

CAUSE NO. D-1-GN-19-000723

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
CAPSON PHYSICIANS INSURANCE	§	
COMPANY,	§	
<i>Defendant.</i>	§	250 <sup>TH</sup> JUDICIAL DISTRICT

**SPECIAL DEPUTY RECEIVER’S APPLICATION**  
**TO APPROVE SETTLEMENT AGREEMENT**  
**[Nationwide Life and Annuity Insurance Company]**

TO THE HONORABLE JUDGE OF SAID COURT:

Cantilo & Bennett, L.L.P., Special Deputy Receiver of Capson Physicians Insurance Company (the “SDR” and “CPIC,” respectively) files this *Application to Approve Settlement Agreement [Nationwide Life and Annuity Insurance Company]* (the “Application”), and shows the following:

**I. INTRODUCTION**

1.1 The SDR seeks approval of a settlement in connection with its claims involving certain insurance proceeds from a key man life insurance policy covering Maury Magids (the “Nationwide Policy”) which was issued by Nationwide Life and Annuity Insurance Company (“Nationwide”). The SDR seeks this Court’s approval of the settlement under TEX. INS. CODE § 443.154(y) because it involves a claim exceeding \$5 million. A true and correct copy of the Settlement Agreement (the “Nationwide Settlement Agreement”) is attached as Exhibit 1. In summary, the Nationwide Settlement Agreement provides for: (1) Nationwide to pay the proceeds of the Nationwide Policy and accrued interest to an escrow account held by Wells Fargo Bank and (2) the SDR agrees that any claims it has against Nationwide in connection with the Nationwide

Policy and/or the proceeds of the policy shall be satisfied solely out of the assets in escrow, and (3) the SDR to seek Receivership Court approval of the settlement.

1.3 The settlement is in the best interests of the receivership estates and their policyholders and creditors and has been approved by the Receiver. The SDR is currently negotiating to settle its claims against Capson Corp. and its other affiliated entities. Among the disputed issues is entitlement to receipt of the proceeds of the Nationwide Policy. Settlement with Nationwide will ensure that the funds are safely held, earning interest, while the SDR seeks to resolve its disputes with Capson Corp. This settlement will also prevent the funds from being paid out to Capson Corp. or into the registry of the bankruptcy court in the Capson Corp. bankruptcy proceeding.

## II. BACKGROUND AND JURISDICTION

2.1 CPIC was placed in receivership for rehabilitation in this proceeding on February 11, 2019. The Receiver designated Cantilo & Bennett, L.L.P. as SDR on that same date. Subsequently, on June 28, 2019, the Court entered its *Order Appointing Liquidator and Permanent Injunction* (the "Permanent Injunction").

2.2. This Court has jurisdiction over the subject matter of this Application and of the parties and property affected herein pursuant to TEX. INS. CODE § 443.005. The Court has personal jurisdiction over all claimants against the assets of the receivership estate of CPIC ("Claimants") because this is a civil proceeding arising under and related to a delinquency proceeding under Chapter 443 of the Texas Insurance Code (the "Code"), the transactions and occurrences which form the basis for the proceeding occurred, in whole or in part, in this state, because the Claimants fall under the Court's statutory personal jurisdiction set out in TEX. INS. CODE § 443.005(d) and TEX. CIV. PRAC. & REM. Code Chapter 17, alternatively, because the Claimants reside and/or conduct business in this state that is directly related to the subject matter of this proceeding, and

because the exercise of jurisdiction over any non-resident Claimant comports to customary standards of fair play and substantial justice and complies with the protections of the Constitutions of the United States of America and the State of Texas.

2.3. The SDR is authorized to file this Application pursuant to TEX. INS. CODE § 443.154(y).

2.4. The subject matter of this Application has been referred to the Special Master appointed in this proceeding in accordance with Paragraph III of the *Order of Reference to Master* entered on February 21, 2019 and Paragraph II of the *Supplemental Order of Reference to Master* entered on September 18, 2019.

### **III. THE DISPUTE WITH NATIONWIDE**

3.1 Before receivership, Nationwide issued policy no. B502060540 (the Nationwide Policy). The Nationwide Policy named Maury Magids as insured and Capson Corp. as beneficiary. The Nationwide Policy was purchased using funds improperly diverted from CPIC in violation of Texas law. Moreover, CPIC continued to pay the policy premiums in violation of the supervision order entered against CPIC in early 2018.

3.6 On February 11, 2019, Maury Magids died. On March 7, 2019, Capson Corp. made a claim on the Nationwide Policy and requested the policy proceeds be paid to Capson Corp. Nationwide, aware of the pendency of this proceeding and the SDR's claim to the proceeds of the Nationwide Policy, did not pay the proceeds to Capson Corp.

3.7 On June 28, 2019, the State of Texas filed its Plaintiff's Original Petition, Application for Order Appointing Liquidator, and Request for Injunctive Relief (the "Corp. Receivership Action") in the action styled Cause No. D-1-19-003720, *State of Texas v. Capson Corporation, et al.*, in the 126<sup>th</sup> Judicial District Court for Travis County, Texas. The Corp.

Receivership Action sought to place Capson Corp. and its affiliates (other than CPIC) into receivership along with CPIC. In response, in early July 2019, Capson Corp. and its subsidiaries (other than CPIC) filed petitions in bankruptcy, and Capson Corp. filed an adversary proceeding against Nationwide seeking recovery of the Nationwide Policy's proceeds. Subsequent to the bankruptcy filing, the SDR and Capson Corp. began intensive settlement negotiations seeking a global resolution of all disputes, including entitlement to the Nationwide Policy proceeds. To date, those negotiations remain ongoing.

3.8 On August 21, 2019, facing the necessity to appear and defend in the Capson Corp. adversary proceeding, Nationwide sought permission from the bankruptcy court to interplead the proceeds of the Nationwide Policy into the registry of the bankruptcy court. Nationwide did not dispute its obligation to pay the proceeds of the Nationwide Policy, it requested that it be allowed to pay the funds into the registry of the bankruptcy court to avoid any potential liability should it choose the incorrect party to pay. Due to the jurisdictional conflicts between this Court and the bankruptcy court, the SDR and Capson Corp. agreed that the funds should be paid into a neutral escrow account at Wells Fargo, and that entitlement to the funds should await agreement by the parties and/or final order of a court of competent jurisdiction. Nationwide, in turn, requested that its payment of the funds into the escrow account should absolve it of further potential liability.

#### **IV. THE NATIONWIDE SETTLEMENT**

4.1 The SDR moves the Court to approve the settlement with Nationwide. The Nationwide Settlement Agreement (Exhibit 1) requires Receivership Court approval of its terms, which includes payment of the Nationwide Policy proceeds (in excess of \$5,000,000) to an escrow account agreed to by the SDR. This amount is the full amount that would be owed by Nationwide on account of the Nationwide Policy and would keep the funds in neutral hands – earning interest – pending resolution of the disputes between the SDR and Capson Corp. regarding entitlement to

recover the funds. The payment would avoid any possibility that Nationwide could assert some entitlement to void or otherwise refuse to pay on the Nationwide Policy. Further, payment to the escrow account avoids any need to litigate issues relating to jurisdictional conflicts between this Court and the bankruptcy court at this time, allowing the SDR and Capson Corp. to continue seeking a global resolution of their various disputes by agreement rather than protracted litigation.

#### **V. NOTICE**

5.1 The SDR has served this Application to all known parties at interest and all individuals and entities identified by the SDR in the Certificate of Service by email, or such other method as is described in the Certificate of Service.

#### **VI. OFFER OF PROOF AND VERIFICATION**

6.1 This Application is verified by the affidavit and certification pursuant to TEX. INS. CODE § 443.017(b) by Joseph N. West, Partner in CANTILO & BENNETT, L.L.P., Special Deputy Receiver of Capson Physicians Insurance Company.

#### **VII. NOTICE OF ELECTRONIC SERVICE REQUIREMENT**

7.1 Pursuant to the *Order Granting Special Deputy Receiver's Application to Require Electronic Service of Pleadings and Notices* entered on April 3, 2019, all pleadings filed in response to this Application or in regard to the estate shall be served by email on the undersigned counsel and all parties shown in the attached Certificate of Service.

#### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, CANTILO & BENNETT, L.L.P., Special Deputy Receiver of Capson Physicians Insurance Company prays that the Court enter an order as follows:

1. Granting the Application;
2. Approving the Nationwide Settlement Agreement in the same or substantially

similar format as Exhibit 1;

3. Authorizing the SDR to proceed with the performance of its duties under the Nationwide Settlement Agreement and to accept Nationwide's payment to the escrow account as resolution of claims against Nationwide;
4. Ordering that notwithstanding any provision to the contrary that otherwise may be contained in the Order or the Nationwide Settlement Agreement, the Order does **not** release the SDR's actions, causes of action, claims, counterclaims, debts, demands, liabilities, losses and damages against any party **other** than Nationwide (and, as to claims against Nationwide, such release will only operate to require the SDR to seek to satisfy any such claim from the proceeds paid into the escrow account described in the Nationwide Settlement Agreement);
5. Finding that the SDR expressly reserves its actions, causes of action, claims, counterclaims, debts, demands, liabilities, losses and damages, known or unknown, against all other parties, including but not limited to: Capson Corp., Capson Physicians Insurance Agency, Inc., Capson Healthcare Services, Inc., AXA Equitable Life Insurance Company, all current or former officers, directors, employees, agents, shareholders, and/or attorneys of CPIC, Capson Corp., Capson Physicians Insurance Agency, Inc., Capson Healthcare Services, Inc.;
6. Authorizing the SDR to take any action necessary to carry out the Order;
7. Finding that the Order constitutes a final judgment fully resolving all issues relating to the Application, provided that this Court shall retain jurisdiction to issue further orders pursuant to TEX. INS. CODE Chapter 443;
8. Finding that the Order shall not affect in any way, the Receiver's and the SDR's

immunities from suit and shall not give rise to any right to sue or create any causes of action against the Receiver or the SDR;

9. Finding that the Permanent Injunction and the automatic stay under TEX. INS. CODE § 443.008 remain in effect;
10. Ordering that the SDR and Nationwide shall pay their own respective attorneys' fees and costs that have arisen, and may continue to arise, in connection with this Order and the Nationwide Settlement Agreement; and
11. Granting the SDR such other and further relief to which it may justly entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on November 1, 2019, a true and correct copy of the foregoing *Application to Approve Settlement Agreement [Nationwide Life and Annuity Insurance Company]* was served pursuant to the Supplemental Order of Reference to Master, the Texas Rules of Civil Procedure and TEX. INS. CODE 443.007(d) on the following by email, except as specifically otherwise noted.

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Adrienne Cain

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1634 Broadway

Paducah, KY 42002

/s/ Greg Pierce  
Gregory A. Pierce

## APPLICANT'S NOTICE OF SUBMISSION

Pursuant to the terms of the Supplemental Order of Reference to Master entered by the District Court in this cause, the Special Deputy Receiver's *Application to Approve Settlement Agreement [Nationwide Life and Annuity Insurance Company]* is hereby set for written submission before the Special Master, Tom Collins, on **November 18, 2019**.

The Special Master has asked that the following rules be provided you:

1. Any objection must be filed with the Travis County District Clerk at least three (3) calendar days before the submission date.
2. A copy of any objection shall be served by e-mail by such date on:
  - (a) The Special Master's Docket Clerk, at [specialmasterclerk@tdi.texas.gov](mailto:specialmasterclerk@tdi.texas.gov);
  - (b) The undersigned counsel, Greg Pierce at [gpierce@gpiercelaw.com](mailto:gpierce@gpiercelaw.com); and
  - (c) All interested parties, including those listed on the SDR's Certificate of Service.
3. The objecting party shall coordinate with the SDR's counsel and the Docket Clerk [(512) 676-6915] to obtain an oral hearing setting for argument on the Application and Objection, and complete and attach an "Objecting Party's Notice of Oral Hearing" to the objection.
4. The written objection must specifically list all reasons for objection with supporting references to and discussion of statutory and case authorities. Reasons not stated in writing will not be considered orally.
5. **Please note that if an objection is not filed as described in the Notice of Submission, the Master may consider the Application without a hearing.**
6. **Failure to file timely a written objection before the Special Master constitutes a waiver of the right to object to the Special Master's recommendation to the District Court.**
7. Any Acknowledgment of Notice and Waiver to be filed by the Guaranty Association or other interested party should be filed at least three (3) calendar days before the submission or hearing date.

/s/ Greg Pierce  
Gregory A. Pierce



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

AFFIDAVIT OF JOSEPH N. WEST

STATE OF TEXAS §  
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority appeared Joseph N. West, who after being by me duly sworn, stated the following under oath:

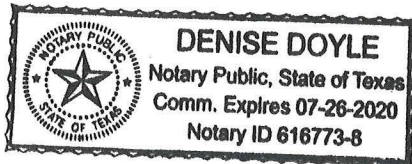
1. "My name is Joseph N. West. I am of sound mind, capable of making this affidavit, and am competent to testify to the matters contained in this affidavit.
2. I am a partner in CANTILO & BENNETT, L.L.P., the Special Deputy Receiver of Capson Physicians Insurance Company (the "SDR" and "CPIC" respectively), I am duly authorized to make this Affidavit on behalf of the SDR.
3. I have reviewed the *Application to Approve Settlement Agreement [Nationwide Life and Annuity Insurance Company]* and the facts stated therein are true and correct based on my personal knowledge, my review of estate records and my consultation with the staff and subcontractors.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
JOSEPH N. WEST

SUBSCRIBED AND SWORN TO BEFORE ME on October 31, 2019, by Joseph N. West, partner in CANTILO & BENNETT, L.L.P., Special Deputy Receiver of Capson Physicians Insurance Company.

  
\_\_\_\_\_  
Notary Public, State of Texas



# **EXHIBIT 1**

## SETTLEMENT AGREEMENT

This Settlement Agreement, dated September \_\_\_\_\_, 2019 (the “**Agreement**”), is entered into by and among Nationwide Life and Annuity Insurance Company (“**Nationwide**”) and CANTILO & BENNETT, L.L.P. (the “**SDR**”) in its capacity as the Special Deputy Receiver for Capson Physicians Insurance Company (“**CPIC**”) (Nationwide and the SDR will be collectively referred to as the “**Parties**,” and individually, as a “**Party**”).

### RECITALS

WHEREAS, Nationwide issued a key man life insurance policy (policy number B502060540 (the “**Nationwide Policy**”)) covering Maury Magids; and

WHEREAS, on February 11, 2019, CPIC was placed into receivership in the action styled Cause No. D-1-GN-19-000723; *State of Texas v. Capson Physicians Insurance Company*; in the 250<sup>th</sup> Judicial District Court of Travis County, Texas (“**Receivership Court**”), and the SDR was appointed as special deputy receiver for CPIC; and

WHEREAS, on February 11, 2019, Maury Magids died; and

WHEREAS, on March 6, 2019, Capson Corp. (“**Capson**”) submitted a completed Life Insurance Claim Form, a corporate resolution from Capson, and an original certified death certificate that listed the manner and cause of death of Maury Magids, and also sent a letter to Nationwide reserving its rights to the proceeds as the beneficiary under the Nationwide Policy; and

WHEREAS, on June 28, 2019, CPIC was placed into liquidation by order of the Receivership Court; and

WHEREAS, on July 3, 2019, Capson filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Western District of Texas, Austin Division (the “**Bankruptcy Court**”), captioned as *In re Capson Corp., et al.*, jointly administered under case no. 19-10890-hcm (the “**Bankruptcy Case**”); and

WHEREAS, Capson commenced an adversary proceeding against Nationwide in the Bankruptcy Court in a proceeding captioned as *Capson Corp. v. Nationwide Life and Annuity Insurance Company*, Adv. No. 19-01045-hcm (the “**Nationwide Adversary**”); and

WHEREAS, Nationwide filed a motion in the Bankruptcy Case seeking authority to deposit the proceeds of the Nationwide Policy with the Bankruptcy Court (defined below as the Escrow Property); and

WHEREAS, there is a dispute between the Parties regarding, among other things, the Escrow Property and the jurisdiction of the respective courts, and they, along with Capson, have agreed to deposit the Escrow Property in an escrow account while the SDR and Capson negotiate their own disputes; and

WHEREAS, the Parties agree to direct the deposit of the Escrow Property in escrow certain with the Escrow Agent who agrees to hold and distribute such proceeds in accordance with the terms of the Escrow Agreement attached as **Exhibit A**; and

In consideration of the promises and agreements of the Parties and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

- 1.1 **Payment to Escrow Agent.** Nationwide will pay to the Escrow Agent (as defined in the Escrow Agreement attached as **Exhibit A**) certain proceeds due under the Nationwide Policy in the amount of \$5,063,655.47 (the “**Escrow Property**”) in immediately available funds.
- 1.2 **Satisfaction of Nationwide’s Obligation.** The SDR agrees that payment by Nationwide in conformance with ¶1.1 shall be in full satisfaction of Nationwide’s obligations in connection with the Nationwide Policy, and the SDR agrees that it will look solely to the Escrow Property to satisfy any claim that it has to recovery of the proceeds of the Nationwide Policy.
- 1.3 **Receivership Court Approval.** The Parties recognize and agree that this Agreement must be approved by the Receivership Court before it can be effective. The SDR will file an application for approval of this agreement by the Receivership Court and will take all reasonable actions necessary to obtain approval for this Agreement by the Receivership Court.
- 1.4 **Binding.** This Agreement is binding upon and inures to the benefit of the respective Parties hereto and their respective successors and assigns.
- 1.5 **Authorization.** Each Party represents and warrants that it is authorized to execute this Agreement, and that the person signing this Agreement on their behalf is authorized to execute this Agreement on their behalf.
- 1.6 **All Terms.** The provisions of this Agreement comprise all of the terms, conditions, agreements, and representations of the Parties respecting their agreement, as set forth herein. This Agreement may not be altered or amended or waived except by written agreement executed by all Parties. All Parties agree that the terms of this Agreement have in no way been changed, modified or expanded by any oral agreements or representations entered into or made by any party prior to or at the execution of this Agreement.
- 1.7 **Interpretation/Assistance of Counsel.** The Parties acknowledge that each of them has had the opportunity to engage counsel of his or its own choice and has been offered an opportunity to review this Agreement with chosen counsel. The Parties further acknowledge that they have, through their respective counsel or otherwise, participated or had the opportunity to participate in the preparation of this Agreement, and it is understood that no provision will be construed more strictly against any Party.
- 1.8 **Governing Law.** The Parties agree that this Agreement shall be governed by the laws of the State of Texas. Any dispute relating to this Agreement shall be brought solely in the Receivership Court.

1.9 **No Admission.** The Parties agree that this Agreement represents a compromise of disputed claims, the liability for which each party hereto has expressly denied. The execution of this Agreement by any party hereto shall not be deemed an admission of liability or fault on the part of any person or entity executing this Agreement.

1.10 **Counterparts.** This Agreement may be executed in one or more original or facsimile counterparts each of which shall be deemed an original, but also which together will constitute on and the same instrument. Further, facsimile copies or electronic signatures shall be treated as originals for all purposes.

1.11 **Notices.** All notices to the SDR relating to this Agreement shall be made by email to Greg Pierce at [gpierce@gpiercelaw.com](mailto:gpierce@gpiercelaw.com). All notices to Nationwide shall be made by email to Kristen Perry at [kristen.perry@dbr.com](mailto:kristen.perry@dbr.com).

1.12 **Attorneys' Fees.** If any legal action, arbitration or other proceeding is commenced to enforce or interpret any provision of this Agreement, the prevailing party shall be entitled to an award of its actual fees and expenses, including, without limitation, attorneys' fees and disbursements (including fees on appeal) expert witness fees and disbursements. The term "prevailing party" shall include a party who receives substantially the relief desired whether by settlement, dismissal, summary judgment, judgment or otherwise.

1.13 **Exhibits.** All of the Exhibits shall be deemed incorporated herein by reference and made a part hereof for all purposes.

1.14 **Closing Costs.** All costs and expenses of the Parties' performance of their respective obligations hereunder shall be borne by the party incurring such cost or expense. Without limiting the generality of the foregoing, each party shall be responsible for the costs and expenses of their respective attorneys.

IN WITNESS WHEREOF, the Parties have executed this Agreement September \_\_\_\_, 2019.

CANTILO & BENNETT, L.L.P., Special  
Deputy Receiver for Capson Physicians  
Insurance Company

NATIONWIDE LIFE AND ANNUITY  
INSURANCE COMPANY

By: \_\_\_\_\_  
Joseph N. West

By: \_\_\_\_\_  
Mark Trigg

Its: Partner

Its: \_\_\_\_\_