and the state laws in question are preempted under the "relates to" rule in U.S.C § 1144(a).

For purposes of applying the insurance savings clause, ERISA preemption case law makes clear that not all laws regulating insurance are found in the insurance code, and not all laws found in the insurance code constitute a law *regulating insurance*. *See e.g.*, *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 740 (1985); *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 50 (1987). It is also possible for a state insurance law to be saved from preemption to the extent that it applies to insurance companies but preempted to the extent that it applies to other entities. For example, in reviewing a state law that required group life insurance policies to offer continuation and conversion rights, the U.S. Department of Labor concluded that two provisions of the law were not preempted, due to the insurance savings clause, but that other provisions (regarding premium collection, notices, and liability) were preempted because they were directed at employer-sponsors of life insurance plans, not at insurers. U.S. Department of Labor, *Advisory Opinion 96-03A*, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1996-03a (last visited May 31, 2022).

[4] The Trust has also previously explained in detail its rationale for why the Association's Assessments against the Trust under to SDCL Ch. 58-29C, made possible by the pre-amendment version of § 58-18-88(6) — both of which are pursuant to South Dakota's insurance code — must be found inconsistent with ERISA's exclusive benefit rule. *See* Appellant's Brief, pp. 23–28.

While the provisions of SDCL § 58-18-88(6) and SDCL Ch. 58-29C are both certainly insurance laws to the extent they are creatures of the state's insurance code, the Association's stated views coupled with the fact that the assessments serve no purpose other than essentially taxing the Trust (a so-called "cost of doing business"), calls into question of whether these laws, when applied to the Trust, have the requisite effect of actually "regulating insurance." Based on precedential case law, they do not.

In *Kentucky Association of Health Plans, Incorporated v. Miller*, the U.S. Supreme Court set forth the test for determining when a state law will be deemed to regulate insurance within the meaning of the ERISA preemption savings clause. 538 U.S. 329 (2003). In order for a state law to survive ERISA preemption as a law regulating insurance, "it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. . . . Second, . . . the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* at 342. While the insurance statutes in this case satisfy the requirements of the first prong of this test, it is unclear how these laws could ever satisfy the second prong according to the Association's view. *See Sgro v. Danone Waters of N. Am., Inc.*, 532 F.3d 940, 943-944 (9th Cir. 2008) (finding state insurance regulation requiring insurers reimburse claimants for copying costs was ERISA-preempted as the law did not substantially affect risk-pooling arrangement between insurer and insured because, among other reasons, it did not require insurers to insure against additional risks).

Notably, SDCL § 58-29C-46.B(2)(d)(i) expressly states that "[t]his chapter may not provide coverage for a portion of a policy or contract issued to a plan or program of an employer, association, or other person to provide life, health, or annuity benefits to its

employees, members, or others, to the extent that the plan or program is self-funded or uninsured, *including benefits payable by an employer, association, or other person under a multiple employer welfare arrangement as defined in section 3(40) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1002(40)*." (emphasis added). While the Trust agrees that SDCL Ch 58-29C and the pre-amendment version of SDCL § 58-18-88(6), generally speaking, may constitute laws regulating insurance, the application of these laws to the Trust — with the net effect being as the Association argues nothing more than a "cost of doing business," essentially a tax [5] — seemingly has no impact whatsoever on the risk pooling arrangement between the Trusts and its participants.

Where it cannot be disputed that the Association's assessments are made to fund benefits for a statutorily-defined set of covered participants in the event certain member insurers become insolvent and that the Trust's participants are expressly excluded from SDCL Ch. 58-29C's definition of "covered participants,"[6] this Court cannot deem application of SDCL Ch 58-29C and SDCL § 58-18-88(6) *to the Trust* to constitute laws "regulating insurance." (emphasis added). Therefore, the ERISA "insurance savings clause" exception for self-funded MEWAs such as the Trust set forth in 29 U.S.C. §

[5] Notably, state tax laws are not saved from ERISA preemption and are expressly preempted when found to "relate to" an ERISA plan. *See* 29 U.S.C. § 1144(b)(5)(B)(i).

[6] The Association now claims that it "has never taken the position that it would not provide coverage for plan participants of a MEWA/MET that was a member of the Association under the pre-amendment version of SDCL 58-18-88(6)." Appellee's Brief, p. 29. However, this new claim is in direct conflict with prior statements made by the Association in this case. For example, according to the Association: "[T]he fact that the assessment does not provide a direct benefit to the Trust's participants does not provide a rationale for the application of ERISA preemption." *See* Record M (Letter from Charles Gullickson, pg. 5). The Association's claims also contradict the statute itself, as SDCL § 59-29C-52 specifically excludes coverage for participants in a MEWA such as the Trust. *See* SDCL § 58-29C-46.B(2)(d)(i).

1144(b)(6)(A)(ii) does not apply and the pre-amendment version of SDCL § 58-18-88(6) should be found preempted as clearly relating to an ERISA plan pursuant to 29 U.S.C. § 1144(a).

This is essentially a matter arising out of legislative fiat, corrected in part by Senate Bill 37. To summarize, an ERISA-covered MEWA such as the Trust never should have been made subject to assessment by the Association as a member insurer under SDCL § 58-29C-52, particularly considering that the Trust's own participants were at all times statutorily excluded from the Association's insolvency protections. To use the Association's own words, the assessments were nothing more than a "cost of doing business." As such, to accept the Association's internally inconsistent and self-serving arguments requires this Court to adopt an ERISA preemption analysis that ignores the express terms of the ERISA statute, precedential case law and the economic reality of application of the pre-amendment version of SDCL § 58-18-88(6) and Ch. 58-29C to the Trust.

ERISA preempts any and all state laws that "relate to" an ERISA plan. The pre-amendment version of SDCL § 58-18-88(6) unquestionalbly related to an ERISA plan. Assuming, arguendo, that the exception to ERISA preemption at 29 U.S.C. § 1144(b)(6)(A)(ii) even applies, the pre-amendment version of SDCL § 58-18-88(6) and Ch. 58-29C should be found preempted by ERISA as their application to the Trust is inconsistent with ERISA's exclusive benefit rule. In the alternative, despite being creatures of the South Dakota insurance code, SDCL § 58-18-88(6) and Ch. 58-29C, when applied to the Trust, should not be characterized as laws regulating insurance in the first place. Pursuant to the U.S. Supreme Court, to fall within the exception to ERISA

preemption for laws regulating insurance, the laws in question must affect the risk pooling arrangement between the insurer and the insured. This requirement has not been satified. Thus, where a law so clearly relating to an ERISA plan, like the pre-amendment version of SDCL § 58-18-88(6), is not otherwise saved from preemption, it must be found preempted by the controlling federal statute.

III. THE CIRCUIT COURT'S AWARD OF PREJUDGMENT INTEREST WAS IMPROPER.

The Association points to the fact that it paid interest of 0.04% (totaling $11.40) to the Trust pursuant to SDCL § 58-29C-52.I(5) as some sort of authority and justification to suggest that the Court's order that the Trust pay prejudgment interest of 10% pursuant to SDCL § 21-1-13.1 to the Association was somehow appropriate in this case. Section 58-29C-52.I(5) states that "[i]nterest on a refund due a protecting member insurer shall be paid at a rate actually earned by the *association*." Nothing in SDCL Ch. 58-29C requires any like kind payment of interest back to the Association should the member somehow be required to repay the Association for any refund it may be required to repay.

As discussed in the Appellant's Brief, "[p]rejudgment interest seeks to compensate an injured party for [the] *wrongful detention* of money owed." *S.D. Subsequent Injury Fund v. Homestake Mining Co*., 1999 S.D. 159, ¶ 9, 603 N.W.2d 527, 529 (internal quotations omitted) (emphasis added). The Trust, in accepting that money the Association was ordered to pay it, was not "wrongfully detaining" its own money; it was simply receiving its own money, per the OHE decision. Therefore, the circuit court erred when it awarded prejudgment interest to the Association, because the Trust was not wrongfully detaining the money which the OHE had ordered the Association pay it.

CONCLUSION

The Trust did not become liable for all future Penn Treaty assessments in 2017. The 2020 and 2021 assessments were authorized and called per statute after the Trust ceased to be a member of the Association on or about July 1, 2019. The Plan of Operation version applicable to this case permitted the Association to assess insurers whose licenses had been terminated for impairments, but not for insolvencies. ERISA preempts any and all state laws that "relate to" an ERISA plan. The Association's assessment of the Trust, for the sole purpose of funding coverage for beneficiaries of insolvent insurance arrangements *other than* the Trust, is, on its face preempted by ERISA and otherwise inconsistent with ERISA's exclusive benefit rule. The Association's argument that the assessment is a "cost of doing business" demonstrates why no exception to ERISA preemption applies in this case.

The Supreme Court should reverse the circuit court's decision and affirm the OHE's decision that the Trust is not liable to pay any assessment from the Association which was authorized and called after the Trust ceased to be a member on July 1, 2019.

Dated this ____ day of June, 2022.

MAY, ADAM, GERDES & THOMPSON, LLP

BY:_____

TERRA M. LARSON
Attorneys for Appellant
503 South Pierre Street; P.O. Box 160
Pierre, SD 57501
(605) 224-8803
terra@mayadam.net

CERTIFICATE OF SERVICE

Terra M. Larson of May, Adam, Gerdes & Thompson LLP hereby certifies that on the ___ day of June, 2022, she served an electronic copy of the foregoing Appellant's Reply Brief in the above-captioned action to the appellee's counsel, to-wit:

Charles D. Gullickson
Mitchell A. Peterson
Michael A. Snyder
Davenport, Evans, Hurwitz
& Smith, LLP
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101
Attorneys for Appellee

BY:_____
Terra M. Larson

CERTIFICATE OF COMPLIANCE

Terra M. Larson, counsel for Appellant, hereby certifies that the foregoing Reply Brief of Appellant complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 4,542 words, exclusive of the Table of Contents, Table of Authorities, Certificate of Service, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Times New Roman, and left justified.

Dated this ____ day of June, 2022.

MAY, ADAM, GERDES & THOMPSON, LLP

BY:_____
TERRA M. LARSON
Attorneys for Appellant
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
(605) 224-8803
terra@mayadam.net

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL 15-26C-3 she served an electronic copy in Word format, and the original and two (2) hard-copies of the above and foregoing Appellant's Reply Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

Clerk of the Supreme Court
State Capital Building
500 E. Capitol Avenue
Pierre, SD 57501
scclerkbriefs@ujs.state.sd.us

Dated this ____ day of June, 2022.

MAY, ADAM, GERDES & THOMPSON, LLP

BY:_____
TERRA M. LARSON
Attorneys for Appellant
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
(605) 224-8803
terra@mayadam.net