

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

STATE OF SOUTH DAKOTA, EX REL.)	32CIV18-125
LARRY DEITER, DIRECTOR OF)	
INSURANCE OF THE STATE OF SOUTH)	
DAKOTA,)	
)	
Petitioner,)	LIQUIDATOR'S APPLICATION
)	FOR APPROVAL OF SETTLEMENT
v.)	WITH RSM US, LLP
)	IN 32CIV20-000207
RELIAMAX SURETY COMPANY,)	
)	
Respondent.)	

Larry Deiter, as Court-appointed Liquidator in the above-captioned matter (the “Liquidator”), by his counsel of record, hereby respectfully moves the Court for an Order approving the Liquidator’s settlement with RSM US LLP, in 32CIV20-000207, and for such purpose respectfully states to the Court as follows:

1. The Liquidator has commenced that certain action entitled *Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation v. Michael Van Erdewyk, John Van Erdewyk, Bradley Messerli, Mark Payne, Randy Schaefer, and Jim Rickards, individually and as the Directors and Officers of ReliaMax Surety Company and ReliMax Holding Company; and RSM US LLP*, in Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, Case No. 32CIV20-000207 (the “Liquidator Action”).

2. The Complaint in the Liquidator Action is dated June 11, 2020 and service was admitted by the Defendants as set forth in the Stipulation for Admission of Service,

Extension of Time to Answer or Respond and Stay that has been filed in the Liquidator Action.

3. The Liquidator Action has been brought pursuant to SDCL 58-29B-49(13), by which the Liquidator has sole authority to prosecute for the benefit of the Liquidation Estate any action which may exist on behalf of the creditors, members, policyholders, or shareholders of ReliaMax Surety Company (“RSC”) against any officer of the insurer or any other person, and pursuant to SDCL 58-29B-49(19), which states that the Liquidator may “exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder, or member”

4. Pursuant to the above-described statutory authority, the Liquidator has negotiated a separate settlement with RSM US LLP, the terms of which are contained in a Settlement Agreement and Release (the “RSM Settlement Agreement”), a true executed copy of which is attached hereto as Exhibit A.

5. In negotiating and agreeing to this settlement, the Liquidator has taken into consideration the applicable law, disputed and undisputed facts, potential defenses, the costs of litigation and the potential effect on the Liquidator’s claims against the remaining defendants in the Liquidator Action. Based on all these factors, the Liquidator believes and submits that the settlement described in the RSM Settlement Agreement is fair and reasonable.

6. By the terms of the RSM Settlement Agreement, the settlement cannot be concluded unless the Court enters an Order approving the RSM Settlement Agreement.

7. The requested form of Order Approving Settlement in 32CIV20-000207 is appended hereto as Exhibit B.

8. The Liquidator respectfully requests that the Court determine that due and proper notice has been given and that the Order in the form appended hereto as Exhibit B be entered by the Court.

Dated: December 22, 2020

CADWELL SANFORD DEIBERT
& GARRY LLP

By /s/ SW Sanford_____

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*Attorneys for Liquidator
of ReliaMax Surety Company*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was served on December 22, 2020 via Odyssey on the following:

Lisa Harmon [lisa.harmon@state.sd.us]
Frank Marnell [frank.marnell@state.sd.us]
Additional Counsel for Petitioner

Joshua Andersen [jandersen@reliamax.com]
ReliaMax Surety Company

Jeana L. Goosmann [goosmannj@goosmannlaw.com]
Counsel for Key Corp Trust

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Counsel for Wright-Patt Credit Union Inc.

Dennis Duncan [dduncan@ddlawsd.com]

The same was also served on December 22, 2020 by email and U.S. mail, postage prepaid, on those listed below:

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CADWELL SANFORD DEIBERT
& GARRY LLP

By /s/ *SW Sanford*_____

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*Attorneys for Liquidator
of ReliaMax Surety Company*

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter the "Settlement Agreement") is made this 17th day of December, 2020, and is entered into by and between Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation (the "Liquidator"), and RSM US LLP ("RSM"). The Liquidator and RSM shall collectively be referred to herein as the "Parties" or separately as a "Party."

WHEREAS, ReliaMax Surety Company ("RSC") was a South Dakota domiciled insurer regulated by the South Dakota Division of Insurance ("DOI") ("ReliaMax" shall herein refer to RSC collectively with ReliaMax Holding Company);

WHEREAS, RSM was engaged by ReliaMax since 2009 to provide certain professional services for RSC, including audits of RSC's annual statutory-basis financial statements for the years ending 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017 (together the "RSM Services");

WHEREAS, on June 27, 2018, the Circuit Court of the Sixth Judicial Circuit, Hughes County (the "Hughes County Circuit Court") entered that certain "Order Of Liquidation, Judicial Declaration of Insolvency, and Injunctive Relief in the case captioned *State of South Dakota, Ex. Rel. Larry Deiter, Director of Insurance of the State of South Dakota*, No. 32 CIV 18-125 (the "Liquidation Proceeding"), which Order also appointed the Liquidator to exercise statutory rights and duties with respect to the assets, rights, liabilities of and claims against RSC (the "Liquidation Estate");

WHEREAS, on June 11, 2020, the Liquidator served a Complaint (the "Complaint") asserting claims against RSM and certain Directors and Officers of ReliaMax (the "Liquidator Action") asserting, *inter alia*, that RSM and the ReliaMax Directors and Officers are jointly and severally liable on certain claims for losses experienced by ReliaMax, and the Liquidation Estate, including without limitation losses experienced by creditors, members, policy holders, and shareholders of RSC;

WHEREAS, the Complaint in the Liquidator Action states that "[p]ursuant to SDCL Chapter 58-29B and particularly §58-29B-34 and -49, the Liquidator is empowered to institute in his own name and prosecute any action which may exist on behalf of the creditors, members, policy holders, or shareholders of RSC against any officer of RSC or any other person" and includes an action against RSM, and RSM admitted service thereof on June 19, 2020;

WHEREAS, RSM denies any and all liability or wrongdoing alleged in connection with the Liquidator Action and maintains that the Liquidator is not entitled to recover any of the damages sought; and

WHEREAS, in order to avoid the costs and uncertainties of litigation, the Parties have decided to compromise, settle, forever resolve, and finally dispose of the Liquidator Action and any and all claims between the Parties;

NOW, THEREFORE, in consideration of the premises aforesaid and the mutual covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby stipulate and agree as follows:

1. Court Approval of Settlement Agreement. Within five (5) business days of the execution of this Settlement Agreement, the Liquidator shall file the Complaint in the Liquidation Action and seek from the Hughes County Circuit Court presiding over the Liquidation Proceeding an order (the "Settlement Approval Order") (a) approving in all respects the terms of this Settlement Agreement and (b) permanently enjoining RSC and any and all creditors, members, policy holders, or shareholders of RSC and all of their respective present or former agents, officers, directors, consultants, employees, members, partners, principals, attorneys, advisors, and representatives from commencing, prosecuting, or asserting against RSM any right, claim, debt, cause of action, demand, suit of damages, liability act or right of action of any nature whatsoever whether in the right of such creditors, members, policy holders, or shareholders or derivatively and whether asserted or unasserted, known or unknown, arising from or related to the RSM Services.

2. Settlement Payment.

- a. If the Hughes County Circuit Court enters the Settlement Approval Order, then, in consideration for the releases, representations, and promises set forth in this Settlement Agreement, RSM shall pay the Liquidator the total sum of three million dollars (\$3,000,000.00) (the "Settlement Amount"), which payment shall be due and payable in a lump sum no later than thirty (30) days after entry of the Settlement Approval Order. RSM's obligation to pay the Settlement Amount shall be satisfied by wiring payment to the account identified below, and this act shall constitute "payment of the Settlement Amount." RSM shall have no responsibility for determining the distribution of the Settlement Amount. Payment of the Settlement Amount shall be tendered in immediately available funds by wire transfer to the following account:

Account name: ReliaMax Surety Company, in Liquidation

Account #:

ABA/RTN:

Bank name: American Bank & Trust, 120 E Main, Wessington Springs, SD
57382

- b. If the Hughes County Circuit Court does not enter the Settlement Approval Order, then this Settlement Agreement shall be null and void, and RSM shall have no obligation to pay the Settlement Amount.

3. Release of RSM. Effective upon RSM's payment of the Settlement Amount, the Liquidator, on behalf of (a) the Liquidator, (b) RSC and the Liquidation Estate, and (c) all creditors, members, policy holders, shareholders, or other claimants of RSC or the Liquidation Estate (collectively "the Releasing Parties"), hereby releases, forever discharges, covenants not to sue, indemnifies, and holds harmless RSM and its predecessors, successors, parents, subsidiaries, and affiliates, as well as its present or former agents, officers, directors, consultants, employees, members, partners, principals, attorneys, advisors, and representatives of any kind (collectively

“the RSM Released Parties”), from each and every right, claim, debt, cause of action, demand, suit for damages, liability, act, or right of action of any nature whatsoever, whether asserted or unasserted, known or unknown, arising out of or related to the RSM Services, including, but not limited to, claims that were or could have been asserted against any RSM Released Party in the Liquidator Action (“Released Claims”).

4. Intervention. At its own expense, the Liquidator will move to intervene and dismiss any action, claim, suit, or cause of action brought by any creditors, members, policy holders, or shareholders of RSC against RSM to the extent alleging any Released Claim, whether asserted in their own right or derivatively, on all colorable grounds, including without limitation, lack of standing and that the right to bring the claim asserted in the action belongs exclusively to the Liquidator.

5. Effect of Releases on Claims for Contribution by Alleged Joint Tortfeasors. The parties agree that the release granted herein to the RSM Released Parties is intended and is sufficient pursuant to S.D.C.L. 15-8 to relieve the RSM Released Parties from liability in contribution to any person or entity that is a joint tort-feasor as to the RSM services (“contribution bar”). The Liquidator agrees that the damages recoverable by the Liquidator; RSC; the Liquidation Estate; or the creditors, members, policy holders, shareholders, or other claimants of RSC or the Liquidation Estate against all such joint tort-feasors other than the RSM Released Parties shall be reduced to the extent necessary to effect a contribution bar. Such reduction shall be the greater of (a) the consideration paid by RSM pursuant to this Agreement; or (b) the RSM Released Parties’ pro rata share of the of the Liquidator’s or the ReliaMax’s Estate damages. This provision shall be interpreted consistent with SDCL Chapter 15-8, particularly §15-8-17 and to satisfy the condition stated in §15-8-18. The Parties understand and acknowledge that certain claims against other defendants in the Liquidator Action are such that RSM Released Parties and those other parties are not joint tort-feasors; and as to such claims, those other defendants shall not be entitled to the credit described in this section.

6. Effect of Releases on Claims for Indemnification by Alleged Joint Tortfeasors. In the event that any joint tort-feasor subject to the contribution bar under Section 5 is found liable under circumstances that entitle such joint tort-feasor to be indemnified under common law by any RSM Released Party, the liability of such joint tort-feasor will be deemed settled and discharged as part of the consideration for this Settlement Agreement and any indemnitee of the RSM Released Parties under this Section 6 will be relieved of liability to the Releasing Parties without additional consideration. The indemnity provided for in this Section shall not apply to any claims described in the last sentence of Section 5.

7. No Assignment of Claims. The Liquidator represents and warrants that it has not assigned, transferred, or purported to assign or transfer, to any person or entity, any claim or cause of action asserted, or that could have been asserted, in the Liquidator Action, or any other right, claim, debt, cause of action, demand, suit for damages, liability, act, or right of action to be released pursuant to this Settlement Agreement, and agrees to indemnify, defend, and hold the RSM Released Parties harmless from and against any claims based on or arising out of any such assignment or transfer, or purported assignment or transfer.

8. No Admission of Liability or Wrongdoing. This Settlement Agreement is a compromise of disputes relating to and arising out of the claims asserted in connection with the Liquidator Action and may not be construed as or deemed to be an admission of liability or wrongdoing of any kind by any of the Parties. Each Party specifically denies any and all liability and wrongdoing alleged in connection with the Liquidator Action.

9. Attorneys' Fees and Costs. Each Party shall bear its own attorneys' fees and costs incurred in connection with the Liquidator Action and all matters arising in connection with this Settlement Agreement.

10. Notices. All notices to be sent or information to be provided under this Settlement Agreement shall be sent by overnight delivery and e-mail to the following:

For the Liquidator:

Steven W. Sanford
CADWELL SANFORD DEIBERT & GARRY LLP
200 E. 10th St. Suite 200
Sioux Falls, SD 57104
ssanford@cadlaw.com

For RSM:

Antonio M. Trillo
Assistant General Counsel
RSM US LLP
200 South Wacker Drive, Suite 3900
Chicago, Illinois 60606
tony.trillo@rsmus.com

11. Successors and Assigns. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties hereto, their partners, principals, officers, employees, agents, and insurers, and their respective successors and assigns.

12. Entire Agreement. This Settlement Agreement constitutes the entire agreement of the Parties hereto as to the subject matter hereof. The undersigned acknowledge that there are no communications or oral understandings contrary to, different than, or that in any way restrict this Settlement Agreement, and that all prior agreements or understandings within the scope of the subject matter of this Settlement Agreement are, upon the execution and delivery of this Settlement Agreement, superseded, null, and void.

13. Amendments. No waiver, modification, or amendment of the terms of this Settlement Agreement shall be valid or binding unless made in writing and signed by the Parties, and then only to the extent as set forth in such written waiver, modification, or amendment.

14. Counterparts. The Parties may execute this Settlement Agreement in whole or separate counterparts and by separate signature pages, and execution of counterparts shall have the

same force and effect as if the Parties had signed the same instrument. Signatures transmitted electronically or by facsimile shall have the same effect as original signatures.

15. Choice of Law and Consent to Jurisdiction. This Settlement Agreement shall be governed by, construed, and enforced in accordance with, the laws of the State of South Dakota, without regard to its conflict of law principles. The Parties agree that any litigation or proceeding to enforce the provisions of this Settlement Agreement shall be brought before the Sixth Judicial Circuit Court, Hughes County, South Dakota.

16. Neutral Interpretation. In the event any dispute arises among the Parties with regard to the interpretation of any term of this Settlement Agreement, all of the Parties shall be considered collectively to be the drafting party and any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall be inapplicable.

17. Authority. Each Party warrants and represents that the person signing this Settlement Agreement on its behalf is duly authorized to enter into this Settlement Agreement on behalf of such Party. Each Party represents that such Party has sole ownership and/or control of the claims being released by it herein, and that it has not transferred, assigned, subrogated, or otherwise encumbered any such claims or any part thereof.

18. Severability. Each term and provision of this Settlement Agreement shall be considered severable, and if for any reason any term or provision of this Settlement Agreement, or the application of such term or provision to any person or circumstance, shall be finally declared, held, or found to be invalid, illegal, or unenforceable in whole or in part by any arbiter or court of competent jurisdiction and cannot be modified by such arbiter or court to be enforceable, then: (i) such term or provision, or part thereof, shall be ineffective solely in such jurisdiction to the extent of such invalidity, illegality, or unenforceability without invalidating the application of the affected provision to persons or circumstances in such jurisdiction other than those to which it was held invalid or unenforceable, and without invalidating the remaining terms or provisions hereof in any jurisdiction, (ii) if capable of performance in such jurisdiction, the remainder of this Settlement Agreement shall remain in full force and effect, and (iii) solely as to such jurisdiction, the Parties hereto shall negotiate in good faith to modify or replace the invalid, illegal, or unenforceable term or provision with a valid, legal, and enforceable term or provision which most accurately represents the Parties' intention with respect to the invalid, illegal, or unenforceable term or provision. Any modification of a term or provision of this Settlement Agreement by an arbiter or court of competent jurisdiction in accordance with the terms of this paragraph shall apply only within said jurisdiction.

19. Advice of Counsel. The Parties acknowledge that they have been represented by counsel of their own choice in the negotiations leading up to the execution of this Settlement Agreement and that they have read this Settlement Agreement and have had the opportunity to receive an explanation from legal counsel regarding the legal nature and effect of the same, and each Party has had it fully explained to them by its counsel and understands the terms and provisions of this Settlement Agreement and its nature and effect. Each Party further represents that they are entering into this Settlement Agreement freely and voluntarily, relying solely upon the advice of its own counsel, and not relying on the representation of any other Party or of counsel for any other Party.

20. Acknowledgement. This Settlement Agreement was executed after arm's length negotiations between the Parties and their respective counsel, and reflects the conclusion of each Party that this Settlement Agreement is in the best interests of such Party.

21. Divisions and Headings. The divisions of this Settlement Agreement into sections and the use of captions and headings in connection therewith are solely for convenience and shall have no legal effect in construing the provisions of this Settlement Agreement.

SIGNATURE PAGE

The undersigned hereby executes that certain Settlement Agreement and Release by and between Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation, and RSM US LLP. After this signature page is executed, it may be attached to the original or original counterpart of that Settlement Agreement to the same effect as though the signature page was so attached at the time of its execution.

Dated: 17th December __, 2020




Larry Deiter, Director of Insurance of the State of South Dakota,
as Liquidator of Reliamax Surety Company in Liquidation

SIGNATURE PAGE

The undersigned hereby executes that certain Settlement Agreement and Release by and between Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation, and RSM US LLP. After this signature page is executed, it may be attached to the original or original counterpart of that Settlement Agreement to the same effect as though the signature page was so attached at the time of its execution.

Dated: December 17, 2020



Antonio M. Trillo
Assistant General Counsel
RSM US LLP

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, EX REL.)
LARRY DEITER, DIRECTOR OF)
INSURANCE OF THE STATE OF SOUTH)
DAKOTA,)
Petitioner,)
v.)
RELIAMAX SURETY COMPANY,)
Respondent.)
)
)
)
)
)

32CIV18-125

**ORDER APPROVING
SETTLEMENT WITH
RSM US, LLP IN
32CIV20-000207**

A. The court-appointed Liquidator in this proceeding (the “Liquidator”) having commenced that certain civil action entitled *Larry Deiter, Director of Insurance of the State of South Dakota, as Liquidator of ReliaMax Surety Company in Liquidation v. RSM US LLP, et al*, in Circuit Court for the Sixth Judicial Circuit, Hughes County, South Dakota, 32CIV20-000207 (the “Liquidator Action”); and

B. The Liquidator and RSM US LLP (“RSM”) having reached an agreement to settle the Liquidator’s claims against RSM as described in that certain Settlement Agreement and Release dated December 17, 2020 (the “RSM Settlement Agreement”); and

C. The Liquidator having filed his Application for Approval of Settlement dated December 21, 2020; and

D. Due and proper notice of such Application and exhibits having been given to counsel appearing in the Liquidation and in the Liquidator Action, either via Odyssey or by email and mail, and to other interested parties by posting to the Liquidation website, and no objection has been filed; and

E. The Court having reviewed all filings with respect to such Application and having considered all files and proceedings herein; and for cause shown:

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Liquidator's Application for Approval of Settlement is hereby GRANTED in all respects.

2. The terms of the RSM Settlement Agreement are APPROVED in all respects. The terms “RSM Services” and “RSM Released Parties” shall have the same meaning as used in the RSM Settlement Agreement.

3. The RSM Settlement Agreement is fair and reasonable.

4. Pursuant to SDCL 58-29B-49(13) the Liquidator has the sole authority to prosecute for the benefit of the liquidation estate any action which may exist on behalf of the creditors, members, policyholders, or shareholders of ReliaMax Surety Company (“RSC”) against any officer of the insurer, or any other person, and SDCL 58-29B-49(19) states that the liquidator may “exercise and enforce all the rights, remedies, and powers of any creditor shareholder, policyholder, or member.”

5. The RSM Settlement Agreement is fully binding and enforceable against all persons and entities for whom the Liquidator is authorized to act under Chapter 58-29B; and the Liquidator and all such persons and entities shall be deemed to have fully, finally and forever released, relinquished, discharged and dismissed each and every claim against the RSM Released Parties arising from or related to RSM Services.

6. Any and all creditors, members, policy holders, or shareholders of RSC and all of their respective present or former agents, officers, directors, consultants, employees, members, partners, principals, attorneys, advisors, and representatives are hereby permanently **BARRED, ENJOINED AND RESTRAINED** from commencing, prosecuting, or asserting against any RSM Released Parties any right, claim, debt, cause of action, demand, suit of damages, liability act or right of action of any nature whatsoever whether in the right of such creditors, members, policy holders, or shareholders or derivatively and whether asserted or unasserted, known or unknown, arising from or related to the RSM Services.

7. When the Liquidator Action is fully and finally concluded, including all claims against the Defendant Directors and Officers and their Insurers, the final judgment shall include dismissal of RSM with prejudice and without costs to any party.

8. A certified copy of this Order shall also be filed in the Liquidator Action.

BY THE COURT:

Circuit Court Judge