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8 **BEFORE THE INSURANCE COMMISSIONER**
9 **OF THE STATE OF CALIFORNIA**
10

11 In the Matter of the Appeal of:

File No. AHB-WCA-17-42

12 **VAN DE POL ENTERPRISES, INC.;**
13 **FUEL DELIVERY SERVICES, INC.,**

Appellants.

NOTICE OF NON-ADOPTION OF
PROPOSED DECISION; and ORDER OF
REFERRAL

(Title 10 Cal. Code Regs., section 2509.69,
subds. (d) & (e).)

14 From the Decision of:

15 **CALIFORNIA INSURANCE**
16 **COMPANY; APPLIED**
17 **UNDERWRITERS CAPTIVE RISK**
ASSURANCE COMPANY

18 Respondents.
19
20

21 This matter came for hearing before Clarke de Maigret, Administrative Law Judge
22 (hereafter "ALJ") of the Administrative Hearing Bureau. The ALJ closed the record on June 3,
23 2019, signed his Proposed Decision on June 6, 2019, and recommended its adoption as the
24 Decision of the Commissioner. On June 10, 2019, the Commissioner received the attached
25 Proposed Decision.

26 On page 20 of the Proposed Decision, the ALJ finds in part "...[t]he rates set forth in the
27 guaranteed cost policies comport with Respondents' rate filings under Insurance Code section
28 11735." On page 36 of the Proposed Decision, the ALJ finds "...there has been no allegation in

1 this appeal that any portion of the guaranteed cost policies is unlawful.” On page 36, footnote
2 196, the ALJ expressly “...makes no finding as to whether the guaranteed cost policies are valid
3 or enforceable...”

4 On page 27, the ALJ notes that Insurance Code section 11737, subdivision (f) “grants the
5 Commissioner broad authority to award remedies in workers’ compensation appeals...[and]
6 authorizes him to ‘affirm, modify, or reverse’ an insurer’s action concerning the application of its
7 rating system. The statute contains no language restricting remedies the Commissioner may
8 order.” The ALJ also notes on page 28 that “...remedies under subdivision (f) may be
9 retrospective.”

10 Now, therefore, pursuant to the provisions of California Code of Regulations section
11 2509.69(d), the Insurance Commissioner chooses not to adopt the attached proposed decision as
12 his decision in the above-entitled matter. By operation of this Order, this matter is referred back
13 to ALJ de Maigret, to take additional evidence on the following:

14
15 SEMIMOUTH: The Proposed Decision includes findings that the rates set forth in the guaranteed
16 cost policies comport with Respondents’ rate filings under Insurance Code section
17 11735, and that there has been no allegation in this appeal that any portion of the
18 guaranteed cost policies is unlawful. Given the above, does the precedent decision
19 *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm’r, Jun.
20 20, 2016, AHB-WCA-14-31) compel the conclusion that Appellants are obligated
21 to pay the full guaranteed cost policy premium?

- 22 2. If payment of the full guaranteed cost policy premium is not required, what
23 remedies may the Commissioner implement under his broad authority to award
24 remedies in workers’ compensation appeals in order to properly ‘affirm, modify,
25 or reverse’ Respondents’ action in this case?

26 //

27 //

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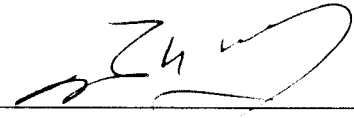
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3. Is there any other guidance on the question of available administrative remedies that the parties or the Commissioner should expressly seek from a court of law that may review the Commissioner's ultimate decision in this case?

It is so ordered.

DATED: June 27, 2019.

RICARDO LARA
Insurance Commissioner

By: 
BRYANT W. HENLEY
Deputy Commissioner & Special Counsel



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BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
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VAN DE POL ENTERPRISES, INC.;) FILE AHB-WCA-17-42
FUEL DELIVERY SERVICES, INC.)
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Appellants,)
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From the Decision of)
)
CALIFORNIA INSURANCE COMPANY;)
APPLIED UNDERWRITERS CAPTIVE)
RISK ASSURANCE COMPANY)
)
Respondents.)
)

PROPOSED DECISION

Statement of the Case

Workers' compensation is a comprehensive benefits system that balances the interests of workers and their employers. Workers receive timely compensation for employment-related injuries but are generally barred from suing their employers. Employers receive protection from lawsuits but must provide benefits regardless of fault.¹

Because workers' compensation insurance is usually mandatory for California employers, the Legislature charged the Insurance Commissioner ("Commissioner") with closely scrutinizing

¹ See 2 Witkin, Summary Cal. Law 11th, Workers' Compensation, § 1 (2018).

all insurance plans to protect both workers and their employers.² To assist the Commissioner in carrying out this responsibility and to support employers seeking affordable coverage, the Insurance Code mandates that insurers publicly file with the Commissioner all rates and related information used to set workers' compensation insurance premiums.³

This proceeding, as well as dozens like it, arises out California Insurance Company ("CIC") and Applied Underwriters Captive Risk Assurance Company, Inc.'s ("AUCRA") decision to circumvent California's filing requirements and directly sell an unfiled insurance plan to unwitting employers. Van De Pol Enterprises, Inc. and Fuel Delivery Services, Inc. ("Appellants") assert this unfiled plan, titled EquityComp, and its accompanying Reinsurance Participation Agreement ("RPA"), unlawfully modified CIC's filed rates. Appellants' argument substantially relies upon the Commissioner's precedential decision *In the Matter of the Appeal of Shasta Linen Supply, Inc.*,⁴ in which the Commissioner determined that Respondents' unfiled RPA was unlawful and void.

Respondents maintain that neither the RPA nor its contents were required to be filed, notwithstanding the *Shasta Linen* decision. Respondents further argue the Commissioner lacks jurisdiction over this appeal and may not grant the remedies Appellants request. In addition, Respondents contend that AUCRA may not be included as a party to this appeal. Lastly, Respondents contend the Administrative Law Judge ("ALJ") denied them due process by excluding certain witness testimony and prohibiting Respondents from relitigating *Shasta Linen's* factual findings and conclusions.

For the reasons discussed below, the ALJ concludes as follows: First, the Commissioner

² *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118.

³ See Ins. Code, §§ 11730-11742.

⁴ *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, Jun. 20, 2016, AHB-WCA-14-31) (*Shasta Linen*). *Shasta Linen* was designated precedential under Government Code section 11425.60, subdivision (b).

has exclusive jurisdiction to hear and decide this case. Second, AUCRA and CIC must be treated as a single enterprise. Third, the RPA unlawfully misapplied CIC's rate filings and is unenforceable. Finally, Respondents were not deprived of due process in this appeal and may not relitigate *Shasta Linen's* findings and conclusions.

Issues Presented

1. Did Respondents misapply their Insurance Code section 11735 filings to Appellants by entering into and applying the RPA?
2. If so, what is the appropriate remedy?

Procedural Background

This appeal arises under Insurance Code section 11737, subdivision (f).⁵ Appellants initiated the proceedings on December 20, 2017, by filing an appeal from Respondents' December 1, 2017, rejection of Appellants' complaint concerning its workers' compensation insurance and the RPA. The California Department of Insurance ("CDI") Administrative Hearing Bureau issued an Appeal Inception Notice on December 21, 2017. Respondents filed a response on January 3, 2018.⁶

On March 16, 2018, the CALJ ordered the parties to brief the question of whether the Commissioner's *Shasta Linen* decision precluded Respondents from rearguing issues decided in that case. On July 20, 2018, the CALJ issued an Order barring Respondents from rearguing the issues decided in *Shasta Linen* under the doctrines of collateral estoppel and failure to exhaust judicial remedies.

Under that Order, the CALJ also took official notice of the following materials: (i) the

⁵ Additionally, these proceedings were conducted in accordance with California Code of Regulations, title 10, sections 2509.40 et seq., and the administrative adjudication provisions of the California Administrative Procedure Act referenced in Regulations section 2509.57. Throughout this Proposed Decision, "Regulations" refers to California Code of Regulations, title 10.

⁶ The Workers Compensation Insurance Rating Bureau of California ("WCIRB") also filed a response on January 3, 2018, electing not to actively participate in this appeal.

Shasta Linen decision and the entire evidentiary record before the CDI's Administrative Hearing Bureau in *Shasta Linen*; (ii) the Stipulated Consent and Desist Order *In the Matter of the Certificates of Authority of the California Insurance Company and Applied Underwriters Captive Risk Assurance Company, Inc.*, MI-2015-00064, adopted by the Commissioner on September 6, 2016; and (iii) the Settlement Agreement among the CDI, CIC and AUCRA, executed in June of 2017.

On July 20, 2018, the CALJ reassigned the appeal to Administrative Law Judge Clarke de Maigret. On March 7, 2019, the ALJ conducted an evidentiary hearing in CDI's San Francisco hearing room. Larry J. Lichtenegger, Esq. of The Lichtenegger Law Office represented Appellants. Travis Wall, Esq. and Angela Han, Esq. of Hinshaw & Culbertson LLP represented Respondents.

At the evidentiary hearing, David B. Atwater testified on behalf of Appellants. Respondents called no witnesses.⁷ The evidentiary record includes Mr. Atwater's testimony and the documents admitted into evidence, as identified on the parties' exhibit lists.⁸

On April 25, 2019, Respondents submitted a request that the ALJ take official notice of a related civil complaint and California Assembly bill analysis referenced by Respondents in their post-hearing briefing. Having received no objection from Appellants, the ALJ took official notice of those documents on May 29, 2019.

Following post-hearing briefing by both parties, the ALJ closed the record on June 3, 2019.

⁷ In their pre-hearing witness list, Respondents listed two potential witnesses: Ellen Gardiner and Gary Osborne. On February 26, 2019, the ALJ sua sponte issued order limiting Ms. Gardiner's testimony and excluding Mr. Osborne as a witness, on the grounds that their testimony would be irrelevant, unduly time consuming relative to its probative value, or improper for an expert witness.

⁸ The following exhibits were admitted: Exhibits 1 through 20, 200 through 240, and 300 through 327.

Findings of Fact

The ALJ makes the following factual findings based on a preponderance of the evidence in the record:

I. Appellants' Business

Van De Pol Enterprises, Inc. ("VDPE") and Fuel Delivery Systems, Inc. are commonly-owned corporations headquartered in Stockton, California.⁹ They distribute petroleum products and engage in fuel wholesaling in northern and central California.¹⁰ During the policy periods at issue, Appellants also had affiliated operations in Nevada and Arizona.¹¹ The companies are successor entities to a fuel distribution business started in 1947 by the grandfather of VDPE vice-president David B. Atwater.¹²

II. Appellants' Purchase of EquityComp

In the years before 2013, Appellants purchased workers' compensation insurance from an insurer other than Respondents.¹³ In September 2013, Appellants' insurance broker presented them with a written program summary, as well as a proposal and quote ("Proposal"), for Respondents' EquityComp insurance program.¹⁴ Shortly thereafter, Appellants decided to purchase a three-year EquityComp program, and signed Respondents' Request to Bind Coverage & Services on October 4, 2013 (the "Request to Bind").¹⁵ The Request to Bind provides in relevant part:

The applicant(s) identified below, whether one or more

⁹ Transcript of Proceedings of March 7, 2019 ("Tr."), at p.18:10-14; Evidentiary hearing exhibit ("Exh.") 200 at pp. 200-1, 200-2. Page references throughout this proposed decision omit all preceding zeros. For example, "p. 200-2" refers to the page of Exhibit 200 marked "200-02."

¹⁰ Tr. at pp. 16:22-25, 18:10-19.

¹¹ Exhs. 5 through 7.

¹² Tr. at pp. 17:3-18:19.

¹³ Exh. 200 at p. 200-1.

¹⁴ Exh. 202.

¹⁵ Exh. 3.

(collectively, the “Applicant”)¹⁶ request that Applied Underwriters, Inc. through its affiliates and/or subsidiaries (collectively, “Applied”) pursuant to the Workers’ Compensation Program Proposal & Rate Quotation (“Proposal”) cause to be issued to Applicant one or more workers’ compensation insurance policies and such other insurance coverages identified in the Proposal (collectively the “Policies”) subject to Applicant executing the following agreements (collectively the “Agreements”): (1) Reinsurance Participation Agreement; and where available, (2) Premium Finance Agreement.

. . . This acknowledgment and disclosure is intended to confirm receipt of the Proposal and Applicant’s acceptance of the Proposal along with certain additional terms and conditions. Only the Agreements and Policies contain the actual operative provisions.¹⁷

Appellants’ EquityComp program began on October 1, 2013, and ended on October 1, 2016.¹⁸

Appellants elected not to renew the program after the three year term ended.¹⁹ The Policies and RPA referenced in the Request to Bind are discussed below.

III. Respondents’ Business and Organization²⁰

Respondents’ organizational structure is extensively described in the *Shasta Linen* decision, and that description is adopted here.²¹ In short, CIC is a licensed property and casualty company, domiciled in California and licensed to transact business in multiple states.²² CIC is wholly-owned by North American Casualty Company, a non-insurer owned by Applied Underwriters, Inc. (“AU”), a Nebraska corporation.²³

AUCRA, also an affiliate of AU, is an insurance company domiciled in Iowa.²⁴ Its sole

¹⁶ I.e., Appellant.

¹⁷ Exh 3.

¹⁸ Exh. 4 at p. 4-1; Exh. 5 at p. 5-1; Exh. 7 at p. 7-1.

¹⁹ Tr. at pp. 60:10-61:15.

²⁰ Use of the present tense in this part III means as of the date of the *Shasta Linen* decision, June 20, 2016, and applies to all times relevant to this proceeding.

²¹ Specifically, the Commissioner’s findings of fact in part V(B) of *Shasta Linen* are incorporated in this Proposed Decision. As noted below, Respondents are precluded from challenging the *Shasta Linen* findings in these proceedings.

²² *Shasta Linen*, *supra*, at p. 9.

²³ *Ibid.*

²⁴ *Ibid.*

purpose is to serve as CIC's reinsurance arm.²⁵ It does not reinsure any other entities or perform any other functions.²⁶ AUCRA.²⁷

AU is a financial services company that provides payroll processing services and underwrites workers' compensation insurance through its affiliated insurers to small and medium-sized employers.²⁸ AU manages all of CIC's underwriting, investment, administrative, actuarial and claim services through a management services agreement. It also administers the EquityComp program on behalf of CIC. For this reason, the EquityComp documents presented to Appellants bear AU's name and/or logo.²⁹

The boards of directors of CIC, AUCRA and AU are identical in composition.³⁰

IV. EquityComp's Purpose and Program Mechanics

EquityComp's purpose and structure is described at length in *Shasta Linen* and that description is adopted here.³¹ In brief, the underlying purpose of EquityComp was to circumvent California's workers' compensation policy aims by providing a type of loss-sensitive insurance to employers who were too small to qualify for that kind of coverage under California law.³² In loss-sensitive programs, the employer's cost for a given policy year is impacted by the workers' compensation claims incurred that year.³³ In contrast, a guaranteed cost policy's price is unaffected by claims incurred during the policy year.³⁴

EquityComp is a specific form of loss-sensitive insurance known as a "retrospective

²⁵ *Id.* at pp. 10-11.

²⁶ *Id.* at p. 11.

²⁷ *Id.* at p. 10.

²⁸ *Ibid.*

²⁹ Exhs. 1 through 4.

³⁰ *Ibid.*

³¹ The Commissioner's findings of fact in *Shasta Linen* starting at page 15, subpart (c), through page 30 are incorporated in this Proposed Decision, excluding the first two full sentences on page 30.

³² *Shasta Linen, supra*, at pp. 23-24, 66.

³³ *Id.* at p. 15.

³⁴ *Id.* at p. 22.

rating plan.”³⁵ Respondents’ EquityComp patent describes the scheme as follows:

The reinsurance company can now provide funds to implement a non-linear retrospective rating plan as a “participation plan.” The reinsurance company does this by entering into a separate contractual arrangement with the insured. If the insured has lower than average losses in the next year, then the reinsurance company can provide a premium reduction according to the participation plan. If the insured has higher than average losses in a given year, then the reinsurance company will assess additional premium accordingly. The insured can now, in effect, have a retrospective rating plan because of the arrangement among the insurance carrier, the reinsurance company and the insured even though, in fact, the insured has Guaranteed Cost insurance coverage with the insurance carrier³⁶

AU acknowledged that one of the challenges of a “fundamentally new premium structure” is that “the structure must be approved by the respective insurance departments regulating the sale of insurance.”³⁷ In addition, California and other states prohibit the sale of retrospective plans to small and mid-sized employers. AU attempted to skirt that regulatory environment by implementing “a reinsurance based approach to providing non-linear retrospective plans to insureds that may not have the option of such a plan directly.”³⁸

Following the framework outlined in Respondents’ patent, the EquityComp program sold to Appellants was effectuated under separate annual guaranteed cost policies, combined with a three-year Reinsurance Participation Agreement.³⁹ The RPA superseded the guaranteed cost policies.⁴⁰ Premium owed under the policies was replaced by amounts paid under the RPA.⁴¹ The contracts are discussed in more detail below.

³⁵ *Shasta Linen, supra*, at p. 23.

³⁶ *Id.* at p. 24.

³⁷ *Id.* at p. 23.

³⁸ *Ibid.*

³⁹ Exhs. 4 through 7.

⁴⁰ *Shasta Linen, supra*, at pp. 24, 55.

⁴¹ *Ibid.*

A. The Guaranteed Cost Policies

The guaranteed cost policies were entered into between CIC and Appellants, with annual terms commencing October 1, 2013, October 1, 2014 and October 1, 2015.⁴² The policies contain standard language approved by the Commissioner, consistent with the applicable requirements of the Insurance Code and its implementing regulations. For example, each policy states that CIC's rates, rating plans and related information are filed with the Commissioner and open to public inspection.⁴³

Each policy sets out the rates that CIC may charge Appellants.⁴⁴ CIC filed those rates with the Commissioner before the policies' commencement.⁴⁵ In addition, as required by law,⁴⁶ CIC warrants in each policy that it adheres to a single uniform loss experience rating plan and applies that experience rating to each policy.⁴⁷

CIC's guaranteed cost policies also include a cancellation provision and a "short rate" cancellation notice, as required by the Insurance Code.⁴⁸ The policies provide that after cancellation, the final premium will be determined as follows:

- a. If we [CIC] cancel, final premium will be calculated pro rata based on the time the policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
- b. If you cancel, the final premium may be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate cancellation table and procedure. Final premium will not be less than the pro rata share of the minimum premium.⁴⁹

The short rate penalty, which discourages employers from changing insurers mid-year, is

⁴² Exhs. 5 through 7.

⁴³ E.g., Exh. 5 at p. 5-39.

⁴⁴ E.g., Exh. 5 at p.5-5.

⁴⁵ Exhs. 16 through 19.

⁴⁶ Ins. Code, § 11752.8.

⁴⁷ E.g., Exh. 5 at p. 5-39; see also *Shasta Linen, supra*, at p. 12.

⁴⁸ E.g., Exh. 5 at p.5-29; see also *Shasta Linen, supra*, at p. 12.

⁴⁹ E.g., Exh. 5 at p. 5-18.

a percentage of the full-term premium based on the number of days of coverage in the canceled policy.⁵⁰ CIC's short rate calculation table provides a formula for determining the early cancellation penalty.⁵¹

CIC's policies also set a minimum and estimated premium based on an employer's payroll estimates and loss experience modification factor.⁵² After estimated taxes and fees, the guaranteed cost policies provide the employer with an annual premium estimate.⁵³ The final premium due is calculated using actual payroll amounts assigned to a specific classification of the policy and the employer's experience modification factor.⁵⁴ Under the policy documents in the absence of the RPA, the final premium for a given policy period would not be impacted by the losses incurred during that period.⁵⁵

The policies' dispute resolution provisions do not provide for binding arbitration or any other alternative dispute resolution methods.⁵⁶

B. The RPA and Proposal

The RPA is materially identical to the Reinsurance Participation Agreement at issue in *Shasta Linen*, with the exception of the insureds' names, account numbers and dates, and the specific rates and other numbers set forth on Schedule 1 of those agreements.⁵⁷ The RPA and Proposal modify a number of the guaranteed cost policy provisions.⁵⁸ Where the RPA and the policies differ, the RPA's terms control.⁵⁹

⁵⁰ *Shasta Linen*, *supra*, at p. 14.

⁵¹ E.g., Exh. 5 at pp. 5-29 through 5-31; see also *Shasta Linen*, *supra*, at p. 14.

⁵² E.g., Exh. 5 at p. 5-1; see also *Shasta Linen*, *supra*, at p. 14.

⁵³ *Ibid.*

⁵⁴ *Shasta Linen*, *supra*, at p. 14.

⁵⁵ *Ibid.*

⁵⁶ See Exhs. 5 through 7.

⁵⁷ Exh. 4; *Shasta Linen* Exh. 207. Accordingly, all of the Commissioner's findings of fact in part V(D) of *Shasta Linen* are incorporated in this Proposed Decision, with the exception of the second full sentence on page 33.

⁵⁸ *Shasta Linen*, *supra*, at p. 55.

⁵⁹ *Ibid.*

For example, the RPA contains workers' compensation rates, termed "loss pick containment rates" that supplant the rates set forth in the guaranteed cost policies.⁶⁰ The same loss pick containment rates were used to calculate Appellants' projected EquityComp costs set out in the monthly plan analyses provided by Respondents.⁶¹ Additionally, the Proposal states that Appellants would be billed at the RPA's loss pick containment rates.⁶² The Proposal makes no reference to the guaranteed cost policies' rates.⁶³

The RPA and Proposal are largely comprised of financial terms that affect the amounts Appellants must remit.⁶⁴ Most significantly, the RPA establishes a mechanism for assessing additional premium if the insureds incur higher than expected losses.⁶⁵ That mechanism, set out in RPA sections 1, 2 and 4, establishes a "segregated cell" account that Appellants must pay into.⁶⁶ The mechanism is further described in sections 1 through 4 of RPA Schedule 1, which establish a "run-off" term during which additional premium may be assessed, and detail how Appellants' premium is calculated and allocated based in large part on "loss pick containment amounts," "loss development factors," and "exposure group adjustment factors" or "EGAFs."⁶⁷ The Proposal sets forth a simplified overview of that mechanism under the headings "Profit Sharing Plan" and "Billing Terms."⁶⁸

RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees that modify the guaranteed cost policies' cancellation terms and filed rates.⁶⁹ Also, the RPA removes

⁶⁰ Exh. 4 at p. 4-9; *Shasta Linen, supra*, at p. 55.

⁶¹ E.g., Exh. 9 at p. 9-3.

⁶² Exh 1 at p. 1-4.

⁶³ *Ibid.*

⁶⁴ Exhs. 1, 4.

⁶⁵ Exh. 4; *Shasta Linen, supra*, at p. 24.

⁶⁶ Exh. 4 at pp. 4-1, 4-2.

⁶⁷ Exh. 4 at pp.4-6, 4-7.

⁶⁸ Exh. 1.

⁶⁹ Exh. 4. The early cancellation fees are described on *Shasta Linen* pages 32-35.

Appellants' loss experience modification factor from the premium calculations.⁷⁰ Finally, the RPA's terms potentially require the insured to wait a minimum of three years or longer after the RPA's expiration to receive a refund of any excess payments.⁷¹

Respondents did not file the Proposal or RPA's rates or other financial terms described in this subpart with the Commissioner before or during the RPA's term.⁷² Nevertheless, Respondents charged Appellants in accordance with the Proposal and RPA's rates and terms rather than those of the guaranteed cost policies.⁷³

V. Post-Shasta Linen Proceedings

On June 20, 2016, the Commissioner issued the *Shasta Linen* decision and order. On July 1, 2016, CIC and AUCRA filed a Verified Petition for a Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief in Los Angeles County Superior Court (the "Writ Petition and Complaint").⁷⁴ The writ petition portion sought judicial review of the *Shasta Linen* decision and order.

On June 28, 2016, the CDI issued a Notice of Hearing and Order to Cease and Desist from Issuance or Renewal of Workers' Compensation Insurance Policies and Collateral/Ancillary Agreements in Violation of Insurance Code Sections 11658 and 11735 and California Code of Regulations, Title 10, Sections 2251 and 2268.⁷⁵ On July 13, 2016, the CDI issued an amended version of that notice and order. In connection with the proceedings initiated by the notice, CIC, AUCRA and the CDI entered into a stipulated Consent Cease and Desist

⁷⁰ Exh. 4; *Shasta Linen*, *supra*, at p. 56.

⁷¹ Exh. 4 at p. 4-7; *Shasta Linen*, *supra*, at pp. 34-35. The RPA also overrides the guaranteed cost policies' dispute resolution provisions. (Exh. 4 at pp. 4-3, 4-4; Exh. 5 at pp. 5-37, 5-38.)

⁷² See Exhs. 15 through 17.

⁷³ E.g., Exh.9 at p. 9-3.

⁷⁴ Exh. 308.

⁷⁵ Exh. 309 at p. 309-1.

Order that was adopted by the Commissioner on September 6, 2016 (the “Consent Order”).⁷⁶

Section IV of the Consent Order provides, in part:

A. CIC and AUCRA will cease and desist from issuing any new RPAs or renewing existing RPAs with respect to a California Policy until such time as the RPA has been submitted to the WCIRB and the CDI in compliance with the requirements of Insurance Code § 11658 and 11735 and all other applicable statutes and regulations, and the RPA has not been disapproved.

B. Notwithstanding Paragraph IV(A) above, CIC may renew a Policy issued in connection with an RPA in force as of July 1, 2016.

...

N. [Subject to certain exceptions not pertinent to this appeal,] nothing in this Stipulated Agreement affects or limits the powers or rights of the Insurance Commissioner to contend or declare that RPAs (other than RPAs that are filed with the WCIRB and the CDI and that are not disapproved) are unenforceable, void, voidable, or illegal and nothing limits the powers or rights of the Insurance Commissioner to initiate or make any investigation, to institute any legal or administrative proceeding, to take any action permitted by law, and to seek and obtain all relief and remedies (including any fines or penalties), or to adjudicate the rights of others, as otherwise permitted by law.

On June 2, 2017, CIC, AUCRA and the CDI entered into a Settlement Agreement settling the judicial proceedings initiated by the Writ Petition and Complaint.⁷⁷ On June 21, 2017, a request for dismissal was entered on the Writ Petition and Complaint, with prejudice as to the writ petition portion.

Sections 2 and 3 of the Settlement Agreement provide:

2. Resolution of the Dispute. The Shasta Order⁷⁸ applies to Shasta Linen Supply, Inc. and is based upon the facts and circumstances of the Shasta Action. The designation of the Shasta Order as precedential pursuant to California Government Code § 11425.60, subdivision (b) applies to administrative proceedings before the

⁷⁶ Exh. 309.

⁷⁷ Exh. 313.

⁷⁸ I.e., the Commissioner’s Decision and Order in *Shasta Linen*.

CDI in cases involving facts and circumstances substantially similar to those in the Shasta Action.

3. Amended RPA. CDI and AUCRA have met and discussed the Shasta Order and modification to the RPA and have agreed that the RPA, as modified (the “Amended RPA”) is an agreement between a third party and the insured, and attached in form and substance as Exhibit 1, Form Number AUCRA—CAL 102 (3/17). The Amended RPA will be issued after execution of an Accredited Participant Acknowledgment and Disclosure (the “Acknowledgment”) Form Number AUCRA—CAL 101 (5/17). The CDI by execution of this Agreement hereby approves the Amended RPA and Acknowledgment. AUCRA further agrees that it will not make any changes to the Amended RPA or Acknowledgment in the State of California without first submitting it to the CDI for review and approval. CIC and AUCRA agree to provide the AUCRA—CAL 101 and AUCRA—CAL 102 forms to any prospective insured prior to the inception date of the coverage.

The Amended RPA attached to the Settlement Agreement contains a number of changes to the RPA form at issue in *Shasta Linen* and the present appeal.⁷⁹ For example, the Amended RPA sets out post-expiration accounting and liquidation provisions that are significantly more favorable to the insured than those of the RPAs in *Shasta Linen* and here.⁸⁰

Discussion

Appellants argue the Commissioner has jurisdiction over this appeal. Appellants also contend Respondents unlawfully used the RPA to misapply their filed rates and rate information. Respondents refute these assertions and stand behind their decision to enforce the RPA. They also maintain that AUCRA may not be included as a party to this appeal. Finally, Respondents contend they have been denied due process and that they are not precluded from rearguing the Commissioner’s factual findings and legal conclusions in *Shasta Linen*. The ALJ finds Appellants’ arguments convincing and rejects Respondents’ contentions.

⁷⁹ Exh. 313 at pp. 313-6 through 313-19.

⁸⁰ Exh. 4 at p. 4-7 [¶5]; Exh. 313 at p. 313-16 [¶ 5].

I. The Commissioner Has Exclusive Jurisdiction Over This Appeal.

A. Applicable Law

1. The Statutory Rate Filing Scheme

California has an “open rating” workers’ compensation regulatory system, in which each insurer sets its own rates and files them with the Commissioner. This framework is intended to curtail monopolistic and discriminatory pricing practices, ensure carriers charge rates adequate to cover their losses and expenses, and provide public access to rate information so that employers may find coverage at the best competitive rates.⁸¹

Insurance Code section 11735 lays out the statutory filing requirements. Subdivision (a) provides in part that “[e]very insurer shall file with the commissioner all rates and supplementary rate information that are to be used in this state. The rates and supplementary rate information shall be filed not later than 30 days prior to the effective date.” The term “rate” means “the cost of insurance per exposure base unit,” subject to certain limitations.⁸² And “supplementary rate information” means “any manual or plan of rates, classification system, rating schedule, minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured.”⁸³

2. Insurance Code Section 11737, Subdivision (f)

Insurance Code section 11737, subdivision (f), confers upon the Commissioner jurisdiction to hear and decide private party appeals concerning the application of insurers’ section 11735 filings. Specifically, the statute provides, in pertinent part:

Every insurer ... shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer ... on written request to review the manner

⁸¹ See, generally, Ins. Code, §§ 11730-11742.

⁸² Ins. Code § 11730, subd. (g). Rates exclude the application of individual risk variations based on loss or expense considerations, as well as minimum premiums.

⁸³ Ins. Code § 11730, subd. (j).

in which the rating system has been applied in connection with the insurance afforded or offered. ... Any party affected by the action of the insurer ... on the request may appeal ... to the commissioner, who after a hearing ... may affirm, modify, or reverse that action.

This jurisdiction is exclusive to the Commissioner. As explained in *Farmers Ins.*

Exchange v. Superior Court:

Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action [in court].⁸⁴

B. Analysis and Conclusions of Law

Appellants assert Respondents failed to correctly apply the rates filed under Insurance Code section 11735 and set forth in the guaranteed cost policies. Specifically, Appellants contend Respondents modified or superseded the policies' filed rates with the RPA's unfiled rating information.⁸⁵ Because the appeal concerns the manner in which Respondents applied the rating system described in their section 11735 filings, the Commissioner has jurisdiction to hear and decide this case under Insurance Code section 11737, subdivision (f).⁸⁶

Moreover, section 11737 sets out "a comprehensive scheme" to address workers' compensation rate filing violations. As discussed below, section 11737 grants the Commissioner broad authority not only to hear private party appeals, but also to disapprove unfiled rates on his own initiative. Nothing in the statutory language or history indicates the Legislature intended to

⁸⁴ *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.

⁸⁵ Amended Notice of Appeal, filed December 20, 2017 ("Appeal"), pp. 2-5.

⁸⁶ Appellants also asserted a violation of Insurance Code section 11658 in this proceeding. Respondents contest that assertion. The Commissioner determined in *Shasta Linen* that Respondents violated that section by failing to file the RPA form. (*Shasta Linen*, *supra*, at p. 69; see also *Nielsen Contracting v. Applied Underwriters, Inc.*, *supra*, 22 Cal.App.5th at pp. 1117-1118 [RPA's arbitration clause held unlawful and unenforceable because it was not filed as required by section 11658].) Respondents are precluded from further litigating that issue in these proceedings, as addressed below. However, the outcome of this appeal is not dependent upon the determination of that issue, and it need not be further discussed here.

create a private right to bring civil court actions concerning unfilled rates. Therefore, the Commissioner's jurisdiction under section 11737, subdivision (f), is exclusive.

II. CIC and AUCRA Are a Single Enterprise for the Purposes of this Appeal.

Respondents argue that AUCRA is not an appropriate party to this appeal because it did not provide workers' compensation insurance to Appellants.⁸⁷ Respondents further argue the RPA did not modify the guaranteed cost policies because the agreements are between different parties.⁸⁸ Specifically, Respondents assert the guaranteed cost policies are between Appellants and CIC, while the RPA is between Appellants and AUCRA. These arguments are not persuasive.

A. Applicable Law

Distinctions between related corporations may be disregarded under the "single enterprise" doctrine.⁸⁹ "Two conditions are generally required for the application of the doctrine to two related corporations: (1) such a unity of interest and ownership that the separate corporate personalities are merged, so that one corporation is a mere adjunct of another or the two companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one corporation alone."⁹⁰

B. Analysis and Conclusions of Law

In *Nielsen Contracting v. Applied Underwriters, Inc.*,⁹¹ the Court of Appeal agreed with the Commissioner's finding in *Shasta Linen* that AUCRA and CIC are so "enmeshed" and "intertwined" that they should be considered together in determining whether an RPA modified CIC's policies. As the Commissioner determined in *Shasta Linen*:

⁸⁷ Respondents' Post-Hearing Opening Brief, filed April 25, 2019 ("Resp. Post-Hearing Br."), at pp. 16-17.

⁸⁸ Resp. Post-Hearing Br. at p. 27.

⁸⁹ *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1218.

⁹⁰ *Id.* at p. 1219.

⁹¹ *Nielsen Contracting v. Applied Underwriters, Inc.*, *supra*, 22 Cal.App.5th at p. 1116.

AUCRA is not an independent party[.] ... AUCRA is a wholly-owned subsidiary of Applied Underwriters, Inc.; the same corporation that owns CIC. The Boards of Directors for CIC, AU, and AUCRA are identical in composition[.] ... In addition, AUCRA's sole purpose is to serve as supposed reinsurer to CIC. As such, it is inextricably intertwined with CIC and AU. Indeed, the affiliated entities are so enmeshed that each of CIC's financial examinations discusses EquityComp as a CIC product, and there is no evidence CIC sought to distinguish itself from EquityComp.⁹²

Thus, CIC and AUCRA shared such a unity of interest and ownership that AUCRA acted as a "mere adjunct" to CIC for the purposes of EquityComp.

The Commissioner further found as follows:

While CIC may not be a signatory to the RPA, CIC represented that the rates filed and approved by the Commissioner would be the rates charged to California consumers. That CIC contracted with an affiliated corporation to alter or modify those rates does not absolve the carrier from liability in this proceeding, nor does it protect the RPA from analysis. This is especially true given that AU structured EquityComp and the RPA to circumvent state regulators.

Lastly, the Commissioner must determine whether the rates and rating plan sold to [the appellant] adhere to the Insurance Code and the approved rating plan. If [the appellant's] rates differ from those quoted by CIC and approved by the Commissioner, [the appellant] may challenge those rates under section 11737, subdivision (f), regardless of whether CIC or AUCRA sold [the appellant] the RPA.⁹³

These findings establish that treating AUCRA as a separate enterprise would allow CIC to circumvent California's rate filing laws, a plainly inequitable result. Therefore, both prongs of the single enterprise doctrine are met, and CIC and AUCRA must be treated as one entity for the purposes of this appeal.

⁹² *Shasta Linen, supra*, at pp. 49-51.

⁹³ *Ibid.*

III. Respondents Violated Insurance Code Section 11735 by Supplanting CIC's Filed Rates with the RPA's Unfiled Rates and Supplementary Rate Information, Thereby Misapplying CIC's Rating Plan.

Appellants argue the RPA unlawfully employed unfiled rates and supplementary rate information.⁹⁴ Appellants further contend Respondents' use of the unfiled information misapplied the guaranteed cost policies' rating plan.⁹⁵ Respondents assert that a finding of unlawfulness by the Commissioner equates to rate disapproval, which would be invalid because the Commissioner did not comply with the statutory notice and hearing requirements for rate disapproval.⁹⁶ Respondents alternatively argue the use of unfiled rates is not unlawful unless the Commissioner first disapproves them, which he did not do.⁹⁷ The ALJ finds Appellants' arguments persuasive and is not convinced by Respondents' arguments.

A. Applicable Law

As previously indicated, Insurance Code section 11735, subdivision (a), requires insurers to file all rates and supplementary rate information, without exception, before using them in California. The term "supplementary rate information" includes any "minimum premium, policy fee, rating rule, rating plan, and any other similar *information needed to determine the applicable premium for an insured.*"⁹⁸ The Commissioner and courts construe "premium" broadly to include any amounts paid to insurers for coverage.⁹⁹ Thus, any information necessary to determine amounts owed by an insured to its insurer is supplementary rate information. As such, it must be filed and open to public inspection under section 11735.

⁹⁴ Appeal at p. 3:4-9.

⁹⁵ *Id.* at p. 5:15-24; Appellant's Post-Hearing Opening Brief, filed April 19, 2019 ("App. Post-Hearing Br."), p. 4:5-8.

⁹⁶ Resp. Post-Hearing Br. at pp. 17-18.

⁹⁷ *Id.* at p. 28.

⁹⁸ Ins. Code, § 11730, subd. (j), emphasis added.

⁹⁹ *Shasta Linen, supra*, at pp. 48-49 ["[M]oney paid by an insured to an insurer for coverage constitutes premium regardless of its name."]; *Mercury Ins. Co. v. Lara* (2019) 35 Cal.App.5th 82, __ ["[I]nsurance premium includes not only the 'net premium' ... but also the direct and indirect costs associated with providing that insurance coverage and any profit or additional assessment charged."].

In addition, insurers may charge premium only in accordance with their filed rates and supplementary rate information.¹⁰⁰ As the Commissioner determined in *Shasta Linen*, an insurer’s use of unfiled rates or supplementary rate information is unlawful.¹⁰¹ That is true regardless of whether the Commissioner disapproved the unfiled rates under Insurance Code section 11737.¹⁰²

B. Analysis and Conclusions of Law

The rates set forth in the guaranteed cost policies comport with Respondents’ rate filings under Insurance Code section 11735.¹⁰³ In contrast, the RPA unlawfully imposes unfiled rates and supplementary rate information that substantially modify and misapply the guaranteed cost policies’ rates.

1. Respondents Charged Appellants Unfiled Rates.

Starting in policy year 2013,¹⁰⁴ the Proposal and RPA imposed “loss pick containment rates” of \$12.71 for California classification code 8350, \$1.16 for classification code 8742, and \$0.88 for classification code 8810.¹⁰⁵ Those rates were not filed in accordance with section 11735.¹⁰⁶ In contrast, the filed California rates for those classification codes set out in the 2013 guaranteed cost policy were \$11.69, \$1.07, and \$0.80, respectively.¹⁰⁷ Similar discrepancies can be seen in all three policy years, as shown in the following table:¹⁰⁸

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¹⁰⁰ *Shasta Linen, supra*, at p. 49.

¹⁰¹ *Id.* at p. 52.

¹⁰² See *Ibid.*

¹⁰³ Exh. 5 at p. 5-5; Exh. 6 at p. 6-5; Exh. 7 at p. 7-6; Exh. 16 at p. 16-9; Exh. 18 at p. 18-9; Exh. 20 at p. 20-9.

¹⁰⁴ I.e., the annual period beginning October 1, 2013.

¹⁰⁵ Exh. 1 at p. 1-4; Exh. 4 at p. 4-9. The classification codes are set out in the California Workers’ Compensation Uniform Statistical Reporting Plan—1995, Cal. Code Regs., tit. 10, § 2318.6.

¹⁰⁶ See Exhs. 14 through 20.

¹⁰⁷ Exh. 5 at p. 5-5; Exh. 16 at p. 16-9.

¹⁰⁸ Exh. 1 at p. 1-4; Exh. 4 at p. 4-9; Exh. 5 at p. 5-5; Exh. 6 at p. 6-5; Exh. 7 at p. 7-6; Exh. 16 at p. 16-9; Exh. 18 at p. 18-9; Exh. 20 at p. 20-9.

| Classification Code | Rates (dollars per \$100 of payroll) | | | |
|---------------------|--------------------------------------|-------------|-------------|------------------|
| | 2013 Policy | 2014 Policy | 2015 Policy | RPA and Proposal |
| 8350 | \$11.69 | \$14.60 | \$13.99 | \$12.71 |
| 8742 | \$1.07 | \$1.05 | \$1.02 | \$1.16 |
| 8810 | \$0.80 | \$0.84 | \$0.79 | \$0.88 |

Simply put, Respondents charged Appellants based on the unfiled loss pick containment rates in the Proposal and RPA, not the guaranteed cost policies' filed rates.¹⁰⁹ It is beyond doubt that the rates Appellants paid departed from those in the guaranteed cost policies. Indeed, Respondents' EquityComp Proposal notes that rates applicable to Appellants are the RPA's loss pick containment rates and not the policies' rates.¹¹⁰ The monthly EquityComp plan analyses sent by Respondents also confirm that Appellants' program cost was based on the RPA's rates rather than those in the policies.¹¹¹ Moreover, the Commissioner found in *Shasta Linen* that the RPA rates and payment terms supplanted those of CIC's policies, and Respondents are precluded from arguing otherwise.¹¹² Because Respondents charged Appellants based on the unfiled Proposal and RPA rates, they unlawfully changed and misapplied the filed rates in the guaranteed cost policies.

2. Respondents Applied Unfiled Supplementary Rate Information.

As laid out above, any information contained the RPA necessary to determine amounts owed by Appellants constitutes supplementary rate information. As such, it was required to be filed and made public under Insurance Code section 11735. The RPA is predominantly comprised of such information, all of which was unfiled and unlawfully altered the filed rates set out in the guaranteed cost policies.

Most significantly, the RPA lays out a framework for altering Appellants' premium based

¹⁰⁹ See *Shasta Linen, supra*, at p. 55.

¹¹⁰ Exh. 1 at p. 1-4.

¹¹¹ E.g., Exh. 9 at p. 9-3.

¹¹² *Shasta Linen, supra*, at p. 56. See discussion below regarding *Shasta Linen's* preclusive effect.

on losses. Respondents' EquityComp patent describes the premium alteration as follows:

If the insured has lower than average losses in the next year, then the reinsurance company can provide a *premium reduction* according to the participation plan. If the insured has higher than average losses in a given year, then the reinsurance company will assess *additional premium* accordingly.¹¹³

The contractual mechanism for assessing additional premium is described in RPA sections 1, 2 and 4, which establish the “segregated cell” account that Appellants must pay into.¹¹⁴ The mechanism is further described in sections 1 through 4 of RPA Schedule 1, which establish a “run-off” term during which additional premium may be assessed.¹¹⁵ Those sections also detail the calculation and allocation of Appellants' premium based in large part on “loss pick containment amounts,” “loss development factors,” and “exposure group adjustment factors.”¹¹⁶

In addition, RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees not set out in Respondents' rate filings, and modify the guaranteed cost policies' cancellation terms and filed rates.¹¹⁷ Finally, the RPA removes Appellants' loss experience modification factor in calculating premium.¹¹⁸ That factor, which is detailed in Respondents' rate filings and the guaranteed cost policies, is required by law.¹¹⁹

In sum, all of the RPA's economic terms purport to change Appellants' premium obligations. Those terms therefore constitute “rates” or “supplementary rate information” as defined in Insurance Code section 11730. Because Respondents included none of that

¹¹³ *Shasta Linen, supra*, at p. 24, emphasis added.

¹¹⁴ Exh. 4 at pp. 4-1, 4-2.

¹¹⁵ *Id.* at pp. 4-6, 4-7.

¹¹⁶ *Ibid.*

¹¹⁷ *Id.* at pp. 4-2, 4-7.

¹¹⁸ See Exh. 4.

¹¹⁹ Cal. Code Regs., tit. 10, § 2351.1; *Shasta Linen, supra*, at p. 56.

information in its rate filings, as required by Insurance Code section 11735,¹²⁰ the RPA is unlawful and misapplied Respondents' rate filings.¹²¹

3. Respondents' Failure to File the RPA's Rates and Supplementary Rate Information Contravened Public Policy.

Respondents' failure to file the RPA's rate information contravenes public policy, and is not merely a technical violation. The main goal of California's workers' compensation framework is to protect the state's workforce by ensuring benefits are available to those injured or sickened in the course of their employment.¹²² Insurance Code section 11735's filing and public inspection requirement furthers that goal in two ways. First, the filing requirement ensures the Commissioner has the rate information necessary to determine that insurers charge amounts that are not discriminatory, not monopolistic, cover their losses and expenses, and do not threaten their solvency.¹²³ By withholding the RPA's rate information from their rate filings, Respondents prevented the Commissioner from exercising those oversight duties.

Second, section 11735's public inspection requirement provides broad access to filed rate information allowing employers to find coverage at the best competitive rates.¹²⁴ When rate information is transparent, policyholders are better able to compare coverage and reduce their costs. And insurers are less likely to gain a monopolistic advantage when all carriers' pricing information is public.

In furtherance of those aims, the Legislature passed Insurance Code section 11742 establishing a mandatory online rate comparison guide. Subdivision (a) provides:

The Legislature finds and declares that the insolvencies of more than a dozen workers' compensation insurance carriers have

¹²⁰ See Exh 14 through 20.

¹²¹ See *Shasta Linen, supra*, at p. 52.

¹²² *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.

¹²³ See Ins. Code, §§ 11732-11737.

¹²⁴ Ins. Code, § 11735, subd. (b); see also Ins. Code, § 11742, subd. (a).

seriously constricted the market and lead to a dangerous increase in business at the State Compensation Insurance Fund. Yet more than 200 insurance companies are still licensed to offer workers' compensation insurance in California. Unfortunately, many employers do not know which carriers are offering coverage, and it is both difficult and time consuming to try to get information on rates and coverages from competing insurance companies. A central information source would help employers find the required coverage at the best competitive rates.

When insurers use unfiled rates and supplementary rate information to modify their filed rates and information, they frustrate the Legislature's intent behind the comparison guide and section 11735's public inspection provisions. Respondents' failure to file the RPA's rates and supplementary rate information directly undermined these policy aims by preventing the public from comparing Respondents' filed rates to those actually charged under EquityComp.¹²⁵

4. Rate Disapproval Procedures Are Not Applicable to This Proceeding.

Respondents argue that use of unfiled rate information is not unlawful unless the Commissioner follows the rate disapproval procedures laid out in Insurance Code section 11737, subdivisions (a) and (d).¹²⁶ But *Shasta Linen* determined that use of unfiled rates is unlawful regardless of any rate disapproval action.¹²⁷ Respondents are bound by that determination and are precluded from rearguing it here.¹²⁸ In any event, their argument is incorrect. Finding the use of unfiled rate information unlawful under subdivision (f) is neither equivalent to, nor predicated on, rate disapproval.¹²⁹

Section 11737 delineates two separate roles for the Commissioner. Subdivision (f) authorizes the Commissioner to hear private party appeals concerning the application of rate

¹²⁵ In addition, by marketing and selling EquityComp to companies with less than \$500,000 in annual premiums, Respondents frustrated the policy aim of protecting small and mid-sized employers from the risks of loss-sensitive insurance plans. (See *Shasta Linen, supra*, at pp. 15-16.)

¹²⁶ Resp. Post-Hearing Br. at pp. 16, 28.

¹²⁷ *Shasta Linen, supra*, at pp. 45, 52.

¹²⁸ See below regarding *Shasta Linen*'s preclusive effect.

¹²⁹ See *Shasta Linen, supra*, at p. 45 ["The authority to hear grievances of employers for misapplication of rates ... is separate from the Commissioner's authority to disapprove rates."]

filings. In contrast, subdivisions (a) through (e) permit the Commissioner to bring his own actions to disapprove unfiled or otherwise improper rates. When the Commissioner finds an unfiled rate or supplementary rating information unlawful under subdivision (f), he performs an *adjudicatory* function. When the Commissioner disapproves an unfiled rate under subdivisions (a) and (d), he acts in an *enforcement* capacity. Indeed, subdivision (f) makes no reference to disapproval. Thus, contrary to Respondents' assertions, determinations of unlawfulness and rate disapprovals are not equivalent.

Respondents further argue that use of unfiled rate information remains lawful unless the rates are first disapproved.¹³⁰ Their argument implies that if use of unfiled rates were *per se* unlawful, the Commissioner's authority to disapprove those rates would be superfluous. According to that argument, disapproval must be a prerequisite to finding unfiled rates unlawful.¹³¹ But the argument overlooks statutory language and relevant case law.

A First, rate disapproval allows the Commissioner to forestall the use of unlawful rates prior to private party appeals. If the Commissioner learns an insurer is using an unfiled rate, he may stop the unlawful activity by disapproving the rate on his own initiative, rather than waiting until a private party appeal.¹³² Thus, rather than being superfluous, the rate disapproval mechanism serves an important policy aim.

Second, California courts have not accepted Respondents' argument. In *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,¹³³ the plaintiff public utility sought to enforce a higher contractual rate than the rate it had filed with the Public Utilities Commission ("PUC"). The

¹³⁰ Resp. Post-Hearing Br. at p. 28.

¹³¹ See, e.g., *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.* (E.D.Cal. Jun. 20, 2016, Civ. No. 2:16-158 WBS AC) 2016 WL 3407797 at p. *4.

¹³² Of course, the fact the rates are unfiled makes it likely the Commissioner will not learn of their unlawful use until an aggrieved private party raises an appeal, in which case rate disapproval would be too late to benefit the appellant.

¹³³ *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal.App.3d 750 (*South Tahoe Gas*).

defendant countered that the contract was illegal and violated state law and PUC regulations since it charged an unfiled rate. Much like Insurance Code section 11735, the Public Utilities Code section 489 requires the utility to file its rates and rating information. And similar to Insurance Code section 11737, Public Utilities Code section 728 permits the PUC to disapprove a utility's rates. Although there was no indication the PUC acted under section 728, the Court of Appeal agreed that a charge in excess of the filed rate was illegal.¹³⁴ In essence, the Court's ruling confirms that rate disapproval proceedings are not a prerequisite to finding the use of unfiled rates unlawful.

Finally, Respondents rely upon an unpublished opinion of the Court of Appeal and interlocutory orders in another case to argue that use of unfiled rates remains lawful unless disapproved by the Commissioner.¹³⁵ Those cases are easily distinguished. In both, the plaintiffs attempted to base Unfair Competition Law ("UCL")¹³⁶ claims on violations of section 11735's filing requirements. The courts held that such a violation could not form the basis for a claim *in court* when the Commissioner had not disapproved the unfiled rates. In reaching this result, the Court of Appeal relied on *Samura v. Kaiser Foundation Health Plan, Inc.*¹³⁷ The *Samura* court held that a UCL claim may not be based on violations of a statute whose enforcement "has been entrusted exclusively" to a regulatory agency.¹³⁸ Such a claim, if allowed, would result in the court improperly invading the agency's exclusive purview.¹³⁹ But nothing in *Samura* suggests the agency charged with enforcing the statute may not remedy its violation. While courts may not have original jurisdiction to remedy a violation of section 11735 in a private party action, the

¹³⁴ *Id.* at p. 755.

¹³⁵ Resp. Post-Hearing Br. at p. 28 [citing *Bristol Hotels & Resorts v. Nat. Council on Compensation Ins., Inc.* (Mar. 13, 2002, E027037) [nonpub. opn.]; *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, *supra*, 2016 WL 6094446 at pp. *3-*6].

¹³⁶ Bus. & Prof. Code § 17200 et seq.

¹³⁷ *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284 (*Samura*).

¹³⁸ *Id.* at p. 1299.

¹³⁹ *Ibid.*

Commissioner does.¹⁴⁰

IV. The RPA Must Be Severed from the Guaranteed Cost Policies.

Having found the RPA void, the ALJ must consider the appropriate remedy. Respondents argue the Commissioner has no authority to order retrospective remedies under Insurance Code section 11737, subdivision (f). Specifically, Respondents assert the Commissioner may not find a contract void or unenforceable in private party appeals.¹⁴¹ Appellants argue that this tribunal should enforce the terms of the Request to Bind.¹⁴² The ALJ finds both parties' arguments unpersuasive.¹⁴³

A. Applicable Law

1. Insurance Code Section 11737, Subdivision (f)

Section 11737, subdivision (f), grants the Commissioner broad authority to award remedies in workers' compensation appeals. As previously noted, the statute authorizes him to "affirm, modify, or reverse" an insurer's action concerning the application of its rating system. The statute contains no language restricting remedies the Commissioner may order. Nor has any California court inferred such restrictions from the statute. Indeed, the breadth of the Commissioner's authority is consistent with his comprehensive role to "require from every insurer a full compliance with all the provisions of [the Insurance Code]."¹⁴⁴

While Respondents argue that remedies under rate disapprovals may only be applied prospectively,¹⁴⁵ remedies for findings of unlawfulness under subdivision (f) may either be

¹⁴⁰ See the discussions on jurisdiction in part I above and remedies in part IV below.

¹⁴¹ Resp. Post-Hearing Br. at pp.17-18.

¹⁴² App. Post-Hearing Br. at pp 6-8.

¹⁴³ As a preliminary matter, the ALJ notes the Commissioner determined in *Shasta Linen* that he has authority to find a contract void in a private party appeal. (*Shasta Linen, supra*, at pp. 65-68.)

¹⁴⁴ Ins. Code, § 12936.

¹⁴⁵ Resp. Post-Hearing Br. at p. 18. This Proposed Decision need not, and does not, decide whether there may be circumstances in which rate disapproval remedies may be applied retrospectively.

prospective or retrospective.¹⁴⁶ In fact, nothing in subdivision (f) suggests the Commissioner’s decision to modify or reverse an insurer’s action may apply only on a going-forward basis. That subdivision principally concerns past harm, in that it authorizes a private party “aggrieved” (past) to request action by an insurer to review the manner in which its rating system “has been applied” (past) in connection with the “insurance afforded or offered” (past). Since a prospective remedy would do nothing to address past harm, logically remedies under subdivision (f) may be retrospective.

Finally, because subdivision (f) does not limit the available remedies, the Commissioner may void contracts that are based on unlawful rates and sever unlawful provisions, as appropriate.¹⁴⁷ The California Supreme Court’s holding in *Marathon Entertainment, Inc. v. Blasi*¹⁴⁸ clarifies this authority. There, an actress brought a claim a before the California Labor Commissioner, seeking to void a contract with her manager on the grounds the agreement violated the Talent Agency Act. The Labor Commissioner found a violation and declared the contract void even though the statute specified no remedy. The Court explained that since “the Legislature has not seen fit to specify the remedy for violations” of the act, “the full voiding of the parties’ contract is available, but not mandatory; likewise, severance is available, but not mandatory.”¹⁴⁹ The Court further stated those remedies could be imposed at the administrative level, as well as by the courts.¹⁵⁰

2. Civil Code Sections 1598 and 1608

Civil Code sections 1598 and 1608 render a contract “void” if its object or consideration

¹⁴⁶ *Shasta Linen, supra*, at p. 53.

¹⁴⁷ *Id.* at pp. 65-66.

¹⁴⁸ *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Id.* at pp. 996, 998.

are unlawful.¹⁵¹ And the California Supreme Court has held that a contract made in violation of a regulatory statute is generally void.¹⁵² Indeed, courts will not normally enforce an illegal agreement or one against public policy, as the public importance of discouraging prohibited transactions outweighs equitable considerations of possible injustice between the parties.¹⁵³

This is especially true where regulated entities fail to file their rates as required by law. In such cases, California courts have held contractual provisions based on the unfiled rates unlawful and void.¹⁵⁴ Similarly, the Commissioner determined in *Shasta Linen* that insurance contracts based on unfiled rates in violation of Insurance Code section 11735, subdivision (a), are unlawful and void.¹⁵⁵

In compelling cases, the courts will enforce illegal contracts in order to avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.¹⁵⁶ “[T]he extent of enforceability and the kind of remedy granted depend upon a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts.”¹⁵⁷ A contract is absolutely void where the illegality involves *malum in se*—acts “of an immoral character, those which are inequities in themselves, and those opposed to sound public policy or designed to further a crime or obstruct justice.”¹⁵⁸ On the other hand, where the illegality involves *malum prohibitum*, the contract will be voidable “depending on the factual context and the public policies involved.”¹⁵⁹ In deciding whether to enforce an illegal contract, courts may also consider whether the parties are *in pari delicto* and whether the statute’s purpose would best

¹⁵¹ *R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563.

¹⁵² *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291.

¹⁵³ *Ibid.*

¹⁵⁴ *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*, *supra*, 25 Cal.App.3d at p. 752.

¹⁵⁵ *Shasta Linen*, *supra*, at pp. 52, 65-66.

¹⁵⁶ *Asdourian v. Araj*, *supra*, 38 Cal.3d at p. 292.

¹⁵⁷ *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*, *supra*, 25 Cal.App.3d at p. 759.

¹⁵⁸ *Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 593.

¹⁵⁹ *Asdourian v. Araj*, *supra*, 38 Cal.3d at p. 293.

be served by enforcement of the contract.¹⁶⁰

In addition, a contract made in violation of statute will be enforced “where the penalties imposed by the Legislature exclude by implication the additional penalty of holding the contract void.”¹⁶¹ In determining whether to enforce such a contract, “the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the Legislature and to a wise public policy.”¹⁶²

3. Civil Code Section 1599

The California Civil Code permits severing unlawful provisions from an otherwise lawful contract. Civil Code section 1599 states that “[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest.” Section 1599 applies “when the parties have contracted, in part, for something illegal. Notwithstanding any such illegality, it preserves and enforces any lawful portion of a parties’ contract that feasibly may be severed.”¹⁶³

Severing illegal terms prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of a voided contract.¹⁶⁴ And it further conserves a contractual relationship where doing so would not condone an illegal scheme.¹⁶⁵

The doctrine of severability is equitable and fact specific.¹⁶⁶ The overarching inquiry is whether severance would further the interests of justice.¹⁶⁷ As explained in *Baeza v. Superior Court*:¹⁶⁸

¹⁶⁰ *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990-991.

¹⁶¹ *Asdourian v. Araj*, *supra*, 38 Cal.3d at p. 291.

¹⁶² *Vitek, Inc. v. Alvarado Ice Palace, Inc.*, *supra*, 34 Cal.App. at p. 593.

¹⁶³ *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991.

¹⁶⁴ *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Marathon Entertainment, Inc. v. Blasi*, *supra*, 42 Cal.4th at p. 998.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Baeza v. Superior Court*, *supra*, 201 Cal.App.4th at p. 1230.

Courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate. [Citation.] California cases take a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered.

4. Civil Code Section 3399

Civil Code section 3399 authorizes courts to reform—i.e., revise—a contract that “does not truly express the intention of the parties” as a result of fraud or mistake.¹⁶⁹ Absent those circumstances, however, adjudicators may not reform a contract unless specifically authorized by statute.¹⁷⁰ “Generally, courts reform contracts only where the parties have made a mistake [citation] and not for the purpose of saving an illegal contract.”¹⁷¹

B. Analysis and Conclusions of Law

1. The RPA and the Request to Bind Are Void and Their Terms Cannot Be Severed.

Because the RPA is based on unfiled rates and supplementary rate information in violation of Insurance Code section 11735, the agreement is unlawful and void.¹⁷² This determination is consistent with California case law concerning unfiled rates and the Commissioner’s determination in *Shasta Linen*.¹⁷³ And because the RPA’s sole objective is to circumvent lawfully filed rates, its terms cannot be severed.

¹⁶⁹ *American Home Ins. Co. v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 961. Section 3399 provides: “When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.”

¹⁷⁰ *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 125 [Courts have no power “under their inherent limited authority to reform contracts.”].

¹⁷¹ *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407-408.

¹⁷² *Shasta Linen, supra*, at pp. 52, 65-66.

¹⁷³ See *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra*, 25 Cal.App.3d at p. 752 [public utility’s unfiled rate held void]; *Shasta Linen, supra*, at pp. 52, 65-66.

Consider *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,¹⁷⁴ discussed above. There, the plaintiff public utility sought to enforce a higher contractual rate than was set out in the plaintiff's regulatory rate filings. The court found the unlawful contractual rate void and unenforceable.¹⁷⁵ The court severed the unlawful rate and enforced the remainder of the contract in that case because "there is no law against contracting for the extension of a gas main. It is only the amount that can be charged which is regulated."¹⁷⁶ That contrasts with this appeal, where the RPA's central purpose was to illegally modify Respondents' filed rates and override the legal rate scheme set out in the guaranteed cost policies. As earlier discussed, the RPA's economic terms consist of unfiled rates and supplementary rate information whose use is illegal. The remainder of the RPA is boilerplate that serves only to implement the economic provisions.¹⁷⁷ Accordingly, the RPA "has but a single object"¹⁷⁸ making it impossible to sever only those provisions relating to rates and supplementary rate information. In addition, no interest of justice or public policy would be furthered by enforcing any of the boilerplate terms. The ALJ therefore finds the entire RPA void and unenforceable.

Appellants argue the Request to Bind should be enforced in lieu of the RPA.¹⁷⁹ However, the Request to Bind's purpose is to incorporate the unlawful rates set out in the RPA and Proposal, which renders the Request to Bind equally unenforceable. Appellants alternatively seek enforcement of the "profit sharing" portions of Proposal incorporated in the Request to Bind.¹⁸⁰ But those provisions are not the RPA's (or the Proposal's) only illegal terms, as discussed above. This tribunal cannot sever unlawful terms that disadvantage Appellants but

¹⁷⁴ *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*, *supra*, 25 Cal.App.3d at p. 752.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Id.* at p. 757.

¹⁷⁷ See Exh. 4.

¹⁷⁸ Civil Code, §1598.

¹⁷⁹ App. Post-Hearing Br. at pp. 6-8.

¹⁸⁰ Appeal at p. 4; Appellant's Post Hearing Reply Briefing, filed May 2, 2019, p. 4.

enforce those that Appellants find favorable. As Appellants rightly pointed out,¹⁸¹ adjudicators must refuse to enforce *all* unlawful contract terms that violate public policy once the illegality is apparent.¹⁸²

2. No Compelling Reason Exists to Enforce the RPA or Request to Bind.

Even assuming the illegal RPA or Request to Bind were merely voidable rather than void *per se*, no valid reason exists to enforce them.¹⁸³ Failure to enforce the agreement would neither result in unjust enrichment nor an unduly harsh penalty. Additionally, there is no indication the Legislature intended to exclude the administrative remedy of finding the RPA and Request to Bind void.

a. Finding the RPA and Request to Bind Unenforceable Would Not Result in Unjust Enrichment or an Unduly Harsh Penalty.

The policy behind Insurance Code section 11735, the nature of the illegality, and the particular facts of this case support the conclusion that the RPA should not be enforced.

First, there is no risk of *unjust* enrichment to Appellants, because “an insurer’s issuance of an illegal contract, even if it results in enrichment to the insured, does not result in *unjust* enrichment, since the insured did nothing wrong and the insurer should have known of its own legal duties.”¹⁸⁴

Second, denying enforcement of the illegal RPA and Request to Bind is not unduly harsh, because Respondents knew of California’s filing requirements. In fact, their EquityComp patent

¹⁸¹ App. Post-Hearing Br. at p. 3:12-21.

¹⁸² See *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 147-148 [“Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. [Citations.] It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality.”].

¹⁸³ See *Shasta Linen*, *supra*, at pp. 67-68.

¹⁸⁴ *American Zurich Ins. Co. v. Country Villa Service Corp.* (C.D.Cal. Jul. 9, 2015, No. 2:14-cv-03779-RSWL-AS) 2015 WL 4163008 at p. *16; accord *Shasta Linen*, *supra*, at pp. 67-68.

makes it clear that Respondents not only knew of the filing requirements but used the RPA to evade their regulatory obligations.¹⁸⁵ Additionally, enforcing the RPA or Request to Bind would encourage illegal activity—i.e., the use of unfiled rates and supplementary rate information.¹⁸⁶

Third, the parties are not *in pari delicto*. Appellants had no reason to know the RPA's rates and supplementary rate information was unfiled. Respondents are the sole parties at fault, since it used the RPA to circumvent California's filing requirements. "[I]t would not be equitable to allow the party who created the illegality to enforce the illegal contract."¹⁸⁷

Finally, an important purpose behind section 11735's filing and public inspection requirements is to ensure the protection of California's workforce.¹⁸⁸ Insurers who unlawfully use unfiled rate information frustrate that policy.¹⁸⁹ Except in narrow circumstances not applicable here, "[i]t is a settled rule that a contract will not be enforced if the contract is in violation of the provisions of a statute enacted for the protection of the public."¹⁹⁰

Respondents nevertheless argue under *Medina v. Safe-Guard Products*¹⁹¹ that the RPA should be enforced because Appellants suffered no harm or loss due to its unfiled rates.¹⁹² But Respondents' reliance on *Medina* is misplaced. There, the statute specifically required the plaintiff to have "suffered injury in fact and ha[ve] lost money or property" in order to assert a claim.¹⁹³ In contrast, Insurance Code section 11737, subdivision (f), requires no such injury or

¹⁸⁵ See *Shasta Linen, supra*, at pp. 23-24, 61-62.

¹⁸⁶ *American Zurich Ins. Co. v. Country Villa Service Corp., supra*, at p. *17; accord *Shasta Linen, supra*, at p. 68.

¹⁸⁷ *American Zurich Ins. Co. v. Country Villa Service Corp., supra*, at p. *17; *Shasta Linen, supra*, at p. 68.

¹⁸⁸ See the discussion in part III(B)(3) above.

¹⁸⁹ See discussion in part III(B)(3) above. See also *Shasta Linen, supra*, at p. 67.

¹⁹⁰ *Napa Valley Elec. Co. v. Calistoga Elec. Company* (1918) 38 Cal.App. 477, 478-479; accord *American Zurich Ins. Co. v. Country Villa Service Corp., supra*, at p. *17. The exception involves licensing laws enacted solely "for the protection of private economic interests (such as the interest of property owners in competent construction)" by licensed contractors. (*R. M. Sherman Co. v. W. R. Thomason, Inc., supra*, 191 Cal.App.3d at 566.) Since the workers' compensation statutes were enacted in large part to protect California's workforce, and not merely the economic interests of employers, any "analogy with the licensing cases fails entirely." (*Id.* at p. 568.)

¹⁹¹ *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 115 (*Medina*).

¹⁹² Resp. Post-Hearing Br. at pp. 31-32.

¹⁹³ *Medina, supra*, at p. 115.

loss.¹⁹⁴

Accordingly, the illegal RPA and Request to Bind should not be enforced.

b. The Insurance Code Permits Finding the RPA Void.

The Insurance Code does not prevent the Commissioner from finding illegal insurance contracts void, nor is there any indication the Legislature intended such. While section 11737, subdivision (a) authorizes the Commissioner to bring separate proceedings to disapprove unfiled rates, rate disapproval complements, rather than precludes, remedies in private party appeals. As discussed above, disapproval proceedings prevent the use of unfiled rates should the Commissioner promptly learn of the illegal activity. The fact that the Legislature granted the Commissioner such enforcement authority in no way suggests it intended to leave aggrieved parties without a remedy where the Commissioner fails to bring disapproval proceedings because, for example, he was not informed of the unlawful activity in time or lacks the necessary resources. To the contrary, “wise public policy” best discourages the unlawful use of unfiled rates where the Commissioner has authority both to forestall it through the disapproval process and to provide aggrieved parties meaningful recourse after the fact. The Legislature implemented this policy by including both the rate disapproval procedures and the separate private appeal process in section 11737.

3. The RPA and the Request to Bind Must Be Severed from the Guaranteed Cost Policies.

Given that the RPA and Request to Bind are void and unenforceable, we turn to the question of whether to sever them from the guaranteed cost policies, or whether instead to find the parties’ entire contractual arrangement void. The ALJ finds the RPA and Request to Bind

¹⁹⁴ In a similar context, the court in *South Tahoe Gas* found an unfiled rate unenforceable even though the buyer apparently suffered no harm from the rate’s unfiled status. (*South Tahoe Gas Co. v. Hofmann Land Investment Co.*, *supra*, 25 Cal.App.3d at p. 755.)

must be severed.

While the main purpose of the RPA and Request to Bind was illegal—*i.e.*, to use unfiled rate information to modify and misapply Respondents’ filed rates—the central purpose of the parties’ overall arrangement was valid; to provide Appellants with workers’ compensation insurance. The RPA and Proposal incorporated in the Request to Bind, with their focus on unlawful rates and supplementary rate information, was collateral to that central purpose. Additionally, there has been no allegation in this appeal that any portion of the guaranteed cost policies is unlawful. Moreover, “the interest of justice or the policy of the law would be furthered”¹⁹⁵ by severing the RPA and Request to Bind. Finding the entire arrangement void, including the policies, would leave Appellants uninsured for the period in question. That would be neither lawful, since the law requires Appellants to have workers’ compensation insurance, nor would it be in the best interest of the workers left without coverage for any injuries occurring during that period. Accordingly, the RPA and Request to Bind should be severed from the guaranteed cost policies.¹⁹⁶

V. Respondents Received Due Process and a Fair Hearing.

Respondents argue they were deprived of due process and fair hearing rights because they were not permitted to present testimony of certain proposed witnesses.¹⁹⁷ This argument is unconvincing. As discussed in the ALJ’s February 26, 2019 Order Limiting Witness Testimony, the testimony of the proposed witnesses would have been irrelevant or otherwise inadmissible. In particular, most of the proposed testimony concerned issues decided in *Shasta Linen* that

¹⁹⁵ *Baeza v. Superior Court*, *supra*, 201 Cal.App.4th at p. 1230.

¹⁹⁶ For avoidance of doubt, the ALJ makes no finding as to whether the guaranteed cost policies are valid or enforceable. There has been no allegation in this proceeding that the policies are unenforceable on any grounds within the Commissioner’s jurisdiction under Insurance Code section 11737, subdivision (f).

¹⁹⁷ Resp. Post-Hearing Br. at pp. 25-26. Respondents also argued that their due-process rights were violated because they were prohibited from conducting pre-hearing discovery. (*Id.* at p. 25.) However, Respondents did not request discovery in this appeal and, contrary to Respondents’ assertion, the ALJ issued no order denying discovery.

Respondents were estopped from rearguing in this appeal. Respondents had ample opportunity to elicit similar expert witness testimony in *Shasta Linen* and did so. Because they decided to settle and terminate judicial review of that case, Respondents are now bound by its findings.

Respondents further contend they may reargue various issues decided in *Shasta Linen*.¹⁹⁸ That is incorrect. As discussed at length in the Notice Regarding the Preclusive Effect of the *Shasta Linen* Decision (“Preclusive Effect Notice”),¹⁹⁹ Respondents are precluded from further litigating those issues by the doctrines of collateral estoppel and failure to exhaust judicial remedies.

VI. The Consent Order Has No Impact on This Appeal.

Respondents argue this appeal must be dismissed because the Consent Order among the CDI, CIC and AUCRA requires the RPA to be enforced and strips Appellants of standing under Insurance Code section 11737, subdivision (f).²⁰⁰ That argument is incorrect for several reasons. First, nothing in the Consent Order suggests that it binds third parties such as Appellants.²⁰¹ Second, the Consent Order provides that the *Shasta Linen* decision is precedential and applies to “any form of RPA that is substantially similar to the RPA issued in Shasta Linen Supply, Inc.”²⁰² Third, the Consent Order expressly states that it neither prevents the Commissioner from declaring unfiled RPAs “unenforceable, void, voidable, or illegal” nor from “adjudicat[ing] the rights of others.”²⁰³ As discussed above, the RPA in this case is substantially similar to the RPA in *Shasta Linen*, which the Commissioner determined was unlawful and unenforceable.²⁰⁴ Accordingly, the Consent Order does not prevent the Commissioner from adjudicating this

¹⁹⁸ Resp. Post-Hearing Br. at p. 25.

¹⁹⁹ Order Taking Official Notice; Notice Regarding Preclusive Effect of the *Shasta Linen* Decision, dated July 20, 2018.

²⁰⁰ Resp. Post-Hearing Br. at p 24.

²⁰¹ See Exh. 309.

²⁰² *Id.* at pp 309-2, 309-3.

²⁰³ *Id.* at p. 309-6.

²⁰⁴ *Shasta Linen, supra*, at p. 69.

appeal and finding the RPA void.

VII. The ALJ and the Commissioner Are Not Equitably Estopped from Finding the RPA Void.

Respondents argue the ALJ and the Commissioner are equitably estopped from finding the RPA void, because the CDI knew for several years that the RPA was unfiled yet took no action.²⁰⁵ Respondents' argument is precluded under *Shasta Linen*.²⁰⁶ The argument is also wrong. A party may properly assert equitable estoppel only against another *party* to the proceeding.²⁰⁷ Neither the CDI, nor the ALJ nor the Commissioner is a party here. The ALJ and the Commissioner are the *adjudicators* of this appeal. The ALJ is aware of no case in which the adjudicator was equitably estopped from drawing legal conclusions or granting relief because of his or her agency's prior actions. In any event, even when the government is a party, mere failure to enforce the law does not estop the government from subsequently enforcing it.²⁰⁸ Therefore, the ALJ and the Commissioner are not estopped from finding the RPA void.

A SEMIMONTHLY PUBLICATION FOR THE WORKERS' COMP EXECUTIVE

Conclusions of Law

Based on the foregoing facts and analysis, the ALJ makes the following legal conclusions:

1. Pursuant to Insurance Code section 11737, subdivision (f), the Commissioner has exclusive jurisdiction to adjudicate Appellants' claim that Respondent misapplied their Insurance Code section 11735 filings.
2. Respondents' RPA contained rates and supplementary rate information that must be filed pursuant to Insurance Code section 11735. Respondents violated section 11735 by

²⁰⁵ Resp. Post-Hearing Br. at pp. 18-24.

²⁰⁶ *Shasta Linen*, *supra*, at pp. 64-65; see discussion above regarding *Shasta Linen*'s preclusive effect.

²⁰⁷ See *Lentz v. McMahon* (1989) 49 Cal.3d 393, 399 ["the party to be estopped . . ."].

²⁰⁸ *West Washington Properties, LLC v. Cal. Dept. of Transp.* (2012) 210 Cal.App.4th 1136, 1148-1149; *Feduniak v. Cal. Coastal Commission* (2007) 148 Cal.App.4th 1346, 1369.

failing to file the RPA's rates and supplementary rate information.

3. Respondents misapplied their Insurance Code section 11735 filings by overriding their filed rates with the RPA's unfiled rates and unfiled supplementary rate information.

4. Because the RPA applied unfiled rates and supplementary rate information, contravening Insurance Code section 11735, the RPA is illegal and void. The RPA cannot be reformed and no compelling reason exists to enforce it. Accordingly, the RPA must be severed from the guaranteed cost policies.

ORDER


IT IS ORDERED:

To the extent Appellants, or either of them, have remitted to any of Respondents funds in excess of the total amount that may be validly charged under Appellants' guaranteed cost policies,²⁰⁹ CIC shall refund the excess to Appellants within 30 days after the date this proposed decision is adopted. This Order shall not apply to charges to the extent they relate to insurance for Appellants' operations outside of California.

* * *

I submit this proposed decision based on the evidentiary hearing, records and files in this matter, and recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: June 6, 2019


CLARKE de MAIGRET
Administrative Law Judge
Administrative Hearing Bureau

²⁰⁹ See footnote 196, *supra*.

DECLARATION OF SERVICE BY MAIL

Case Name/No.: In the Matter of the Appeal of:
VAN DE POL ENTERPRISES, INC.;
FUEL DELIVERY SERVICES, INC.,
File No. AHB-WCA-17-42

I, CANDACE GOODALE, declare that:

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to this action. My business address is State of California, Department of Insurance, Executive Office, 300 Capitol Mall, Suite 1700, Sacramento, California, 95814.

I am readily familiar with the business practices of the Sacramento Office of the California Department of Insurance for collection and processing of correspondence for mailing with the United States Postal Service. Said ordinary business practice is that correspondence is deposited with the United States Postal Service that same day in Sacramento, California.

On June 28, 2019 following ordinary business practices, I caused a true and correct copy of the following document(s):

NOTICE OF NON-ADOPTION OF PROPOSED DECISION; and ORDER OF REFERRAL; PROPOSED DECISION

to be placed for collection and mailing at the office of the California Department of Insurance at 300 Capitol Mall, Sacramento, California, 95814 with proper postage prepaid, in a sealed envelope(s) addressed as follows:

(SEE ATTACHED SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on June 28, 2019.


CANDACE GOODALE

PARTY SERVICE LIST
VAN DE POL ENTERPRISES, INC.;
FUEL DELIVERY SERVICES, INC
FILE NO.: AHB-WCA-17-42

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