SHAND S. STEPHENS (Bar No. 67694)
shand.stephens@dlapiper.com
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, CA 94105-2933
Tel.: 415.836.2500
Fax: 415.836.2501

ANTHONY P. COLES (admitted *pro hac vice*)
anthony.coles@dlapiper.com
DLA PIPER LLP (US)
1251 Avenue of the Americas, 27th Floor
New York, NY 10020
Tel: 212.335.4500
Fax: 212.335.4501

Attorneys for Respondent California Insurance Company, Inc., a California corporation, and its Successor, California Insurance Company, Inc., a New Mexico corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO – UNLIMITED JURISDICTION

INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Applicant,

v.

CALIFORNIA INSURANCE COMPANY, INC., a California corporation,

Respondent.

CASE NO. 19CIV06531

RESPONDENT CALIFORNIA INSURANCE COMPANY'S GENERAL AND SPECIFIC OBJECTIONS TO PROPOSED STATEMENT OF DECISION AND TENTATIVE ORDER AFTER HEARING AUGUST 23, 2023

Department: 3
Judge: Hon. Susan L. Greenberg

GENERAL OBJECTIONS TO ENTIRETY OF THE PROPOSED STATEMENT OF DECISION AND TENATIVE ORDER AFTER HEARING AUGUST 23, 2023

This Court's adoption of the Conservator's Plan rejects 85 years of California Supreme Court jurisprudence that in a conservation "liquidation is a last resort." *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 329 (1937). On November 3, 2019, *the day before the Conservation*, CIC was a company with $1 billion in assets including capital and surplus of $600 million. It did business in twenty-six states, was rated "A" by the insurance industry rating agency, A.M. Best, and was ranked among the top five in claims management by the California Department of Labor. Its insurance operations, including its loss sensitive Workers' Compensation Program, were audited by the Commissioner of Insurance on five occasions between 2006 and 2015. None of the resulting reports concluded, or provided CIC with any reason to conclude, that its Program violated any law or regulation. Under the Conservator's Plan, *the day after the Conservation*, CIC will be a shell of itself, destroying years of the development of a thriving, financially strong business. The Court's Proposed Statement of Decision and Tentative Order (the "Proposed Order") forces the sale at auction of 86% of CIC's policyholder business, eviscerating CIC as a going concern. Under California Supreme Court precedent there is no justification for liquidating a conserved company *regardless of whether or not the liquidation generates fair value* except in the very narrow circumstance where liquidation actually is a last resort—which plainly is not the case with CIC, indisputably a financially strong company. *Carpenter*, 10 Cal. 2d at 329. The forced sale of CIC's assets is not a fair market transaction because it is not between a willing buyer and a willing seller, the most basic precept of a fair market sale.

According to the Conservator, the Plan merely enables CIC to "withdraw" from the California insurance market in a manner compliant with the Insurance Code. This is a pretext for a punitive auction of CIC's assets *that is not required* by the California Insurance Code. There is no evidence that CIC—an asset rich, thriving company—has chosen to forfeit its California license at the cost of becoming a financial skeleton. Whatever pretextual label the Conservator offers, the Plan is a punitive liquidation of a going concern. The Plan violates even the Conservator's own

representations to A.M. Best that "[t]he goal here is not to destroy the company but to correct some unacceptable behaviors." (CIC Compendium of Evid. Ex. 100.)

Many lawful alternatives exist to the liquidation of CIC, ranging from allowing affiliate Continental Indemnity Company ("Continental"), which is licensed in California, to assume the CIC policies on appropriate terms, or by authorizing CIC under Insurance Code section 1072 to service existing policies. The Insurance Code provides a panoply of remedies ranging from fines to various levels of oversight, to the provisions of Insurance Code section 1072. The record in this case makes clear that the Conservator did not seriously consider any alternative other than CIC's punitive liquidation, despite his fiduciary obligation to do so. The statement in the Proposed Order that the proposed Plan "is not intended to destroy CIC" is wrong in light of the forced sale of 86% of CIC's business and is irreconcilable with the Conservator's fiduciary duties. Section 2.2 of the Plan should be rejected.

The Proposed Order's justification for Section 2.6 also is mistaken as a matter of law. The Plan rests on unproven allegations made by plaintiff-policyholder lawyers in ongoing litigations against CIC who have no personal knowledge of the facts they allege—allegations that have been rejected in federal court, in state court, and in arbitration.[1] The Proposed Order supplants the California courts that are adjudicating the pending cases in the RPA Litigation without this Court actually hearing the evidence and strips CIC of any due process right to defend itself. The Proposed

[1] For example, *in federal court*, the Eastern District of California found that "Pet Food has not offered any other theory of loss and therefore lacks standing to sue under the UCL. Accordingly, the court will grant summary judgment to defendants." (CIC Compendium of Evid. Ex. 22 at p.6, *Pet Food Express, Ltd. v. Applied Underwriters, Inc.*, No. 2:16-CV-01211 WBS AC, 2019 WL 4318584, at *8 (E.D. Cal. Sept. 12, 2019).) ***In state court***, after a one-week trial, the Superior Court of Ventura County issued a Statement of Intended Decision providing its reasoning for dismissal of the policyholder's claims under the UCL, as well as its claims for fraud, misrepresentation, and bad faith, and entry of a verdict in favor of CIC. (CIC Compendium of Evid. Ex. 31, *Roadrunner Mgmt. Servs., Inc. v. Applied Underwriters, Inc.*, No. 56-2017-00493391 (Super. Ct. Ventura Cnty. Nov. 12, 2019).) ***In arbitration***, in a proceeding that is ***prominently misdescribed*** in the Proposed Order, *infra*, the arbitrator ruled that AUCRA was the prevailing party and that "O'Connell lacks standing to invalidate the contract pursuant to Insurance Code section 11658, or under theories of fraud, bad faith, ambiguity or unconscionability." (CIC Compendium of Evid. Ex. 38 at Ex. 1, Final Award at 10, *O'Connell Landscape Maintenance, Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, JAMS No. 1100084561.) *See, e.g.*, CIC Compendium of Evid. Exs. 7, 18-31 (attaching proceedings resulting in dismissal of policyholder claims).

Order adopts the Conservator's assertion that allowing the courts to hear the evidence on the merits "***would not be fair***." (Cons. Draft Order at 70 (emphasis added).) Rarely does one see such lack of confidence in the fairness of our California trial and appellate court judges expressed by a California trial court judge or a Conservator, much less adopted in a proposed order.

The unfairness permeating Section 2.6 lies in authorizing the Conservator to resolve every case in the RPA Litigation without hearing the evidence that would be presented at trial, and where discovery is at its preliminary stages. CIC is entitled to the standard of proof on disputed issues in the RPA Litigation that applies to the resolution of every California civil court action—a "preponderance of the evidence." For example, it is error for this Court to credit the declaration of Larry Lichtenegger, a witness for the Conservator, over the declaration of Michael Donegan, a witness for CIC (Proposed Order at 23-24) over a disputed issue of fact without a complete evidentiary record, including testimony from other witnesses with personal knowledge. It is also error for the Court to credit Lichtenegger's conclusory declaration that his clients felt pressured to sign the RPA (Proposed Order at 9), but ignore the declaration of Ellen Gardiner, an *unchallenged* CIC witness, who testifies that: "In addition, to being sold exclusively through brokers, the Program has explanatory marketing materials that are provided to every Policyholder which explain the Program and the Program's costs and the risks attendant to any loss-sensitive program. Each Policyholder is further asked to confirm that he has had an opportunity to consult with its broker or other professional adviser and that it understands the operation of the Program. No Program is sold without that representation." (Gardiner Decl. in Supp. of CIC Opp'n to Appl. for Approval of Rehabilitation Plan, ¶ 5 (Nov. 8, 2022) ("Gardiner Decl.").) There is no equitable basis for replacing CIC's right to a full hearing with an incomplete, "back of the envelope" type factfinding.[2]

[2] In assessing Mr. Lichtenegger's credibility, the Proposed Order does not address that he wrote his entire twenty-six page declaration, which covers a time span of over 6 years, entirely "from memory" (CIC Compendium of Evid. Ex. 2, Lichtenegger Dep. at p. 215:2-3), or that at the time the Conservator submitted Mr. Lichtenegger's declaration, the Conservator was not aware that he had been charged with seven crimes and found guilty of contempt by a federal court, for committing perjury. (CIC Compendium of Evid. Ex. 3, Holloway Dep. at pp. 54-57.)

The Proposed Order also fails to fairly consider that the Conservator's allegations concerning CIC's Program are refuted by the Commissioner of Insurance's execution of the June 2017 Settlement Agreement. The Court's Proposed Order erroneously is based on repeating the assertions in the Commissioner's 2016 Shasta Linen decision but fails to address the terms of the Commissioner's *subsequent* June 2017 Settlement Agreement, entered into while an appeal was pending. (CIC Compendium of Evid. Exs. 9, 11.) The subsequent Settlement Agreement authorized the continuation of the RPA Litigation and acknowledged that the issue of the legality of the RPA presented a "good faith dispute." (CIC Compendium of Evid. Ex. 11, ¶ 1.) The Court's Proposed Order turns the chronology of events in *Shasta Linen* upside down without any basis.

It is also irrational for the Court to accept the Conservator's argument that the "terminology" of the RPA is misleading in light of the fact that the Commissioner of Insurance approved an Amended RPA *with the same terminology*. Nor does the Proposed Order address the Department of Insurance's contemporaneous acknowledgement that "*we did not make any significant edits to the financial structure of the program*. It is still a non-linear retro rated program, it is still a multi-year program, the loss experience feeding into the premium calculation of the ultimate premium is still based on a three-year loss experience." (CIC Compendium of Evid. Ex. 10 (emphasis added).) Although the Proposed Order cites to the Muzzarelli Declaration for the proposition that the RPA contains "non-standard terminology," *that same language was approved by the Commissioner in the Amended RPA*. (CIC Compendium of Evid. Ex. 11, ¶¶ 1, 3, 4.)[3]

The Proposed Order ignores other salient facts, including that the Program was reviewed by the Commissioner of Insurance on five occasions, and publicly described in its patent, and in its marketing materials. As found by the Eastern District of California.

> [CIC] disclosed in program documents that the RPA was not a filed retrospective rating plan, and detailed how the profit sharing program would work. … [CIC] described in detail, in a publicly available patent, how the program would operate. … Moreover, while the RPA was never officially filed with the Department of

[3] The Proposed Order references the "disclosures" that were adopted as part of the Amended RPA, but they are not included as part of the record by the Conservator, and they did not change the material financial terms of the RPA. Indeed, the Commissioner concluded in the Settlement Agreement that the litigation over the legality of the RPA was in "good faith" regardless of the "disclosures." (CIC Compendium of Evid. Ex. 11.)

> Insurance, it does appear that the Department was aware of the RPA's existence. … This explanation clarifies why [CIC] explicitly described the insurance program's structure and the existence of the RPA in documents that were provided to plaintiffs and in a publicly available patent, and yet did not file the RPA.

(CIC Compendium of Evid. Ex. 7 at pp. 12-13, Mem. & Order re: Defs.' Mot. to Dismiss, *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, Nos. 2:16-00158, 2:16-01211, 2017 WL 4652758, at *5 (E.D. Cal. Oct. 17, 2017).) Notably, this finding by the Eastern District is consistent with and corroborates the Commissioner's acknowledgment in the 2017 Settlement Agreement that the issue of the legality of the RPA is a "good faith dispute" that is properly the subject of litigation. (CIC Compendium of Evid. Ex. 11, ¶ 1.)[4]

It is ***regulatory entrapment*** for this Court to impose Section 2.6 to punish CIC for engaging in the very litigation that the Commissioner authorized as being in "good faith." (*Id.*) It is irrational to blame CIC for complying with the Settlement Agreement. The tenor of the Proposed Order is to challenge the good faith of CIC, but the record, including the express terms of the 2017 Settlement Agreement, refutes that challenge.

The Proposed Order's core statutory justification for Section 2.6 is that settlement of the RPA Litigation is *required* because the allegations in the pending cases are "liabilities," and Insurance Code section 1071.5 requires all "liabilities" to be resolved in the conservation. (Proposed Order at 26.) This is legal error because the allegations in the RPA Litigation are not liabilities. The Proposed Order refers to the Statement of Statutory Accounting Principles ("SSAP") Paper No. 5 but misconstrues the relevant language. SSAP No. 5 sets out the "three essential characteristics" of a "liability" for purposes of insurance accounting and contains an illustrative parenthetical that a liability "includes but is not limited to liabilities arising from policyholder obligations (e.g. policyholder benefits, reported claims, and reserves for incurred but not reported claims)." SSAP No. 5, ¶ 2, Accounting Practices and Procedures Manual, National Association of Insurance

[4] As explained in CIC's proposed order, there is no appellate decision squarely addressing the legality of not filing the RPA. It is unreasonable and arbitrary for the Court to accept the Conservator's argument that CIC should simply forfeit its legal rights, or that CIC litigating its rights can be characterized as excessively onerous.

Commissioners (Mar. 16, 1998), https://content.naic.org/sites/default/files/inline-files/005_J.pdf.) The Proposed Order (at 26) mistakenly concludes that this illustrative parenthetical means that the unproven allegations in the RPA litigation are "liabilities." However, by its plain language the parenthetical only applies to ***liabilities*** that arise from policyholder obligations. In other words, exposures arising from policyholder obligations must meet the "three essential characteristics" of SAP liability. As correctly argued at the hearing before the Court, the unproven claims in the RPA Litigation do not meet the ***three*** essential characteristics of a liability under SAP.

Moreover, CIC's (or any insurer's) accounting of "policyholder benefits" is entirely different from the allegations in the RPA Litigation. CIC, of course, acknowledges that it is liable and obligated to provide the coverage of injured workers that is specified in the CIC policies, including incurred but not reported claims (known as "IBNR"s). When an injured worker's claim is substantiated, CIC has a current liability to pay the amount covered by the policy. But that is different from the unproven allegations in the RPA Litigation.[5] The legal foundation for Section 2.6 is wrong; the RPA Litigations are not required to be settled under section 1071.5. Section 2.6 of the Plan should be rejected.

In addition to the above General Objections, CIC makes the following specific objections to the Proposed Order, all of which lead to the conclusion that the Order should be reconsidered and Sections 2.2 and 2.6 of the Plan should be rejected.

SPECIFIC OBJECTIONS

CIC incorporates herein the General Objections stated above and makes the following Specific Objections to the Proposed Order, with reference to the applicable page of the Order:

(1) Order at 2: "In his Conservation Application, the Commissioner explained that 'if CIC is permitted to consummate the illegal merger, CIC policyholders in California will be left holding

[5] Of importance, the statement in the Proposed Order that the language of SSAP No. 5 was "misrepresented" by CIC's counsel is wrong and the record must be removed and corrected. (Proposed Order at 26.) It was accurately described by CIC. The Court (and the Conservator) conflate *insured* liabilities that are reserved for through IBNR reserves, such as liabilities related to CIC's policyholder obligations to cover not yet reported workers' compensation claims, and liabilities related to *uninsured* events such as the RPA Litigation. The entirety of Paper No. 5 is cited and hyperlinked in CIC's December 11, 2023, proposed order at 27, and accordingly was duly submitted to this Court for review.

policies of a non-admitted insurer. Since CIC could not legally service those policies, ***policyholders, including employees with serious work-related injuries and other claimants entitled to vital and necessary insurance benefits, may not have recourse to benefits***.' (*Id.* at 4, ¶ 11 [emphasis added].)"

OBJECTION: This "explanation" from the Conservator is wrong as a matter of law and fact and is not a basis for justifying Sections 2.2 and 2.6 of the proposed Plan. The California Supreme Court has rejected this very proposition, finding:

> [T]he provision authorizing the Commissioner to waive the requirements of the discharge/reinsurance provision necessarily contemplates that solvent insurers in appropriate cases may withdraw with policies in force—policies not reinsured and assumed by another admitted insurer—and thus that these insurers can validly service their policies after cancellation of their certificates.

Travelers Indem. Co. v. Gillespie, 50 Cal. 3d 82 (1990). The picture presented by the Conservator of policyholders being left without "recourse to benefits" to justify the extreme, disproportionate relief it now seeks—an effective liquidation—is a false one. Many alternatives exist under the Insurance Code to rehabilitating CIC rather than liquidating it and allow this Court to reconcile the Plan with the Supreme Court's mandate that liquidation be a "last resort." *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 10 Cal. 2d 307, 329 (1937). Some of those alternatives include allowing Continental to assume those policies, authorizing CIC II to continue to service extant policies in California, or following the guidance that the Conservator provided to A.M. Best at the commencement of the Conservation that he did not want to "destroy" CIC. (CIC Compendium of Evid. Ex. 100.) The determination to "destroy" CIC is of the Conservator's own making and not required by law, is inconsistent with the Conservator's own statements, unsupported by the record in the Conservation, and inconsistent with his fiduciary duties as Conservator. Tellingly, the Conservator admits that he did not consider the alternatives to liquidation—a persuasive example of the Conservator acting in derogation of his fiduciary duties. (*See* Cons. Proposed Order at 18, n.11.)

Under the record here, this Court cannot approve a proposed Plan that requires the liquidation of CIC, a solvent and financially healthy company that was regulated and audited for

years by the Commissioner without any material expression of concern. The proposed rehabilitation plan is far from a "last resort," and it turns the meaning and purpose of a "conservation" on its head by making it a liquidation.

(2) Order at 2-3: "The Commissioner emphasized that, prior to the unlawful merger attempt, 'CIC had established a pattern of flouting regulatory processes designed to protect California policyholders from unfair, and deceptive practices,' citing CIC's illegal modifications to insurance policies."

OBJECTION: This assertion by the Conservator is false and misleading and not a basis on which either Section 2.2 or 2.6 can be justified. As the record shows, no significant issue was raised by the Department of Insurance concerning CIC's management or its conduct in complying with regulatory processes in five separate statutory reports issued between 2006 and 2015. Presumably, the Conservator is referring to the Commissioner's 2016 administrative Order in the *Shasta Linen* matter, but this is misleading because the Conservator ignores the fact that the Order was appealed and that during the pendency of the appeal the Commissioner entered into the 2017 Settlement Agreement, superseding the 2016 Order. The Conservator largely ignores that in the Settlement Agreement the Commissioner stipulated that there was a "good faith dispute" as to whether the RPA needed to be filed, refuting any claim that CIC acted intentionally or deceptively in not having filed it, and that the Commissioner approved the Amended RPA on materially the same financial terms as the existing RPA. The Settlement Agreement further acknowledged that there was no basis for an enforcement action against CIC related to the RPA. The statement by the Conservator that prior to the conservation CIC had "established a pattern of flouting regulatory processes" is a fiction unsupported by a fair and complete understanding of the record. (Proposed Order at 3 (quoting Ex Parte Appl. for Order Approving Comm. ¶ 17).) To the contrary, the Settlement Agreement expressly anticipates that the parties will litigate over the legality of the RPA and that its legality is "for the courts to decide" in the pending RPA Litigations. (CIC Compendium of Evid. Ex. 11 at p. 2 & ¶ 1.)

(3) Order at 8: "CIC, AUI, and AUCRA intentionally failed to seek the Commissioner's approval for the RPA. Indeed, they patented the RPA as a vehicle to avoid insurance regulation, and touted the program's freedom from state regulatory constraints in the patent application."

OBJECTION: This is inconsistent with the evidence, inaccurate, and does not credibly support the approval of Section 2.2 or 2.6 of the proposed Plan. As noted, the Commissioner issued four Reports of Examination of CIC and one Market Conduct Examination. None of those reviews identified any violation of any state rules or regulations, even though under the NAIC protocols, the Commissioner's audits specifically included a review of whether CIC complied with state statutes and regulations. (CIC Compendium of Evid. Ex. 88, Introduction.) The Court cannot rationally credit the Conservator's claim that obtaining a publicly available patent that explains the operation and reasoning for the Program is an example of *wrongdoing* by CIC. The public description of the Program is an example of transparency, not obfuscation. It is there for the world to see.

The RPA marketing materials plainly disclose that the RPA is not a "filed" program (CIC Compendium of Evid. Exs. 82 & 83.) A complete and fair review of the record rebuts the negative implications drawn by the Court. In the June 2017 *Shasta Linen* Settlement Agreement, the Commissioner admits that whether or not the RPA is required to be filed with his office presents a "good faith dispute" for the courts to decide. (CIC Compendium of Evid. Ex. 11 at p. 2 & ¶ 1.) The Conservator hopes that this Court simply ignores this admission, but, obviously, it cannot. On this point, as noted above, the Eastern District of California places the record in proper perspective:

> [CIC] disclosed in program documents that the RPA was not a filed retrospective rating plan, and detailed how the profit sharing program would work. … [CIC] described in detail, in a publicly available patent, how the program would operate. … Moreover, while the RPA was never officially filed with the Department of Insurance, it does appear that the Department was aware of the RPA's existence. … This explanation clarifies why [CIC] explicitly described the insurance program's structure and the existence of the RPA in documents that were provided to plaintiffs and in a publicly available patent, and yet did not file the RPA.

(CIC Compendium of Evid. Ex. 7 at pp. 12-13, Mem. & Order re: Defs.' Mot. to Dismiss, *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, Nos. 2:16-00158, 2:16-01211, 2017 WL 4652758, at *5 (E.D. Cal. Oct. 17, 2017).)

(4) **Order at 8:** "The Commissioner found that the EquityComp RPAs departed in material ways from industry-standard loss-sensitive programs, as the RPAs employed nonstandard terminology and gave CIC 'sole discretion' to determine several variables upon which

policyholders' charges were based. (*Shasta Linen*, *supra*, at 22-23 … .)" (Internal citations and footnote omitted.)

OBJECTION: This assertion fails and is not a credible basis for justifying Section 2.2 or 2.6 of the proposed Plan. It fails to recognize that *after* the Commissioner issued his 2016 administrative order in *Shasta Linen*, and after that Order was challenged on appeal, the Commissioner in the 2017 Settlement Agreement approved an Amended RPA with the ***same*** terminology that the Commissioner now irrationally claims to be "nonstandard." (*See* CIC Compendium of Evid. Ex. 11, ¶ 3.) Contemporaneously with the Commissioner's approval of the Amended RPA, the Department of Insurance confirmed that:

> ***[W]e did not make any significant edits to the financial structure of the program***. It is still a non-linear retro rated program, it is still a multi-year program, the loss experience feeding into the premium calculation of the ultimate premium is still based on a three-year loss experience.

(CIC Compendium of Evid. Ex. 10 (emphasis added).) Further, the record in this matter contains the expert report of Richard Fein, which is not challenged, concluding that the financial effect of the RPA and the Amended RPA do not materially differ. (Fein Decl. in Supp. of CIC Opp'n to Appl. for Approval of Rehabilitation Plan, Ex. B at pp. 4-5 (Nov. 2, 2022).)

(5) Order at 9: "Moreover, policyholders that executed the RPA were unlikely to be fully aware of its terms. CIC and its affiliates withheld copies of prospective policyholders' RPAs under (*sic*) after policyholders had paid to enroll in the EquityComp program. At that point, refusal to sign the RPA would have resulted in cancellation of their workers' compensation coverage. (*Shasta Linen*, *supra*, at 25, 27-28; Lichtenegger Plan Appl. Decl. ¶¶ 26, 32.)" (Footnote omitted.)

OBJECTION: The Court here accepts Mr. Lichtenegger's conclusory assertion that his clients felt pressured to sign the RPA, but wrongly disregards the Declaration of Ellen Gardiner, an unchallenged CIC witness who details the many checks in place to ensure policyholders understood the RPA's terms:

> In addition, to being sold exclusively through brokers, the Program has explanatory marketing materials that are provided to every Policyholder which explain the Program and the Program's costs and the risks attendant to any loss-sensitive program. Each Policyholder is further asked to confirm that he has had an opportunity to consult with its broker or other professional adviser and that it

> understands the operation of the Program. No Program is sold without that representation.

(Gardiner Decl., ¶ 5.)

The two primary marketing documents provided to all brokers and insureds are the Program Proposal & Rate Quotation (CIC Compendium of Evid. Ex. 82) and the Program Summary & Scenarios (Lichtenegger Plan Appl. Decl. Ex. F). The Program Proposal describes to the insured and its broker that the loss-sensitive feature of the Program is separate from the CIC guaranteed cost policies and also clearly states that it is not a "filed retrospective rating program." (CIC Compendium of Evid. Ex. 82 at p. 3.) It states that the Program's cost will be determined by the RPA, subject to minimum and maximum agreed upon amounts. (*Id.*) The Program Summary provides the insured with a chart describing its overall cost based on the amount of its claims, correlating those potential claims and costs, and illustrating how the costs may vary over the course of the Program, all within the minimum and maximum amounts agreed to by the parties and based on the insured's then reported payroll. (Lichtenegger Plan Appl. Decl. Ex. F at pp. 194-199.)

(6) **Order at 9:** "The RPA that policyholders signed differed materially from the representations made in the marketing materials, including as to cost of coverage. (*Id.* at 27 [Program Summary & Scenario document provided to potential policyholders included a 'single-year-table [that] does not represent the one-year cost of the program.']."

OBJECTION: This is an inaccurate description of the marketing materials. The record refutes the wholly conclusory statement above, which the Court credits in assessing the justification of Sections 2.2 and 2.6 of the Plan. The Program Summary & Scenarios, one of the two primary marketing documents provided to the insured's broker, describes the Program costs on a three-year basis, and also provides an example of a one-year basis according to the insured's historical performance. (Lichtenegger Plan Appl. Decl. Ex. F at p. 196.) It states that "[t]his program is effected through a separate reinsurance transaction," and states clearly that it is a 3-year Program. (*Id.* at p. 193.) It provides charts of projected costs based on the insured's past performance. (*Id.* at pp. 196-199.) The document itself cautions the policyholder that the scenarios presented are illustrative, because they are based on past performance and current reporting of payroll. (*Id.* at p.

192.) As noted above, the other primary Program document provided to brokers and their customers, the Program Proposal & Rate Quotation, supplies additional detail about the terms of the program, including that it is "not a filed retrospective rating program." (CIC Compendium of Evid. Ex. 82 at p. 3.) Moreover, each employer policyholder was represented by its chosen independent insurance broker and stated that it understood the Program.

(7) **Order at 11:** "The second category [of RPA Litigations] consists of the cross-complaints which AUCRA has filed in the first category of cases in order to enforce the RPA's terms, despite Court of Appeal precedent that has concluded that the RPA is illegal." (Citing *Luxor Cabs, Nielsen, Jackpot*.)

OBJECTION: The statement that "Court of Appeal precedent [] has concluded that the RPA is illegal" is simply wrong. It is a point that the Conservator relies on extensively in justifying the proposed Section 2.6, and the fact that it is wrong makes it error to adopt Section 2.6 on this record. To be clear: there is ***no*** appellate precedent concluding that the RPA is illegal. The Conservator ignores the relevant appellate statement which in fact establishes exactly the reverse of what the Conservator claims. *Nielsen* addresses only the dispute resolution provisions of the RPA and holds that the issue of the legality of the RPA is not being decided, but has to be determined on the basis of a full and complete record—not the type of judicial shorthand that the Conservator tries to persuade this Court to endorse in justifying Section 2.6: "These determinations do not preclude the parties from litigating the merits of Nielsen's causes of action and requested relief at trial based on a more complete evidentiary record." *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.*, 22 Cal. App. 5th 1096, 1121, n.6 (2018). *Luxor Cabs* concerned only the validity of the RPA's delegation clause and its arbitration provision. And *Jackpot* does not even concern the RPA, but rather a different Program document, and likewise addressed only the enforceability of an arbitration delegation clause. As noted, the Commissioner in the 2017 Settlement Agreement himself admitted that the issue of whether the RPA had to be filed was a "good faith" dispute. Further, the Eastern District court in *Pet Food* expressly rejected the plaintiff's reliance on *Luxor Cabs* and *Nielsen* as conclusive of the RPA's illegality, noting that "[n]either court determined that the rate was unlawful

as a result of it not being filed" and "neither court foreclosed the possibility of Applied selling the RPA legally (i.e., a filed and approved version of the RPA)." (CIC Compendium of Evid. Ex. 22 at p. 6, Mem. & Order re: Cross Mots. for Summ. J., *Pet Food Express, Ltd. v. Applied Underwriters, Inc.*, No. 2:16-CV-01211 WBS AC, 2019 WL 4318584, at *7 (E.D. Cal. Sept. 12, 2019).)

In the absence of an appellate ruling, there is no legitimate basis on which this court could rationally justify Section 2.6 based on CIC's good faith litigation of the legality of the RPA.

(8) **Order at 11:** "The third category of litigation concerns parallel litigation initiated by AUI in Nebraska to enforce promissory notes signed by policyholders who could not afford the charges imposed by the RPA. … Although these cases are almost always dismissed for lack of personal jurisdiction, the Commissioner argues that the threat of costly litigation has deterred policyholders from asserting the illegality of the RPA." (Internal citations omitted.)

OBJECTION: This is wrong as a matter of law and on the facts. The litigations initiated by AUI to enforce the promissory notes are not "parallel litigation." The promissory notes were a benefit given by AUI to policyholders who could not immediately satisfy the Program charges. Those litigations stand separate and apart from actions initiated by policyholders challenging the legality of the RPA for not being filed. For example, in *Applied Underwriters, Inc. v. Top's Personnel, Inc.*, the District of Nebraska, reviewing Nebraska law, granted summary judgement to Applied on the face amount of a promissory note and found that "while the note undoubtedly derives from EquityComp and the RPA, it is a separately executed obligation for unpaid insurance premiums. In exchange for the promissory note, Applied agreed to continue the insurance coverage notwithstanding Top's nonpayment." (CIC Compendium of Evid. Ex. 43 at pp. 6-7, Mem. & Order, No. 15-CV-90 (D. Neb. Aug. 2, 2018).) The Conservator misstates the record before this Court, once again. CIC also incorporates here its response to the Conservator's argument regarding CIC's initiation of lawsuits against policyholders in Nebraska, the forum designated in the promissory notes' forum selection clause, appearing at Objection (24), *infra*.

(9) **Order at 14:** "[W]ere CIC to have filed with the California Secretary of State a certificate of merger, the merger of CIC into CIC II would have been completed …, and CIC's Certificate of Authority to transact the business of insurance in California would have been revoked by operation of law, in which case 'CIC policyholders in California will be left holding policies of a non-admitted insurer. Since CIC could not legally service those policies, policyholders, including employees with

serious work-related injuries and other claimants entitled to vital and necessary insurance benefits, may not have recourse to benefits.'" (Internal citations omitted.)

OBJECTION: This is inaccurate for the reasons articulated in Objection (1), *supra*.

(10) Order at 18: "The Court notes that in this case, many of the facts cited by the Commissioner are based on findings in an adjudicatory Department hearing conducted by an administrative law judge in *Shasta Linen*, at which parties were represented, testimony and documentary evidence was received, and express findings and conclusions were made in a decision the Commissioner designated as precedential. Such findings provide a rational basis for actions based on them."

OBJECTION: This is a flawed basis on which to justify either Section 2.2 or Section 2.6. The Conservator appears to "wish" that the 2017 Settlement Agreement did not exist, but it does and this Court cannot ignore it. The *Shasta Linen* Order was superseded by the 2017 Settlement Agreement—through which the Commissioner agreed that whether the RPA needed to be filed presented a "good faith dispute" that was for the "courts to decide." (CIC Compendium of Evid. Ex. 11 at p. 2 & ¶ 1.) Further, the Commissioner expressly stipulated in the Settlement Agreement that the *Shasta Linen* Order was precedential ***only*** in administrative proceedings and not before the courts handling the RPA Litigation, where the issue of legality is to be determined. (*Id.* ¶ 2.)

Of course, agency interpretations as to the legality of the RPA are not binding under California Supreme Court precedent. As the Eastern District of California found in a case involving the CIC Program:

> The California Supreme Court has held that while "an agency['s] interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts," the "courts are the ultimate arbiters of the construction of a statute." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 7, 17 (1998) … An agency's interpretation is only "one among several tools available to the court" in construing a statute. *Id.* "Depending on the context, [an agency's interpretation] may be helpful, enlightening, even convincing." *Id.* at 7-8. It is not controlling, however. *Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal. 3d 1379, 1388 (1987) (holding that while agency interpretation of statutes may be "entitled to great weight," they are "not controlling")[.]

(CIC Compendium of Evid., Ex. 19 at p. 9, Mem. & Order re Mot. for Reconsideration, *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.*, 2016 WL 6094446, at *4 (E.D. Cal. Oct. 17, 2016).) Here, the most significant finding relevant to the *Shasta Linen* decision is that in the

subsequent 2017 Settlement Agreement the Commissioner acknowledged that the legality of the RPA was a "good faith" dispute that the Commissioner anticipated would continue to be litigated in the courts addressing the RPA Litigation. (CIC Compendium of Evid. Ex. 11.)

(11) **Order at 19:** "Prior to cancelling the departing insurer's California certificate of authority, the Commissioner must examine the insurer's books and records to confirm that the insurer has no outstanding liabilities to California residents or policies which have not been reinsured by an admitted insurer. (*Id.* at § 1072.) While the Commissioner may waive this requirement in his discretion if a departing company is solvent, he is not required to do so."

OBJECTION: This is not a rational basis on which to liquidate CIC. The Commissioner must exercise his fiduciary duty to CIC's shareholders in a manner that complies with the law regardless of whether such exercise is at the specific request of the party being liquidated. *See, e.g.*, *In re Exec. Life Ins. Co.*, 32 Cal. App. 4th 344, 374 (1995), *as modified on denial of reh'g* (Mar. 15, 1995) (referencing the Commissioner's general fiduciary duties in role as a trustee). The Commissioner also has an obligation not to liquidate a company unless it is a "last resort." *Carpenter v. Pac. Mut. Life Ins. Co. of Cal.*, 10 Cal. 2d 307, 329 (1937). The Conservator's punitive determination to do so anyway, and to force a liquidation of a thriving, well-capitalized company, ignores *Carpenter*'s mandate. The Conservator provides no cogent basis for declining to exercise its jurisdiction to avoid an outcome *Carpenter* prohibits. All it can muster is a comment in its own proposed order that "Respondent does not claim anybody requested him to exercise the discretion of [Section 1072's] third sentence, and Respondent does not identify any duty of a commissioner to *sua sponte* exercise his or her discretion wherever it may reside in the California codes." (Cons. Proposed Order at 18, n.11.) These explanations are pretextual, only, and ignore the panoply of remedies available to the Conservator that can be resorted to instead of a liquidation.

(12) **Order at 20-21:** "The record supports the Commissioner's position that CIC's leadership has repeatedly violated the Conservation Order" and "provides a rational basis for the Commissioner's concerns regarding CIC's management."

OBJECTION: The Conservator's attempted character assassination of CIC's management on this record is ironic and unsupported. Not only did the Commissioner authorize the RPA

Litigation in the 2017 Settlement Agreement, but from November 4, 2019 to the current day, CIC's management has continued to operate the Company in the ordinary course of business. Not once has the Conservator sought the Court's intervention on CIC's operation. A fair and accurate review of the record does not provide a rational basis for justifying either Section 2.2 or Section 2.6, or for imposing a third-party administrator ("TPA") on Continental. The Court cites to two examples that it concludes supports the Commissioner's "concerns regarding CIC's management" in finding that the Plan's TPA provision is not arbitrary. Neither does.

Example No. 1: The Court cites to a $20 million uncollateralized loan CIC made to Applied in March 2020 for the development of new corporate headquarters in Omaha, finding this to have "clearly exceeded the scope of the Conservation Order." (Proposed Order at 21.) It did not. The Conservator authorized CIC's management to run CIC and enter transactions in the ordinary course of business. (Order Appointing Insurance Commissioner as Conservator and Restraining Orders, ¶ 15 (Nov. 4, 2019) [App. to Conservator's Reply App. B at pp. 4-5].) A $20 million inter-company loan issued by a company with more than $1 billion in assets is a standard and ordinary transaction in the course of its business. Moreover, CIC made every effort to fully apprise the Conservator of information concerning the loan, including its status of and payments made thereunder. (CIC Compendium of Evid. Ex. 3, Holloway Dep. at pp. 187-192.) In a July 6, 2020, email, Mr. Silver advised the Conservator of an early payment of $2.5 million on the loan, noting that the balance was reduced to $17.5 million. (*Id.* at p. 191:15-20.) The Conservator could not recall any further, specific discussions with Mr. Silver regarding the status of the note, nor could he recall ever demanding that the loan transaction be reversed. (*Id.* at pp. 190:1-192:9.) Mr. Holloway testified that he did not even know the reason for the loan. (*Id.* at pp. 189:20-190:7.) This evidence shows full candor and transparency on the part of CIC's management and forecloses the opposite conclusion the Conservator urges this Court to draw.

Example No. 2: The Court finds that CIC's issuance of letters to its policyholders in 2020 advising them that their CIC policies would be transferred to Continental likewise violated the Conservation Order and gave the Commissioner reason to doubt management's "willingness to deal

with the [Commissioner] about such issues in an open manner and in good faith." (Proposed Order at 21 (internal quotation marks and citation omitted).) This is not supported by a complete review of the record, which the Conservator did not provide to the Court. In fact, CIC *affirmatively* notified the Conservator of its intent to transfer its policies to Continental, and this was the subject of many communications with the Commissioner over a month-long period. The Conservator expressly told CIC to explore the transfer in a November 10, 2022, email to Jeff Silver, CIC's general counsel, stating: "The Conservator will consider offers to transfer all CIC policy liabilities to another, non-affiliated CA admitted carrier as long as the Section 2.6 liabilities are excluded and Scott Pearce or myself are included in any substantive discussions with third parties." (CIC Compendium of Evid. Ex. 101.) In his deposition, the Conservator, through Mr. Holloway, reiterated that his email approving the transfer reflected his belief at that time. (CIC Compendium of Evid. Ex. 3, Holloway Dep. at p. 193:8-20.) He also testified that Mr. Silver "brought up the idea of a loss portfolio transfer on a couple of occasions." (*Id.* at p. 194:2-3.) What the record shows is that, for whatever reason, the Conservator "changed his mind" about the transfer—the evidence simply does not show what the Court says that it does. At Mr. Holloway's deposition, he acknowledged this fact:

> Q: Changed his mind about what?
>
> A: Allowing just a loss portfolio transfer
>
> Q: Okay. And do you recall – when did the conservator change his mind?
>
> A: I don't recall.

(*Id.* at p. 194:20-24.)

It is irrational and unsupported to use the proposed transfer as a basis for justifying either Section 2.2 or 2.6 of the Plan, or the TPA. The complete record reflects full transparency on the part of CIC and approval to proceed, as acknowledged by the Conservator himself when testifying under oath. These facts are wholly inconsistent with the Conservator's false and misleading characterization of CIC's management as unwilling to "deal with the Commissioner … in an open manner and in good faith" in connection with this particular (or any) matter. (Proposed Order at 21 (quoting Holloway Reply Decl. ¶ 9).)

(13) **Order at 21:** "Although counsel for Respondents attested before this Court that Armanino had completed its audit of CIC and the affiliates, the Court has not received any audited financial statements in evidence. On this record, the Court considers the Commissioner's concerns about CIC's management arising from the absence of an independent audit rational."

OBJECTION: This also not an accurate statement. At the hearing and in its submissions, the Conservator invited the Court to conclude—erroneously—that CIC did not submit a current audited financial statement to the Court. In fact, the current CIC audited financial statement from Armanino LLP, which included a clean audit opinion, was submitted to this Court with the December 11, 2023 Declaration of Shand Stephens. (Stephens Decl. in Supp. of. CIC Proposed Order, Ex. B (Dec. 11, 2023).) The Stephens Declaration also demonstrates that the Conservator had the audited statement in its possession since February 17, 2023, months before the submission of its papers—even though the Conservator told the Court on August 23, 2023 that it had not seen it before. (*See id.* ¶¶ 5-6 & Ex. A; 8/23/23 Tr. 138:19-22.)

(14) **Order at 22:** "California law does not require a rehabilitation plan to continue to employ delinquent management of a conserved insurer. Rather, courts have denied the requests of pre-conservation management to be reinstated after willingly changing their offending business practices where management has not shown any corresponding change in their state of mind which would preclude further transgressions." (Citing *Caminetti v. Guaranty Union Life Ins. Co.* 52 Cal. App. 2d 330, 335 (1942).)

OBJECTION: This is wrong as a matter of law. In *Caminetti*, the court rejected the argument that "there could be no hazard to policyholders so long as the business is solvent" because that would "sanction the withdrawal of policyholders' money in the payment of excessive salaries without restriction." *Caminetti*, 52 Cal. App. 2d at 335. But in *Caminetti*, management's conduct—improper withdrawal of funds to pay management's excessive salaries—placed the company's financial condition and ability to pay policyholders at risk, notwithstanding the company's solvency:

> To follow to its conclusion appellant's argument that there could be no hazard to policyholders so long as the business is solvent, would be to sanction the withdrawal of policyholders' money in the payment of excessive salaries without restriction. This is not the law. ***Excessive withdrawal of policyholders' funds continued long enough will eventually render any company insolvent***, and thus destroy the very purpose of the payment of insurance premiums. The people of the state and interested policyholders have a vital interest in this.

Id. at 333 (emphasis added). For this reason, management's conduct created a "hazard" under the insurance code:

> Withdrawal of money from a mutual insurance company as salary for services not performed, or for services overpaid, ***continued long enough must finally result in loss to the policyholder members and in the insolvency of the company.*** And, insolvent or not, such withdrawals ***must result in loss to the policyholders month by month as the money is taken out of the insurance company's funds.***

Id. at 333-34 (emphasis added).

The facts here stand in stark contrast to those in *Caminetti*. There is no evidence that CIC's failure to file the RPA or its management's conduct has placed CIC's continued solvency or ability to pay policyholder claims at risk. Indeed, all of the evidence establishes CIC as a thriving, well-capitalized company whose solvency is vastly more than necessary to address any potential exposure on the RPA Litigations. (*See, e.g.*, CIC Compendium of Evid. Ex. 3, Holloway Dep. at p. 169:3-14; Ex. 5, Henley Dep. at pp. 236:18-237:6; Muzzarelli Decl. in Supp. of Opp'n to Mot. to Compel, ¶ 3 (Nov. 3, 2022); Muzzarelli Reply Decl. in Supp. of Appl. for Approval of Rehab. Plan, ¶ 42 (Feb. 10, 2023).) *Caminetti* does not support disregarding CIC's financial strength and solvency in determining whether CIC's management should stay in place.

(15) **Order at 26:** "CIC argues that the Commissioner lacks the power to settle pending RPA litigations because they are not yet 'liabilities' as defined in the Insurance Code. … In support of this argument, counsel for CIC presented in oral argument an excerpt from what he identified as 'Paper No. 5' of 'the statutory accounting principles which govern the definition of assets and liabilities for insurance companies,' which purportedly stated that reserves for future losses 'are not liabilities because the allegations in a lawsuit don't meet any of the three essentials of the definition of liabilities.' … Counsel was apparently referring to the third criterion, listed on his presentation in court, which requires that 'the transaction or other event obligating the entity has already happened.' However, counsel for CIC misrepresented the authority proffered to support his position. Counsel for the Commissioner quoted the remainder of the Paper, which provides that such liabilities include 'but [are] not limited to, liabilities arising from policyholder obligations (e.g., policyholder benefits, reported claims, and reserves for incurred but not reported claims.' … This refutes CIC's argument by clarifying that reported claims and reserves for claims that have not yet been reported are conventionally treated as liabilities." (Internal citations, quotation, and footnote omitted.)

OBJECTION: As noted in the General Objection, this is wrong as a matter of law and falsely and unfairly charges counsel for CIC as "misrepresent[ing]" the authority proffered to support CIC's position—a finding that should be stricken and removed from the record. The Proposed Order's core statutory justification for Section 2.6 is that settlement of the RPA Litigation is *required* because the allegations in the pending cases are "liabilities," and Insurance Code section 1071.5 requires all "liabilities" to be resolved in the conservation. (Proposed Order at 26.) This is legal error because the allegations in the RPA Litigation are not liabilities.

The Proposed Order refers to the Statement of Statutory Accounting Principles ("SSAP") Paper No. 5 but misconstrues the relevant language. SSAP No. 5 sets out the "three essential characteristics" of a "liability" for purposes of insurance accounting and includes an illustrative parenthetical that: "This includes but is not limited to liabilities arising from policyholder obligations (e.g. policyholder benefits, reported claims, and reserves for incurred but not reported claims.)" SSAP No. 5, ¶ 2. The Proposed Order mistakenly concludes that this parenthetical means that the unproven allegations in the RPA litigation are "liabilities." (Proposed Order at 26.)This is not correct. By its plain language, the examples provided in the parenthetical are liabilities only if they meet the three essential characteristics of a liability listed in (a) through (c) of the definition. As correctly argued at the hearing before this Court, the unproven claims in the RPA Litigation do not meet the three essential characteristics of a liability under SAP. The illustrative parenthetical does not alter the standard.

Moreover, CIC's (or any insurer's) accounting of "policyholder benefits" is different from the allegations in the RPA Litigation. CIC, of course, acknowledges that it is liable and obligated to provide the coverage of injured workers that is specified in the CIC policies, including IBNRs. When an injured worker's claim is substantiated, CIC has a current liability to pay the amount covered by the policy. But that is different from the unproven allegations in the RPA Litigation.[6] The legal

[6] Of importance, as noted above, the statement in the Proposed Order that the language of SSAP No. 5 was "misrepresented" by CIC's counsel is wrong and the record must be removed and corrected. It was accurately described by CIC. The Court (and the Conservator) conflate *insured* worker's compensation liabilities that are reserved for through IBNR reserves, such as liabilities related to CIC's policyholder obligations to cover

foundation for Section 2.6 is wrong; the RPA Litigations are not required to be settled under Insurance Code section 1071.5. Section 2.6 of the Plan should be rejected on that ground as well.

(16) Order at 23: "CIC has challenged this evidence, highlighting that '[i]n audits performed by the California Department of Industrial Relations (DIR) in 2013 and 2019, CIC ranked second and fourth in the state, respectively, in workers' compensation claims handling practices.' (Opp. at 42, citing Silver Opp. Decl. ¶ 81, Exhs. 89-90, & Donegan Opp. Decl.) Ironically, this assertion validates the Commissioner's concerns. As the Commissioner noted, Respondent's high ratings in DIR audits are entirely consistent with overpayment of claims because those audits are, by law, conducted to detect underpayments, not overpayments. (Lab. Code, § 129, subd. (a).)" (Footnote omitted.)

OBJECTION: This is wrong as a matter of law and on the facts and is an unsupported conclusion. The audits, known as Performance Audit Reviews (PARS), specifically state that they are designed to determine the "prompt and *accurate* provision of workers' compensation benefits." (CIC Compendium of Evid. Ex. 89 at p.1, Ex. 90 at p. 2 (emphasis added).) The PARS involve in-depth reviews of claims files, and Labor Code section 129.5 requires that as part of that in-depth review whether the audited company "[d]ischarged or administered compensation obligations in a dishonest manner "or in a manner as to cause injury to the public or those dealing with the employer or insurer." Lab. Code § 129(e). Accordingly, as a matter of law under the Labor Code, the PARS are not just limited to underpayments. The conclusion in the Proposed Order that CIC's favorable PARS audit ranking by the Department of Industrial Relations serves as a basis for the imposition of a TPA, or any remedy, is irrational. The Department also rejected a request to conduct a market conduct examination after reviewing CIC claim information.

(17) Order at 27: "CIC's contention that Section 2.6 is barred by the June 2, 2017 Shasta Settlement between CDI, CIC, and AUCRA settling the *Shasta Linen* administrative action disregards the Commissioner's express reservation of rights … . As the Commissioner correctly argues, CIC cannot plausibly maintain that the Commissioner is in breach of a contract by taking action that is expressly reserved to him by the contract."

OBJECTION: This is wrong as a matter of law and on the facts. The *Shasta* Settlement

---

not yet reported workers' compensation claims, and claims related to events such as the RPA Litigation (i.e., for example, unproven UCL claims) which are different and not covered by those policies. The entirety of Paper No. 5 is cited and hyperlinked in CIC's December 11, 2023, Proposed Order at 27, and accordingly was duly submitted to this Court for review.

Agreement reflects an arbitrary and inconsistent position taken by the Commissioner as to the RPA Litigation. In the Settlement Agreement, the Commissioner admits that the disagreements over the filing of the RPA represented a "good faith dispute … specifically as to the remedy authorized by the California Insurance Code and whether the RPA is void as a matter of law." (CIC Compendium of Evid. Ex. 11, ¶ 1; *see* CIC Proposed Order at 15-16, 18-19.) But before this Court, the Commissioner takes the opposition position, contending that Section 2.6 is an appropriate resolution of the RPA Litigation. Section 2.6, as now presented by the Commissioner, pretends the admission in the Settlement Agreement never happened. But it did happen, and the admission in it still stands despite the general reservation of rights in the Settlement Agreement's paragraph 5.

Further, the Commissioner's broad reading of the General Release swallows the Settlement Agreement whole and renders illusory its key terms, including those contained in Paragraph 1 as well as the Commissioner's stipulation that whether the RPA is void as a matter of law "is ultimately for the courts to decide." (CIC Compendium of Evid. Ex. 11 at p. 2 & ¶ 1; CIC Proposed Order at 17-18; *see also* CIC Opp'n to Approval of Conservation Plan, Nov. 10, 2022, at 14-15.) Such a reading is prohibited by the fundamental contract law precept that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other," and to avoid a reading that renders any one provision superfluous or illusory. Cal. Civ. Code § 1641 (West). *See, e.g.*, *London Mkt. Insurers v. Superior Ct.*, 146 Cal. App. 4th 648, 662 (2007). In the future, no settlement agreement with any administrative agency containing a general reservation of rights would be enforceable against it. The Court's interpretation of the effect of an agency's general reservation will interfere with the capacity of government agencies to enter into settlements of regulatory disputes.

(18) **Order at 28:** "CIC offers no legal authority for its argument that the Commissioner is usurping the authority of California's courts."

OBJECTION: It is arbitrary and irrational for the Conservator to invite this Court to decide cases pending before the California courts without hearing any of the evidence. As noted in the General Objections, the Plan rests on unproven allegations made by plaintiff-policyholder lawyers

in ongoing litigations against CIC who have no personal knowledge of the facts they allege—allegations that have been rejected in federal court, in state court, and in arbitration. The Proposed Order supplants the California courts that are adjudicating the pending cases in the RPA Litigation without this Court actually hearing the evidence, and strips CIC of any right to defend itself. The Proposed Order adopts the Conservator's assertion that allowing the courts to hear the evidence on the merits "***would not be fair***." (Cons. Proposed Order at 70 (emphasis added).) Rarely if ever does one see such lack of confidence in the fairness of our California trial and appellate court judges expressed by a California trial court judge or a Conservator, much less adopted in a proposed order.

The unfairness inherent in Section 2.6 lies in authorizing the Conservator to resolve every case in the RPA Litigation without hearing the evidence that would be presented at trial, and where discovery is in preliminary stages. CIC is entitled to the standard of proof on disputed issues in the RPA Litigation that applies to the resolution of every civil court action, a "preponderance of the evidence." The blanket remedy imposed by Section 2.6 not only deprives the courts of the ability to oversee and adjudicate their own cases, but strips CIC of its rights in litigation. CIC is entitled to have its claims and defenses heard on the merits. Section 2.6 deprives CIC of this right. This presents inequity upon inequity, is wholly disproportionate and untethered to the purpose of these proceedings and presents a windfall to Plaintiffs' attorneys.

(19) **Order at 30:** "CIC argues that the Commissioner's discretion to address CIC's affairs is confined to the 'purposes of the conservatorship proceeding.' (*Caminetti*, *supra*, 16 Ca1.2d at 843.) But that does not necessarily mean that a rehabilitation plan is limited to the purposes known and pled on the day a conservation order is sought."

OBJECTION: This finding is clearly erroneous, overlooks the evidence and finds no support in the caselaw. *Caminetti* is unequivocal that the Conservator's discretion is confined by the "purpose of a conservatorship proceeding." *Caminetti*, 16 Cal. 2d at 843. Judge Chou was likewise unequivocal at the April 22, 2021 hearing that "section 1012 of the insurance code … makes it clear that the ***rehabilitation claim has to address the actual grounds for the conservatorship***." (4/22/21

Hr'g Tr. 17 (emphasis added).)[7] Judge Chou reinforced this in his April 26, 2021 Order, in which he found that "the Plan is supposed to resolve the issues requiring the Conservation Proceeding," and that "California Courts have rejected a proposed rehabilitation plan because its provisions had nothing to do with the reason for the conservator proceeding." (Order Granting Mot. for Leave to Conduct Discovery (Apr. 26, 2021) Dkt. No. 312.) To permit the Commissioner to ever-evolve its conservation theory to pursue any and all remedies at any given time, regardless of how untethered they are to the grounds of the conservation proceeding, violates these fundamental mandates.

Moreover, the Court's finding ignores and is belied by the unequivocal statements of the Commissioner himself and of the Department's lead actuary that neither the RPA Litigations nor CIC's solvency were the grounds of the Conservation:

- "In the end, however, none of these questions were material because the company had, in addition to its loss reserves and deposits, approximately $600 million statutory surplus, vastly more than necessary to cover any conceivable results from the RPA litigation, whether through pre-conservation pending litigation or through section 2.6." (Muzzarelli Decl. in Supp. of Opp'n to Mot. to Compel, ¶ 3 (Nov. 3, 2022));
- "I have never stated the imposition of the conservation was necessary because of the pending RPA litigation. As stated, the conservation was necessary because of the attempted illegal merger of CIC with CIC II." (Holloway Decl. in Supp. of Opp'n to Mot. to Compel, ¶ 22 (Oct. 22, 2021));
- "Shortly after the Conservation Order was entered, Deputy Conservator David Wilson and I, along with Mr. Silver of CIC, had a telephone conference with representatives of A.M. Best and confirmed to A.M. Best, both orally and in writing, that the conservation was not based on financial impairment concerns but rather on regulatory issues." (Holloway Decl. in Supp. of Opp'n to Mot. to Vacate Order Appointing Cons., ¶ 7 (Feb. 7, 2020));
- "Based on the records available to the Conservator, CIC currently has a surplus of over $600 million and over $1.1 billion in assets, and does not presently pose a solvency risk." (*Id.*¶ 9.)

The Conservator's and his witness' own sworn statements fundamentally contradict the position

[7] Judge Chou's citation to section 1012 of the Insurance Code is pertinent because section 1012 sets forth the standard for vacating a Conservation Order where it, "after a full hearing, appear[s] to the court that the ground for the order directing the commissioner to take title and possession does not exist or has been removed and that the person can properly resume title and possession of its property and the conduct of its business." Ins. Code § 1012.

now taken that Section 2.6 somehow concerns the "purpose of [the] conservatorship proceeding." *Caminetti*, 16 Cal. 2d at 843.

The Court's conclusion is also contradicted by its own findings regarding the purpose of the conservation proceeding, which findings the Court recites not once but twice:

- "The Commissioner therefore sought the Conservation Order under Insurance Code section 1011, subdivision (c), which authorizes him to take over the business of an insurer that 'has transferred, or attempted, to transfer, substantially its entire property or business or, without consent, has ***entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person***.'" (Proposed Order at 14 (emphasis supplied).)

- "The conservation application was based on the Commissioner's allegation that Menzies had not 'filed and obtained' written approval of the Commissioner' to consummate the Merger, in violation of California Insurance Code § 1215.2(d)." (Proposed Order at 12 (quoting *Applied Underwriters, Inc. v. Lara*, 37 F.4th 579, 585-87 (9th Cir. 2022).)

Finally, the statement in the Proposed Order (at 30-31) that the Commissioner must be able to address matters that arise post-Conservation does not apply to the RPA Litigation. The RPA Litigation was known to the Commissioner for years prior to the Conservation, and the Commissioner in the 2017 Settlement Agreement affirmatively authorized the continuation of the RPA Litigation in the courts in which it was pending. (CIC Compendium Ex. 11 at ¶¶ 1, 4.) Also, the statement in the Proposed Order that the RPA Litigation must be settled because the RPA Litigations are "outstanding liabilities" is in error. (Order at 31.) As explained above (Objection (15), *supra*), the claims in the RPA Litigation are not "liabilities."

(20) **Order at 34:** "CIC's argument that Schedule 2.6 represents a global settlement which precludes CIC from asserting appropriate defenses to outstanding RPA litigation is likewise unavailing. CIC has not raised any across-the-board defenses which it has, or could have, raised."

OBJECTION: Remarkably, the Court faults CIC for not having "raised any across-the-board defenses" in connection with the global settlement presented by Schedule 2.6. The RPA Litigation consists of dozens of cases. There is no across-the-board defense because none is appropriate. These cases are not one-size fits all for all the reasons already addressed in CIC's prior submissions. (*See* CIC Opp'n to Appl. for Approval of Rehabilitation Plan, Nov. 10, 2022, at 7

(asserting that Schedule 2.6 "precludes CIC from offering any defenses or challenging the remedies imposed based on the actual facts and issues [of] each individual case"); *see also id.* at 11-13.) The Court here assumes that the Commissioner's mere declaration that the RPA is void for not having been filed ends the inquiry and is sufficient to resolve each of the outstanding RPA Litigations. It does not and is not. This is proven by the judgment ***against*** the policyholder in *Pet Food*. It is critical error to treat the RPA Litigations as one, homogenous case presenting one, cohesive question of law and one, solitary set of facts, that necessarily will be resolved in each policyholder's favor. As held in *Top's* by the District of Nebraska, "the differences between program participants will require 'necessary individualized factual inquiries [that] will preclude common answers apt to drive the resolution of the litigation.' … [A] key element of the state fraud claim—necessarily requires individual determinations and assessments unique to each class member." (CIC Compendium of Evid. Ex. 24 at p. 7, Mem. & Order, *Applied Underwriters, Inc. v. Top's Personnel, Inc.*, No. 8:15-CV-90 (D. Neb. Mar. 14, 2019).)

(21) **Order at 35:** "Substantial evidence on the record supports the Commissioner's assertion that CIC has engaged in improper conduct towards its policyholders in RPA litigation in several ways."

OBJECTION: An insurance company is entitled to defend itself, and as addressed *infra*, none of the evidence the Commissioner offers supports the conclusion that CIC has engaged in improper conduct in the RPA Litigation. The Commissioner omits mention that no court has ever sanctioned, or threatened to sanction, CIC for its conduct in the dozens of RPA litigations. Indeed, even Mr. Lichtenegger, on whose declaration the Commissioner rests to present CIC's litigation conduct as improper, never sought sanctions in the many, contentious cases on which he was opposite CIC. That litigation is hard-fought does not make it improper.

(22) **Order at 35:** First, adjudicators have found the arbitration provision unenforceable under Nebraska law, as Nebraska Revised Statue 25 - 2602.01 forbids arbitration of 'any agreement concerning or relating to an insurance policy.' (Final Award in *Applied Underwriters Captive Risk Assurance Company, Inc. v. O'Connell Landscape Maintenance, Inc.*, ICDR Case No. 01-16-0005-0136, dated August 27, 2018, Reply Compendium, Exh. 85 at 2.) Still, CIC and affiliates sought arbitration of disputes even when the arbitrators themselves have found that they 'do not have

jurisdiction to hear the merits of this dispute' under governing law. (*Ibid.*)"

OBJECTION: This is wrong as a matter of law and on the facts, including with respect to the very case on which it relies, *O'Connell Landscape*. As an initial matter, this ignores that certain policyholders themselves initiated arbitrations against CIC. *O'Connell Landscape* is one such case, where the plaintiff and its counsel, Mr. Lichtenegger, engaged in a pattern of dilatory and obstructionist litigation tactics. There, the plaintiff was first to initiate an arbitration before JAMS. (Stephens Decl. in Supp. of Opp'n to Appl. for Approval for Rehabilitation Plan, ¶ 65 (Nov. 10, 2022).) The arbitrator found that the RPA should have been filed under Section 11658 but that the plaintiff lacked a private right of action to enforce that provision and was "'not entitled to damages as a result of the violation.'" (*Id.*) The Arbitrator found against the plaintiff on all of its other claims and found AUCRA to be the prevailing party, awarding it attorneys' fees of approximately $80,000. (*Id.*)

The plaintiff had three months to seek to vacate, modify, or correct the award. (*Id.* ¶ 66.) Once the period expired without any such application, AUCRA filed a petition to confirm the award before the United States District Court for the Central District of California. (*Id.*) Although the statutory period to contest the award had long passed, the plaintiff, through Mr. Lichtenegger, refused to stipulate to or not to oppose the confirmation provision. (*Id.* ¶ 67.) Mr. Lichtenegger subsequently filed a motion to dismiss the petition and quash service of the summons, arguing that the RPA—the same RPA the plaintiff sought to have declared void—provided that the courts of ***Nebraska*** were the proper court to bring the petition. (*Id.* ¶ 68.) AUCRA ultimately prevailed in confirming the arbitration award before the Central District of California, only for the plaintiff to file an appeal with the Ninth Circuit which the plaintiff later dismissed. (*Id.* ¶ 70.) In view of these facts, *O'Connell Landscape* lends no support to the finding that efforts by CIC to enforce the arbitration provision reflect improper litigation conduct.

(23) **Order at 35-36:** "Second, even if a policyholder elected to arbitrate its disputes, some arbitrators nevertheless decided that only the Commissioner had the authority to declare the RPA void. (See Final Award in *O'Connell Landscape Maintenance, Inc. v. Applied Underwriters Captive Risk Assurance Company, Inc., et al.*, JAMS Case No. 1100084561, dated December 4, 2017, Reply

Compendium, Exh. 83 at 7 [determining that only the Commissioner can claim that the RPA is unenforceable].) By requiring policyholders to resolve their disputes before an arbitrator, only to have the arbitration clause be found unenforceable or for the arbitrator to conclude that they cannot decide the dispute, CIC and affiliates have trapped policyholders in circular litigation at great cost."

OBJECTION: This is wrong on the facts. As highlighted above, the plaintiff in *O'Connell Landscape*, with the help of Mr. Lichtenegger, *trapped itself* and Respondents in circular litigation all to evade a valid judgment entered by the arbitrator. Moreover, that the arbitrator in *O'Connell Landscape* found the plaintiff to lack a private right of action to enforce provisions of the insurance code does nothing to "trap[]" a policyholder—the policyholder had a hearing on the merits, and it lost. It then challenged the award and lost again on the merits. (CIC Compendium of Evid. Exs. 38, 55.)

(24) Order at 36-37: "CIC does not dispute that its affiliates regularly sued its California policyholders in Nebraska despite repeated findings of lack of personal jurisdiction. … Commissioner's counsel characterizes this tactic as a 'common practice of CIC and its affiliates that serves to increase the costs of litigation.' (Larsen Reply Decl. ¶ 17.) There is substantial evidentiary support for this assertion."

OBJECTION: This is wrong as a matter of law and on the facts. The suits initiated against policyholders in Nebraska were to enforce promissory notes that contained a forum selection clause designating the courts of Nebraska as the appropriate forum. The promissory notes are freely negotiated contracts. There is no evidence that policyholders were ill-equipped to consent to those terms. It is erroneous and inequitable to imbue CIC's exercise of its contract rights with a presumption of bad faith. Moreover, the RPA's forum selection clause has been upheld as valid and enforceable in other litigation. In *Amazing Home Care Servs., LLC v. AUCRA*, Index No. 650789/18, Case No. 2019-05452 (N.Y. Sup. Ct., 1st Dep't, Feb. 16, 2021 Order), for instance, the Court enforced the RPA's forum selection clause to find that plaintiffs' challenges to the RPA must be litigated in Nebraska. *Id.* at 4. The appellate court specifically rejected the plaintiffs' allegation that AUCRA had not disclosed that the RPA contained a forum selection clause both because "plaintiffs are presumed to know the contents of the instrument they signed and to have assented to such terms" and the "forum selection clause is clearly set forth in the RPA in capital letters. *Id.* (internal citations,

quotation marks and alterations omitted). Likewise, in *Milmar Food Grp. II, LLC v. Applied Underwriters, Inc.*, 61 Misc. 3d 812, 820-22, 831-32, 85 N.Y.S.3d 347 (N.Y. Sup. Ct. Orange Cnty. 2018), the court found that the RPA's forum selection clause was valid and enforceable under both Nebraska and New York law and rejected the plaintiffs' arguments that three prior decisions finding the clause unenforceable collaterally estopped AUCRA from relying on it.

(25) **Order at 37:** "The record contains evidence that CIC has incentives to prolong litigation through the appellate process to continue accruing investment income. For example, in the *Barker Management* and *Bayless Engineering* cases, policyholders who agreed to arbitrate their disputes—and who won 'substantial' awards from their respective arbitrators—saw years-long delays in receiving payment. (*Id.* at ¶ 38.) Still, today, Bayless has yet to receive its award."

OBJECTION: The Court cites to the *Bayless Engineering* and *Barker Management* actions as "evidence that CIC has incentives to prolong litigation through the appellate process to continue accruing investment income." The facts of neither case support this conclusion.

The payment in *Bayless* was delayed due to the lack of diligence by Plaintiff's own counsel, Mr. Lichtenegger, who failed to respond to correspondence from counsel for CIC asking him to confirm his stipulation to the bond and CIC's filing notice. (CIC Compendium of Evid. Ex. 36.) Mr. Lichtenegger did not raise the matter for over one year until days after the Conservation Order was entered, at which point he purported that he had provided his approval "telephonically" to CIC's counsel. (*Id.* Ex. 37.) CIC's counsel had no recollection or record of any such telephonic approval, otherwise it would have been promptly filed. (Barzelay Decl. in Supp. of Opp'n to Appl. for Approval of Rehabilitation Plan, ¶ 10 (Nov. 10, 2022) ("Barzelay Decl.").) Moreover, there is no basis to read bad faith into assertions by CIC's counsel that "AUCRA could not pay the award because CIC was in conservation." (Proposed Order at 37.) Certainly, the Commissioner can correct CIC if it is wrong and CIC is, in fact, able to satisfy the award without violating the Conservation Order. The Commissioner has never stated anything to that effect. Nor did Mr. Lichtenegger ever seek to except the judgment from the stay in *Bayless*—an option well available to him. (CIC Compendium of Evid. Ex. 4, Henley Dep. at pp. 260:18-61:3.)

As for *Barker Management*, it was *Mr. Lichtenegger* that opposed AUCRA's motion for

approval of the bond covering the judgment pending AUCRA's appeal to the Ninth Circuit. (Barzelay Decl. ¶ 6.) He did so based on the wholly speculative claim that CIC faced theoretical solvency risks due to the RPA Litigation. (*Id.*) The Court ultimately granted the motion, finding Mr. Lichtenegger's assertions to be without support, and approved the bond. (*Id.*) The plaintiff was promptly paid once the appeal concluded, and before the conservation. CIC has the same right to appeal a judgment as every other litigation. There never was any suggestion that CIC's appeal was without merit or frivolous, and the fact of the matter is that CIC paid the plaintiff once all was said and done. Nothing about these facts reflects an effort to "prolong" litigation or delay payment via an appeal.

(26) **Order at 38:** "A certain amount of disagreement between insurers and their policyholders is not uncommon, nor is it particularly out of the ordinary to have those disagreements spill into litigation. But the repetitive and prolonged nature of the RPA litigation is atypical. CIC does not contend that this litigation is in any way ordinary."

OBJECTION: This finding is difficult to defend legal error. The RPA Litigations are individual suits filed in connection with a policy offered to hundreds of policyholders for more than a decade. It stands to reason that there will be a certain volume of litigation as a result, and their "prolonged nature" depends on the individual facts of each case. The Court also ignores that the pending litigations are all that remain of an existing several dozen cases, 36 of which were resolved through the normal litigation process before the conservation. (*See* CIC Proposed Order at 5, 9.)

(27) **Order at 39:** "CIC's citations to cases where it defeated class certification are irrelevant here."

OBJECTION: This finding is legal error. CIC's victories on class certification confirm that class-wide resolution of a panoply of individual claims, facts, and circumstances comprising the RPA Litigation is inappropriate. (*See* CIC Opp'n to Appl. for Approval of Rehabilitation Plan at 17-18; CIC Proposed Order at 24-28.) Courts across the United States, including in California, have found that treating disputes as to the RPA with an undifferentiated class method is completely improper. (*See* CIC Proposed Order at 24-28.) That is exactly what Section 2.6 effectuates. It presumes without basis that there is no fact that could resolve any litigation in CIC's favor and that the only appropriate resolution is a global remedy machinated by the Conservator and its experts, which assumes that the

facts and evidence in each case are entirely irrelevant. Numerous judges have soundly rejected this blanket approach, deciding that these issues are not suitable for class treatment. Those findings are plainly relevant given the class-wide treatment Section 2.6 forces and should be given due consideration. As held by the District of Nebraska in *Top's* in denying class action certification, "the differences between program participants will require necessary individualized factual inquiries [that] will preclude common answers apt to drive the resolution of the litigation," including with respect to determining "ascertainable loss," which "necessarily requires individual determinations and assessments unique to each class member." (CIC Compendium of Evid. Ex. 24 at p. 7, Mem. & Order, *Applied Underwriters, Inc. v. Top's Personnel, Inc.*, No. 8:15-CV-90 (D. Neb. Mar. 14, 2019) (internal citation and quotation marks omitted).)

(28) **Order at 40:** "As the Commissioner points out, CIC's citation to a Statement of *Intended* Decision in *Roadrunner Management Services, Inc. v. Applied Underwriters, Inc.* (Ventura Sup. Ct. case no. 692017-0049339 -CU-CO-VTA) ('*Roadrunner*') is not final. (CIC Evid., Exh. 31.) Notably, CIC admits that this 'has not been converted to a final judgment due to the timing of this conservation and the resulting injunction and stay of litigations.' . . . As '[a] tentative ruling is, by definition, not final,' the Court declines to accord weight to this proffered authority. (*People v. Hatt* (2018) 20 Cal.App.5th 321, 324; Reply at 17:26-28, fn. 11) Further, as the Commissioner argues, '*Pet Food* does demonstrate one salient point: the perils of piecemeal litigation and its inevitable multiplicity of inconsistent results.' (Reply at 15:6-7.)"

OBJECTION: The Court errs in disregarding the Statement of Intended Decision in *Roadrunner*. (CIC Compendium of Evid. Ex. 31.) It was issued after a full trial on the merits, and directly addresses many of the issues raised in the RPA Litigation. The Superior Court of Ventura County issued a Statement of Intended Decision providing its reasoning for dismissal of the policyholder's claims under the UCL, as well as its claims for fraud, misrepresentation, and bad faith, and entry of a verdict in favor of CIC. Unlike the cases cited by the Conservator, *Roadrunner* deals specifically with those causes of action *in the context of the RPA* and finds that they fail. It is not rational for the Conservator to simply invite this Court to ignore a decision of an experienced trial judge made after hearing all of the evidence and all of the arguments of the lead plaintiffs' lawyer, Mr. Lichtenegger. *Roadrunner* illustrates the Conservator's error in assuming, and asking this Court to assume, that all of the RPA Litigations will presumptively be resolved in favor of the

policyholder.

The Court likewise errs in giving credence to the Conservator's argument that *Pet Food* demonstrates the "perils of piecemeal litigation." (Cons. Proposed Order at 40.) These litigations are not "piecemeal"; they are brought by or against individual policyholders based on individual circumstances and individual questions of fact and law. In that case, the evidence showed that the policyholder could not prove any loss and thus had no claims under the UCL. Other policyholders, many of whom had more expensive policies as alternatives to the Program, will be similarly situated and are unlikely to be able to state a UCL claim. It is for this reason that it is relevant that numerous courts have denied motions for class certifications and concluded that the issues raised by the RPA Litigations are not suitable for class-wide treatment or relief. As noted, the District of Nebraska held in *Top's* that "the differences between program participants will require necessary individualized factual inquiries [that] will preclude common answers apt to drive the resolution of the litigation." (CIC Compendium of Evid. Ex. 24 at p. 7 (internal quotation marks and citation omitted).)

(29) **Order at 41:** "CIC mischaracterizes Schedule 2.6 Option 2 as 'rewrit[ing]' the RPA based upon an imaginary proxy company."

OBJECTION: This is inconsistent with the evidence. CIC's characterization of Schedule 2.6, Option 2 comes directly from the testimony of Giovanni Muzzarelli, the Department's lead actuary, who opined that Option 2 presented an "imaginary proxy company." (CIC Compendium of Evid. Ex. 1, Muzzarelli Dep. at pp. 183:16-187:11.)

Although parties to a void contract may seek restitution of any ill-gotten gains resulting from the illegality, that does not allow courts to rewrite or create entirely new contractual arrangements. *See, e.g.*, *Rosen v. State Farm Gen. Ins. Co.*, 30 Cal. 4th 1070, 1073 (2003) (courts do not "rewrite any provision of any contract…for any purpose"); *Kolani v. Gluska*, 64 Cal. App. 4th 402, 407-08 (1998) (courts do not reform contracts "for the purpose of saving an illegal contract"). But that is exactly what Schedule 2.6 does. It allows policyholders retroactively to purchase a retrospective rating plan that was never sold by CIC or any other California insurer. And the Proposed Order overlooks the fact that the Commissioner already has ruled that a remedy like Option 2 would be

unlawful. When RDR Builders (a Lichtenegger client), sought a similar remedy in its CDI administrative appeal, seeking "claims paid and a reasonable overhead and profit to [CIC] for operating the plan" without application of certain RPA factors, the Commissioner agreed with CIC that "such a remedy would amount to 'cobbl[ing] together a hybrid contract with terms that RDR has cherry-picked from both the RPA and CIC Policies, while simultaneously rejecting the application of either in its entirety.'" (CIC Compendium of Evid. Ex. 12 at pp. 36-37.) It is irrational and arbitrary for the Commissioner now to do an about-face on the merits of Option 2, and also for the Proposed Order to selectively disregard the Commissioner's pre-litigation position that was reached after development of the record in an administrative proceeding.

Option 2 is also entirely inappropriate for each of the reasons addressed in CIC's prior submissions. (CIC Proposed Order at 31-33; CIC Opp'n to Appl. for Approval of Rehabilitation Plan at 28-30.) And courts have rejected Option 2 before. Indeed, in the *Roadrunner* action, the plaintiff, represented by Mr. Lichtenegger, sought to avoid payment of $340,000 properly due in premiums by retaining Ronald Groden to present to the judge a resolution akin to Option 2. This was soundly rejected. (Statement of Intended Decision, CIC Compendium of Evid. Ex. 31 at p. 5.) But Section 2.6 will place Option 2 back on the table for policyholders like *Roadrunner*, unwinding the decision of the court without any basis to do so.

(30) **Order at 41:** "The Commissioner's inclusion of CIC's affiliates in this part of the Plan falls squarely within his authority as Conservator and this Court's jurisdiction, both of which reach non-conserved entities that share an identity of interest with the conserved estate. (*Garamendi v. Executive Life Ins. Co*. (1993) 17 Cal. App. 4th 504, 523.)"

OBJECTION: This is without factual or legal support. There is no evidence in the record that CIC, AUCRA, and AUI are a "single entity" or a "joint enterprise," and the caselaw cited by the Commissioner is inapposite for the reasons presented in CIC's submissions. (*See* Proposed Order at 41.) The Court further mistakes *Executive Life* in concluding that CIC's affiliates fall within the Conservator's authority. *Executive Life* deals specifically with an insolvent insurance company, and its reasoning is based entirely on principles of federal bankruptcy law dealing only with insolvent companies. *See* 17 Cal. App. 4th at 516-17. There is no reason to invoke bankruptcy and insolvency

principles to expand the Conservator's conservation power over a solvent and financially strong company like CIC in order to strip the rights of *separate* CIC corporate affiliates. (CIC Opp'n to Appl. for Approval of Rehabilitation Plan at 40-41.)

(31) **Order at 17:** "[Connecticut and New York] noted that CIC II is not licensed to transact the business of insurance in their states, placing policyholders and their employees at risk of losing insurance coverage when the Merger is completed."

OBJECTION: The Court should not accept these unsupported assertions. New York law allows an insurer to perform its obligations under existing policies after its withdrawal from the state because this does not constitute engaging in the business of insurance. *See, e.g.*, *Am. Fid. Co. v. Leahy*, 189 A.D. 242, 245 (1st Dep't 1919), *aff'd*, 233 N.Y. 628, 135 N.E. 946 (1922) (finding an insurer's "continuance of its liability" under a contract guaranteeing contract performance, "after the expiration of the period during which it was so authorized to do business, does not constitute doing business within the fair intent and meaning of the statute"); *People ex rel. Lewis v. Safeco Ins. Co. of Am.*, 98 Misc. 2d 856, 860, 414 N.Y.S.2d 823 (Sup. Ct. N.Y. Cnty. 1978) ("So long as an insurer is 'authorized' at the time of issuance of a policy, it has been consistently held that the rights and obligations under that policy are not impaired by reason of a subsequent termination of such authority."). Connecticut's and New York's untimely submissions, submitted nearly two years after the deadline in the Conservation Notice, are also time-barred and thus the Court lacks discretion to consider them. Ins. Code §§ 1021(a), 1024; *see also Kinder v. Pac. Pub. Carriers Co-Op, Inc.*, 105 Cal. App. 3d 657, 664 (1980) ("[T]he court has no power to use its discretion to allow for a late claim.").

Dated: March 26, 2024

DLA PIPER LLP (US)

By: _____

SHAND S. STEPHENS
ANTHONY COLES
Attorneys for Respondent California Insurance Company

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and employed in San Francisco, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is DLA Piper LLP (US), 555 Mission Street, Suite 2400, San Francisco, California 94105. On March 26, 2024, I served a copy of the within document(s):

RESPONDENT CALIFORNIA INSURANCE COMPANY'S GENERAL AND SPECIFIC OBJECTIONS TO PROPOSED STATEMENT OF DECISION AND TENTATIVE ORDER AFTER HEARING AUGUST 23, 2023

☒ BY TRANSMITTING VIA E-MAIL OR ELECTRONIC TRANSMISSION, the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Michael J. Strumwasser
Dale K. Larson
Caroline Chiappetti
Julia Michel
Strumwasser & Woocher LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024
Tel: 310-576-1233
mstrumwasser@strumwooch.com
dlarson@strumwooch.com
cchiappetti@strumwooch.com
jmichel@strumwooch.com

Cynthia J. Larsen, Esq.
Justin Giovannettone, Esq.
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95814
Tel: 916-447-9200
clarsen@orrick.com
jgiovannettone@orrick.com

Phil Walker
Phil Walker Law
250 King Street, Suite 414
San Francisco, CA 94107
Tel: 415-816-3527
phil@askphilwalker.com

Larry Lichtenegger
The Lichtenegger Law Office
2017 W. F Street
Napa, CA 94558
Tel: 831-601-2801
lawyer@mbay.net

Nicholas P. Roxborough
Roxborough, Pomerace, Nye & Adreani LLP
5820 Canoga Avenue, Suite 250
Woodland Hills, CA 91367
Tel: 818-992-9999
npr@rpnalaw.com
lucy@rpnalaw.com
jcg@rpnalaw.com
emarlyn@rpnalaw.com

Eric Lawton
Law Office of Eric Lawton
100 Wilshire Blvd., Suite 700
Santa Monica, CA 90401
Tel: 310-319-5409
elawton@ericlawtonlaw.com

Shawn A. Williams
Robbins Geller Rudman & Dowd LLP
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Tel: 415-288-4534
shawnw@rgrdlaw.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 26, 2024, at Dublin, California.

Sandy Holstrom