

1 XAVIER BECERRA
Attorney General of California
2 MOLLY K. MOSLEY
Supervising Deputy Attorney General
3 KAREN W. YIU
Deputy Attorney General
4 State Bar No. 230710
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 879-1245
Fax: (510) 622-2270
7 E-mail: Karen.Yiu@doj.ca.gov

8 ROBERT H. NUNNALLY, JR.
State Bar No. 134151
9 WISENER NUNNALLY ROTH & HIGGINS, LLP
245 Cedar Sage Drive, Suite 240
10 Garland, Texas 75040
11 Telephone: (972) 530-2200
Facsimile: (972) 530-7200
12 Email: robert@wnrlaw.com

13 *Attorneys for Applicant Insurance*
14 *Commissioner of the State of California as*
Liquidator of Western Employers Insurance
15 *Company*

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF SAN FRANCISCO

19 **INSURANCE COMMISSIONER OF THE**
20 **STATE OF CALIFORNIA,**

21 Applicant,

22 v.

23 **WESTERN EMPLOYERS INSURANCE**
24 **COMPANY,**

25 Respondent.

Case No. CPF-97-984281

APPLICANT INSURANCE
COMMISSIONER OF THE STATE OF
CALIFORNIA'S MEMORANDUM OF
SUPPORT OF MOTION FOR
APPROVAL OF EPA PIONEER METAL
SETTLEMENT AGREEMENT

Date: February 24, 2021
Time: 9:30 a.m.
Dept: 302
Judge: Honorable Ethan P. Schulman

ELECTRONICALLY

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Superio Cour o California,
Count o Sa Francisco

01/22/2021
Cler o th Court

BY SANDR SCHIRO
Deput Clerk

1 **INTRODUCTION**

2 Applicant Insurance Commissioner of the State of California (“Commissioner”), as the
3 liquidator (“Liquidator”) of Western Employers Insurance Company (“WEIC”), applies for the
4 Court’s approval of the EPA Pioneer Metal Settlement Agreement (“Settlement Agreement”), to
5 allow claimant the United States Environmental Protection Agency’s (“EPA”) proof of claim in
6 the amount \$1.2 million as an Insurance Code section 1033 policyholder priority proof of claim.
7 The Commissioner respectfully requests that the Court grant the motion to approve the Settlement
8 Agreement.

9 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 WEIC is a California insurance company which has been in liquidation since April 19,
11 1991. (Declaration of Michele Vass in Support of Motion (“Vass Decl.”), ¶ 2.) The initial claims
12 bar date for filing of proofs of claim against WEIC was November 15, 1991. (*Ibid.*) The
13 Commissioner, as liquidator, received 9,608 proofs of claims by the claims bar date. The Court
14 set a 2010 deadline for filing updates of the claims, and a 2017 deadline for the liquidation of the
15 claims. (*Ibid.*)

16 One policyholder named in an insurance policy issued by WEIC is Pioneer Metal Finishing,
17 Inc. (also known as Pioneer Metal Finishing Co., Inc. and Pioneer Metal Finishing Company,
18 Inc.) (“Pioneer Metal”) in New Jersey, for coverage of \$2 million. That entity filed a timely
19 proof of claim. Subsequently, its proof of claim against WEIC was rejected. Pioneer Metal did
20 not file an application for an order to show cause to contest the rejection. (Vass Decl., ¶ 3.)

21 The Liquidator and the United States reached an agreement, approved by this Court in
22 2015, in which the United States released all super-priority claims against WEIC. (Vass Decl., ¶
23 3.) The claims issue made the subject of this motion addresses a proof of claim filed after the
24 claims bar date asserting that the EPA had certain environmental and natural resource claims
25 against Pioneer Metal that should be accorded Class Two treatment under Insurance Code section
26 1033.

27 Subsequently, a proof of claim was filed against the WEIC policy issued to Pioneer Metal
28 after the claims bar date. The claim stemmed from an environmental clean-up claim that the EPA

1 asserted against Pioneer Metal arising from the Pioneer Metals Finishing Superfund Site in
2 Franklinville, New Jersey. The EPA asserted that it had expended several million dollars in
3 remediation at the site and that it projected a clean-up cost of over \$70 million. It further asserted
4 that the claim should be accorded Class Two treatment under Insurance Code section 1033 and
5 sought full policy limits for the claim. (Vass Decl., ¶ 4.) On the other hand, there were issues
6 concerning whether the EPA may assert its claim in light of the United States' prior agreement to
7 release super-priority claims, the timing of its assertion of claims after the claims bar date for
8 WEIC, and policy allocation. (See Vass Decl., ¶ 6.) After engaging in an extensive discussion
9 and analysis of the matter, the parties ultimately determined to seek court approval of a
10 compromise in the form of an approved policyholder priority claim in the amount of \$1.2 million.
11 (Vass Decl., ¶ 7 & Ex. A, p. 2.) This motion seeks approval of the Settlement Agreement.

12 ARGUMENT

13 I. THE COURT SHOULD GRANT THE MOTION BECAUSE THE APPROVAL OF THE EPA'S 14 POLICYHOLDER CLAIM IS REASONABLE AND APPROPRIATE

15 The Commissioner has broad discretion in exercising his power to liquidate an insolvent
16 insurer. (*In re Executive Life Ins. Co.* (1995) 32 Cal.App.4th 344, 356 [citing *Commercial Nat.*
17 *Bank v. Superior Court* (1993) 14 Cal.App.4th 393, 402].) For instance, the Commissioner has
18 authority to allow claims and to “compound, compromise or in any other manner negotiate
19 settlements of claims” under terms and conditions as the Commissioner deems to be the most
20 advantageous to the estate that is being liquidated. (Ins. Code, § 1037, subd. (c); see *id.* § 1033,
21 subd. (a).) The Court assesses whether the Commissioner is properly exercising his broad
22 discretion as statutory liquidator. (See, e.g., *In re Executive Life Ins. Co.*, *supra*, 32 Cal.App.4th
23 at p. 358 [standard of review for court's review of liquidator's decisions is abuse of discretion].)
24 The Commissioner's ultimate duty is to collect the assets and distribute them ratably among
25 creditors. (*W. J. Jones & Sons v. Independence Indem. Co.* (1942) 52 Cal.App.2d 374, 378-379.)

26 This matter presents certain fundamental issues, including claims bar issues and coverage
27 issues. (See Vass Decl., ¶ 6.) For claims bar issues, the Liquidator contends that the EPA faces
28 obstacles in making a claim because the underlying claim of insured Pioneer Metal has already

1 been rejected, and no application for an order to show cause was filed. This raises the issue of
2 whether the EPA, as a mere third-party claimant, can assert a claim after rejection of the insured's
3 proof of claim. (See *Jones v. Golden Eagle Ins. Corp.* (2011) 201 Cal.App.4th 139, 146.)

4 Another issue is whether the claims bar date prohibits the EPA's claim under Insurance Code
5 section 1024. While the Liquidator pointed out that the claims bar date had expired long ago, the
6 EPA contended that *United States v. Summerlin* (1940) 310 U.S. 414 exempts it from state court
7 bar dates. There is also a question as to the effect of the United States' previous super-priority
8 release upon the subject claim. As to coverage issues, an issue of allocation exists as the loss in
9 question arguably arose over decades. Because the loss in question occurred in New Jersey, an
10 allocation among policy years, based on New Jersey law, rather than an "all sums" approach
11 applies. (*Carter-Wallace, Inc. v. Admiral Ins. Co.* (1998) 154 N.J. 312, 326-327 [712 A.2d 1116,
12 1124].) The EPA contended that the loss allocation should only apply to the years that Pioneer
13 Metal owned the Superfund site, resulting in an allocation of more losses to WEIC. Further, the
14 Liquidator took the position that numerous other policies existed for Pioneer Metal on its
15 Superfund site such that there should be an allocation of the loss in part to other policies. (See
16 Vass Decl., ¶ 6.) On the other hand, the EPA claimed that the losses were sufficiently substantial
17 to exhaust WEIC's policy, notwithstanding policy allocation principles. (See Vass Decl., ¶ 5.)
18 Additionally, issues arose as to the availability of policy coverage in light of the "known loss"
19 doctrine (see Vass Decl., ¶ 5), which prohibits the insured from collecting from a liability insurer
20 for a loss known at the time of policy inception.

21 While the Liquidator feels that WEIC has a strong position, the matter raises issues that
22 involve complex legal questions of federal and state law, and factual questions affecting loss
23 allocation. The parties exchanged materials and the Liquidator's claims personnel analyzed the
24 issues and reviewed the claim. (Vass Decl., ¶ 6.) The EPA provided materials in support of its
25 claims sufficient to permit a determination to settle the issues as to the potential coverage by the
26 WEIC policy through a \$1.2 million claims approval. (Vass Decl., ¶ 5) The settlement will
27 preserve the resources of the parties and of the court. It will aid in bringing this liquidation to a
28 conclusion. Given the complexity of the issues involved in the EPA's claim, the Commissioner

1 believes that the settlement is an appropriate resolution of this proof of claim matter. The
2 Commissioner recommends that the Court approve the entry into the Settlement Agreement with
3 the EPA which will result in the approval of the claim at policyholder priority in the amount of
4 \$1.2 million only. (Vass Decl., ¶ 7 & Ex. A at p. 2.) The Settlement Agreement provides that the
5 EPA shall give notice of this settlement in the public record pursuant to federal CERCLA¹
6 statutes, and then confirm its decision to move forward with the settlement after the comment
7 period has expired. (Vass Decl., Ex. A at p. 5.)

8 CONCLUSION

9 Therefore, for the foregoing reasons, the Commissioner respectfully requests that the Court
10 grant the motion, approve the Settlement Agreement, and authorize the Commissioner to take
11 other steps as the Commissioner deems necessary and appropriate to implement the agreement.

12 Dated: January 22, 2021

Respectfully Submitted,

13 XAVIER BECERRA
14 Attorney General of California
15 MOLLY K. MOSLEY
16 Supervising Deputy Attorney General

/s/ Karen W. Yiu

17 KAREN W. YIU
18 Deputy Attorney General
19 *Attorneys for Applicant Insurance*
20 *Commissioner of the State of California as*
21 *Liquidator of Western Employers Insurance*
22 *Company*

23 SF2003CV0729

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25 POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR APPROVAL OF EPA PIONEER METAL
26 SETTLEMENT AGREEMENT.doc

27 ¹ CERCLA refers to the Comprehensive Environmental Response, Compensation, and
28 Liability Act, 42 U.S.C. § 9601 et seq.